

## WSR 21-02-075

## PROPOSED RULES

## UNIVERSITY OF WASHINGTON

[Filed January 5, 2021, 3:46 p.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 20-21-064.

Title of Rule and Other Identifying Information: Chapter 478-121 WAC, Student conduct code for the University of Washington.

Hearing Location(s): On February 16, 2021, at 9:00 - 10:00 a.m. This will be held via video and phone conference and the link will be available on the University Policy and Rules Website [<https://www.washington.edu/rules/wac/>]. Due to the governor's restrictions on in-person gatherings, the University of Washington will hold the public hearing via video and phone conference and will have the link and details located on the University Policy and Rules Website [<https://www.washington.edu/rules/wac/>].

Date of Intended Adoption: March 10, 2021.

Submit Written Comments to: Barbara Lechtanski, Director and State Rules Coordinator for the University Policy and Rules Office, Box 351210 Seattle, WA 98195-1210, email [rules@uw.edu](mailto:rules@uw.edu), by February 16, 2021, end of business.

Assistance for Persons with Disabilities: Contact disability services office, phone 206-543-6450, fax 206-685-7264, TTY 206-543-6452, email [dso@uw.edu](mailto:dso@uw.edu), by February 5, 2021.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The university edited sections and created new sections to update current chapter 478-121 WAC, Student conduct code for the University of Washington, in order to be in compliance with the new United States Department of Education (DOE) Title IX regulations that went into effect on August 14, 2020.

Reasons Supporting Proposal: The new DOE Title IX regulations went into effect, and in order to maintain compliance with these new regulations, the University of Washington updated existing sections and created new sections to our current chapter 478-121 WAC, Student conduct code for the University of Washington. Agencies not in compliance would be at risk of losing federal funding. The university currently has an emergency rule filed to maintain compliance while we complete this permanent rule making.

Statutory Authority for Adoption: RCW 28B.20.130.

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

Rule is necessary because of federal law, 34 C.F.R. Part 106.

Name of Proponent: University of Washington, governmental.

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

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. RCW 34.05.328 does not apply to the university, and the university has not voluntarily decided to apply it.

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: 34 C.F.R. Part 106, DOE, Title IX regulation updates. If a university is not in compliance, they could risk the loss of federal funding.

Is exempt under RCW 19.85.025(4).

Explanation of exemptions: The proposed rule has no impact on small businesses.

January 5, 2021  
Barbara Lechtanski  
Director of the University  
Policy and Rules Office  
and State Rules Coordinator

### OTS-2510.3

AMENDATORY SECTION (Amending WSR 17-15-068, filed 7/14/17, effective 8/18/17)

**WAC 478-121-020 General application of the student conduct code.**

This conduct code applies to all students from the time of admission through the actual conferral of a degree, including any period between terms of enrollment.

The disciplinary sanctions specified in WAC 478-121-210, up to and including suspension or dismissal, may be imposed on any student or student organization found responsible for prohibited conduct set forth in WAC 478-121-100 through 478-121-173, WAC 478-121-605, and as described in relevant university policies.

[Statutory Authority: RCW 28B.20.130. WSR 17-15-068, § 478-121-020, filed 7/14/17, effective 8/18/17.]

AMENDATORY SECTION (Amending WSR 17-15-068, filed 7/14/17, effective 8/18/17)

**WAC 478-121-040 Jurisdiction of the university.** (1) The scope of the university's jurisdiction includes reports that prohibited conduct occurred:

(a) On any university premises or in connection with any university-sponsored program or activity, regardless of the location of the program or activity; or

(b) Off campus (i.e., conduct that does not occur on university premises or in the context of a university-sponsored program or activity) where: The university reasonably determines that the conduct adversely affects a university interest or, has continuing adverse effects or may create a hostile environment on university premises or in the context of a university-sponsored program or activity.

(2) Nothing in this conduct code shall be construed to limit academic action that may be taken by schools, colleges, or programs against a respondent based on an established violation of this conduct code that demonstrates a failure to meet the academic and/or professional standards of the school, college, or program.

(3) If a respondent withdraws from the university (or fails to reenroll) while a conduct proceeding is pending, the university may move forward with the conduct proceeding and, if so, the respondent will be provided with a continued opportunity to participate.

(4) Under regulations established by the United States Department of Education, 34 C.F.R. Part 106, the prohibited conduct defined in WAC 478-121-605 must be addressed as provided under Part VII of this code, not as provided under Parts II through V, if, and only if: It is alleged to have occurred in a university education program or activity, and it is against a person in the United States.

[Statutory Authority: RCW 28B.20.130. WSR 17-15-068, § 478-121-040, filed 7/14/17, effective 8/18/17.]

AMENDATORY SECTION (Amending WSR 17-15-068, filed 7/14/17, effective 8/18/17)

**WAC 478-121-100 General application.** Prohibited conduct under this code includes, but is not limited to, the prohibited conduct described in WAC 478-121-100 through 478-121-173, WAC 478-121-605, and relevant university policies. For additional interpretation of prohibited conduct, see *Student Governance and Policies, chapter 209, student conduct policy for academic misconduct and behavioral misconduct, and chapter 210, student conduct policy for discriminatory and sexual harassment, intimate partner violence, sexual misconduct, stalking, and retaliation* (~~and chapter 209, student conduct policy for academic misconduct and behavioral misconduct~~).

[Statutory Authority: RCW 28B.20.130. WSR 17-15-068, § 478-121-100, filed 7/14/17, effective 8/18/17.]

**PART VII  
COMPLIANCE WITH DEPARTMENT OF EDUCATION FEDERAL REGULATIONS REGARDING  
SEXUAL HARASSMENT**

NEW SECTION

**WAC 478-121-600 Scope of Part VII.** The United States Department of Education federal regulations, 34 C.F.R. Part 106, establish a definition of "sexual harassment" that includes all of the prohibited conduct listed under WAC 478-121-605 (Department of Education federal regulations prohibited conduct or EDFR prohibited conduct). The con-

duct listed under WAC 478-121-605 is prohibited conduct under this code and is subject to the procedures set forth under Part VII of this code if, and only if:

- (1) The EDFR prohibited conduct occurs in a university education program or activity; and
- (2) The EDFR prohibited conduct is against a person in the United States.

EDFR prohibited conduct that does not meet both of these requirements or is reported by a person who is not eligible to file a formal complaint under WAC 478-121-625 is subject to Parts II through V of this code.

For the purposes of Part VII of this code, "education program or activity" includes locations, events, or circumstances over which the university exercised substantial control over both the respondent and the context in which the EDFR prohibited conduct occurred and also includes any building owned or controlled by a recognized student organization. Part VII only applies to formal complaints made on or after August 14, 2020, and only when 34 C.F.R. Part 106 is deemed enforceable by law and/or by United States courts.

[ ]

#### NEW SECTION

**WAC 478-121-605 Department of Education federal regulations prohibited conduct (sexual harassment).** Department of Education federal regulations (EDFR) define "sexual harassment" as conduct on the basis of sex that satisfies one or more of the following, which are referred to collectively under this code as "EDFR prohibited conduct":

- (1) EDFR hostile environment sexual harassment. EDFR hostile environment sexual harassment is unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the university's education program or activity.
- (2) EDFR sexual assault. EDFR sexual assault includes a sex offense under the uniform crime reporting system of the Federal Bureau of Investigation. Specifically, EDFR sexual assault means one or more of the following:
  - (a) The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the complainant.
  - (b) The oral or anal sexual intercourse with a complainant, without the consent of the complainant, including instances where the complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.
  - (c) The use of an object or instrument to penetrate, however slightly, the genital or anal opening of the body of a complainant, without the consent of the complainant, including instances where the complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.
  - (d) The touching of the private body parts of a complainant (e.g., buttocks, groin, breasts) for the purpose of sexual gratification, without the consent of the complainant, including instances where the complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

(e) Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by Washington law.

(f) Sexual intercourse with a person who is under the statutory age of consent of Washington.

(3) EDFR dating violence. EDFR dating violence is an act or acts of violence committed by 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 determined based on the length and type of relationship as well as the frequency of interaction between the individuals involved in the relationship.

(4) EDFR domestic violence. EDFR domestic violence is an act or acts of violence committed by a current or former intimate partner of the complainant, by a person with whom the complainant shares a child in common, or by a person who is cohabitating with or has cohabitated with the complainant as an intimate partner.

(5) EDFR stalking. EDFR stalking is engaging in a course of conduct directed at a complainant that would cause a reasonable person to fear for the complainant's safety or the safety of others, including the safety of the respondent, or would cause a reasonable person to suffer substantial emotional distress.

(a) For the purposes of this section, "course of conduct" means two or more acts including, but not limited to, acts in which the respondent directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property. Stalking also includes cyberstalking such as through electronic media, the internet, social networks, blogs, cell phones, or text messages.

(b) For the purposes of this section, "substantial emotional distress" means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

[ ]

#### NEW SECTION

##### **WAC 478-121-610 Consent for purposes of EDFR prohibited conduct.**

Consent means that at the time of and throughout the sexual contact, there are words or conduct that reasonably communicate freely given agreement between or among the persons engaging in the sexual contact.

(1) Consistent with WAC 478-121-150, consent cannot be obtained when force or threat is used to gain consent; consent cannot be obtained where the respondent knew or reasonably should have known the complainant was incapacitated; and consent cannot be given or granted by a person who is under the statutory age of consent in accordance with the criminal code of Washington, chapter 9A.44 RCW, Sex offenses. A respondent's use of alcohol or drugs is not a valid defense to a charge of EDFR sexual assault, and a respondent will be held to the standard of a reasonable sober person in evaluating whether the respondent knew or reasonably should have known the complainant was incapacitated.

(2) For the purposes of determining whether consent was present:

(a) Consent cannot solely be inferred from silence, passivity, or a lack of resistance, and relying on nonverbal communication alone may violate the code;

(b) Consent cannot be inferred merely from an existing or previous dating or sexual relationship;

(c) Even in the context of a relationship, there must be mutual consent to engage in sexual contact;

(d) Past consent alone is not sufficient to imply future consent;

(e) Consent given to one person does not constitute consent given to another person;

(f) Consent to one sexual act does not constitute consent to other sexual acts; and

(g) Consent can be withdrawn at any time, and once consent is withdrawn and reasonably communicated, sexual contact must stop immediately.

(3) As used in the definition of consent, incapacity means an individual lacks the ability to understand the facts, nature, extent, or implications of the sexual contact for any reason including, but not limited to, being asleep, unconscious, unaware that the sexual contact is occurring, mentally or physically impaired due to an intellectual or other disability, or mentally or physically incapacitated due to the effects of alcohol or other drugs.

(a) When assessing whether the respondent "knew or reasonably should have known" the complainant was incapacitated, indicators of incapacitation include, but are not limited to, stumbling, falling down, an inability to stand or walk on the complainant's own, slurred speech or incoherent communication, an inability to focus the complainant's eyes or confusion about what is happening around the complainant, combativeness, emotional volatility, incontinence, passing out, or vomiting.

(b) A failure to exhibit any of these behaviors, however, does not necessarily mean that a person is capable of giving consent or is not incapacitated.

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#### NEW SECTION

**WAC 478-121-615 Additional definitions.** For the purposes of Part VII of this code and where a respondent is charged with prohibited conduct defined under WAC 478-121-605:

(1) Complainant. Complainant is an individual who is alleged to be the victim of conduct that could constitute EDFR prohibited conduct.

(2) Formal complaint. Formal complaint is a document filed by a complainant or signed by the university's Title IX coordinator alleging EDFR prohibited conduct against a respondent and requesting that the university investigate the allegation of EDFR prohibited conduct. When filed by a complainant, the formal complaint must contain the complainant's physical or digital signature or otherwise indicate that the complainant is the person filing the formal complaint.

(3) Hearing advisor. Hearing advisor refers to the person who may accompany a complainant or respondent to any part of the investigation or hearing outlined in Part VII of this code. At a hearing, a complainant and a respondent must have a hearing advisor to conduct oral

cross-examination on that party's behalf. This hearing advisor may or may not be an attorney, as defined in WAC 478-121-050(1). If a party does not choose a hearing advisor prior to a hearing, the university will provide a hearing advisor of the university's choice to conduct cross-examination on behalf of the party at the hearing. One hearing advisor and one support advisor are the only persons a party is permitted to bring with them to any part of the investigation or hearing. Hearing advisors and support advisors may be referred to collectively as "advisors."

(4) Hearing officer. Hearing officer is the individual delegated authority by the university to preside over the hearing and act as the decision-maker to reach a determination about responsibility. The hearing officer may simultaneously preside over a hearing under this Part VII of this code and a full adjudicative proceeding, consistent with WAC 478-121-400 through 478-121-427.

(5) Investigator(s). Investigator is an individual delegated authority by the university to provide written notification of a formal complaint, interview witnesses, gather documentation, and prepare the investigative report.

(6) Party or parties. Party or parties refers to a complainant and/or respondent.

(7) Respondent. Respondent is an individual who has been reported to be the perpetrator of conduct that could constitute EDFR prohibited conduct. A respondent must be a student as defined in WAC 478-121-050(14).

(8) Support advisor. Support advisor refers to a person who may accompany a party to any part of the investigation or hearing outlined in this Part VII of this code. If a party has both a support advisor and hearing advisor, the support advisor's ability to communicate with the hearing officer and other party and the other party's advisors at a hearing will be limited. One support advisor and one hearing advisor are the only persons a party is permitted to bring with them to any part of the investigation or hearing. Support advisors and hearing advisors may be referred to collectively as "advisors."

(9) Supportive measure. Supportive measures are nondisciplinary, nonpunitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Supportive measures are designed to restore or preserve equal access to the university's education programs and activities without unreasonably burdening the respondent, including measures designed to deter EDFR prohibited conduct or protect the safety of all parties or the university's educational environment. Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures.

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NEW SECTION

**WAC 478-121-620 Reporting EDFR prohibited conduct.** (1) Any person may report EDFR prohibited conduct in person, by mail, by telephone, or by electronic mail, using the contact information listed on the website for the university's Title IX coordinator, or designee, or by any other means that results in the Title IX coordinator receiving the person's verbal or written report. The person reporting may, but need not, be the person alleged to be the victim of conduct that could constitute EDFR prohibited conduct.

(2) Upon receipt of a report as provided under subsection (1) of this section, the Title IX coordinator, or designee, will promptly contact the complainant to discuss the availability of supportive measures, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint.

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NEW SECTION

**WAC 478-121-625 Formal complaint.** (1) Only a complainant or the university's Title IX coordinator may file a formal complaint. At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in a university education program or activity. The authority to initiate conduct proceedings provisions outlined in WAC 478-121-215 (1) and (2) do not apply to Part VII of this code.

(2) A complainant may file a formal complaint with the Title IX coordinator or designee in person, by mail, or by electronic mail at the address provided on the Title IX coordinator's website.

(3) Upon receipt of a formal complaint, the university will, at a minimum, provide the following written notice to the known parties:

(a) The allegations potentially constituting EDFR prohibited conduct, including the identities of the parties involved in the incident, if known, the conduct allegedly constituting EDFR prohibited conduct, and the date and location of the alleged incident, if known;

(b) Information regarding the university's grievance process for formal complaints, including the parties' right to be accompanied by a hearing advisor and support advisor and to inspect and review evidence; and

(c) An explanation regarding presumptions regarding nonresponsibility and good-faith filing.

(4) The university may consolidate formal complaints where allegations of EDFR prohibited conduct arise out of the same facts or circumstances. The university may also join or consolidate any complaint alleging prohibited conduct under Part II of this code with a formal complaint if the allegations arise out of or relate to the same facts or circumstances. Should the university consolidate a formal complaint under Part VII with allegations of prohibited conduct under Part II, the university may elect to hold one hearing to consider all allegations. During such a hearing, the university may adhere to the process described in Parts II through V to the extent feasible for allegations of prohibited conduct outlined in Part II and to the process described



in Part VII for allegations of EDFR prohibited conduct. Where these processes conflict, Part VII will be followed.

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NEW SECTION

**WAC 478-121-630 Dismissal of a formal complaint.** (1) Mandatory dismissal. In accordance with the Department of Education federal regulations, the university will dismiss a formal complaint for purposes of Title IX and its implementing regulations if the alleged conduct:

- (a) Would not constitute EDFR prohibited conduct even if proved;
- (b) Did not occur in the university's education program or activity;
- (c) Did not occur against a person in the United States; or
- (d) Was alleged by or in respect to a complainant who is not participating in or attempting to participate in a university education program or activity.

If dismissal occurs under this subsection (1) of this section, the university may pursue a conduct proceeding under other parts of this code.

(2) Discretionary dismissal. The university may dismiss the formal complaint, or any allegations therein, for the purposes of Title IX and its implementing regulations, if at any time during the investigation or hearing:

(a) A complainant notifies the university's Title IX coordinator in writing that the complainant would like to withdraw the formal complaint or any specific allegations in the formal complaint;

(b) The respondent is no longer an enrolled university student;

or

(c) Specific circumstances prevent the university from gathering evidence sufficient to reach a determination as to the formal complaint or any allegations made in the formal complaint.

(3) Notice. Upon a dismissal required or permitted under this section, the university will promptly send written notice of the dismissal and reason(s) therefore simultaneously to the parties.

(4) Consequences of dismissal. Dismissal of a formal complaint does not preclude the university from investigating alleged misconduct under Part II or adjudicating such alleged misconduct under Parts III through V of this code.

(5) Appeal. If the university dismisses a formal complaint, the parties have a right to appeal, as described in WAC 478-121-635.

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NEW SECTION

**WAC 478-121-635 Appeal from a dismissal of a formal complaint.**

(1) A party may appeal a dismissal of a formal complaint or dismissal of any allegations in a formal complaint on any of the following bases:

- (a) Procedural irregularity affected the outcome of the matter;

(b) New evidence that was not reasonably available at the time the dismissal was made; and/or

(c) A university official involved in the dismissal of the formal complaint had a conflict of interest or bias for or against complainants or respondents generally, or the individual complainant or respondent, that affected the outcome of the matter.

If one of the grounds is to consider newly discovered evidence, that evidence must be provided with the appeal.

(2) An appeal must be submitted in writing to the investigator within five business days of the notice of dismissal of formal complaint. The appeal is the party's opportunity to provide the party's position regarding why the appeal should be granted, and it must identify at least one of the grounds outlined in subsection (1) of this section.

(3) When an appeal is received, the university will:

(a) Notify both parties in writing that the appeal was received, of the name of the individual(s) who will be deciding the outcome of the appeal, and when the nonappealing party's response is due;

(b) Provide the nonappealing party an opportunity to submit a written statement within five business days of receipt of notice of the appeal. This is the nonappealing party's opportunity to respond to the appeal;

(c) Consider the available evidence, which may include, but is not limited to, any summaries of interviews conducted by the investigator, evidence gathered by or provided to the investigator, and/or any newly discovered evidence;

(d) Issue a written decision describing the result of the appeal and rationale for such result; and

(e) Provide the written decision simultaneously to both parties.

(4) Communications with the individual(s) deciding the appeal, except for communications related to procedural aspects of maintaining an orderly process, must be made in the presence of, or with a copy to, all other parties, advisors (if any), and the investigator(s). Any communications not following such a procedure will be placed on the record, and others will be given an opportunity to respond.

(5) Appeals of a dismissal of a formal complaint may be decided by a single individual, and such appeals will be decided within five business days of the deadline for the nonappealing party's response.

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#### NEW SECTION

**WAC 478-121-640 Informal resolution.** If a formal complaint has been filed and parties have received notice of the allegations, the university may facilitate an informal resolution process consistent with RCW 34.05.060. Parties will be informed of the informal resolution process, including circumstances where the parties would be precluded from resuming a formal complaint based on the same allegations. Before an informal resolution process can proceed, both parties must provide voluntary, written consent to the process. A party has the right to withdraw from an informal resolution process at any time prior to agreeing to a resolution. If a party withdraws from such informal resolution process, the investigation or adjudication process resumes.

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NEW SECTION

**WAC 478-121-645 Emergency removal.** The university may remove a respondent from the university's educational programs or activities on an emergency basis pursuant to WAC 478-121-237. Such emergency removal must be based on a belief the alleged EDFR prohibited conduct poses an immediate threat to the physical health, safety, or welfare of any student or other individual(s).

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NEW SECTION

**WAC 478-121-650 Investigation.** (1) After a formal complaint is filed, the university will commence an investigation. Throughout the investigative process, including meetings with an investigator, a party may be accompanied by a hearing advisor and/or a support advisor. During the investigation, a party's hearing advisor and/or support advisor may provide advice to the party but may not speak on behalf of the party. The initial interview of a respondent will be scheduled to allow time for the respondent to prepare a response following receipt of the notice of formal complaint.

(2) During an investigation, parties may present witnesses as well as other inculpatory and exculpatory evidence for the investigator to consider. Parties will be provided an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint so that each party may meaningfully respond to the evidence prior to the conclusion of the investigation.

(3) Prior to completion of the investigative report, the university will send to each party and the party's advisors, if any, the evidence subject to inspection and review. The parties will have at least ten calendar days to submit a written response, which the investigator will consider prior to completion of the investigative report.

(4) At least ten calendar days prior to the hearing, the investigator will provide the parties with the final investigative report and all evidence gathered during the investigation. The final investigative report and all evidence related to the allegations will be included in the record for the hearing.

(5) No later than at the conclusion of the investigation, the investigator will notify the hearing officer that it is appropriate to commence a hearing to consider the allegations contained in the formal complaint. Such notification is consistent with a conversion to full adjudicative proceeding, as described in WAC 478-121-205, and consistent with RCW 34.05.413 through 34.05.476.

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NEW SECTION

**WAC 478-121-655 Hearings.** (1) The hearing officer, or designee, will set the time and place of the hearing and give ten or more calendar days' notice to all parties and the investigator. At the hearing officer's discretion, any or all parties, witnesses, and other participants, such as advisors and investigator(s), may appear at the hearing virtually, with technology enabling participants simultaneously to see and hear each other.

(2) Communications with the hearing officer, except for communications related to procedural aspects of maintaining an orderly process, must be made in the presence of, or with a copy to, all other parties, advisors (if any), and the investigator(s). Any communications not following such a procedure will be placed on the record, and other parties, hearing advisor(s), or investigator(s) will be given an opportunity to respond.

(3) Prior to the hearing, the hearing officer, upon a self-initiated motion or upon request of the parties, may request that the parties, advisors (if any), and the investigator(s) engage in a meeting or meetings to consider:

- (a) Simplification of issues;
- (b) Necessity of amending notices, if any;
- (c) The possibility of obtaining stipulations;
- (d) Limitations on the number of witnesses and/or which witnesses will testify at the hearing;
- (e) Procedural matters; and/or
- (f) Other matters that may aid in the disposition or settlement of the proceeding.

If such a prehearing meeting(s) is held, it may occur in person, by telephone conference, or by other technological means as determined by the hearing officer or designee. Further, if such a prehearing meeting(s) occurs, the hearing officer will issue, in writing, determinations regarding the issues discussed at the meeting(s). The determinations will be effective when served on the parties and advisors.

(4) At appropriate stages, the hearing officer will give parties reasonable opportunity to submit and respond to requests, such as pleadings, motions, and objections.

(5) The hearing officer has the discretion to grant postponements, continuances, extensions of time, and/or adjournment if good cause is shown.

(6) The applicable standard of proof is the "preponderance of evidence" standard. This means that, in order for a respondent to be held responsible for EDFR prohibited conduct as defined in WAC 478-121-605, the hearing officer must conclude, based on all of the evidence in the record, that it is more likely than not that the respondent engaged in an act or acts of EDFR prohibited conduct. The parties will be provided equal opportunity to present witnesses and other inculpatory and exculpatory evidence.

(7) During a hearing, all testimony of parties and witnesses shall be made under oath or affirmation. The hearing officer will permit each party's hearing advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination will be conducted directly, orally, and in real-time. Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the hearing officer will first determine whether the ques-

tion is relevant and explain any decision to exclude a question as not relevant. If a hearing advisor is disruptive or interferes with any aspect of the proceeding, as determined by the hearing officer, the hearing advisor may be removed and a new hearing advisor made available to the party.

(8) The university will create an audio, audiovisual, or transcribed recording of the hearing. Upon request to the hearing office or as may otherwise be required under Part VII of this code, the university will make the recording available to the parties for inspection and review.

(9) Hearings will be conducted in accordance with the Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. Sec. 1232g) and its implementing regulations (34 C.F.R. Part 99) except to the extent preempted by 34 C.F.R. Part 106.

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#### NEW SECTION

##### **WAC 478-121-660 Determination regarding responsibility. (1)**

Following a hearing, the hearing officer will apply the preponderance of the evidence standard described in WAC 478-121-655(6) and issue a written determination regarding responsibility in accordance with RCW 34.05.461, which will be simultaneously served on the parties. The written determination will include:

(a) Identification of the allegations as defined in WAC 478-121-605;

(b) A description of procedural steps taken from receipt of the formal complaint through the determination;

(c) Findings of fact supporting the hearing officer's determination;

(d) Conclusions regarding the application of Part VII of this code to the facts and the rationale for those conclusions; and

(e) Directions as to any sanctions imposed on the respondent or remedies provided to the complainant.

(2) One or more of the disciplinary sanctions outlined in WAC 478-121-210 may be imposed for any violation of EDFR prohibited conduct. In determining an appropriate sanction, if any, the hearing officer may consider the factors contained in WAC 478-121-210 (2) and (3), which are incorporated herein by this reference. Remedies for the complainant may be the same as the individualized services that comprise supportive measures or may be effectuated via sanctions impacting the respondent.

(3) The hearing officer must provide the written determination to the parties simultaneously and include the university's procedures for the parties to appeal. The determination regarding responsibility and any applicable sanction imposed becomes final and effective either on the date that the university provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.

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NEW SECTION

**WAC 478-121-665 Appeal from determination regarding responsibility.** (1) A party may appeal a determination of responsibility on any of the following bases:

- (a) Procedural irregularity affected the outcome of the matter;
- (b) A material error substantially affected the outcome of the fact finding or sanctioning;
- (c) New evidence that was not reasonably available at the time the determination regarding responsibility and/or dismissal was made could affect the outcome of the matter; and/or
- (d) A university official involved in the formal complaint investigation or adjudication had a conflict of interest or bias for or against complainants or respondents generally, or the individual complainant or respondent, that affected the outcome of the matter.

If one of the grounds is to consider newly discovered evidence, that evidence must be provided with the appeal.

(2) An appeal must be submitted in writing to the hearing officer within twenty-one calendar days of service of the determination of responsibility. The appeal is the party's opportunity to provide the party's position regarding why the appeal should be granted, and it must identify at least one of the grounds outlined in subsection (1) of this section.

(3) When an appeal is received, the university will:

- (a) Notify both parties in writing that the appeal was received; of the name of the individual(s) who will be deciding the outcome of the appeal; and when the nonappealing party's response is due;
- (b) Provide the nonappealing party an opportunity to submit a written statement within twenty-one calendar days of receipt of notice of the appeal. This is the nonappealing party's opportunity to respond to the appeal;
- (c) Consider the available evidence, which may include, but is not limited to, the transcript of the hearing, any summaries of interviews conducted by the investigator, evidence gathered by or provided to the investigator, the investigative report, decisions related to the hearing, the recording of the hearing, the written determination of responsibility, the appeal and/or response to the appeal, and/or any newly discovered evidence;

(d) Issue a written decision describing the result of the appeal and rationale for such result; and

(e) Provide the written decision simultaneously to both parties.

(4) Communications with the individual(s) deciding the appeal, except for communications related to procedural aspects of maintaining an orderly process, must be made in the presence of, or with a copy to, all other parties, advisors, the investigator(s), and the hearing officer. Any communications not following such a procedure will be placed on the record, and others will be given an opportunity to respond.

(5) Appeals of a determination regarding responsibility will be made by a panel consisting of an odd number of members, and such appeals will be decided within thirty calendar days of the deadline for the nonappealing party's response. The panel will be managed by a non-voting individual who may be the review coordinator as defined in WAC 478-121-050(11). The panel may include reviewing officers, as defined by WAC 478-121-050(13), and may decide appeals of determinations of responsibility regarding EDFR prohibited conduct under Part VII or initial orders regarding prohibited conduct under Part II of this code.

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NEW SECTION**WAC 478-121-670 Service and time—Subpoenas—No discovery.** (1)

Service of all university notices will be sent by electronic mail (email) addressed to the parties' university-issued email addresses unless either party provides an alternative and preferred email address. Parties are permitted to file documents, provide evidence, and respond to investigators, the hearing officer, or other individuals responsible for appeals via email. Service is complete at the moment the email is sent to the email addresses.

(2) In computing any period of time prescribed or allowed under Part VII of this code, the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, a Sunday, nor a legal holiday. Legal holidays are prescribed in RCW 1.16.050. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. A "business day" is any Monday, Tuesday, Wednesday, Thursday, or Friday that is not a legal holiday. A "calendar day" is any day of the week, Monday through Sunday, including legal holidays.

(3) Typically, the period from commencement of a proceeding conducted under Part VII of this code to the issuance of the investigative report, inclusive of the time parties may review the draft report and provide feedback will not exceed eighteen weeks. The period from issuance of an investigative report to the date of the hearing will not exceed seven weeks. Finally, the period from the hearing to the determination of responsibility, inclusive of the time frames required by the Department of Education federal regulations in light of those required to comply with state law for any appeal, will not exceed twenty-two weeks. Investigators and the hearing officer, or designee(s), will notify the parties in writing of any delay in the proceedings and the cause for such delay. Delays are permissible for good cause, which may include, and not be limited to, the absence or unavailability of a party or witness, scheduling conflicts, concurrent law enforcement activity, holidays, or academic calendar breaks.

(4) The hearing officer may issue subpoenas. The parties may also request that the hearing officer issue subpoenas or a party's attorney of record may also issue a subpoena on whose behalf the witness is required to appear at a hearing. The requesting party is responsible for serving the subpoena upon the witness.

(5) Discovery, including depositions, interrogatories, requests for production, entry onto land for inspection or other purposes, and physical and mental examinations, is not available in conduct proceedings under this code.

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NEW SECTION

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

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

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

(4) An investigator or hearing officer may not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has voluntarily waived the privilege in writing. An investigator or hearing officer also may not access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent.

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NEW SECTION

**WAC 478-121-680 Disqualification.** (1) Any person designated by the university as an investigator, hearing officer, or Title IX coordinator, or to determine an appeal or facilitate an informal resolution process shall self-recuse if this person discovers a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent or otherwise cannot act impartially.

(2) A party shall promptly petition for the disqualification of an individual described in subsection (1) of this section upon receipt



ing notice of a formal complaint or upon discovering facts establishing grounds for disqualification. Such petition must be in writing and delivered to the person whose disqualification is requested, with copies of the petition delivered simultaneously to other known parties and any person known to be designated by the university as an investigator, hearing officer, or Title IX coordinator, or to determine an appeal or facilitate an informal resolution process.

(3) The individual whose disqualification is requested shall determine whether to grant the petition, stating facts and reasons for the determination. If the individual whose disqualification is requested does not self-disqualify, the party may cite such failure for disqualification as a reason to appeal a dismissal or determination of responsibility. If the individual whose disqualification is requested self-disqualifies, an appropriate individual will be substituted for the disqualified individual's role in the investigation, hearing, appeal, or informal resolution process.

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#### NEW SECTION

**WAC 478-121-685 General record keeping.** Records related to proceedings under Part VII of this code shall be maintained consistent with RCW 34.05.476 and 34.05.494, university records retention policies, and other relevant policies, rules, and regulations. If federal regulations under 34 C.F.R. Part 106 differ from Washington state law requirements or university policies, rules, or regulations, records will be maintained in accord with the more stringent standard.

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