

MEMBERS:

- **Rebecca Johnson,**
Chair
- **Wendy Bohlke,**
Vice Chair
- **Steve Adelstein**
- **John Pedlow**
- **Teresa Taylor**

BOARD OF TRUSTEES

Meeting Agenda

Wednesday, August 12, 2020

Special Board Meeting -8:30 am

Via Zoom

<https://zoom.us/j/98334580823?pwd=aVJqeFZEWHHiY2tjajV1T1pRNEp2dz09>

Meeting ID: 983 3458 0823 Passcode: 248095

- I. Call to Order
- II. Action Item
 - Proposed Title IX Emergency Rules (First reading, possible action)
- III. Adjournment

If you are a person with a disability and require an accommodation while attending the meeting, please contact the President's Office at 383-3330 (or TDD 647-3279) as soon as possible to allow sufficient time to make

Memorandum

Office of Human Resources and Student Services

To: Whatcom Community College Board of Trustees

From: Benjamin Reed, Title IX & ADA Coordinator
Becky Rawlings, Executive Director for Human Resources
Dr. Luca E. Lewis, Vice President for Student Services

Date: August 5, 2020

RE: Title IX Emergency Rules

The United States Department of Education Office for Civil Rights released final regulations under the Title IX Education Amendments of 1972 on May 6, 2020 to go into effect on August 14, 2020. Numerous states, including Washington State, joined together to request a preliminary injunction. There was an argument on the motion for preliminary injunction on July 24, 2020. The Washington State Office of the Attorney General anticipates the court will issue a decision between August 4 and August 14. If the court rule against the injunction, the College is required to implement these emergency rules by August 14, 2020 in order to remain in compliance with federal regulations.

These emergency rules, once adopted, will remain in effect for 120 days which will allow time for a full review and updates of current College policies 615 and 620 with input and feedback from employees, students, union leadership, community stakeholder groups, and the Board of Trustees.

Major Changes and Impacts

The US Department of Education uses narrowly defined and protracted definitions, jurisdiction, and practices in the emergency rules than in previous iterations. They are as follows:

- **Hostile environment.** Unwelcome conduct that a reasonable person would find to be so severe, pervasive, and (changed from or) objectively offensive that it effectively denies a person equal access to the College's educational programs or activities, or employment.
- **Narrowed jurisdiction.** In order to consider a Title IX investigation incident must happen during an "educational program or activity" in the United States. Student off campus or studying abroad are no longer covered.
- **Formalized support for respondent.** Requires schools give equitable support for claimant and respondent. Previously, there were only standards for the claimant.
- **Live hearings.** A new requirement, in which all investigations that are within jurisdiction must conclude in a live hearing where claimants and respondents can be cross-examined by the others' advisors.
- **The decision maker.** A new role (must not be Title IX coordinator) who determines responsibility, and sanctions at the end of an investigation. Can be a hearing board of people, or a single person.
- **Informal resolution.** Schools must allow for informal resolution to take place if all parties agree.

Recommendation

That the Board approve the attached emergency rules for Title IX. It is important to note that the Board's approval is subject to the federal rules going into effect on August 14, 2020, as anticipated. Should it become clear that the rules will go into effect at a later date, the College will not be required to seek Board approval again in order to file the CR 103(e) with the Code Reviser's office, so long as the emergency rules being submitted are unchanged from those being approved.

Therefore, the Human Resources and Student Services provides the suggested motion below:

Move to adopt the attached emergency rules for Title IX which impacts the College's current WACs (non-discrimination policy 615 and the student rights and responsibilities policy 620) in order to be in compliance with the United States Department of Education Office for Civil Rights' Final Rules.

Attachments (1):

Whatcom Community College Title IX Emergency Rules

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MODEL SUPPLEMENTAL TITLE IX PROCEDURES

WAC 132U-___-001 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. § 106. To the extent these supplemental hearing procedures conflict with the College’s standard disciplinary procedures, WAC 132U-300-030 through -140, and WAC 132U-126-001 through -100¹ these supplemental procedures shall take precedence.²

WAC 132U-___-002 Prohibited Conduct Under Title IX

Pursuant to RCW 28B.50.140(13) and Title IX of the Education Act Amendments of 1972, 20 U.S.C. §1681, the College 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”³ encompasses the following conduct:

- (1) Quid Pro Quo Harassment. A college employee conditioning the provision of an aid, benefit, or service of the College 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 the College’s educational programs or activities, or 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

¹ Cite to existing student conduct code and procedure.

² To comply with these procedures, College officials must read these supplemental procedures in conjunction with the regular procedures. The regular procedures still apply, even if they are not expressly mentioned in the supplemental procedures. The only time one won’t comply with the regular procedures is when they conflict with the supplemental procedures, in which case, the supplemental procedures control.

³ Washington’s Law Against Discrimination (WLAD), RCW 49.60, and Gender Equality in Higher Education Act, RCW 28B.110, provide broader protection from sexual misconduct than the narrow definitions of “sexual harassment” prohibited under Title IX. Accordingly, institutions will want to retain broader definitions of sexual misconduct that are in their regular student conduct code, as this conduct is still subject to regulation under state law and institutional policies prohibiting gender discrimination.

This model procedure has been prepared by the Washington State Attorney General’s Office on behalf of Washington’s Community and Technical Colleges, Regional Universities and The Evergreen State College. Please consult your assigned Assistant Attorney General before changing or modifying this procedure.

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- 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 (18).
 - (d) Statutory Rape. Consensual sexual intercourse between someone who is eighteen (18) years of age or older and someone who is under the age of sixteen (16).
- (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 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 (i) who is or has been in a social relationship of a romantic or intimate nature with the victim; and (ii) where the existence of such a relationship shall be determined based on a consideration of the following factors:
- (a) The length of the relationship;
 - (b) The type of relationship; and
 - (c) 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.

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WAC 132U-___-003 Title IX Jurisdiction

- (1) This supplemental procedure applies only if the alleged misconduct:
 - (a) Occurred in the United States;
 - (b) Occurred during a College 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 supplemental procedure, an “educational program or activity” is defined as locations, events, or circumstances over which the College 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 the College.
- (3) Proceedings under this supplemental procedure must be dismissed if the decision maker determines that one or all of the requirements of Section (1)(a)-(c) have not been met. Dismissal under this supplemental procedure does not prohibit the College from pursuing other disciplinary action based on allegations that the Respondent violated other provisions of the College’s student conduct code, WAC 132U-126.⁴
- (4) If the Student Conduct Officer 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 Officer will issue a notice of dismissal in whole or part to both parties explaining why some or all of the Title IX claims have been dismissed.

WAC 132U-___-004 Initiation of Discipline

- (1) Upon receiving the Title IX investigation report from the Title IX Coordinator, the Student Conduct Officer 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 Officer determines that there are sufficient grounds to proceed under these supplement procedures, the Student Conduct Officer will initiate a Title IX disciplinary proceeding by filing a written disciplinary notice with the Chair of the Student Conduct Committee⁵ and serving the notice on the Respondent and the Complainant, and their respective advisors. The notice must:

⁴ Insert citation to the institution’s student conduct code.

⁵ Given the sensitivity and complexity of Title IX matters, institutions may want to consider having hearings heard by a smaller panel of college employees (e.g., two faculty and an administrator) or even a single

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- (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 on the party’s behalf;
 - (ii) An advisor may be an attorney; and
 - (iii) The College 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
- (3) Explain that if a party fails to appear at the hearing, a decision of responsibility may be made in their absence.

WAC 132U-___-005 Pre-Hearing Procedure

- (1) Upon receiving the disciplinary notice, the Chair of the Student Conduct Committee will send a hearing notice to all parties, in compliance with WAC 132U-300-090. In no event will the hearing date be set less than ten (10) days after the Title IX Coordinator provided the Final Investigation Report to the parties.
- (2) 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 (5) days before the hearing, the attorney files a notice of appearance with the committee chair with copies to all parties and the student conduct officer.
- (3) In preparation for the hearing, the parties will have equal access to all evidence gathered by the investigator during the investigation, regardless of whether the College intends to offer the evidence at the hearing.

WAC 132U-___-006 Rights of Parties

hearing officer. There is no legal requirement that a student conduct committee hear these cases. Institutions may also want to consider utilizing the same panel or hearing officer to hear both employee and student Title IX discipline cases. Finally, institutions may want to combine resources by retaining and training one hearing officer or committee chair to handle cases at multiple institutions. Any school pursuing these options will want to carefully review and revise the supplemental procedures to reflect these decisions.

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- (1) The College’s Student Conduct Procedures, WAC 132U-126,⁶ and this supplemental procedure shall apply equally to all parties.
- (2) The College bears 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 an advisor. The parties are entitled to an advisor of their own choosing and the advisor may be an attorney. If a party does not choose an advisor, then the Title IX Coordinator⁷ will appoint an advisor of the [College or University]’s choosing on the party’s behalf at no expense to the party.

WAC 132U-___-007 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.

⁶ Citation to the institution’s student conduct procedures.

⁷ This responsibility could also be assigned to the Chair of the Student Conduct Committee. This may invite allegations of bias or conflict of interest. The Title IX Coordinator does not have any part in the determination of responsibility, so may be a better choice.

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- (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) 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 counsellors;
 - (e) Privileges applicable to sexual assault and domestic violence advocates; and
 - (f) Other legal privileges identified in RCW 5.60.060.

WAC 132U-___-008 Initial Order

In addition to complying with WAC 132U-126, the Student Conduct Committee will be responsible for conferring and drafting an Initial Order that:

- (1) Identifies the allegations of sexual harassment;
- (2) 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;
- (3) Makes findings of fact supporting the determination of responsibility;
- (4) Reaches conclusions as to whether the facts establish whether the Respondent is responsible for engaging in Sexual Harassment in violation of Title IX;
- (5) Contains a statement of, and rationale for, the Committee's determination of responsibility for each allegation;
- (6) Describes any disciplinary sanction or conditions imposed against the Respondent, if any;
- (7) Describes to what extent, if any, Complainant is entitled to remedies designed to restore or preserve Complainant's equal access to the [College or University]'s education programs or activities; and

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- (8) Describes the process for appealing the Initial Order to the [College or University] President.
- (9) The Committee Chair will serve the Initial Order on the Parties simultaneously.

WAC 132U-___-009 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 timeframes set forth in WAC 132U-126-090.⁸
- (2) The President or their delegate 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) President’s Office shall serve the Final Decision on the parties simultaneously.

⁸ Citation to the procedure for appealing an Initial Order to the President under the institution’s student conduct procedure.