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NO. 100598-9

IN THE SUPREME COURT OF WASHINGTON

(Court of Appeals No. 82418-0-I)

ERASMUS BAXTER, ASIA FIELDS and
JULIA FURUKAWA,

Appellees,

v.

WESTERN WASHINGTON UNIVERSITY, an agency
of the State of Washington,

Appellees,

DOE 3 and DOE 4,

Appellants-Intervenors

APPELLANTS' PETITION FOR REVIEW

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I. INTRODUCTION

Two intervenors, identified as Doe 3 and Doe 4 in the proceedings below and as Appellants herein, are former students of Western Washington University (“WWU”), the third largest public university in this state. These student intervenors are among the group of students who are alleged to have violated WWU’s Student Code of Conduct between 2013 and 2018. Before participating in conduct proceedings, the student intervenors were assured that their personally identifiable information and the results of the proceedings would not be shared with any members of the public. And these same assurances were delineated in WAC 516-21 and the Code provisions that existed at the time of their disciplinary proceedings.

Nevertheless, a Superior Court judge and the Court of Appeals ruled that these students personally indefinable information must be disclosed in response to a request under Washington’s Public Records Act (“PRA”) – but for very

different reasons. In the Court of Appeals' reading of these statutes, WWU is a public agency that is subject to the PRA but it should not be considered a "public school" within the meaning of the student files exception to the PRA as documented in RCW RCW 42.56.230(1). Moreover, ignoring the Code provisions in place at the time of these student disciplinary proceedings, the Court of Appeals rejected any due process objections by pointing to provisions that were enacted years *after* the proceedings were concluded. In so ruling, the Court of Appeals' decision could upset the settled expectations of every student at WWU and perhaps every student that has participated in a disciplinary proceeding at a public university in the State of Washington.

This case presents issues of substantial public interest. The disclosure of personally identifying information of students at WWU has broad implications across public schools in the State of Washington and therefore involves a fundamental and urgent issue of broad public import which requires prompt and ultimate determination by this Court.

II. IDENTIFY OF PETITIONERS

Petitioners, Doe 3 and Doe 4, are two former students of WWU.¹

III. COURT OF APPEALS' DECISION

On December 26, 2021, the Court of Appeals issued a published decision affirming the WWU student's motion for injunctive relief. *See Appendix A.*

IV. ISSUES PRESENTED FOR REVIEW

This Petition for Review presents the Court with an opportunity to address important and unresolved legal issues of first impression concerning the interaction between the Family Educational Rights and Privacy Act and Washington's Public Records ACT. The issues presented include:

- (1) Whether a student's due process protections are violated when the student agrees to participate in a school disciplinary proceeding based on assurances that the results of that proceeding,

¹ Doe 1, Doe 2, Doe 5, Doe 6 and Doe 7 are no longer participating in this matter.

and the student's personally identifiable information, would not be disclosed to the public and where the school fails to notify the student that these assurances are illusory?

- (2) Does FERPA supersede or override the confidentiality provisions in WAC 516-21 or WAC 516-26?
- (3) Is Western Washington University a "public school" within the meaning the PRA exemption in RCW 42.56.210(1)?
- (4) Are the confidentiality provisions in WWU's Student Code of Conduct, as codified in WAC 516-21 or WAC 516-26, "other statutes" within the meaning of RCW 42.56.070?
- (5) Is the final result exemption in FERPA is void for vagueness in light of the United States Supreme Court's decision in *Johnson v. United States*, 576 U.S. 591 (2015) and its progeny?

V. STATEMENT OF THE CASE

A. WWU's Student Code of Conduct and Student Intervenor's Disciplinary Proceedings

Doe 3 and Doe 4 were the subjects of a disciplinary proceeding at WWU. Doe 3's proceeding was initiated in 2017; Doe 4's proceeding was initiated in 2015. Both Doe 3 and Doe

4 were found to have violated the WWU's Student Code of Conduct following a hearing. After initiating an appeal, Doe 3 entered into a final settlement agreement with WWU.

All student disciplinary proceedings at WWU are governed by its Student Code of Conduct as delineated in WAC 516-21 ("Code"). The pertinent Code provisions severely limit the release of personally identifying information and disciplinary findings. *See* WAC 516-26.² The Code provides:

The university shall not permit access to or release of a student's education records or personally identifiable information contained therein to any person without the written consent of the student, except as provided in WAC 516-26-080, 516-26-085, or 516-26-090.

WAC 516-26-070. The only pertinent exception is found in WAC 516-26-080(g), which authorizes disclosure of the results of any disciplinary proceeding to the alleged victim of any crime of violence.

² Because these Student Intervenors' hearings occurred several years ago, this Court should look to the Code provisions in place at that time. For the Court's convenience, a copy of the relevant WAC provisions are attached as *Appendix C*.

The Code contains a comprehensive confidentiality notice pertaining to disciplinary records. *See* WAC 516-21-310. In fact, the Code includes a directive that such records “[w]ill not be shared with *any member of the public*, except upon the informed written consent of the student(s) involved. or as stated in the student records policy.” WAC 516-21-310(1)(b).

Doe 3 and Doe 4 relied upon these Code provisions – and WWU’s assurances of confidentiality – before participating in the school’s disciplinary process.

B. Plaintiffs’ PRA Request

On October 10, 2018, Plaintiffs delivered a PRA request to WWU, where they sought disclosure of “the final results, *including the student’s name*, of disciplinary proceedings where [WWU] has determined a student was responsible for a crime of violence or non-forcible sexual offense in the last five years.” *Appendix D* (emphasis added). When advancing this claim, Plaintiffs argued that this information must be disclosed under the “final results” exception to FERPA as set forth in 20 U.S.C.

§ 1232g(b)(6)(B). WWU initially resisted that request. But, sometime later, the school's public records officer subsequently sent an email message inviting the impacted students to seek an injunction to block disclosure. *See Appendix E.*

C. The WWU Litigation

Meanwhile, Plaintiffs initiated a civil action against WWU in the Whatcom County Superior Court wherein they argued that the school had failed to provide a complete response to the PRA request. Among other things, Plaintiffs noted WWU had already provided a “table” in response to the request in which the school had redacted the names of all students and former students who were identified in that document.³ But Plaintiffs claimed the redacted names were not exempt from disclosure under the PRA.

Thereafter, the parties filed a stipulation that permitted several students to intervene pursuant to CR 24(a). Student

³ This table was prepared and produced by WWU before Student Intervenor were notified of the PRA request. It is debatable whether this type of response was required under the PRA. *See, Fisher Broadcasting-Seattle TV LLC v. City of Seattle*, 180 Wn.2d 515, 523–24 (2014) (PRA does not require an agency to mine existing data and then “create” a new record).

intervenor then moved for an injunction claiming that their personal identifying information was exempt from disclosure for several reasons. *See* CP 105-17, 118-36, 164-75, 176-87, 318-25, 326-30, 331-35. In particular, the students argued that the requested information was exempted under the student records exemption in RCW 42.56.230(1) as well as the confidentiality provisions within WWU's Code and WAC 516-21 or WAC 516-26. Moreover, insofar as Plaintiffs and WWU were claiming that this information was subject to disclosure under FERPA's final result exception, the students argued that the exception was void for vagueness in light of the decision in *Johnson v. United States*, 576 U.S. 591 (2015) and its progeny. Finally, the students claimed that their due process rights had been violated in light of the WWU Code and the school's assurances that their personally identifiable information would not be shared the public.

On August 10, 2020, the parties appeared for a hearing before Whatcom County Superior Court Judge David Freeman.

At the outset, Judge Freeman acknowledged that this was a case of first impression. As he explained: “Frankly, I’m surprised that this issue has not been addressed previously in the appellate courts. I’m a little shocked by that actually.” *Appendix F* (8/10/20 VRP at 3).

Judge Freeman denied Student intervenors’ request for injunctive relief – although he pointedly noted that reasonable minds could differ as to the correct ruling in the case. *See id.* As a threshold matter, Judge Freeman concluded that WWU is a “public school” and thus falls within the ambit of the student files exemption in RCW 42.56.230(1). *See id.* at 4. However, the judge determined that Student Intervenors’ personal identifying information within WWU’s disciplinary records were not exempt from disclosure as a result of this Court’s decision in *Lindeman v. Kelso*, 162 Wn.2d 196 (2007). *See id.*

Judge Freeman also rejected Student intervenors’ claim that the pertinent WAC provisions would amount to an “other statute” under the PRA. *See id.* In essence, the judge ruled that

these WAC provisions were *ultra vires*. *See id.* at 4-5. But Judge Freeman failed to address any of the student's due process claims.

Later, on October 22, 2020, Judge Freeman entered an order pursuant to CR 54(b) (*Appendix B*). Before signing the order, the judge explained his reasoning:

I am prepared to enter an order under 54(b) or a partial order under 54(b) in order for this to go up on appeal. As I stated, when I made my ruling previously, I do think this is a bit of a novel issue. I don't think there is clear case law on this. And I believe that reasonable minds could differ on an outcome here. So I think it is important to have this heard on the merits in the court of appeals which is why the stay is also proper.

See Appendix G (10/22/20 VRP at 14).

D. The Court of Appeals Affirms the Superior Court, but on Different Grounds

The Court of Appeals issued a published Opinion affirming the Superior Court's judge decision requiring WWU to disclose the unredacted disciplinary results. *See App A* (Opinion). The reviewing court rejected the Plaintiffs' core

argument and Judge Freeman’s interpretation of the *Lindeman* case. *See id.* at 7-10. The Court of Appeals nevertheless affirmed the Superior Court’s order, finding, *inter alia*, that WWU is not a “public school” within the meaning of the PRA. *See id.* at 10-16. The Court of Appeals also decided that the pertinent WAC provisions did not constitute “other statutes” under the PRA. *See id.* at 22-24. Finally, the Court of Appeals rejected the issues that had been overlooked by the Superior Court. *See id.* at 16-24.

VI. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The issues raised by this petition are “significant question[s] of law under the Constitution of the State of Washington [and] of the United States,” RAP 13.4(b)(3), as well as “issue[s] of substantial public interest that should be determined by the Supreme Court.” RAP 13.4(b)(4). In fact, these issues could impact thousands of students at colleges and universities throughout the State of Washington. Moreover, not

only does this case presents significant questions of law under Washington's Public Records Act and the Constitution of the United States, but the Court of Appeals' decision is in direct conflict with several decisions of the United States Supreme Court and other courts.

Yet, even more fundamentally, this case squarely presents the question whether the PRA can be used as a tool to acquire the names of any student who may have been disciplined by a public university – and thereby create a registry of student offenders much like Washington's sex offender registration list – even though these same students were promised that the outcome of the disciplinary proceedings would remain confidential.

A. The Use of Washington's PRA to Obtain Student Personal Identifying Information is an Issue of Substantial Public Interest.

Washington has more than 40 public universities and colleges. See <https://nces.ed.gov/collegenavigator/>. Even in the face of a pandemic which has derailed “in person” learning, the total enrollment at Washington's public universities and colleges

is well over 200,000 students. *See id.* For example, WWU reported a total enrollment of 15,197 students for fall 2021. *See* <https://admissions.wvu.edu/quick-facts>.

This case presents issues of profound importance to countless students throughout Washington.⁴ Should this decision stand, the PRA process may be used as a mechanism to obtain the “final results” of hundreds – if not thousands – of disciplinary cases from the public universities and colleges in the State of Washington.

B. The Court of Appeals’ Published Decision Raises Significant Questions of Law Under Washington’s Public Records Act and the Constitution of the United States.

1. Student Intervenors’ Due Process Rights Were Violated, as They Were Assured Their Records Would Not be Released to the Public Before They Participated in WWU’s Student Disciplinary Proceedings.

In *Krakauer v. State of Montana*, 296 Mon. 247, 396 P.3d 201 (2019), the Montana Supreme Court faced some of

⁴ Since the PRA has no limitation period, the case presents issues that would touch the lives of former students, current students and future students.

the same issues present in this case. As the *Krakauer* court noted:

Taken together, these statutes and policies indicate Doe did not have notice his educational records would be subject to public disclosure by the University. Quite the opposite, the statutes and policies provide students like Doe with steadfast assurances that the university system will affirmatively protect their records from disclosure, just as the University and the Commissioner have done here. Doe had notice the University could only disclose the results of his disciplinary proceedings to an alleged victim, essential University personnel, or other necessary individuals in compliance with federal or state law, which would include compliance with a judicial order or subpoena. The University did not have a policy of disclosing educational records. In fact, absent Doe's consent or a judicial subpoena, the University could only disclose specific information from Doe's records in limited circumstances. Accordingly, Doe did not have notice his educational records were publicly available or the University would possibly publicly disclose them.

Id. at ¶ 21.

The very same is true in this case. The Student Intervenors had no notice that the results of his/her disciplinary proceeding might be released to the public. Rather, they were told that any results of the disciplinary hearing would be disclosed *only* to

the complainant and essential school personnel. At the time of the underlying disciplinary proceedings, the student intervenors had every reason to believe that WWU would not release his/her personal information or information relating to the outcome of those proceedings to the public at large. Put another way, Student intervenors were deprived of basic due process protections as they were never advised that their personally identifiable information or the results of any disciplinary proceedings could be disclosed to the public at large.

The Court of Appeals rejected the Student Intervenors' due process claim and refused to follow the Montana Supreme Court's decision in *Krakauer*, by pointing to language in WAC 516-21-310(1). In the Court of Appeals' view, the Student Intervenors had "adequate notice" because WAC 516-21-310(1) "expressly provides for disclosure '*as required by law.*'" *App. A* (Opinion at 24). But this contention is disingenuous as the cited language cannot be found in the version of the Code in existence at the time of the Student Intervenors' disciplinary proceedings.

Rather, without explanation or justification, the Court of Appeals has chosen to rely upon a version of the Code that was enacted *sometime after 2018*.

The Code provision in existence at the time the Student Intervenors faced their disciplinary proceedings – 2015 and 2017 – contained an unconditional mandate that these records of their personally identifiable information “[w]ill not be shared with *any member of the public*, except upon the informed written consent of the student(s) involved. . .” WAC 516-21-310(1)(b) (emphasis added). It is unreasonable to suggest that these students had “adequate notice” that this mandate was illusory or that the school’s these assurances might evaporate if the Code was amended in later years.

2. Student Intervenors’ Personally Identifying Information is Exempt from Disclosure Under the PRA

i. WWU is a Public School

In the proceedings below, Plaintiffs and the Student Intervenors agreed that WWU is a “public school” within the

meaning of the PRA. The Superior Court judge reached that same conclusion and rejected the arguments advanced by the University. *See Appendix F* (In so ruling, the Superior Court explained:

I don't take such a limited view as far as the public school definition. It's not defined by the statute itself, but I am not sure it should be limited to that which is the constitutional standard in light of the fact that reading RCW 42.56.230 as a whole, there are a number of exceptions that are carved out of the PRA. And essentially those students attending public universities would be entirely excluded under those exceptions if I were to read it so narrowly, as far as the definition of public school. I could go through a number of different statutes that define both include and exclude based on that definition. But I think for the purposes of the Public Records Act, I do believe that a public university does fall within the exceptions of 42.56.230 (1).

Appendix F (8/10/20 VRP at 4)).

But the Court of Appeals rejected this conclusion. In the Court's view, WWU is a "public agency" within the meaning of the PRA but it is not a "public school" within the meaning of the PRA exception in RCW 42.56.230(1). *See Appendix A*.

As a threshold matter, the Court of Appeals concluded that the legislature did not intend this exception to apply to institutions of higher learning. Rather than focus on the ordinary meaning of the term “public school” – or what the Court referred to as the “most basic meaning” (*id.* at 12) – the Court decided that the legislature must have intended a somewhat more technical definition of that term. In essence, the Court concluded that the PRA exemption was intended to apply only to “common schools” even though the legislature did not use that term in the PRA statute. Moreover, as further support for this conclusion, the Court looked outside the statute to opine that “use of the term ‘public schools’ is narrow and limited.” *Id.* at 14.

The Court of Appeals relied heavily upon the definition used in Article IX, § 4 of the Washington State Constitution. This Court considered that provision in *State ex rel. Gallway v. Grimm*, 146 Wn.2d 445 (2002), and noted its objective to “define the constitutional principle in accordance with the original understanding of the ratifying public so as to faithfully apply the

principle to each situation which might thereafter arise.” *Id.* at 460. Then, based upon an extensive and highly technical examination, the Court concluded that Article IX, § 4 was not intended to apply to institutions of higher education.

Here, by contrast, there is no reason to conclude that the legislature intended that the term “public school” was to be interpreted as if the PRA had been adopted in 1889. In rejecting any use of the 1990 edition of Black’s Law Dictionary (which defined a school as an “institution or place for instruction and education”), the *Grimm* Court noted that the dictionary definition was published over one hundred years after the constitution’s ratification. *See* 146 Wn.2d at 460. Here, by contrast, the Court of Appeals has relied upon a version of Black’s law dictionary published many years after the PRA was adopted. *See Appendix A* (Opinion at 13 n.47).

The Superior Court judge was correct when he concluded that the PRA exemption covers all public schools – whether they be pre-schools, elementary schools, middle schools, high

schools, trade schools, state colleges, or public universities. The term “public schools” should be given its common (rather than technical) meaning when considering this section. While by no means dispositive, it is noteworthy that WWU’s employees are currently represented by the “Public School Employees of Washington/Services Employees International Union, Local No. 1948 (PSE). *See Pub. Sch. Employees of Washington/SEIU Local 1948 v. Washington State Labor Relations Office, a div. of Office of Fin. Mgmt.*, 155 Wn.App. 1047 (2010).

Students at Washington’s public universities and colleges should not be left to guess whether their records are subject to disclosure under the PRA.

3. Personally Identifiable Information is Exempt from Disclosure in Light the Confidentiality Provisions in WAC 516-21 and WAC 516-26

In addition to the express exemptions within the PRA, the statute contains a short clause exempting all records affected by an “other statute which exempts or prohibits disclosure of specific information or records.” RCW 42.56.070 (2016). This

exemption requires that the “other statute” specifically limit production of the information or record. See *White v. Clark County*, 188 Wn.App. 622, 631 (2015).

Regulations are issued by authority of statutes. Like legislation and the Constitution, regulations are a primary source of law in Washington. Per RCW 42.56.070(1), certain regulatory rules can be treated as “other statutes” for purposes of PRA exemption. See, e.g., *White v. Clark County*, 188 Wn.App. 622, 631 (2015).

Here, the pertinent WAC provisions include a broad presumption of confidentiality as to student disciplinary matters. In fact, WAC 516-26-070 provides:

The university shall not permit access to or release of a student’s education records or personally identifiable information contained therein to any person without the written consent of the student, except as provided in WAC 516-26-080, 516-26-085, or 516-26-090.

Id. (emphasis added). In addition, WWU’s Code includes a comparable provision which provides that conduct records “*will*

not be shared with any member of the public, except upon informed consent or as stated in the student records policy.” WAC 516-21-310(1)(b) (emphasis added).

The Court of Appeals rejected this argument by, once again, pointing to the language added to WAC 516-21-310(1) years after the Student Intervenors’ participated in disciplinary proceedings at WWU. *See Appendix A* (Opinion at 22).

In addition, the Court of Appeals claims that the WAC provisions “are not derived from any particular article of the Washington Constitution or multiple sections of the RCW.” *Id.* at 22-23. In so ruling, the Court seems to argue that these Code provisions are *ultra vires*. To the Contrary, WWU’s rules and regulations are specifically authorized by statute. *See, e.g., Mills v. Western Washington University*, 170 Wn.2d 903, 910-12 (2011) (WWU’s University Faculty Handbook was promulgated pursuant to legislative delegation).⁵

⁵ Here, as in *Mills*, this Court should find that these Code provisions are lawful as they were drafted pursuant to legislative delegation. The WAC provisions regarding confidentiality are not only fully authorized by statute,

The Court of Appeals' ruling could have wide ranging impact throughout the State of Washington. The administrators and students at public schools depend upon a predictable regulatory framework. If upheld, the Court of Appeals' ruling could upset the settled expectations of every student who has participated in disciplinary proceedings at a public school in Washington.

4. FERPA's Final Result Exception is Unconstitutionally Vague

The Fifth Amendment's Due Process Clause "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Alphonsus v. Holder*, 705 F.3d 1031, 1036-37 (9th Cir. 2014) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). See also *Connally v. General Construction Co.*, 269 U.S. 385, 391

but they are necessary and appropriate to the administration of a public university.

(1926) (“[A] statute . . . so vague that men of common intelligence must guess at its meaning . . . violates the first essential of due process of law.”).

Although most often invoked in the context of criminal statutes, the prohibition on vagueness also applies to civil statutes. *See, e.g., Jordan v. DeGeorge*, 341 U.S. 223, 231 (1951). Most recently, the doctrine was utilized to strike down the deportation statute at issue in *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018) (finding the definition of “crime of violence” in the Immigration and Nationality Act, 18 U.S.C. § 16(b), void for vagueness).

As the Court of Appeals’ notes, the degree of vagueness that the Constitution tolerates – as well as the relative importance of fair notice and fair enforcement – depends in part on the nature of the enactment. *See, e.g., Hoffman Estates v. Flipside Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). Although the student intervenors will not be sentenced to prison if an injunction is denied, they are certain to suffer grave consequences, and

perhaps a lifetime of derision and ignominy, if WWU is permitted to disclose and/or publicize the requested information.

FERPA's final result exception reads as follows:

Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing, to an alleged victim of any crime of violence (as that term is defined in [section 16 of title 18](#)), or a nonforcible sex offense, the final results of any disciplinary proceeding conducted by such institution against the alleged perpetrator of such crime or offense with respect to such crime or offense.

Id.

As to the first clause within the exception (“crime of violence”), the United States Supreme Court recently examined whether a nearly identical term (“violent felony”) was unconstitutionally vague. *See Johnson v. United States*, 576 U.S. 591 (2015). There, unlike FERPA, the statute in included a specific definitional section. *See* 576 U.S. at 591 (discussing 18 U.S.C. § 924(e)(2)(B)). But the *Johnson* Court determined that these types of provisions must be interpreted using a “categorical approach.” *Id.* at 596. This turns out to be

“critical” in the Court’s words, because it gives rise to “a wide rang[e]” of “indeterminacy” in assessing both the “potential” for risk of injury, and “how much risk” any given conduct embodies. *See id.* at 578-80. Thus, these types of statutes invite arbitrary enforcement and deny the accused due process of law.

As to the second clause within FERPA’s exception (“nonforcible sex offense”), the federal statutes include no guidance whatsoever as to the meaning of this phrase and there is no similar or comparable term in Washington law. Consequently, educators and students are left to guess what is meant by this phrase within the exception.

FERPA’s final result exception begins with the statement that “[n]othing in this section shall be construed to prohibit an institution of postsecondary education from disclosing” certain information. The statute is not an affirmative grant of authority; it indicates that certain disclosures are allowed, but not required. Thus, FERPA seems to grant a public school, like WWU, a

discretionary choice of whether to disclose the result of certain disciplinary proceedings.

But, as noted above, this type of disclosure is prohibited by WWU's confidentiality provisions as codified within the Washington Administrative Code. *See* WAC 516-26-070 and WAC 516-21-310. Under the Washington Constitution, it is improper to delegate unfettered discretion to an administrative agency. *See Barry & Barry, Inc. v. Department of Motor Vehicles*, 81 Wn.2d 155, 159 (1972). Likewise, WWU must not be granted unfettered discretion to decide when it should be permitted to disregard the privacy protections set forth in the Code provisions. Absent clear legislative guidelines, WWU must abide by the Code provisions and the requested information must not be disseminated to the public at large.

VII. CONCLUSION

This Court should grant review and resolve these crucial issues. Student Intervenors have presented issues of great public

importance – and the ruling in this case is sure to have broad ramifications for public students throughout the State of Washington.

Appellants certify this document contains 4,568 words, excluding those portions exempt under RAP 18.17.

RESPECTFULLY SUBMITTED this 26th day of January, 2022.

/s/ Todd Maybrown
TODD MAYBROWN (DOE 4)

/s/ Stephen Graham
STEPHEN GRAHAM (DOE 3)

APPENDICES TO PETITION FOR REVIEW

Baxter et. al v. WWU, Doe 3 and Doe 4

- A.** Opinion (No. 82418-0-I)

- B.** Order on Motions for Summary Judgment, Findings and Order for Partial Judgment Under CR 54(b) (*Baxter, et. al v. WWU, Whatcom County Superior Court No. 19-2-00855-37*)

- C.** Chapter 516-21 WAC
Student Rights and Responsibilities Code

Chapter 516-26 WAC
Student Records

- D.** Email from Erasmus Baxter, Asia Fields, and Julia Furukawa re Public Records (10.10.18)

- E.** Third-Party Notification Letter from WWU Re Public Disclosure Request PRR18-138 (June 27, 2019)

- F.** Transcript of August 10, 2020 Hearing in *Baxter, et. al v. WWU, Whatcom County Superior Court No. 19-2-00855-37*

- G.** Transcript of October 22, 2020 Hearing in *Baxter, et. al v. WWU, Whatcom County Superior Court No. 19-2-00855-37*

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

ERASMUS BAXTER, ASIA FIELDS, and JULIA FURUKAWA,)	No. 82418-0-I
)	
Respondents,)	
)	
v.)	
)	
WESTERN WASHINGTON UNIVERSITY, an agency of the State of Washington,)	PUBLISHED OPINION
)	
Respondent,)	
)	
JOHN DOES 2, 3, 4, and 6,)	
)	
Appellants.)	
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VERELLEN, J. — In this Public Records Act dispute, three journalists requested the “final results” of “disciplinary proceedings” including the student’s name where Western Washington University had determined a student was responsible for a crime of violence or nonforcible sex offense in the last five years. Four students appeal the trial court’s determination that the “final results” including the names of the students are subject to public disclosure.

Washington’s Public Records Act (PRA) mandates broad public disclosure.¹ Its exemptions are to be construed narrowly to ensure that the public interest is fully

¹ Ch. 42.56 RCW.

protected. We conclude the disciplinary results are not exempt from disclosure under RCW 42.56.230(1), the “public schools student file” exemption, because the term “public schools” as used in that exemption does not contemplate postsecondary educational institutions.

We also conclude the PRA “other statute”² exemption does not extend to the Family Educational Rights and Privacy Act of 1974 (FERPA) here because the “final results” exception to FERPA allows disclosure of the “final results of any disciplinary proceeding” where the alleged student committed “any crime of violence” or “nonforcible sex offense” in violation of the institution’s rules or policies.³

And Washington state regulations governing disciplinary proceedings at the university pursuant to the university’s student code of conduct stand alone and therefore do not constitute an “other statute” exemption under the PRA.

Finally, the students do not establish an actionable lack of notice that their disciplinary results could be disclosed under the PRA.

We affirm.

FACTS

Between 2013 and 2018, John Does 1 through 7 committed various crimes of violence and/or nonforcible sex offenses while they were students, in violation of the university’s student code of conduct.

² RCW 42.56.070(1).

³ 20 U.S.C. § 1232g.

On October 10, 2018, three journalists, Erasmus Baxter, Asia Fields, and Julia Furukawa, sent a public records request to the university's public records officer, Dolapo Akinrinade. The journalists' request stated:

Under Washington's Public Records Act, we would like to request the final results, including the student's name, of disciplinary proceedings where Western has determined a student was responsible for a crime of violence or nonforcible sexual offense in the last five years. If you deny any part of this request, please cite the specific exemption that applies.^{4]}

In response, university officials used Symplicity Advocate, a software tool, "to create a spreadsheet containing data potentially responsive to the request."⁵

On November 8, 2018, "[a]fter conducting research and verifying that the documents were responsive," Akinrinade provided the journalists with "(i) a table of sexual misconduct offenses and resulting discipline imposed, with the names of the offenders redacted, (ii) a table of violent offenses and resulting discipline imposed, with the names of the offenders redacted, and (iii) an exemption log."⁶ The university noted in the exemption log that it found the names of students exempt from disclosure under RCW 42.56.230(1) of the PRA.

On May 6, 2019, the journalists filed suit against the university seeking a court order to compel the university to produce the student names.

At some point after this lawsuit was filed, the university determined that the names of the students were not exempt from disclosure. That summer, the university

⁴ Clerk's Papers (CP) at 144.

⁵ CP at 240.

⁶ CP at 2, 220.

advised each of the involved students it intended to disclose student names in an unredacted version of the response previously provided, and the students had the opportunity to intervene and seek injunctive relief. Seven students intervened. The students and the journalists stipulated that the university would “not release the requested records relating to John Does 1-7 without redacting the intervenor Does’ names until such date as the superior court rules on the question of whether those records are exempt or not, unless otherwise agreed.”⁷

That August, the university sent a letter to the journalists and the students stating, “With the exception of John Doe Plaintiffs 1-7 who have intervened in the lawsuit, the updated response will include the unredacted names of the students whose records were responsive” to the request.⁸ Before the university released the updated response, it “again reviewed the records to re-verify that the underlying behavior . . . for each student at issue fell within the definitions of a crime of violence or nonforcible sexual offense as set forth in 34 CFR 99.39.”⁹ The university issued the updated response disclosing the name of each student who committed a “crime of violence” or “nonforcible sex offense” and the discipline imposed with only the names of Does 1-7 redacted.

Does 1-7 filed motions for injunctive relief in accordance with RCW 42.56.540, and the journalists filed a cross motion for partial summary judgment. On August 10,

⁷ CP at 29.

⁸ CP at 268.

⁹ CP at 240.

2020, the trial court issued its oral decision. That October, the trial court issued an order denying the Does' motions for injunctive relief and granting the journalists' cross motion for summary judgment. In its written decision, the court noted that Does "failed to carry their burden of proof to establish that the names of the students whose offenses are listed in the tables provided by [the university] to the Plaintiffs are exempt under either the [PRA] or [FERPA]." ¹⁰

The trial court entered a partial judgment certified under CR 54(b) to enable Does 1-7 to immediately appeal the court's decision without having to wait for the final resolution of the journalists' claims against the university. ¹¹

Does 2, 3, 4, 5, and 6 (the students) petitioned for direct review to the Supreme Court. ¹² The Supreme Court denied the students' petition and transferred the case to this court. ¹³

ANALYSIS

The students argue that the trial court erred in denying their motions for injunctive relief because they contend the PRA cannot "be used as a tool to acquire the names of students who have been disciplined by a public university." ¹⁴ We

¹⁰ CP at 338.

¹¹ The journalists' claims against the university have been stayed and remain pending before the trial court.

¹² Doe 1 and Doe 7 sought declaratory and injunctive relief before the trial court but did not appeal.

¹³ On October 11, 2021, Doe 5 withdrew his appeal.

¹⁴ Br. of Appellants at 2-3.

review agency actions “taken or challenged” under RCW 42.56.030 through .520 de novo.¹⁵

The “fundamental objective” of statutory interpretation is to “ascertain and carry out” the legislature’s intent.¹⁶ “In determining the meaning of the statutory exemption at issue, we apply general principles of statutory construction.”¹⁷ “These principles begin with the premise that if a statute is plain and unambiguous, its meaning must be derived from the language of the statute itself.”¹⁸

Generally, “the PRA mandates broad public disclosure”¹⁹ and “gives the public access to the public records of state and local agencies, with the laudable goals of governmental transparency and accountability.”²⁰ “The PRA is ‘liberally construed’ and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected.”²¹ To that end, “[t]he PRA requires

¹⁵ RCW 42.56.550(3).

¹⁶ Servais v. Port of Bellingham, 127 Wn.2d 820, 830, 904 P.2d 1124 (1995) (quoting Rozner v. Bellevue, 116 Wn.2d 342, 347, 804 P.2d 24 (1991)).

¹⁷ Limstrom v. Ladenburg, 136 Wn.2d 595, 606, 963 P.2d 869 (1998) (citing Harmon v. Dep’t of Soc. & Health Servs., 134 Wn.2d 523, 530, 951 P.2d 770 (1998); Western Petroleum Importers, Inc. v. Friedt, 127 Wn.2d 420, 423, 899 P.2d 792 (1995)).

¹⁸ Id. (citing State v. Mollichi, 132 Wn.2d 80, 87, 936 P.2d 408 (1997); Marquis v. City of Spokane, 130 Wn.2d 97, 107, 922 P.2d 43 (1996)).

¹⁹ White v. Clark County, 188 Wn. App. 622, 631, 354 P.3d 38 (2015) (citing Sargent v. Seattle Police Dep’t, 179 Wn.2d 376, 385, 314 P.3d 1093 (2013)).

²⁰ City of Federal Way v. Koenig, 167 Wn.2d 341, 343, 217 P.3d 1172 (2009).

²¹ Fisher Broad.-Seattle TV LLC v. City of Seattle, 180 Wn.2d 515, 521, 326 P.3d 688 (2014) (citing RCW 42.56.030).

agencies to disclose any public record on request unless the record falls within [an] exemption.”²²

“There are three sources of PRA exemptions. First, the PRA itself contains specific enumerated exemptions” in sections .210 through .480.²³ Second, public records can be withheld if they fall within an “other statute” which exempts or prohibits disclosure of the specific information or records.²⁴ “Third, the Washington Constitution may exempt certain records from production because the constitution supersedes contrary statutory laws.”²⁵ Only the first two sources are relevant here.

I. Student File Exemption

The “student file” exemption, RCW 42.56.230(1), provides, “Personal information in any files maintained for students in public schools” is “exempt from public inspection and copying under this chapter.” The students argue that the unredacted disciplinary results are categorically exempt from disclosure.

In Lindeman v. Kelso School District No. 458, our Supreme Court relied upon dictionary definitions to conclude that “‘personal information’ means ‘of or relating to a

²² Freedom Found. v. Wash. State Dep’t of Transp., Div. of Wash. State Ferries, 168 Wn. App. 278, 287, 276 P.3d 341 (2012) (citing Neighborhood Alliance of Spokane County v. Spokane County, 172 Wn.2d 702, 715, 261 P.3d 119 (2011)).

²³ White, 188 Wn. App. at 630-31 (citing Dep’t of Transp. v. Mendoza de Sugiyama, 182 Wn. App. 588, 596, 330 P.3d 209 (2014)).

²⁴ RCW 42.56.070(1).

²⁵ White, 188 Wn. App. at 631 (citing Freedom Found. v. Gregoire, 178 Wn.2d 686, 695, 310 P.3d 1252 (2013)).

particular person,” “affecting one individual,” “affecting each of many individuals,” “peculiar or proper to private concerns,” and “not public or general.”²⁶

Here, the students contend, and the journalists agree, that the unredacted disciplinary results including student names contain “personal information” as defined in section .230(1).²⁷

But the students and the journalists disagree whether the unredacted disciplinary results were located in files maintained for students as contemplated by section .230(1). The students argue that because the PRA request here involves information that was “compiled by reviewing disciplinary records,” the unredacted disciplinary results are “by their very nature maintained in student files” and are distinct from the videotape at issue in Lindeman.²⁸

In Lindeman, two elementary school students engaged in an altercation on a school bus.²⁹ A surveillance video camera was installed on the bus and recorded the altercation.³⁰ The parents of one of the students sent a formal request to the district seeking disclosure of the videotape under the PRA.³¹ The district denied the parents’

²⁶ Lindeman v. Kelso School District No. 458, 162 Wn.2d 196, 202, 172 P.3d 329 (2007) (quoting WEBSTER’S THIRD NEW INT’L DICTIONARY 1686 (2002)).

²⁷ See Br. of Resp’ts Baxter et al. at 18-19; Wash. Court of Appeals oral argument, Baxter et al., v. Western Washington University, No. 82418-0-I (Nov, 5, 2021), at 17 min., 48 sec., through 17 min., 56 sec. <https://www.tvw.org/watch/?clientID=9375922947&eventID=2021111017&autoStartStream=true>.

²⁸ Br. of Appellants at 19.

²⁹ Lindeman, 162 Wn.2d at 199.

³⁰ Id.

³¹ Id. at 199-200.

request, stating that the videotape was exempt from disclosure under the “student file” exemption.³² The parents sued the district, arguing that the district violated the PRA by failing to disclose the videotape.

Our Supreme Court held that the videotape was subject to disclosure because it was a “surveillance tape,” not a “student record,” and therefore, it was not a “file maintained for students.”³³ The court noted that the physical location of the information is not determinative and that “[e]ven if the [d]istrict ultimately used the videotape as the basis for disciplining the student who committed the assault, the videotape itself would not thereby be converted into personal information in files maintained for students since the videotape does not reveal whether discipline was or was not imposed.”³⁴

The court reasoned,

The phrase “files maintained for students in public schools” denotes the collection of individual student files that public schools necessarily maintain for their students. The student file exemption contemplates the protection of material in a public school student’s permanent file, such as a student’s grades, standardized test results, assessments, psychological or physical evaluations, class schedule, address, telephone number, social security number, and other similar records.^{35]}

Here, unlike the videotape at issue in Lindeman, the unredacted disciplinary results contained “personal information” located in “files maintained for students.” The disciplinary results were maintained on the university’s computer system and

³² Id.

³³ Id. at 203.

³⁴ Id.

³⁵ Id. at 202.

accessed with Symplicity Advocate, an online software tool that manages the disciplinary records of the university's students, including the names of students who were responsible for a "crime of violence or nonforcible sexual offense in the last five years." The unredacted disciplinary results are simply the compilation of selected portions of the disciplinary files maintained for students.

The journalists contend that because the "tables list numerous offenses by numerous students[,] these records obviously are not part of any particular student's education records" and therefore are not "in files maintained for students."³⁶ But even though the unredacted disciplinary results contain the information for more than one student, that does not mean the individual disciplinary results are not in files maintained for students. Along with assessments, achievements and evaluations, a disciplinary record that a student committed a serious violation of the student code of conduct would logically and reasonably be located in a student's permanent file. We conclude the compilation of disciplinary results sought here for several students are "in files maintained for students."

Finally, we must decide whether "public schools" as prescribed by section .230(1) includes the university. The students argue that "a plain reading of the PRA compels a conclusion that Washington's public universities and colleges—such as WWU—should be treated no differently than any other public schools."³⁷ In essence, the students dismember the statutory phrase "public schools" to separately analyze,

³⁶ Br. of Resp'ts Baxter et al. at 19.

³⁷ Reply Br. of Appellants at 4.

first, whether the university is a “school” and second, whether it is “public” rather than private.

“Where the legislature has not defined a term, [we] will give the term its plain and ordinary meaning ascertained from a standard dictionary.”³⁸ “When determining a statute’s plain meaning, we consider ‘the ordinary meaning of words, the basic rules of grammar, and the statutory context to conclude what the legislature has provided for in the statute.’”³⁹ We also examine related statutory provisions.⁴⁰

Further, individual words should not be read in isolation; the plain meaning of two words used in sequence is sometimes more than the simplest and broadest meaning of those words when viewed individually.⁴¹ The plain and precise meaning of two words used in conjunction is part of the context recognized under the plain meaning rule.⁴²

“A statute is ambiguous when it is susceptible to two or more reasonable interpretations, but a statute is not ambiguous merely because different

³⁸ Cornu-Labat v. Hosp. Dist. No. 2 Grant County, 177 Wn.2d 221, 231, 298 P.3d 741 (2013) (internal quotation marks omitted) (quoting State v. Watson, 146 Wn.2d 947, 954, 51 P.3d 66 (2002)).

³⁹ Citizens Alliance for Property Rights Legal Fund v. San Juan County, 184 Wn.2d 428, 435, 359 P.3d 753 (2015) (quoting In re Forfeiture of One 1970 Chevrolet Chevelle, 166 Wn.2d 834, 838-39, 215 P.3d 166 (2009)).

⁴⁰ Cornu-Labat, 177 Wn.2d at 231.

⁴¹ State v. K.L.B., 180 Wn.2d 735, 742, 328 P.3d 886 (2014) (individual words should not be read in isolation); State v. Roggenkamp, 153 Wn.2d 614, 623, 106 P.3d 196 (2005) (the meaning of words may be indicated or controlled by those with which they are associated).

⁴² K.L.B., 180 Wn.2d at 742; Roggenkamp, 153 Wn.2d at 623.

interpretations are conceivable.”⁴³ “If a statute is ambiguous, we may look to the legislative history of the statute and the circumstances surrounding its enactment to determine legislative intent.”⁴⁴

The PRA does not define the term “public schools.” Webster’s Third International Dictionary defines “public school” as:

[(1)(a)] any of various endowed secondary boarding schools in Great Britain offering a classical curriculum and preparing boys [especially] for the ancient universities or for public service. [(b)] a similar school for girls. [(2)(a)] a tax supported school controlled by a local governmental authority; [specifically] an elementary or secondary school in the U.S. providing free education for the children of residents of a specified area [and (b)] the building housing a public school.^[45]

The students contend that “[i]t is far more likely that the legislature [meant] the common meaning [of] the term “public school” in the exemption with an understanding that it would be applied to Washington’s universities.”⁴⁶ But as noted above, “plain meaning” is not limited to the most basic meaning of each word in isolation. Rather, we should consider the standard dictionary definition of the precise term used in the statute. Here “public school” has a dictionary definition limited to elementary or secondary schools providing free education for the children of

⁴³ State v. Gray, 174 Wn.2d 920, 927, 280 P.3d 1110 (2012) (internal quotation marks omitted) (quoting Estate of Haselwood v. Bremerton Ice Arena, Inc., 166 Wn.2d 489, 498, 210 P.3d 308 (2009)).

⁴⁴ Five Corners Family Farmers v. State, 173 Wn.2d 296, 305-06, 268 P.3d 892 (2011) (internal quotation marks omitted) (quoting Res. Dev., Inc. v. Cananwill, Inc., 150 Wn.2d 674, 682, 80 P.3d 598 (2003)).

⁴⁵ WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1836 (2002) (emphasis added).

⁴⁶ Reply Br. of Appellants at 5.

residents of a particular area. The dictionary definition of the term “public school” does not extend to postsecondary educational institutions.⁴⁷ And related statutes in the PRA provide further support that the term “public schools” only refers to schools below the college or university level.

Our legislature has long recognized the divide between “higher education” involving colleges and universities under Title 28B RCW and “common school provisions” limited to “public schools” that exclude colleges or universities under Title 28A RCW. Specifically, in 2009, the legislature enacted RCW 42.56.320, the “educational information” section of the PRA, which references Title 28B, “higher education provisions,” and Title 28A, “common school provisions.”

Further, in 2020, the legislature enacted RCW 42.56.375, the “sexual misconduct in postsecondary educational institutions” section of the PRA, which also

⁴⁷ Although we need not rely on a legal dictionary to ascertain the “common meaning” of a nontechnical term, we note Black’s Law Dictionary defines “public school” as “[a]n elementary, middle, or high school established under state law, regulated by the local state authorities in the various political subdivisions, funded and maintained by public taxation, and open and free to all children of the particular district where the school is located.” BLACK’S LAW DICTIONARY 1613 (11th ed. 2019). At oral argument before this court, appellants’ counsel argued that the plain and ordinary meaning of “public school” encompassed colleges and universities. In support of his assertion, he referenced two dictionary definitions of the term “school.” Appellants’ counsel noted that Black’s Law Dictionary defines “school” as an “institution or place of public instruction” and that Merriam Webster’s Dictionary defines “school” as “an institution for teaching children or a college or a university.” See Wash. Court of Appeals oral argument, Baxter et al., v. Western Washington University, No. 82418-0 (Nov. 5, 2021), at 1 min., 35 sec. through 4 min., 2 sec., <https://www.tvw.org/watch/?clientID=9375922947&eventID=2021111017&autoStartStream=true>. But appellants’ argument ignores the distinction between the terms “school” and “public schools.” And the plain meaning rule does not compel us to ignore the most precise meaning of a term in the context of the entire statutory and constitutional scheme.

references Title 28B. Section .375 directly refers to RCW 28B.112.040, which under subsection (4) defines a “postsecondary educational institution” as “an institution of higher education as defined in RCW 28B.10.016.” RCW 28B.10.016 subsection (2) notes that the university is a postsecondary educational institution and is specifically classified as a “regional university” under that provision.

More directly, when the legislature enacted Title 28A RCW “common school provisions” in 1969, it expressly defined “public schools” as “the common schools as referred to in Article IX of the state Constitution, charter schools established under chapter 28A.710 RCW, and those schools and institutions of learning having a curriculum below the college or university level as now or may be established by law and maintained at public expense.”⁴⁸ We may look to the only statute defining “public schools” even though not contained in nor referenced by the PRA.⁴⁹

Even if we deem the term “public schools” ambiguous, the rules of construction do not favor the students’ perspective because the history surrounding the use of the term “public schools” is narrow and limited. Specifically, article 9,

⁴⁸ LAWS OF 1969, 1st Ex. Sess., ch. 223, § 28A.01.055.

⁴⁹ In Cornu-Labat v. Hospital Dist. No. 2 Grant County, our Supreme Court resolved the plain meaning of “peer review committee” in the PRA by referencing a statute unrelated to the PRA. 177 Wn.2d 221, 230-31, 298 P.3d 741 (2013). The court noted that the PRA provision referenced another statute, RCW 4.24.250, as involving a “peer review committee” but the referenced section did not define the term. Id. In ascertaining the plain meaning of “peer review committee,” the court used the “only statute” to define “peer review committee,” RCW 7.71.030, even though that definition was not contained in nor referenced by the PRA. Id. Using Title 7 RCW, the court held that because the definition of “peer review committee” as used in RCW 42.56.360 included nonphysicians, the records were exempt from disclosure under the PRA. Id. at 231-32, 234.

section 2 of the Washington Constitution states, “The Legislature shall provide for a general and uniform system of public schools. The public school system shall include common schools, and such high schools, normal schools, and technical schools as may hereafter be established.”⁵⁰ And based upon article 9, section 4 of the Washington Constitution, our Supreme Court held in Gallwey v. Grimm that “universities” are not common “schools.”⁵¹

When the electorate adopted and the legislature codified Initiative 276 in 1973, the “student file” exemption was one of few exemptions expressly included.⁵² The very little “history” that exists for Initiative 276 does not include any express references to the intended meaning of “public schools” as used in the “student file” exemption.⁵³ But the related statutes in existence in 1973 expressly defined “public schools” to exclude colleges and universities.

⁵⁰ WASH. CONST. art. IV, § 2; Litchman v. Shannon, 90 Wash. 186, 186-88, 155 P. 783 (1916).

⁵¹ 146 Wn.2d 455, 466, 48 P.3d 274 (2002).

⁵² Initiative 276, LAWS OF 1973, ch. 1, § 31(1)(a).

⁵³ Voter pamphlet entries may provide “history” used to construe initiative provisions, see Amalgamated Transit Union Local 587 v. State, 142 Wn.2d 183, 205-06, 11 P.3d 762 (2000), but none is present here regarding the student file exemption. See Initiative 276, LAWS OF 1973, ch. 1, § 31(1)(a). Further, in a recent non-PRA decision, our Supreme Court noted that Washington Pattern Jury Instruction 50.62 defines “school” as “a school or institution of learning having a curriculum below the college or university level as established by law and maintained at public expense. The term ‘school’ also means a school maintained at public expense in a school district and carrying on a program from kindergarten through the twelfth grade, or any part thereof, including vocational education courses.” (citing 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 50.62, at 1177 (4th ed. 2016)). And the court also acknowledged that “public school” is defined in RCW 28A.150.010. State v. Anderson, No. 98973-7, slip op. at 5, 11 (Wash. Nov. 18, 2021), <http://www.courts.wa.gov/opinions/pdf/989737.pdf>.

Therefore, under either the plain meaning, or the rules of construction applicable to resolve any ambiguity, the term “public schools” in the student file exemption only contemplates schools below the college and university level.

The unredacted disciplinary results are not exempt from disclosure under the “student file” exemption of RCW 42.56.230(1).

II. Other Statute Exemption

“The ‘other statute’ exemption ‘applies only to those exemptions explicitly identified in other statutes; its language does not allow a court to imply exemptions but only allows specific exemptions to stand.’”⁵⁴ Where an exemption is not found in the PRA itself, we will find an “other statute” exemption “only when the legislature has made it explicitly clear that a specific record, or portions of it, is exempt or otherwise prohibited from production in response to a public records request.”⁵⁵ In Doe ex rel Roe v. Washington State Patrol, our Supreme Court stated, “Our review of Washington case law shows that courts consistently find a statute to be an ‘other statute’ when the plain language of the statute makes it clear that a record, or portions thereof, is exempt from production.”⁵⁶

First, the students rely upon FERPA as an “other statute” exemption. “Federal education funding is often conditional on the institution’s compliance with federal

⁵⁴ Doe ex rel. Roe v. Washington State Patrol, 185 Wn.2d 363, 372, 374 P.3d 63 (2016) (internal quotation marks omitted) (quoting Progressive Animal Welfare Soc. v. Univ. of Wash., 125 Wn.2d 243, 262, 884 P.2d 592 (1994)).

⁵⁵ Id. at 373.

⁵⁶ 185 Wn.2d 363, 375, 374 P.3d 63 (2016).

laws, including FERPA.”⁵⁷ Here, the university receives federal funding.⁵⁸ Generally, “FERPA restricts school disclosure of students’ education records and personally identifiable information.”⁵⁹ And “FERPA is an ‘other statute’ [under the PRA] if it expressly exempts the relevant records from disclosure.”⁶⁰

But the journalists and the university argue that an amendment to FERPA known as the “final results exception” expressly permits certain records of violent or sex offenses to be released to anyone.⁶¹ The “final results exception,” 20 U.S.C. § 1232g(b)(6)(B), provides:

Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing the final results of any disciplinary proceeding conducted by such institution against a student who is an alleged perpetrator of any crime of violence (as that term is defined in section 16 of Title 18), or a nonforcible sex offense, if the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution’s rules or policies with respect to such crime or offense.

Here, the university’s code of conduct states, “The purpose of this student records policy is to establish rules and procedures that appropriately implement [FERPA].”⁶² The university’s public records officer, Dolapo Akinrinade, after verifying

⁵⁷ West v. TESC Bd. of Trs., 3 Wn. App. 2d 112, 114-15, 414 P.3d 614 (2018) (citing 20 U.S.C. § 1232(g); 34 C.F.R. pt. 99).

⁵⁸ Id. at 114.

⁵⁹ Id. (citing 20 U.S.C. § 1232(g)).

⁶⁰ Id. at 119; Ameriquest Mort. Co. v. Office of Atty. Gen., 170 Wn.2d 418, 439-40, 241 P.3d 1245 (2010).

⁶¹ Br. of Resp’ts Baxter et al. at 8; Br. of Resp’t Western Washington University at 10.

⁶² CP at 159; WAC 516-26-010.

which student violations of the university's code of conduct qualified under the final results exception, contacted the university's associate dean, Michael Sledge, who "again reviewed the records to re-verify that the underlying behavior fell for each student at issue . . . within the definitions of a crime of violence or nonforcible sexual offense as set forth in 34 CFR 99.39."⁶³ After confirming that each student's conduct fell within the definition of a "crime of violence" or "nonforcible sexual offense" prohibited under the university's student code of conduct, Akinrinade and Sledge concluded that the unredacted disciplinary results were subject to disclosure under the "final results exception." Stated another way, the journalists and the university contend the unredacted disciplinary results are not exempted from disclosure under FERPA, even though FERPA generally is an "other statute" for purposes of the PRA. We agree.

In response, the students argue that the "final results exception" is unconstitutionally vague because the terms "crime of violence" and "nonforcible sex offense" are insufficiently defined and, consistent with due process, the students may prevent the release of their disciplinary records.

In the criminal context, a statute is unconstitutionally vague if it "does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed" or it "does not provide ascertainable

⁶³ CP at 220, 240.

standards of guilt to protect against arbitrary enforcement.”⁶⁴ “When determining whether a statute provides fair warning of the proscribed conduct, we examine the context of the entire enactment, giving the language a “sensible, meaningful, and practical interpretation.”⁶⁵ In King County Department of Adult and Juvenile Detention v. Parmelee, in rejecting a constitutional vagueness challenge to the PRA, the Court of Appeals noted that “absolute specificity” of the terms used in a statute is not required.⁶⁶ The court stated that “a statute is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct.”⁶⁷

The students acknowledge that “[t]he degree of vagueness the Constitution tolerates . . . depends in part on the nature of the enactment.”⁶⁸ In support of their assertion that 1232g(b)(6)(B) is unconstitutionally vague, the students cite to Johnson v. United States⁶⁹ and Sessions v. Dimaya.⁷⁰ In Johnson, the United States Supreme Court held that the residual clause in the definition of “violent felony” as

⁶⁴ King County Dep’t of Adult & Juvenile Det. v. Parmelee, 162 Wn. App. 337, 355, 254 P.3d 927 (2011) (internal quotation marks omitted) (quoting State v. Williams, 144 Wn.2d 197, 203, 26 P.3d 890 (2001)).

⁶⁵ Id. (quoting City of Spokane v. Douglass, 115 Wn.2d 171, 180, 795 P.2d 693 (1990)).

⁶⁶ 162 Wn. App. 337, 355-56, 254 P.3d 927 (2011) (citing City of Spokane, 115 Wn.2d at 179).

⁶⁷ Id. (quoting City of Seattle v. Eze, 111 Wn.2d 22, 27, 759 P.2d 366 (1988)).

⁶⁸ Br. of Appellants at 26.

⁶⁹ 576 U.S. 591, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015).

⁷⁰ 138 S. Ct. 1204, 200 L. Ed. 2d 549 (2018).

defined in the Armed Career Criminal Act was unconstitutionally vague because in deciding whether a specific crime qualified as a “violent felony,” the court had “to picture the kind of conduct that the crime involve[d] in ‘the ordinary case,’ and to judge whether that abstraction present[ed] a serious potential risk of physical injury.”⁷¹ Similarly, in Dimaya, the United States Supreme Court held that the definition of “aggravated felony” in the Immigration and Nationality Act which included a “crime of violence” as defined in 18 U.S.C. §16(b) was unconstitutionally vague because it also required the court to “picture” a criminal offense in which “the particular facts” demonstrated “a substantial risk that physical force” was involved in committing the offense.⁷² But unlike the statutes at issue under the facts of Johnson and Dimaya, FERPA and the PRA do not similarly require the court “to picture” the criminal offenses that violate them. We can consider other parts of the statutory scheme,⁷³ including the federal regulations⁷⁴ governing the FERPA “final results

⁷¹ Johnson, 576 U.S. at 596-97. The residual clause of the Armed Career Criminal Act provided that a “violent felony” was “burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.” Id. at 594.

⁷² Dimaya, 138 S. Ct. at 1211, 1216. The residual clause of 18 U.S.C. §16(b) provides “any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” Dimaya, 138 S. Ct. at 1211; 18 U.S.C. §16(b).

⁷³ King County Dep’t of Adult & Juvenile Det., 162 Wn. App. at 355-57.

⁷⁴ See West, 3 Wn. App. 2d at 120, 123 (Division Two of this court used the Code of Federal Regulations to interpret FERPA, noting that FERPA restricts disclosure of “personally identifiable information contained [in education records] other than directory information” pursuant to 20 U.S.C. § 1232g(b)(2), and that 34 C.F.R. § 99.3 further defines “education records” and “personally identifiable information.”).

exception.” Those regulations expressly and in plain language define the crimes that qualify as crimes of violence and nonforcible sex offenses for purposes of the “final results exception.” For example, one crime of violence under the federal regulations is burglary. “Burglary” is defined in the regulations as “[t]he unlawful entry into a building or other structure with the intent to commit a felony or theft.”⁷⁵ And a crime that qualifies as a nonforcible sex offense under the federal regulations is incest. “Incest” is defined in the regulations as “[n]onforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.”⁷⁶

Taken together, these definitions provide an ordinary person with a “sensible, meaningful, and practical interpretation”⁷⁷ of the types of crimes that, if committed, constitute a crime of violence or nonforcible sex offense and can be subject to public disclosure under the “final results exception.”

Therefore, when we examine the context of the entire PRA and the “final results exception” in FERPA and give the language used a sensible, meaningful and practical interpretation, we conclude the “final results exception” to FERPA provides fair warning of the offenses that, if committed, could be disclosed. The students do not establish that the “final results exception” is unconstitutionally vague.

⁷⁵ 34 C.F.R. § 99, app. A. The other crimes of violence listed and defined in the regulation include arson, assault offenses, criminal homicide, vandalism of property, kidnapping/abduction, and robbery.

⁷⁶ Id. The other crime of nonforcible sex offense listed and defined in the regulation is statutory rape.

⁷⁷ King County Dep’t of Adult & Juvenile Det., 162 Wn. App. at 355.

In the alternative, the students contend that the unredacted disciplinary results are exempt from public disclosure under the “other statute” provision of RCW 42.56.070(1) because the university’s student code of conduct—in particular, WAC 516-21-310(1) and WAC 516-26-070—constitute an “other statute” and “prohibit disclosure of a student’s personally identifying information to the public.”⁷⁸

WAC 516-26-070 provides, “The university shall not permit access to or release of a student’s education records or personally identifiable information contained therein to any person without the written consent of the student.”⁷⁹ But WAC 516-21-310(1) states that conduct proceedings and records will remain confidential “in compliance with the student records policy. Conduct records . . . [w]ill not be shared with any member of the public, except under the informed written consent of the student(s) involved or as stated in the student records policy, or as required by law or court order.”⁸⁰

In support of their assertion, the students argue White v. Clark County⁸¹ holds that WAC provisions standing alone can create an “other statute” under the PRA. But the students’ argument is misguided. In White, the parties disputed the appropriate format for the results of a PRA request for copies of electronic or digital image files of all pretabulated ballots in the 2013 general election.⁸²

⁷⁸ Br. of Appellants at 21.

⁷⁹ CP at 161.

⁸⁰ CP at 157 (emphasis added).

⁸¹ 188 Wn. App. 622, 354 P.3d 38 (2015).

⁸² White, 188 Wn. App. at 627-28.

Division Two of this court held that the “ballot images” were exempt under the “other statute” exemption of the PRA.⁸³ The court reasoned that under the facts of White, the “other statute” exemption “derives from a combination of article VI, section 6 of the Washington Constitution, multiple sections of Title 29A RCW, and secretary of state regulations authorized by statute.”⁸⁴ Contrary to the students’ contention, White does not hold that WAC regulations alone can constitute an “other statute.” And the view advocated by the students would allow an agency to adopt broad exemptions never contemplated by the legislature.

Unlike the WAC provisions at issue in White, WAC 516-26-070 and WAC 516-21-310(1) are not derived from any particular article of the Washington Constitution or multiple sections of the RCW. We conclude that these WAC regulations do not constitute an “other statute” under section .070(1) where there is no corresponding and related statutory provision, making it clear that the unredacted disciplinary results are exempt from disclosure. And, consistent with WAC 516-21-310(1), PRA disclosure requirements are “required by law.”⁸⁵

⁸³ Id. at 636-37.

⁸⁴ Id. at 631.

⁸⁵ The students contend the WAC 516-21-310(1) provision that “conduct proceedings and records” are exempt from public disclosure except as “required by law” is limited to subpoenas and discovery requests, but we find no authority for such a limited view.

III. Lack of Notice

The students argue that they “had no notice that the results of [their] disciplinary proceeding[s] might be released to the public.”⁸⁶ In support of their assertion, the students cite to Krakauer v. State,⁸⁷ a Montana case which held that the student’s expectation of privacy in his educational records outweighed the public’s right to know the contents of his records because Montana’s student code of conduct did not provide the student with adequate notice that his records could be disclosed. But in its decision, the Montana Supreme Court recognized that the exceptions to FERPA can provide adequate notice.⁸⁸

Here, the university’s student code of conduct contains multiple provisions notifying students that in some circumstances student records can be released to the public. For example, WAC 516-26-010(2) provides that “[t]he university will normally not permit access to the public without a student’s permission; some exceptions exist as detailed in this policy.” Additionally, WAC 516-26-100 requires the university to “annually notify students currently in attendance” of certain rights that each student has under the FERPA. And as noted above, WAC 516-21-310(1) expressly provides for disclosure “as required by law.” We conclude that the university provided the students with adequate notice that their records could be disclosed.

⁸⁶ Br. of Appellants at 31-32.

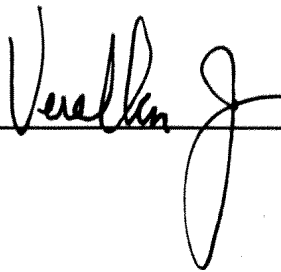
⁸⁷ 396 Mont. 247, 256, 445 P.3d 201 (2019).

⁸⁸ Id. at 255-56 (“If the person had notice his records were subject to public disclosure or the public entity already made them publicly available, then he cannot have an actual or subjective expectation of privacy in the records.”).

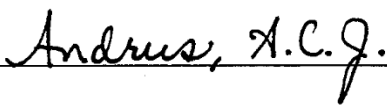
CONCLUSION

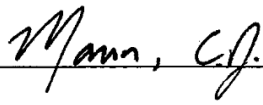
We affirm the trial court's decision that the unredacted disciplinary results are not exempt from disclosure under the PRA "student file" exemption or under the "other statute" exemption. The students do not establish an actionable lack of notice.

Therefore, we affirm the trial court order requiring the university to disclose the unredacted disciplinary results.



WE CONCUR:





APPENDIX B

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**SUPERIOR COURT OF WASHINGTON
FOR WHATCOM COUNTY**

ERASMUS BAXTER, ASIA FIELDS, and
JULIA FURUKAWA,

Plaintiffs,

vs.

WESTERN WASHINGTON UNIVERSITY,
an agency of the State of Washington,

Defendant.

No. 19-2-00855-37

**ORDER ON MOTIONS
FOR SUMMARY JUDGMENT**

**FINDINGS AND ORDER FOR
PARTIAL JUDGMENT UNDER CR
54(b)**

(Revised Proposed)

This matter came before the Court on motions for declaratory and/or injunctive relief filed by Intervenor Does 1-7, and on Plaintiffs' *Response and Cross Motion For Summary Judgment*.

The Court considered the pleadings filed in this case as well as the following:

1. *John/Jane Doe 1's Motion for Declaratory and Injunctive Relief*, and supporting *Declaration of Stephen W. Jackson*;
2. *John/Jane Doe 2's Motion for Declaratory and Injunctive Relief*, and supporting *Declaration of Stephen W. Jackson*;
3. *John/Jane Doe 5's Motion for Declaratory and Injunctive Relief*, and supporting *Declaration of Stephen W. Jackson*;

**ORDER ON MOTIONS FOR SUMMARY JUDGMENT
FINDINGS AND ORDER FOR PARTIAL JUDGMENT
UNDER CR 54(b) - Page 1 of 4**

WILLIAM JOHN CRITTENDEN
12345 LAKE CITY WAY NE 306
SEATTLE, WASHINGTON 98125-5401
PHONE (206) 361-5972

- 1 4. *John/Jane Doe 6's Motion for Declaratory and Injunctive Relief*, and supporting
2 *Declaration of Stephen W. Jackson*;
- 3 5. *John/Jane Doe 7's Motion for Declaratory and Injunctive Relief*, and supporting
4 *Declaration of Stephen W. Jackson*;
- 5 6. *John Doe 3's Motion for Injunctive Relief, Declaration and Memorandum in*
6 *Support*;
- 7 7. *Intervenor John/Jane Doe 4's Motion for Declaratory and Injunctive Relief*, and
8 supporting *Declaration of Todd Maybrown*;
- 9 8. *(Defendant's) Response to John Does 1-7 Motions for Injunctive Relief*;
- 10 9. *Declaration of Public Records Officer, Dolapo Akinrinade*;
- 11 10. *Declaration of Michael Sledge*;
- 12 11. *(Plaintiff's) Response and Cross Motion For Summary Judgment*;
- 13 12. *Declaration of William John Crittenden*;
- 14 13. *John/Jane Doe 1's Reply to WWU's Response for Motions for Injunctive Relief*;
- 15 14. *John/Jane Doe 2's Reply to WWU's Response for Motions for Injunctive Relief*;
- 16 15. *John/Jane Doe 6's Reply to WWU's Response for Motions for Injunctive Relief*;
- 17 16. *John/Jane Doe 7's Reply to WWU's Response for Motions for Injunctive Relief*;
- 18 17. *(Plaintiff's) Reply on Cross Motion For Summary Judgment*;
- 19 18. *Defendant Supp. Resp. to John Does 1-7 Motions for Injunctive Relief*.
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1 The Court having considered the above pleadings and heard the arguments of counsel at
2 a hearing on August 10, 2020, and having ruled that the records at issue are not exempt and that
3 Intervenor's requests for injunctive relief are denied, IT IS HEREBY ORDERED THAT:

4 1. Intervenor's motions are DENIED.

5 2. Plaintiff's cross-motion is GRANTED. Intervenor has failed to carry their
6 burden of proof to establish that the names of the students whose offenses are listed in the tables
7 provided by WWU to the Plaintiff are exempt under either the Public Records Act, Chap. 42.56
8 RCW (PRA) or the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (FERPA).

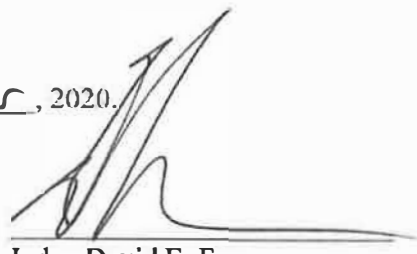
9 3. Pursuant to CR 54(b) the Court finds that a speedy final judgment on the
10 Intervenor's injunction claims is appropriate. There is no just reason for delay because it is in
11 the interest of judicial economy to allow the Intervenor to appeal the exemption issues before
12 such an appeal becomes moot and before the Court addresses the plaintiff's PRA claims
13 against defendant WWU, which could become moot if this Court's ruling on the exemption issues
14 is reversed on appeal. The Court therefore expressly directs the entry of this partial judgment
15 against the Intervenor so that Intervenor may immediately appeal.

16 4. Pursuant to the agreement of the parties the Court will preserve the status quo as
17 follows. Defendant WWU shall not release the unredacted records relating to Intervenor Does
18 until 30 days after any decision(s) on any appeal(s) of this Court's partial judgment on the
19 exemption claims become final. Defendant WWU's liability for penalties under RCW
20 42.56.550(4), if any, is suspended until 30 days after any decision(s) on any appeal(s) of this
21 Court's partial judgment on the exemption claims become final.

22 5. All matters relating to Plaintiff's PRA claims against defendant WWU are
23 reserved for future determination.
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DATED this 22nd day of October, 2020.



Judge David E. Freeman

Presented by:

s/ William J. Crittenden
WILLIAM JOHN CRITTENDEN
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Attorney for Plaintiffs Baxter et al.

APPENDIX C

Chapter 516-21 WAC

STUDENT RIGHTS AND RESPONSIBILITIES CODE

WAC

516-21-010	Introduction.
516-21-020	Definitions.
516-21-030	Jurisdiction.
516-21-040	Student responsibility for guests.
516-21-050	Academic dishonesty.
516-21-060	Conduct that threatens health or safety.
516-21-070	Disruptive behavior.
516-21-080	Failure to comply.
516-21-090	False information.
516-21-100	Fire safety and false alarms.
516-21-110	Harassment.
516-21-120	Hazing.
516-21-130	Illegal possession and/or use of alcohol.
516-21-140	Illegal possession and/or use of drugs.
516-21-150	Interfering with the conduct process.
516-21-160	Misuse of computers, electronic data or communication systems.
516-21-170	Obstructing police and safety personnel.
516-21-180	Sexual misconduct.
516-21-190	Student violation of the law.
516-21-200	Theft or intentional damage of property.
516-21-210	Trespassing.
516-21-220	Weapons and destructive devices.
516-21-230	Sanctions.
516-21-240	Student conduct system.
516-21-250	Student rights in the conduct process.
516-21-260	Procedures for immediate interim suspension.
516-21-270	Proceedings for violations of the code.
516-21-280	Basis for review.
516-21-290	Review procedures.
516-21-300	Deviations from established procedures.
516-21-310	Confidentiality of conduct proceedings and records.
516-21-320	Relationship of the code to university residences.
516-21-330	Interpretation of the code.
516-21-340	Revision of the code.
516-21-350	Referenced policies and regulations in the code.

WAC 516-21-010 Introduction. Western Washington University students enjoy the same basic rights, privileges, and freedoms granted to all members of society. At the same time, acceptance of admission to the university carries with it an obligation to fulfill certain responsibilities and expectations as a member of the Western Washington University community.

As a condition of enrollment at Western, students must assume responsibility for their own actions and maintain an environment conducive to the academic success, safety, and well-being of others. In addition, they are expected to be truthful, respect the rights of others, and abide by all university policies and procedures, as well as all applicable local, state, and federal laws and regulations. All students are responsible for understanding and complying with the responsibilities and expectations set forth in this code.

The student conduct process at Western is designed to be a learning process that promotes an understanding of students' responsibilities as members of the university community. The objectives of the student conduct system, as set forth in this code, are twofold: To ensure that students act in a manner consistent with high standards of scholarship and behavior, and to maintain the safety and well-being of all members of the university community.

(12/9/11)

[Statutory Authority: RCW 28B.35.120(12) and 20 U.S.C. 1681-1688 (Title IX Education Amendments of 1972). WSR 12-01-021, § 516-21-010, filed 12/9/11, effective 1/9/12.]

WAC 516-21-020 Definitions. As used in this chapter, the following words and phrases mean:

(1) **Appeals board.** The student conduct appeals board.

(2) **Business day.** Any day, Monday through Friday (excluding holidays), during which university offices are open.

(3) **Catalog.** The *Western Washington University General Catalog*.

(4) **Code.** The student rights and responsibilities code.

(5) **Conduct hold or judicial hold.** A block placed on a student's official university record at the request of the conduct officer or dean of students. A conduct or judicial hold prohibits a student from registering for classes, requesting an official transcript, or receiving a degree from the university until the hold has been removed.

(6) **Conduct officer.** The student conduct officer or his/her authorized designee.

(7) **Dean of students.** The dean of students or his/her designee.

(8) **Guest.** Any person who is not a member of the university community, who is on university property or attending an official university function at the invitation and/or hosting of a student.

(9) **Member of the university community.** Any person who is a student, university official, or who is otherwise employed or contracted by the university. A person's status in a particular situation shall be determined by the dean of students.

(10) **Official university function.** Any activity, on or off campus, that is initiated, sponsored, or supervised by any entity of Western Washington University.

(11) **Preponderance of evidence.** Defined as "more likely than not," the standard of responsibility that is used when determining whether a violation of the student rights and responsibilities code has occurred.

(12) **Student.** Any person who:

(a) Has been formally admitted to the university;

(b) Is enrolled in one or more classes at the university, including nonmatriculated international students attending language institutes or foreign study programs;

(c) Is participating in a certificate, degree, distance learning, or professional enrichment program, through extended education and summer programs;

(d) Is participating in a university-sponsored study abroad program;

(e) Was enrolled in a prior quarter or summer session at the university and is eligible to continue enrollment in the quarter or summer session that immediately follows; or

(f) Withdrew from the university after an alleged violation of the code, for conduct that occurred while they were

[Ch. 516-21 WAC p. 1]

enrolled or participating in a program offered by the university.

(13) **University.** Western Washington University and all associated programs, including those offered online and/or at off-campus program sites.

(14) **University official.** Any person employed or contracted by the university, who is performing assigned teaching, administrative, or professional responsibilities. University officials may be full- or part-time, and may include student staff members.

(15) **University property.** All land, buildings, facilities, and other property that is owned, used, leased, or controlled by Western Washington University. University property also includes adjacent streets and sidewalks.

(16) **WAC.** An abbreviation for the Washington Administrative Code.

[Statutory Authority: RCW 28B.35.120(12) and 20 U.S.C. 1681-1688 (Title IX Education Amendments of 1972). WSR 12-01-021, § 516-21-020, filed 12/9/11, effective 1/9/12.]

WAC 516-21-030 Jurisdiction. (1) The student rights and responsibilities code applies to all conduct that occurs on university property or in connection with any official university function.

(2) Western Washington University does not act as a policing agent for students when they are off campus. However, the university reserves the right to take action if a student's conduct is determined to adversely affect a substantial university interest. Student conduct that occurs off campus may be subject to the student rights and responsibilities code when it:

(a) Adversely affects the safety or well-being of any member of the university community; or

(b) Involves academic work or any records, documents, or identifications of the university.

In determining whether to exercise jurisdiction over such conduct, the student conduct officer shall consider the seriousness of the alleged offense, the risk of harm involved, and whether the alleged victim(s) are members of the university community. Any question of interpretation or application of jurisdiction shall be referred to the dean of students for final determination.

(3) Students are responsible for their conduct from the time they have confirmed their enrollment at Western through the awarding of their degree. This includes conduct that occurs before classes begin, after classes end, and during periods between actual terms of enrollment. Students who are found to be in violation of the code may be subject to sanctions under the code.

(4) A student with a pending conduct violation may not avoid the conduct process by withdrawing from the university. In these circumstances, a conduct hold will be placed on the student's official record, preventing them from registering for classes, requesting an official transcript, or receiving a degree from the university. This hold will remain in place until the student has met with the conduct officer to discuss the alleged conduct violation(s).

(5) Sanctions against student organizations are decided by procedures established by the university administrative unit governing that organization's recognition. Conduct proceedings against individual member(s) of a student organiza-

tion can be initiated under this code, independent of any departmental action(s) taken against the student organization.

[Statutory Authority: RCW 28B.35.120(12) and 20 U.S.C. 1681-1688 (Title IX Education Amendments of 1972). WSR 12-01-021, § 516-21-030, filed 12/9/11, effective 1/9/12.]

WAC 516-21-040 Student responsibility for guests.

(1) Guests and visitors on university property or at official university functions are expected to comply with all university policies and procedures, as well as all applicable local, state, and federal laws and regulations.

(2) Students who invite guests into their campus residence hall or apartment, or to official university functions open only to Western students, are responsible for the behavior of their guests. As a result, a student may be held responsible for any alleged violation(s) of the code committed by their guests. See also WAC 516-24-001 Conduct of campus guests and visitors.

[Statutory Authority: RCW 28B.35.120(12) and 20 U.S.C. 1681-1688 (Title IX Education Amendments of 1972). WSR 12-01-021, § 516-21-040, filed 12/9/11, effective 1/9/12.]

WAC 516-21-050 Academic dishonesty. The university's policy and procedures regarding academic dishonesty are addressed in the academic honesty policy and procedure. As noted in the policy, academic dishonesty at Western Washington University is a serious infraction dealt with severely. For a list of actions that constitute academic dishonesty, refer to the academic honesty policy and procedure in the catalog.

[Statutory Authority: RCW 28B.35.120(12) and 20 U.S.C. 1681-1688 (Title IX Education Amendments of 1972). WSR 12-01-021, § 516-21-050, filed 12/9/11, effective 1/9/12.]

WAC 516-21-060 Conduct that threatens health or safety. Conduct that threatens the health or safety of any person, including oneself, is a violation of the code. Conduct that threatens health or safety includes, but is not limited to:

(1) Intoxication or impairment through the use of alcohol or other substances to the point that a student is unable to exercise care for his/her own safety or well-being.

(2) Any threat, stated or implied, to the health, safety or well-being of self or others.

(3) Any contact or communication of a threatening nature that intimidates, harasses, or causes a person to fear for their safety or well-being.

(4) Incidents involving the use or display of a weapon or destructive device likely to cause bodily injury and/or damage to property.

[Statutory Authority: RCW 28B.35.120(12) and 20 U.S.C. 1681-1688 (Title IX Education Amendments of 1972). WSR 12-01-021, § 516-21-060, filed 12/9/11, effective 1/9/12.]

WAC 516-21-070 Disruptive behavior. Behavior that substantially disrupts, disturbs, or interferes with the ability of students to learn or university officials to perform their assigned duties is a violation of the code. Disruptive behavior includes, but is not limited to:

(1) Demonstrations or protests that substantially disrupt, disturb, or interfere with:

(a) Classroom activities or other educational pursuits;

(b) Official university activities or functions including, but not limited to, ceremonies, meetings, office functions, performances, or athletic events;

(c) Pedestrian or vehicular traffic; or

(d) The preservation and protection of university property and/or the personal property of members of the university community.

(2) Any other behavior that substantially disrupts, disturbs, or interferes with:

(a) Classroom activities or other educational pursuits;

(b) Official university activities or functions including, but not limited to, ceremonies, meetings, office functions, performances, or athletic events;

(c) Pedestrian or vehicular traffic; or

(d) The preservation and protection of university property and/or the personal property of members of the university community.

[Statutory Authority: RCW 28B.35.120(12) and 20 U.S.C. 1681-1688 (Title IX Education Amendments of 1972). WSR 12-01-021, § 516-21-070, filed 12/9/11, effective 1/9/12.]

WAC 516-21-080 Failure to comply. Failure to comply with the instructions or directives of any university official or other public official acting in performance of their duties, or failure to identify oneself when asked to do so by a university official or other public official acting in performance of their duties, is a violation of the code.

[Statutory Authority: RCW 28B.35.120(12) and 20 U.S.C. 1681-1688 (Title IX Education Amendments of 1972). WSR 12-01-021, § 516-21-080, filed 12/9/11, effective 1/9/12.]

WAC 516-21-090 False information. Providing or creating false information is a violation of the code. False information includes, but is not limited to:

(1) Forging, altering, mutilating, or destroying any university document or record, or entering false information into such documents or records;

(2) Possessing or presenting as authentic any falsified document, record, or identification;

(3) Intentionally making false accusations or charges against another member of the university community; and

(4) Knowingly providing false information or statements to any university official or other public official acting in performance of their duties.

[Statutory Authority: RCW 28B.35.120(12) and 20 U.S.C. 1681-1688 (Title IX Education Amendments of 1972). WSR 12-01-021, § 516-21-090, filed 12/9/11, effective 1/9/12.]

WAC 516-21-100 Fire safety and false alarms. Tampering with, altering, or disabling fire safety equipment, including emergency call devices, fire alarms, fire exits, fire extinguishers, smoke/heat detectors, or sprinkler systems; intentionally activating a fire alarm; making a false report of a fire or other emergency; or refusing to leave a building when a fire alarm sounds or when directed to by a university official or by emergency personnel are violations of the code.

[Statutory Authority: RCW 28B.35.120(12) and 20 U.S.C. 1681-1688 (Title IX Education Amendments of 1972). WSR 12-01-021, § 516-21-100, filed 12/9/11, effective 1/9/12.]

(12/9/11)

WAC 516-21-110 Harassment. Harassment, defined as any conduct that is sufficiently severe, pervasive, or persistent to have the purpose or effect of interfering with a member of the university community's ability to work, study, or participate in their regular activities, is a violation of the code. Examples of harassment include, but are not limited to:

(1) Engaging in unwanted contact or communication, including calls, voice messages, electronic mail, text messages, social media posts or messages, written letters, unwanted gifts, or face-to-face contact with a member of the university community;

(2) Repeatedly following a member of the university community; waiting outside their residence, school, or place of employment; or placing them under any form of surveillance; and

(3) Engaging in any form of behavior that is meant to threaten or intimidate a member of the university community based on their membership in a protected class, including race, color, creed, religion, national origin, sex, age, disability, marital status, genetic information, status as a veteran, and/or sexual orientation.

[Statutory Authority: RCW 28B.35.120(12) and 20 U.S.C. 1681-1688 (Title IX Education Amendments of 1972). WSR 12-01-021, § 516-21-110, filed 12/9/11, effective 1/9/12.]

WAC 516-21-120 Hazing. Hazing, defined as any act that, as an explicit or implicit condition for initiation or admission into, affiliation with, or continued membership in a group or organization, endangers the health, safety, or well-being of any member of the university community, is a violation of the code. Examples of hazing include, but are not limited to:

(1) Requiring the consumption of any food, alcohol, drug, or other substance.

(2) Requiring forced participation in physical activities, including calisthenics, exercise, or other games or activities that entail physical exertion.

(3) Requiring exposure to weather elements or to other physically or emotionally uncomfortable situations, including sleep deprivation, confinement in small spaces, physical bondage, and/or taking a student to an outlying area and dropping them off.

(4) Requiring conduct that can be reasonably expected to embarrass another, including the performance of public stunts or activities such as scavenger hunts.

(5) Requiring anything that would be illegal under city, state, or federal law, or in violation of any university policies or procedures, including the code.

[Statutory Authority: RCW 28B.35.120(12) and 20 U.S.C. 1681-1688 (Title IX Education Amendments of 1972). WSR 12-01-021, § 516-21-120, filed 12/9/11, effective 1/9/12.]

WAC 516-21-130 Illegal possession and/or use of alcohol. Illegally possessing, using, distributing, selling, or being under the influence of alcohol while on university property or at an official university function is a violation of the code. This includes, but is not limited to:

(1) Possession or consumption of alcohol by anyone under the age of twenty-one;

(2) Providing alcohol to anyone under the age of twenty-one;

(3) Driving on university property while under the influence of alcohol; and

(4) Public intoxication by persons of any age. See also policy concerning alcohol and other drugs in the catalog.

[Statutory Authority: RCW 28B.35.120(12) and 20 U.S.C. 1681-1688 (Title IX Education Amendments of 1972). WSR 12-01-021, § 516-21-130, filed 12/9/11, effective 1/9/12.]

WAC 516-21-140 Illegal possession and/or use of drugs. Illegally possessing, using, manufacturing, cultivating, packaging, distributing, selling, or providing a controlled or illegal substance, or being under the influence of a controlled or illegal substance while on university property or at an official university function, is a violation of the code. This includes, but is not limited to:

- (1) Possession of drug paraphernalia;
- (2) Driving on university property while under the influence of a controlled or illegal substance; and
- (3) Intentionally misusing or distributing prescription drugs. See also policy concerning alcohol and other drugs in the catalog.

[Statutory Authority: RCW 28B.35.120(12) and 20 U.S.C. 1681-1688 (Title IX Education Amendments of 1972). WSR 12-01-021, § 516-21-140, filed 12/9/11, effective 1/9/12.]

WAC 516-21-150 Interfering with the conduct process. Interfering with the conduct process is a violation of the code. This includes, but is not limited to:

- (1) Giving a false report or claim;
- (2) Attempting to influence the impartiality of witnesses or appeals board member(s);
- (3) Participating in or encouraging retribution against complainants or witnesses;
- (4) Threatening, harassing, or intimidating complainants or witnesses;
- (5) Disrupting or interfering with the orderly conduct of a hearing or meeting; and
- (6) Failing to comply with any sanction(s) imposed as the result of a code violation.

[Statutory Authority: RCW 28B.35.120(12) and 20 U.S.C. 1681-1688 (Title IX Education Amendments of 1972). WSR 12-01-021, § 516-21-150, filed 12/9/11, effective 1/9/12.]

WAC 516-21-160 Misuse of computers, electronic data or communication systems. Misuse of computers, electronic data, or communication systems is a violation of the code. This includes, but is not limited to:

- (1) Unauthorized entry into a file, web page, e-mail account, or online profile to use, download, read, transfer, or change the contents, or for any other purpose;
- (2) Unauthorized use of another person's university-issued identification and password;
- (3) The use of campus computing facilities, networks (including wireless networks), equipment, or services to interfere with the normal operation of the university computing system or the work of any member of the university community;
- (4) The use of campus computing facilities, networks (including wireless networks), equipment, or services to "cyber stalk" another person or to send obscene, abusive or harassing messages;

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(5) The use of campus computing facilities, networks (including wireless networks), equipment, or services to illegally copy, distribute, download, or upload information (including movies, music, or other digital content) from the internet or any electronic source;

(6) The use of campus computing facilities, networks (including wireless networks), equipment, or services to illegally copy, reproduce, or distribute licensed software;

(7) Attempting to modify system facilities or networks, including the introduction of electronic vandalism (e.g., "viruses," "worms," or other disruptive/destructive programs) into university computing resources or those connected to it by the network; and

(8) The use of campus computing facilities, networks (including wireless networks), equipment or services for personal profit or for any use other than authorized university business.

Students are also responsible for reading and complying with all provisions set forth in the Western Washington University policy for responsible computing, the user agreement for WWU network and computing resources, and the using copyrighted materials policy.

[Statutory Authority: RCW 28B.35.120(12) and 20 U.S.C. 1681-1688 (Title IX Education Amendments of 1972). WSR 12-01-021, § 516-21-160, filed 12/9/11, effective 1/9/12.]

WAC 516-21-170 Obstructing police and safety personnel. Obstructing, interfering with, or delaying police or other fire, safety, or emergency personnel is a violation of the code.

[Statutory Authority: RCW 28B.35.120(12) and 20 U.S.C. 1681-1688 (Title IX Education Amendments of 1972). WSR 12-01-021, § 516-21-170, filed 12/9/11, effective 1/9/12.]

WAC 516-21-180 Sexual misconduct. (1) Sexual misconduct, defined as any unwelcome behavior of a sexual nature that is committed without consent or by force, intimidation, or coercion, is a violation of the code. Sexual misconduct includes, but is not limited to:

(a) Sexual harassment (e.g., engaging in unwelcome verbal, written, or physical behavior of a sexual nature that is directed at another person or group, based on that person or group's sex, gender, or perceived sex or gender);

(b) Sexual intimidation (e.g., engaging in any behavior, either verbal or nonverbal, that has the effect of subjecting another person to humiliation, embarrassment, or discomfort because of their sex, gender, or perceived sex or gender);

(c) Sexual coercion (e.g., engaging in the use of pressure, alcohol or drugs, or force to compel or persuade another person to engage in sexual activity);

(d) Sexual exploitation (e.g., engaging in voyeurism or peeping, distributing intimate or sexual information about another person without that person's consent, knowingly transmitting an STD or HIV to another person, or engaging in any behavior that takes sexual advantage of another person without that person's consent);

(e) Sexual assault (e.g., engaging in actual or attempted sexual touching, genital-oral contact, penetration, and/or intercourse without consent).

(2) Consent for all sexual activity must be given free of force, threat, intimidation, or coercion. At the time of the sex-

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ual activity, actual words or conduct demonstrating freely given agreement must occur; silence or passivity do not imply consent. Activity of a sexual nature is considered non-consensual when:

(a) An individual is asleep, unconscious, or otherwise physically unable to communicate his or her willingness or unwillingness to engage in sexual activity;

(b) An individual lacks the ability, at the time of sexual activity, to be able to understand the nature or consequences of the activity, whether due to illness; impairment; the influence of alcohol, drugs, or medication; or another cause; or

(c) An individual is not of legal age to give consent.

(3) Sexual misconduct represents a range of behavior; it can occur between strangers or acquaintances, including individuals involved in an intimate or sexual relationship. Sexual misconduct can also be committed by individuals of any gender and can occur between people of the same or different sex. See also sexual misconduct policy and procedure in the catalog.

[Statutory Authority: RCW 28B.35.120(12) and 20 U.S.C. 1681-1688 (Title IX Education Amendments of 1972). WSR 12-01-021, § 516-21-180, filed 12/9/11, effective 1/9/12.]

WAC 516-21-190 Student violation of the law. Students are expected to abide by all local, state, and federal laws while on campus or at official university functions. Failure to comply with these laws is a violation of the code.

While Western does not act as a policing agent for students when they are off campus, the university reserves the right to take action if a student's conduct is determined to adversely affect a substantial university interest. See also WAC 516-21-030 Jurisdiction.

Proceedings under the code may be carried out prior to, simultaneously, or following civil or criminal proceedings in the courts. Since the standard of proof under the code (preponderance of evidence) differs from that of criminal law, decisions made through the student conduct process are not subject to challenge on the grounds that criminal charges involving the same incident have been dismissed or reduced by a court of law.

[Statutory Authority: RCW 28B.35.120(12) and 20 U.S.C. 1681-1688 (Title IX Education Amendments of 1972). WSR 12-01-021, § 516-21-190, filed 12/9/11, effective 1/9/12.]

WAC 516-21-200 Theft or intentional damage of property. Theft or intentional damage of property is a violation of the code. Theft includes, but is not limited to, attempted or actual theft of university property or services or the property or services of any member of the university community, visitors, or guests. It is also prohibited to possess stolen property or to intentionally damage, destroy, or vandalize the property of the university or others.

[Statutory Authority: RCW 28B.35.120(12) and 20 U.S.C. 1681-1688 (Title IX Education Amendments of 1972). WSR 12-01-021, § 516-21-200, filed 12/9/11, effective 1/9/12.]

WAC 516-21-210 Trespassing. Trespassing is a violation of the code. Trespassing includes, but is not limited to:

(1) Unauthorized entry into, occupation, or use of any university-owned or controlled property, equipment, or facilities;

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(2) Unauthorized entry into, occupation, or use of any restricted areas of the campus, including research areas and utility tunnels;

(3) Unauthorized possession, duplication, or use of keys, including cards or alphanumeric pass-codes, to any university-owned or controlled property, equipment, or facilities; and

(4) Remaining in or on university-owned or controlled property after permission to remain has been revoked by any university official, including university police.

[Statutory Authority: RCW 28B.35.120(12) and 20 U.S.C. 1681-1688 (Title IX Education Amendments of 1972). WSR 12-01-021, § 516-21-210, filed 12/9/11, effective 1/9/12.]

WAC 516-21-220 Weapons and destructive devices. Possession, use, unauthorized storage, or manufacture of firearms, ammunition, explosives, or other weapons or destructive devices capable of causing bodily injury or damage to property, on university property or at official university functions, is a violation of the code. Weapons and destructive devices include, but are not limited to:

(1) Firearms of any kind, including BB, pellet, paintball, and airsoft guns;

(2) Martial arts weapons of any kind, including nunchucks, swords, or throwing stars;

(3) Fireworks of any kind, including firecrackers, cherry bombs, or homemade explosives;

(4) Projectile devices of any kind, including catapults or slingshots;

(5) Any knife with a blade longer than three inches (excluding kitchen utensils); and

(6) Any object that can be used as a weapon to cause bodily injury or damage to property.

See also WAC 516-52-020 Firearms and dangerous weapons.

[Statutory Authority: RCW 28B.35.120(12) and 20 U.S.C. 1681-1688 (Title IX Education Amendments of 1972). WSR 12-01-021, § 516-21-220, filed 12/9/11, effective 1/9/12.]

WAC 516-21-230 Sanctions. Sanctions serve many purposes including, but not limited to, educating students about the seriousness of their actions; reinforcing the high standards of scholarship and behavior expected of Western students; promoting student development; and maintaining the safety and well-being of members of the university community. When a student admits responsibility or is found in violation of the code, the conduct officer or dean of students may impose one or more of the sanctions listed in this section. This list of sanctions is not meant to be exclusive. Other sanctions, designed or intended to enhance the educational value of conduct proceedings, may be applied in a given case.

(1) **Warning.** A formal written notice to the student that a violation of the code has occurred, and that further violations may result in additional sanctions under the code.

(2) **Conditional status.** A probationary status imposed for a specific period of time, during which the student must demonstrate conduct that conforms to university standards. Conditions restricting the student's privileges or eligibility for activities may be imposed. Violations of any conditions specified in the notice of conditional status or violations of any other university policies or regulations during the period

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of the sanction, may result in additional sanctions under the code.

(3) **Loss of privileges.** A student may be denied specific privileges (i.e., participation in specific activities, restriction from specific areas of campus, etc.) on a temporary or permanent basis. Violations of any conditions specified in the notice of loss of privileges or violations of any other university policies or regulations during the period of the sanction, may result in additional sanctions under the code.

(4) **Restriction from contacting others ("no contact" order).** A student may be restricted from direct or indirect physical, verbal, or electronic contact with another person and/or group. Indirect or direct contact made with another person or group while a "no contact" order is in place may result in additional sanctions under the code.

(5) **Educational activities.** A student may be required to engage in educational activities related to violation(s) of the code. Such activities may include, but are not limited to, required attendance at educational programs, community service, conducting research projects, writing assignments, and/or meeting with campus officials.

(6) **Assessment, counseling, or treatment programs.** A student may be required to participate in an assessment, counseling, and/or treatment program (at the student's expense), to address substance abuse, anger issues, or other issues or types of behaviors that pose a threat to their safety or well-being or the safety or well-being of others.

(7) **Restitution.** A student may be required to provide compensation for loss, damage, or injury resulting from a violation of the code. Restitution may take the form of monetary or material replacement or appropriate service to repair or otherwise compensate for the loss, damage, and/or injury caused.

(8) **Parental notification.** Parents may be notified of conduct findings when a student under the age of twenty-one is found responsible for violations involving alcohol and/or drugs. When possible, students whose parents are to be notified will be informed before such notification occurs and given an opportunity to initiate contact with their parents.

(9) **Campus residence hall or apartment relocation.** A student's on-campus living arrangements may be transferred to another residence hall or apartment.

(10) **Termination of university residences agreement.** A student may be removed from their campus residence hall or apartment and their housing agreement terminated.

(11) **Suspension from the university.** A student may be removed from the university for a designated period of time, after which the student will be eligible to return. While suspended, the student is trespassing from all university facilities and prohibited from participating in official university functions. Specific conditions for readmission to the university may be imposed (e.g., counseling, completion of substance abuse treatment, etc.).

(12) **Deferred suspension.** A student may receive a notice of deferred suspension from the university, with a provision that they are allowed to remain enrolled contingent on meeting specific conditions. Failure to meet any condition(s) specified in the notice of deferred suspension will result in immediate suspension from the university.

(13) **Expulsion from the university.** A student may be permanently separated from the university. A student who has been expelled is not eligible for readmission.

[Statutory Authority: RCW 28B.35.120(12) and 20 U.S.C. 1681-1688 (Title IX Education Amendments of 1972). WSR 12-01-021, § 516-21-230, filed 12/9/11, effective 1/9/12.]

WAC 516-21-240 Student conduct system. (1) The vice-president for enrollment and student services is responsible for administration of the code. Supervision of the code has been delegated by the vice-president to the dean of students.

(2) The conduct officer shall be appointed and supervised by the dean of students or his/her authorized designee. The conduct officer has the authority to adjudicate and administer sanctions for violations of the code.

(3) A six-member appeals board shall be appointed at the beginning of each fall term to consider reviews of the conduct officer's findings and decision. The appeals board shall include:

(a) Two faculty members, appointed by the faculty senate;

(b) Three student members, appointed by the associated students board of directors; and

(c) One staff member from the division of enrollment and student services, nominated by the dean of students and confirmed by the vice-president for enrollment and student services.

(4) Alternates will be identified for each area represented on the appeals board. Student appointments are for one academic year. Faculty and staff appointments are for two-year staggered terms.

(5) All appointments to the committee shall be initiated during the first full month of the fall term. Should a request for a review of the conduct officer's findings and decision come forward during the summer term or during other break periods, the review will be heard by the dean of students or by an interim appeals board appointed by the dean of students.

(6) Both the appeals board and the dean of students have full authority to render a decision under the code. All review decisions are final.

[Statutory Authority: RCW 28B.35.120(12) and 20 U.S.C. 1681-1688 (Title IX Education Amendments of 1972). WSR 12-01-021, § 516-21-240, filed 12/9/11, effective 1/9/12.]

WAC 516-21-250 Student rights in the conduct process. All alleged violations of the code will be resolved through the student conduct process, respecting fairness and due process for all involved parties.

(1) Students accused of violating the code have certain rights in the conduct process. These include the right to:

(a) Receive written notification of the section(s) of the code they are alleged to have violated, including a clear description of the basis for the charge(s), delivered via e-mail to the student's official @students.wvu.edu account;

(b) Meet with the conduct officer to discuss the section(s) of the code they are alleged to have violated and present a response to such allegations;

(c) Provide evidence on their own behalf, including the names or written statements of individuals who can offer information regarding the incident in question;

(d) Be accompanied through the conduct process by a person of their choice (this person may give advice to the student, but may not directly address the conduct officer, any member of the appeals board, or the dean of students);

(e) Refuse to answer any question asked of them and have no inference of guilt drawn from such refusal;

(f) Receive written notification of the conduct officer's findings and decision, delivered via e-mail to the student's official @students.wvu.edu account, within seven business days of the date of the meeting (or, if multiple meetings are necessary to determine responsibility or multiple individuals are involved and information presented by each is deemed necessary to determine responsibility, within seven business days of the date of the final meeting for the specific incident);

(g) Request a review of the conduct officer's findings and decision by the appeals board or dean of students, as described in WAC 516-21-280 Basis for review; and

(h) Waive any of the rights contained in this section.

(2) Individuals who have filed a complaint or are the victim of an alleged violation of the code have certain rights in the conduct process. These include the right to:

(a) Submit a written account of the alleged violation(s);

(b) Be advised of the date, time, and location of the hearing;

(c) Provide evidence on their own behalf, including the names or written statements of individuals who can offer information regarding the incident in question;

(d) Be accompanied through the conduct process by a person of their choice (this person may give advice to the student, but may not directly address the conduct officer, any member of the appeals board, or the dean of students);

(e) Be free of any form of retaliation and report any retaliation that occurs for further action;

(f) Have past unrelated behavior excluded from the investigation or hearing; and

(g) Submit an oral or written impact statement to the conduct officer, appeals board, or dean of students, for consideration during the sanctioning phase of the conduct process, if the charged student is found responsible.

(3) For incidents involving violence or sexual violence, including sexual harassment, misconduct, and/or assault, victims shall have the following additional rights:

(a) To be notified of the availability of counseling, assistance, and support resources, both on campus and in the surrounding community;

(b) To request and be granted a "no contact" order against the accused student(s);

(c) To receive written notification of the conduct officer's findings and decision delivered via e-mail to the student's official @students.wvu.edu account, within seven business days of the date of the meeting (or, if multiple meetings are necessary to determine responsibility or multiple individuals are involved and information presented by each is deemed necessary to determine responsibility, within seven business days of the date of the final meeting for the specific incident); and

(d) To request a review of the conduct officer's findings and decision by the appeals board or dean of students, as described in WAC 516-21-280 Basis for review.

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[Statutory Authority: RCW 28B.35.120(12) and 20 U.S.C. 1681-1688 (Title IX Education Amendments of 1972). WSR 12-01-021, § 516-21-250, filed 12/9/11, effective 1/9/12.]

WAC 516-21-260 Procedures for immediate interim suspension. In consultation with university officials, the dean of students may suspend a student from the university on an immediate interim basis, pending disciplinary or criminal proceedings or a medical evaluation.

(1) An interim suspension may only be imposed in the following circumstances:

(a) The student poses a threat to his/her own safety or well-being;

(b) The student poses a threat to the safety or well-being of other members of the university community;

(c) The student poses a threat to university property, is disrupting, or interfering with the normal operations of the university; and

(d) The student is alleged to have committed a serious violation of local, state, or federal law.

(2) During the interim suspension, a student may be denied access to university activities and privileges, including access to classes, university property, and/or campus residence halls and apartments.

(3) A student suspended from the university on an immediate interim basis shall be notified in writing of the terms of the interim suspension. The notice, which shall be delivered both via e-mail to the student's official @students.wvu.edu account and via certified mail to the student's local address on file, shall include the stated violation(s), the circumstances and terms of the interim suspension, and the time, date and location of a meeting to discuss the interim suspension with the dean of students.

(4) The interim suspension meeting shall occur no less than three business days and no more than seven business days from the date that the notification is sent. The student may elect to waive the three-day notice if an earlier date is mutually agreed upon. The purpose of the interim suspension meeting is for the student to have an opportunity to demonstrate to the dean of students why the terms specified in the interim suspension notice should not continue.

(5) Cases of interim suspension are given priority and will be expedited through the student conduct process. The interim suspension will remain in effect until a final decision has been made on the pending code violation(s) or until the dean of students determines that the reasons for imposing the interim suspension no longer exist or are not supported by available evidence.

[Statutory Authority: RCW 28B.35.120(12) and 20 U.S.C. 1681-1688 (Title IX Education Amendments of 1972). WSR 12-01-021, § 516-21-260, filed 12/9/11, effective 1/9/12.]

WAC 516-21-270 Proceedings for violations of the code. (1) Any member of the university community may file a complaint against a student or a student organization, alleging a violation of the code. All complaints should be provided in writing to the conduct officer or dean of students and include a statement of the alleged misconduct.

(2) The conduct officer will conduct a preliminary investigation. If, in the conduct officer's judgment, there is insufficient basis to consider a charge, the individual(s) initiating

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the complaint will be informed. If there is sufficient basis to consider a charge, the conduct officer shall:

(a) Provide the accused student with a written notice of the charge(s), delivered via e-mail to the student's official @students.wvu.edu account. This notice shall include a clear description of the nature and date of the complaint and the specific code section(s) the student is alleged to have violated;

(b) Provide the accused student with a copy of the code as well as information on the availability of procedural advice regarding the code; and

(c) Provide the accused student with written notice to contact the dean of students' office immediately upon receipt of the charge letter to schedule a conduct meeting. This meeting should occur no less than three business days and no more than seven business days from the date that the notification is sent. The student may elect to waive the three-day notice if an earlier date is mutually agreed upon.

(3) During the meeting with the accused student, the conduct officer will determine, based on a preponderance of evidence, whether it is more likely than not that a violation of the code has occurred. If a student fails to meet with the conduct officer after receiving proper notification, a decision on the allegation(s) may be rendered in the student's absence.

(4) Within seven business days of the meeting, the conduct officer shall notify the student in writing of the findings and decision, including any imposed sanctions. This notification will be delivered via e-mail to the student's official @students.wvu.edu account and will include a statement of the student's option for a review of the conduct officer's findings and decision by the appeals board or the dean of students.

(5) If multiple meetings are required to determine responsibility, the findings and decision letter will be sent via e-mail to the student's official @students.wvu.edu account no later than seven business days after the final meeting for the specific incident.

(6) If multiple individuals are involved in the incident and the information presented by each student is deemed necessary to determine responsibility, individual findings and decision letters will be sent via e-mail to the student's official @students.wvu.edu account no later than seven business days after the final meeting for the specific incident.

(7) If both parties agree to mediate a complaint and the conduct officer agrees, mediation may be substituted for a conduct meeting. If mediation is unsuccessful, the original complaint will be considered and decided upon by the conduct officer. Mediation may not be substituted for a conduct meeting in cases involving violence or sexual violence, including sexual harassment, misconduct, or assault.

[Statutory Authority: RCW 28B.35.120(12) and 20 U.S.C. 1681-1688 (Title IX Education Amendments of 1972). WSR 12-01-021, § 516-21-270, filed 12/9/11, effective 1/9/12.]

WAC 516-21-280 Basis for review. (1) A student found in violation of the code may request a review of the conduct officer's findings and decision by either the appeals board or the dean of students. A review may be requested for the following reasons only:

(a) The original meeting was not conducted in conformity with prescribed procedures;

(b) The conduct officer misinterpreted the code;

(c) The sanctions imposed are disproportionate to the violation(s) committed; and

(d) The decision reached did not properly consider the information presented.

(2) For incidents involving violence or sexual violence, including sexual harassment, misconduct or assault, victims may request a review of the conduct officer's findings and decision by either the appeals board or the dean of students. A review may be requested for the following reasons only:

(a) The original meeting was not conducted in conformity with prescribed procedures;

(b) The conduct officer misinterpreted the code;

(c) The sanctions imposed are disproportionate to the violation(s) committed; and

(d) The decision reached did not properly consider the information presented.

(3) The request for review must be submitted in writing to the dean of students within seven business days of receipt of the conduct officer's written notice of findings and decision (which shall be delivered via e-mail to the student's official @students.wvu.edu account). The request must state, as clearly and concisely as possible, the basis for the review and specify whether the student wishes to have their review considered by the appeals board or the dean of students.

(4) Upon receipt of the written request for review, the dean of students will determine whether the request meets one or more of the criteria specified for reviews of the conduct officer's findings and decision. If it does, the review hearing will be scheduled. If it does not, the party requesting the review will be notified in writing and the request will be denied.

(5) For incidents involving violence or sexual violence, including sexual harassment, misconduct or assault, both the student found in violation of the code and the victim will be notified in writing regarding the outcome of the written request for review.

(6) No sanction will begin while a review is pending, except as provided in WAC 516-21-260, Procedures for immediate interim suspension. Temporary relocation of a student to alternative housing and/or restrictions between affected parties may be enforced during an appeal.

[Statutory Authority: RCW 28B.35.120(12) and 20 U.S.C. 1681-1688 (Title IX Education Amendments of 1972). WSR 12-01-021, § 516-21-280, filed 12/9/11, effective 1/9/12.]

WAC 516-21-290 Review procedures. (1) Upon acceptance of a request for review, the dean of students shall notify the student (or, for incidents involving violence or sexual violence, both the student and the victim) in writing of the:

(a) Section(s) of the code the student was found to have violated;

(b) Findings and decision of the conduct officer;

(c) Time, date, and location of the review hearing; and

(d) Location of the code, should they wish to view or download a copy.

(2) The review hearing shall be held no less than three business days and no more than seven business days from the date of notification. The student may elect to waive the three-day notice if an earlier date is mutually agreed upon. If the

student fails to appear at the hearing, the appeals board or the dean of students may proceed with the review, based upon consideration of all available information, or may dismiss the request for review.

(3) During the review hearing:

(a) The chair of the appeals board or dean of students may ask any person with relevant information to speak or provide a written statement regarding the alleged violation.

(b) The student found in violation of the code may ask any person with relevant information to speak or provide a written statement regarding the alleged violation.

(c) The chair of the appeals board or the dean of students may limit or exclude information that is considered to be irrelevant, immaterial, or repetitious.

(d) Five members shall constitute a quorum of the appeals board. Actions by the appeals board require agreement by a majority of members present at the time of the hearing.

(e) Any member of the appeals board that is unable to render an impartial decision in a particular case shall excuse themselves from the appeals board's deliberations in advance and may be replaced by an alternate.

(f) The appeals board or the dean of students may either confirm, reverse, or modify the conduct officer's findings and decision.

(4) New substantive information that was not presented at the time of the original conduct meeting will not be considered during the review. When new substantive information is present prior to or during the review hearing and such evidence could impact the original decision, the allegation(s) will be reheard by the conduct officer.

(5) The chair of the appeals board or the dean of students will render a decision regarding the review within seven business days of the hearing and notify the student (or, for incidents involving violence or sexual violence, both the student and the victim) in writing of their findings and decision. All review decisions are final.

[Statutory Authority: RCW 28B.35.120(12) and 20 U.S.C. 1681-1688 (Title IX Education Amendments of 1972). WSR 12-01-021, § 516-21-290, filed 12/9/11, effective 1/9/12.]

WAC 516-21-300 Deviations from established procedures. Deviations from the timelines set forth in this code may be granted by the dean of students, upon request, for good cause.

[Statutory Authority: RCW 28B.35.120(12) and 20 U.S.C. 1681-1688 (Title IX Education Amendments of 1972). WSR 12-01-021, § 516-21-300, filed 12/9/11, effective 1/9/12.]

WAC 516-21-310 Confidentiality of conduct proceedings and records. (1) The confidentiality of all conduct proceedings and records will be maintained in compliance with the student records policy, as well as all applicable state and federal laws. Conduct records prepared by the conduct officer, the appeals board, and/or the dean of students:

(a) Will be held in the dean of students office for six years, except in cases of suspension, interim suspension, or expulsion, which are permanent records; and

(b) Will not be shared with any member of the public, except upon the informed written consent of the student(s) involved or as stated in the student records policy.

(12/9/11)

(2) The conduct officer's findings may be shared with the victim, as required by law, in cases involving violence or sexual violence, including sexual harassment, misconduct or assault. The disciplinary findings may also be shared with university officials involved in the completion or supervision of the sanction and/or the student. See also chapter 516-26 WAC Student records.

[Statutory Authority: RCW 28B.35.120(12) and 20 U.S.C. 1681-1688 (Title IX Education Amendments of 1972). WSR 12-01-021, § 516-21-310, filed 12/9/11, effective 1/9/12.]

WAC 516-21-320 Relationship of the code to university residences. (1) University residents are responsible for adjudicating most alleged violations of the code that are committed by students living in campus residence halls and apartments.

(2) The dean of students has the authority to designate which area will consider an alleged violation of the code, or whether the alleged violation will be coadjudicated by university residences and the conduct officer. General referral of conduct cases will be made by consensus between university residences and the conduct officer.

(3) Certain cases shall be referred by university residences to the conduct officer or coadjudicated by both areas. These include, but are not limited to, cases involving:

(a) Alleged acts or threats of physical violence or sexual misconduct;

(b) Alleged violations of the distribution or sale of drugs or other controlled substances;

(c) Alleged violations by nonresidential students while in campus residence halls or apartments or at university residences' sponsored programs, events, or activities;

(d) Alleged violations that occur near the end of the term or after a residential student's contract with university residences has ended;

(e) Alleged violations involving the misuse of computers, electronic data and/or communication systems, particularly when the victims of the alleged conduct are nonresidential students (e.g., sending unsolicited mass e-mails, copy-right violations); and

(f) Alleged violations severe enough to result in eviction from campus residence halls or apartments and/or suspension or expulsion from the university.

[Statutory Authority: RCW 28B.35.120(12) and 20 U.S.C. 1681-1688 (Title IX Education Amendments of 1972). WSR 12-01-021, § 516-21-320, filed 12/9/11, effective 1/9/12.]

WAC 516-21-330 Interpretation of the code. Any question of interpretation or application of the code shall be referred to the dean of students for final determination.

[Statutory Authority: RCW 28B.35.120(12) and 20 U.S.C. 1681-1688 (Title IX Education Amendments of 1972). WSR 12-01-021, § 516-21-330, filed 12/9/11, effective 1/9/12.]

WAC 516-21-340 Revision of the code. (1) The code shall be reviewed every five years or more often, if needed, by the committee on student rights and responsibilities. The committee on student rights and responsibilities shall include:

(a) Five students, including at least one graduate student. Three students shall be appointed by the associated students

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board of directors and two shall be appointed by the residence hall association;

- (b) One faculty member, appointed by the faculty senate;
- (c) One staff member from the division of enrollment and student services, appointed by the dean of students;
- (d) One staff member from the department of public safety, appointed by the director of public safety;
- (e) One staff member from university residences, appointed by the director of university residences; and
- (f) The conduct officer.

(2) Recommendations of the committee on student rights and responsibilities shall be made to the vice-president for enrollment and student services for submission to and consideration by the president's cabinet. Prior to adoption of the code, all proposed modifications shall be reviewed by the office of the assistant attorney general at Western Washington University for consistency with university policies and the law. Final authority for changes to the code rests with the Western Washington University board of trustees.

[Statutory Authority: RCW 28B.35.120(12) and 20 U.S.C. 1681-1688 (Title IX Education Amendments of 1972). WSR 12-01-021, § 516-21-340, filed 12/9/11, effective 1/9/12.]

WAC 516-21-350 Referenced policies and regulations in the code. Policies or regulations referenced in the code are available, upon request, in the dean of students' office.

[Statutory Authority: RCW 28B.35.120(12) and 20 U.S.C. 1681-1688 (Title IX Education Amendments of 1972). WSR 12-01-021, § 516-21-350, filed 12/9/11, effective 1/9/12.]

Chapter 516-26 WAC

STUDENT RECORDS

WAC

516-26-010	Preamble.
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516-26-035	Access to education records—Limitations on access.
516-26-040	Right to copy education records.
516-26-045	Request for explanation or interpretation of record.
516-26-050	Challenges—To content of education records—To release of education records—Or to denial of access to education records.
516-26-055	Challenges—Informal proceedings.
516-26-060	Challenges—Hearing before student academic grievance board.
516-26-070	Release of personally identifiable information or education records.
516-26-075	Release of personally identifiable information or education records—Nature of consent required.
516-26-080	Release of personally identifiable information or education records—Exceptions to consent requirement.
516-26-085	Release of information in emergencies.
516-26-090	Release of directory information.
516-26-095	Destruction of education records.
516-26-100	Notification of rights under this chapter.

DISPOSITION OF SECTIONS FORMERLY CODIFIED IN THIS CHAPTER

516-26-065	Student records committee. [Order 76-4, § 516-26-065, filed 8/20/76.] Repealed by WSR 79-06-019 (Order 79-05, Resolution No. 79-05), filed 5/14/79. Statutory Authority: RCW 28B.35.120(11).
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WAC 516-26-010 Preamble. The purpose of this student records policy is to establish rules and procedures that appropriately implement the Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. §1232g. Western Washington University is committed to safeguarding appropriate access to student education records as well as maintaining individual student privacy. The university records officer works to ensure that information contained in student records is treated responsibly with due regard to its personal nature, and for the students', university's and community's needs. Questions regarding this policy should be addressed to the university records officer.

(1) Generally, students have the right to review and copy their education records. Students also have the right to challenge the content of, release of, or denial of access to their education records.

(2) The university will normally not permit access to the public without a student's permission; some exceptions exist as detailed in this policy.

(3) The university may release directory information concerning a student unless the student requests in writing that it not be released.

Please read below for a complete description of the policy.

[Statutory Authority: RCW 28B.35.120(12). WSR 94-17-059, § 516-26-010, filed 8/12/94, effective 9/12/94. Statutory Authority: RCW 28B.35.120(12), 34.05.220 (1)(b), 34.05.250, 28B.15.600, 42.17.310, 42.30.070 - 42.30.075, chapters 69.41 and 43.21C RCW. WSR 90-10-042, § 516-26-010, filed 4/27/90, effective 5/1/90. Statutory Authority: RCW 28B.35.120(11). WSR

(8/12/94)

79-06-019 (Order 79-05, Resolution No. 79-05), § 516-26-010, filed 5/14/79; Order 76-4, § 516-26-010, filed 8/20/76.]

WAC 516-26-020 Definitions. For purposes of this chapter the following terms shall have the indicated meanings:

(1) "Student" shall mean any person, regardless of age, who is or has been officially registered at and attending Western Washington University and with respect to whom the university maintains education records or personally identifiable information.

(2)(a)(i) "Education records" shall refer to those records, files, documents and other materials maintained by Western Washington University or by a person acting for Western Washington University which contain information directly related to a student.

(ii) Records relating to an individual in attendance at the university who is employed as a result of his or her status as a student are considered education records. Records made and maintained by the university in the normal course of business which relate exclusively to a person's capacity as an employee and are not available for any other purpose are not considered education records.

(b) The term "education records" does not include the following:

(i) Records of instructional, supervisory or administrative personnel and educational personnel ancillary to those persons, which are kept in the sole possession of the maker of the record and which are not accessible or revealed to any other person except a substitute;

(ii) Records of the university's public safety office maintained solely for law enforcement purposes, disclosed only to law enforcement officials of the same jurisdiction, and maintained separately from education records in (a) of this subsection; but only if said law enforcement personnel do not have access to education records under WAC 516-26-080; or

(iii) Records concerning a student which are created or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional or paraprofessional capacity, or assisting in that capacity, and which are created, maintained or used only in connection with the provision of treatment to the student and are not available to anyone other than persons providing such treatment, except that such records may be personally reviewed by a physician or other appropriate professional of the student's choice.

(3) "Personally identifiable information" shall refer to data or information which includes either (a) the name of a student, the student's parent, or other family member, (b) the address of the student, (c) the address of the student's family, (d) a personal identifier, such as the student's Social Security number or student number, (e) a list of personal characteristics which would make it possible to identify the student with reasonable certainty, or (f) other information which would

make it possible to identify the student with reasonable certainty.

(4) "Vice-president for student affairs" shall refer to the vice-president for student affairs/dean for academic support services or his or her designee.

(5) "University records officer" shall refer to that individual (or his or her designee) responsible for the policies safeguarding the access, release, or copying of education records and for informing students and parents of their rights.

(6) "Records center manager" shall refer to that individual (or his or her designee) responsible for the facilitation of the development of records retention schedules.

(7) "Records coordinator" shall refer to that individual (or his or her designee) designated by the department or unit head to be responsible for the custody of the education record(s) in that office, department or unit.

(8) "Unit head" shall refer to that individual (or his or her designee) responsible for the supervision or management of an institutional department or unit.

[Statutory Authority: RCW 28B.35.120(12). WSR 94-17-059, § 516-26-020, filed 8/12/94, effective 9/12/94. Statutory Authority: RCW 28B.35.120(12), 34.05.220 (1)(b), 34.05.250, 28B.15.600, 42.17.310, 42.30.070 - 42.30.075, chapters 69.41 and 43.21C RCW. WSR 90-10-042, § 516-26-020, filed 4/27/90, effective 5/1/90. Statutory Authority: RCW 28B.35.120(11). WSR 79-06-019 (Order 79-05, Resolution No. 79-05), § 516-26-020, filed 5/14/79; Order 76-4, § 516-26-020, filed 8/20/76.]

WAC 516-26-030 Access to education records. (1) Except as provided in WAC 516-26-035, each student at Western Washington University shall have access to his or her education records. The right of access shall include the right to inspect, review, and obtain copies of education records.

(2) The records coordinator is responsible for maintaining an up-to-date records retention schedule which lists the types of student education records maintained by that office, department or unit. The said records retention schedule is also filed with the records center manager and the state archives in Olympia.

(3) A student wishing access to his or her education records shall submit a written request for access to the appropriate records coordinator. The records coordinator shall respond to a request for access within a reasonable period of time, not to exceed five days.

(4) The records coordinator shall provide students of the university with an opportunity for reasonable access to education records, and shall be responsible for taking appropriate measures to safeguard and insure the security and privacy of the institution's records while being inspected by students.

(5) The records coordinator will inform in writing a student who has requested access to his or her education records of the nature of any records which are being withheld from the student on the basis of the exceptions set forth in WAC 516-26-035. A student may file with the university records officer a request to review the decision by the records coordinator and/or by the unit head as per WAC 516-26-055 to withhold certain of the student's records. A student may also request a review of the university records officer's decision to withhold certain of the student's records by filing an appeal with the student academic grievance board, refer to WAC 516-26-060.

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[Statutory Authority: RCW 28B.35.120(12). WSR 94-17-059, § 516-26-030, filed 8/12/94, effective 9/12/94. Statutory Authority: RCW 28B.35.120(11). WSR 79-06-019 (Order 79-05, Resolution No. 79-05), § 516-26-030, filed 5/14/79; Order 76-4, § 516-26-030, filed 8/20/76.]

WAC 516-26-035 Access to education records—Limitations on access. (1) Western Washington University shall not make available to a student the following types of materials:

(a) The financial records of the student's parents or any information contained therein, if the parents have requested in writing that such information remain confidential.

(b) Letters or statements of recommendation, evaluation or comment which were provided to the university in confidence, either expressed or implied, prior to January 1, 1975, provided that such letters or statements shall not be used for purposes other than those for which they were originally intended.

(c) If a student has signed a waiver of the student's right of access in accordance with subsection (2) of this section, confidential records relating to the following:

- (i) Admission to any educational agency or institution;
- (ii) An application for employment; or
- (iii) The receipt of an honor or honorary recognition.

(2) A student, or a person applying for admission to the university, may waive his or her right of access to the type of confidential records referred to in subsection (1)(c) of this section, provided that such a waiver shall apply only if the student is, upon request, notified of the names of all persons making confidential recommendations, and such recommendations are used solely for the specific purpose for which the waiver has been granted. The university is not allowed to require such a waiver as a condition for admission to, receipt of financial aid from, or receipt of other services or benefits from the university.

(3) If any material or document in the education record of a student includes information concerning more than one student, the student shall only have the right either to inspect and review that portion of the material or document which relates to the student or to be informed of the specific information contained in that portion of the material or document.

[Statutory Authority: RCW 28B.35.120(12). WSR 94-17-059, § 516-26-035, filed 8/12/94, effective 9/12/94. Statutory Authority: RCW 28B.35.120(11). WSR 79-06-019 (Order 79-05, Resolution No. 79-05), § 516-26-035, filed 5/14/79; Order 76-4, § 516-26-035, filed 8/20/76.]

WAC 516-26-040 Right to copy education records. (1) The records coordinator shall, at the request of a student, provide the student with copies of the student's education records. The fees for providing such copies shall not exceed the actual cost to the university of providing the copies.

(2) Official copies of transcripts from other educational institutions, such as high school or other college transcripts, will not be provided to students by the university.

[Statutory Authority: RCW 28B.35.120(12). WSR 94-17-059, § 516-26-040, filed 8/12/94, effective 9/12/94. Statutory Authority: RCW 28B.35.120(11). WSR 79-06-019 (Order 79-05, Resolution No. 79-05), § 516-26-040, filed 5/14/79; Order 76-4, § 516-26-040, filed 8/20/76.]

WAC 516-26-045 Request for explanation or interpretation of record. The records coordinator shall respond

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to reasonable requests for explanations or interpretations of the contents of student education records.

[Statutory Authority: RCW 28B.35.120(12). WSR 94-17-059, § 516-26-045, filed 8/12/94, effective 9/12/94; Order 76-4, § 516-26-045, filed 8/20/76.]

WAC 516-26-050 Challenges—To content of education records—To release of education records—Or to denial of access to education records. (1) Any student who believes that inaccurate, misleading, or otherwise inappropriate data is contained within his or her education records shall be permitted to have included within the record a written explanation by the student concerning the content of the records.

(2) A student shall have the right, in accordance with the procedures set forth in WAC 516-26-055 and 516-26-060, to:

(a) Challenge the content of education records in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the students;

(b) Have the opportunity to request the correction or deletion of inaccurate, misleading, or otherwise inappropriate data contained within education records;

(c) Challenge the release of education records to specific persons as contrary to the provisions of this chapter; and

(d) Challenge a decision by the university to deny the student access to particular types of records.

(3) A student shall not be permitted under this chapter to challenge the validity of grades given in academic courses, except on the grounds that, as a result of clerical error, the student's records fail to accurately reflect the grades actually assigned by an instructor.

[Statutory Authority: RCW 28B.35.120(12). WSR 94-17-059, § 516-26-050, filed 8/12/94, effective 9/12/94. Statutory Authority: RCW 28B.35.120(11). WSR 79-06-019 (Order 79-05, Resolution No. 79-05), § 516-26-050, filed 5/14/79; Order 76-4, § 516-26-050, filed 8/20/76.]

WAC 516-26-055 Challenges—Informal proceedings. A student wishing to exercise the rights set forth in WAC 516-26-050(2) shall first discuss with the records coordinator the nature of the corrective action sought by the student. Failing resolution, the student shall next discuss with the department or unit head the corrective action sought by the student. Failing resolution, the student shall next discuss with the university records officer the corrective action sought by the student, as outlined in WAC 516-20-030(5).

[Statutory Authority: RCW 28B.35.120(12). WSR 94-17-059, § 516-26-055, filed 8/12/94, effective 9/12/94; Order 76-4, § 516-26-055, filed 8/20/76.]

WAC 516-26-060 Challenges—Hearing before student academic grievance board. (1) If informal proceedings fail to resolve the complaint of a student, the student may file a written request for an appeal to the student academic grievance board of the university.

(2) The student academic grievance board shall process the appeal according to procedures outlined in the student academic grievance policy.

(3) If a student demonstrates that the student's education records are inaccurate, misleading, or otherwise in violation of the privacy or other rights of the student, the student academic grievance board shall have authority to order the cor-

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rection or deletion of inaccurate, misleading or otherwise inappropriate data contained in the records.

(4) If a student demonstrates that the release of the student's education records would be improper under this chapter, the student academic grievance board shall have authority to order that the records not be released.

(5) If a student demonstrates that the student is entitled to access to particular documents under this chapter, the student academic grievance board shall have authority to order that the student be permitted access to the records.

(6) The decision of the student academic grievance board shall be rendered in writing within a reasonable period of time after the conclusion of the hearing.

[Statutory Authority: RCW 28B.35.120(12). WSR 94-17-059, § 516-26-060, filed 8/12/94, effective 9/12/94. Statutory Authority: RCW 28B.35.120(11). WSR 79-06-019 (Order 79-05, Resolution No. 79-05), § 516-26-060, filed 5/14/79; Order 76-4, § 516-26-060, filed 8/20/76.]

WAC 516-26-070 Release of personally identifiable information or education records. The university shall not permit access to or release of a student's education records or personally identifiable information contained therein to any person without the written consent of the student, except as provided in WAC 516-26-080, 516-26-085, or 516-26-090. Misuse or inappropriate access to student education records may result in disciplinary action.

[Statutory Authority: RCW 28B.35.120(12). WSR 94-17-059, § 516-26-070, filed 8/12/94, effective 9/12/94. Statutory Authority: RCW 28B.35.120(11). WSR 79-06-019 (Order 79-05, Resolution No. 79-05), § 516-26-070, filed 5/14/79; Order 76-4, § 516-26-070, filed 8/20/76.]

WAC 516-26-075 Release of personally identifiable information or education records—Nature of consent required. Where the consent of a student is required under WAC 516-26-070 for the release of education records or personally identifiable materials contained therein, the student's consent shall be in writing, shall be signed and dated by the student, and shall include a specification of the records to be released, the reasons for such release, and the names of the parties to whom the records may be released.

[Order 76-4, § 516-26-075, filed 8/20/76.]

WAC 516-26-080 Release of personally identifiable information or education records—Exceptions to consent requirement. (1) The university may permit the access to or release of a student's education records or personally identifiable information contained therein without the written consent of the student to the following parties:

(a) University officials, including faculty members, when the information is required for a legitimate educational purpose within the scope of the recipient's official responsibilities with the university and will be used only in connection with the performance of those responsibilities;

(b) Federal or state officials requiring access to education records in connection with the audit or evaluation of federally or state supported educational programs or in connection with the enforcement of federal or state legal requirements relating to such programs. In such cases the information required shall be protected by the federal or state officials in a manner which shall not permit the personal identification of students or their parents to other than those

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officials, and such personally identifiable data shall be destroyed when no longer needed for the purposes for which it was provided;

(c) Agencies or organizations requesting information in connection with a student's application for, or receipt of, financial aid;

(d) Organizations conducting studies for or on behalf of the university for purposes of developing, validating or administering predictive tests, administering student aid programs, or improving instruction, if such studies are conducted in a manner which will not permit the personal identification of students by persons other than representatives of such organizations, and the information will be destroyed when no longer needed for the purposes for which it was provided;

(e) Accrediting organizations in order to carry out their accrediting functions; or

(f) Any person or entity authorized by judicial order or lawfully issued subpoena to receive such records or information, upon condition that the student is notified of all such orders or subpoenas in advance of compliance therewith by the university. Any university employee or official receiving a subpoena or judicial order for education records or personally identifiable information contained therein shall immediately notify the assistant attorney general representing the university;

(g) An alleged victim of any crime of violence (as defined in section 16 of Title 18, United States Code) may have disclosed the results of any disciplinary proceeding conducted by the university against the alleged perpetrator of such crime with respect to such crime, without the consent of the alleged perpetrator.

(2) Education records of a student or personally identifiable information contained therein which are released to third parties, with or without the consent of the student involved, shall be accompanied by a written statement indicating that the information cannot subsequently be released in a personally identifiable form to any other party without the written consent of the student involved.

(3) The university shall maintain a record, kept with the education records of each student, indicating all parties, other than those parties specified in WAC 516-26-080 (1)(a), which have requested or obtained access to the student's education records, and indicating the legitimate interest that each such party has in obtaining the records or information contained therein. This record of access shall be available only to the student, to the employees of the university responsible for maintaining the records, and to the parties identified under WAC 516-26-080 (1)(a) and (c).

[Statutory Authority: RCW 28B.35.120(12). WSR 94-17-059, § 516-26-080, filed 8/12/94, effective 9/12/94. Statutory Authority: RCW 28B.35.120(11). WSR 79-06-019 (Order 79-05, Resolution No. 79-05), § 516-26-080, filed 5/14/79; Order 76-4, § 516-26-080, filed 8/20/76.]

WAC 516-26-085 Release of information in emergencies. (1) The vice-president for student affairs or his designee may, without the consent of a student, release the student's education records or personally identifiable information contained therein to appropriate parties in connection with an emergency if the knowledge of such information is necessary to protect the health or safety of the student or other persons.

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(2) The university police, during instances of emergency pertaining to individual students, may have access to those student's education records or personally identifiable information.

(3) The following factors should be taken into consideration in determining whether records may be released under this section:

(a) The seriousness of the threat to the health or safety of the student or other persons;

(b) The need for personally identifiable information concerning the student to meet the emergency;

(c) Whether the parties to whom the records or information are released are in a position to deal with the emergency; and

(d) The extent to which time is of the essence in dealing with the emergency.

(4) If the university, pursuant to subsection (1) of this section, releases personally identifiable information concerning a student without the student's consent, the university shall notify the student as soon as possible of the identity of the parties and to whom the records or information have been released and of the reasons for the release.

[Statutory Authority: RCW 28B.35.120(12). WSR 94-17-059, § 516-26-085, filed 8/12/94, effective 9/12/94. Statutory Authority: RCW 28B.35.120(11). WSR 79-06-019 (Order 79-05, Resolution No. 79-05), § 516-26-085, filed 5/14/79; Order 76-4, § 516-26-085, filed 8/20/76.]

WAC 516-26-090 Release of directory information.

(1) The university may release "directory information" concerning a student to the public unless the student requests in writing of the university registrar that the student's directory information not be released except as provided in WAC 516-26-070, 516-26-075, 516-26-080 or 516-26-085.

(2) The term "directory information" shall include information relating to the student's name, local telephone number, dates of attendance, degrees and awards received, participation in officially recognized sports and activities, weight and height if a member of an athletic team, and the most recent previous educational institution attended.

[Statutory Authority: RCW 28B.35.120(12). WSR 94-17-059, § 516-26-090, filed 8/12/94, effective 9/12/94. Statutory Authority: RCW 28B.35.120(12), 34.05.220 (1)(b), 34.05.250, 28B.15.600, 42.17.310, 42.30.070 - 42.30.075, chapters 69.41 and 43.21C RCW. WSR 90-10-042, § 516-26-090, filed 4/27/90, effective 5/1/90. Statutory Authority: RCW 28B.35.120(11). WSR 79-06-019 (Order 79-05, Resolution No. 79-05), § 516-26-090, filed 5/14/79; Order 76-4, § 516-26-090, filed 8/20/76.]

WAC 516-26-095 Destruction of education records.

Except as otherwise provided by law, the university shall not be prevented under this chapter from destroying all or any portion of a student's education records in accordance with established record retention schedules, provided that no education record to which a student has requested access shall be removed or destroyed by the university prior to providing the student with the requested access.

[Statutory Authority: RCW 28B.35.120(12). WSR 94-17-059, § 516-26-095, filed 8/12/94, effective 9/12/94. Statutory Authority: RCW 28B.35.120(11). WSR 79-06-019 (Order 79-05, Resolution No. 79-05), § 516-26-095, filed 5/14/79; Order 76-4, § 516-26-095, filed 8/20/76.]

WAC 516-26-100 Notification of rights under this chapter. The university shall annually notify students cur-

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rently in attendance of their rights under this chapter and the Family Educational Rights and Privacy Act.

The notice shall include a statement of the following student rights:

- (1) Inspect and review his or her education records;
- (2) Request an amendment of the student's education records to ensure that they are not inaccurate, misleading, or otherwise in violation of the student's privacy or other rights;
- (3) Allow or deny disclosures of personally identifiable information contained in the student's education records, except to the extent that these regulations and the regulations promulgated pursuant to the Family Educational Rights and Privacy Act allow;
- (4) File a complaint with the United States Department of Education under 34 C.F.R. 99.64 concerning alleged failures by the university to comply with the requirements of the act;
- (5) Access information concerning the cost to be charged for reproducing copies of the student's records; and
- (6) Access a copy of the regulations in this chapter (chapter 516-26 WAC).

The notice shall indicate the places where copies of these regulations are located.

[Statutory Authority: RCW 28B.35.120(12). WSR 94-17-059, § 516-26-100, filed 8/12/94, effective 9/12/94. Statutory Authority: RCW 28B.35.120(12), 34.05.220 (1)(b), 34.05.250, 28B.15.600, 42.17.310, 42.30.070 - 42.30.075, chapters 69.41 and 43.21C RCW. WSR 90-10-042, § 516-26-100, filed 4/27/90, effective 5/1/90. Statutory Authority: RCW 28B.35.120(11). WSR 79-06-019 (Order 79-05, Resolution No. 79-05), § 516-26-100, filed 5/14/79; Order 76-4, § 516-26-100, filed 8/20/76.]

APPENDIX D

Dolapo Akinrinade

From: Erasmus Baxter [REDACTED] >
Sent: Wednesday, October 10, 2018 9:06 AM
To: Public Records Officer
Cc: Asia Fields; Julia Furukawa
Subject: Public Records Request

Hello,

Under Washington's Public Records Act, we would like to request the final results, including the student's name, of disciplinary proceedings where Western has determined a student was responsible for a crime of violence or non-forcible sexual offense in the last five years.

If you deny any part of this request, please cite the specific exemption that applies.

Sincerely,

Erasmus Baxter
Asia Fields
Julia Furukawa

APPENDIX E



Public Records Officer

516 High Street
MS 9015
Bellingham, Washington 98225
(360) 650-2728

June 27, 2019

RE: Third Party Notification- Public Records Request PRR18-138

Dear [REDACTED]

Western Washington University is in receipt of a public records request pursuant to the Public Records Act of Washington State (RCW 42.56). Attached is a copy of the public records request and record pertaining to you that is responsive to the request. The purpose of this letter is to provide you an opportunity to pursue court action (the legal term is "enjoinment") to stop the release of the responsive records through injunctive relief. Please note that WWU is constrained by RCW 42.56 and case law from withholding information that does not have a specific exemption.

If you decide to seek enjoinment, you must file a legal action to obtain a temporary restraining order and a permanent injunction against Western Washington University prohibiting disclosure. You must file the appropriate complaint paperwork and schedule a hearing date with the Clerk of the Superior Court in Whatcom County. The Office of the Attorney General located at 101 E. Holly Street, Bellingham is the appropriate location for service of process of any complaint for injunctive relief.

Please **contact us no later than July 10, 2019** if you plan to seek enjoinment. If you do not contact us by that date, the requested documents will be released. Should you ultimately decide to seek enjoinment, you must do so **within 7 business days** of notifying us of your decision because WWU is required by law to disclose public records in a timely manner.

WWU Public Records Office cannot provide legal advice. If you need assistance in taking legal action, please seek legal counsel. We are forwarding a copy of this letter to Melissa Nelson of the Attorney General's Office.

Third Party Notification
June 27, 2019
Page 2

If you need any further assistance or have any questions, please do not hesitate to contact me at 360-650-2728.

Sincerely,

A handwritten signature in black ink, appearing to read "Dolapo Akinrinade".

Dolapo Akinrinade.
Public Records Officer

Cc Assistant Attorney General Melissa Nelson

APPENDIX F

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF WHATCOM

Erasmus Baxter, Asia Fields,)
And Julia Furukawa,)

Plaintiffs,)

vs.)

Western Washington University,)
An Agency of the State of)
Washington,)

Defendant.)

No. 19-2-00855-37

HEARING

August 10, 2020

The Honorable David Freeman Presiding

Transcribed by: Bonnie Reed, CET

Court-Certified Transcription

A P P E A R A N C E S

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FOR THE PLAINTIFF:
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FOR THE INTERVENOR:
TODD MAYBROWN
600 University Street, Suite 3020
Seattle, WA 98101-4105

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August 10, 2020

THE CLERK: The Superior Court of Washington in and for Whatcom County is now in session with the Honorable David Freeman presiding. And we have Baxter et al versus Western Washington University, 19-2-85537.

THE COURT: All right. Good afternoon, everyone. It looks like we have everybody present except Mr. Graham, who I think we knew would be unavailable this afternoon.

All right. I have had a chance to look this over a little bit further since last week and I am prepared to issue my ruling at this stage, unless anybody has anything preliminary that we need to address? Not seeing anyone speaking up. So can everyone hear me all right? Thumbs up is good. Okay, great.

All right, as a starting point there's a threshold question here under the PRA and that's whether 42.56.23 (1) under the public school exception applies. Frankly, I'm surprised that this issue has not been addressed previously in the appellate courts. I'm a little shocked by that actually. And initially I have the plaintiff and the interveners all agreeing that it does apply. The defendant maintains that the section does not apply based on the constitutional definition of public school.

1 I don't take such a limited view as far as the public
2 school definition. It's not defined by the statute itself,
3 but I am not sure it should be limited to that which is the
4 constitutional standard in light of the fact that reading
5 RCW 42.56.230 as a whole, there are a number of exceptions
6 that are carved out of the PRA. And essentially those
7 students attending public universities would be entirely
8 excluded under those exceptions if I were to read it so
9 narrowly, as far as the definition of public school. I
10 could go through a number of different statutes that define
11 both include and exclude based on that definition. But I
12 think for the purposes of the Public Records Act, I do
13 believe that a public university does fall within the
14 exceptions of 42.56.230 (1).

15 So the next question that arises is whether the student
16 records or the student file exception would then apply. And
17 I should say generally, I am of the belief that the remedy
18 here as requested by the interveners is limited to that
19 under the PRA. So that does require, one, there be an
20 exception. And, two, that the disclosure would not be in
21 the public interest and would not -- would constitute
22 substantial irreparable harm to the individual. I think
23 that is the standard in which we're applying here.

24 As to the student file exception, this case really turns
25 on the Lindeman matter, from what I can tell. And while

1 reasonable minds could differ here, I read the supreme court
2 cases as carving out an exception as far as security and
3 safety and what really is meant to be maintained for the
4 student versus what is maintained for security and safety.
5 And I have to find in this matter that these disciplinary
6 proceedings were certainly not for the benefit of the
7 student, I should say the interveners here, but for a
8 broader purpose of school safety and security. And I do
9 believe that under Lindeman, these records fall outside the
10 scope of that exception under 42.56.230 (1).

11 I am not going to spend a whole lot of time on (2)a(ii)
12 because I believe that the plain language of that provision
13 does not apply to students -- the interveners at issue. So
14 I don't think that is applicable.

15 Moving on to the other statutes under the PRA and the
16 applicability of other statutes dealing with FERPA clearly
17 under West v Evergreen, FERPA does apply. And so I don't
18 think there's any doubt based on that court of appeals case
19 that FERPA is applicable here. The broader language as far
20 as the student records is clearly reflected in the
21 administrative code. Clearly Western Washington University
22 tailored that after the FERPA regulations and not so much
23 under the PRA based on the broad language of what student
24 records are defined as. However, under that FERPA exception
25 regarding the final dispositions relating to the student

1 conduct at issue, I don't believe that FERPA accepts these
2 records under that provision.

3 Further, while I do have -- I generally would agree with
4 the interveners when it comes to the regulation, I think
5 they go essentially beyond their legal authority. I think
6 the regulations were based on the federal statute. And the
7 federal statute clearly does not exclude from disclosure the
8 records at issue before me.

9 As to those exceptions and whether state law would provide
10 authority for the regulation, I don't find that state law
11 provides sufficient authority for the WAC. So ultimately I
12 do find that while FERPA is applicable, the records before
13 me fall under the exception under FERPA as well.

14 Based on all of that, I am going to deny the interveners
15 request for injunctive relief. Sorry, I am just looking for
16 a proposed order. I know the plaintiff's proposed order is
17 likely the closest to my ruling based on the fact that I did
18 find the public school exception at least applied.

19 MR. CRITTENDEN: The plaintiff's order was pretty broad
20 and limited what it says.

21 THE COURT: Okay.

22 MS. NELSON: You know, may I ask for just a clarification?

23 THE COURT: Yes, go head.

24 MS. NELSON: So I understand you said that the records
25 that 42.66.230 (1) does apply to student records in terms of

1 records of a higher educational institution, but that these
2 records, because they're safety and security records fall
3 outside of that under Lindeman.

4 THE COURT: Correct.

5 MS. NELSON: Okay.

6 THE COURT: So I do find that the statute is applicable,
7 but the records at issue fall outside the scope of that
8 exception.

9 MS. NELSON: Okay, thank you.

10 MR. CRITTENDEN: I don't know if it's necessary for the
11 order to say that or not. I'll leave it up to the Does to
12 make their record if they think that's important.

13 THE COURT: And did counsel want to be heard on that?

14 MS. NELSON: Were you addressing me, Your Honor?

15 THE COURT: I was actually addressing counsel for the
16 Does, either counsel.

17 MR. CRITTENDEN: Mr. Maybrown, I think you're muted. I
18 think you're trying to speak, but I can't hear you.

19 MR. MAYBROWN: -- just in time.

20 THE COURT: There we go.

21 MR. MAYBROWN: Can you hear me now? Sorry about that.
22 Your Honor, we think that the ruling should clearly indicate
23 that public record or the public school exception could
24 apply. But the Court has found there's an exception under
25 Lindeman, so it's clear what the Court's ruling is.

1 THE COURT: Okay.

2 MR. MAYBROWN: And at some point where it's final, we
3 would like to discuss whether -- my client is going to
4 appeal from this ruling. I don't know if other clients are,
5 but we certainly do not want this to be released before
6 we've had (inaudible) for an appeal.

7 THE COURT: I suspected there might be an appeal issue on
8 that.

9 MR. CRITTENDEN: Will there be some time built in if the
10 parties want to take an agreed order off line that will
11 build some time into the schedule before the order is
12 entered.

13 MR. MAYBROWN: That's what I was going to suggest because
14 perhaps we can have a conversation among counsel so we can
15 save everybody some time and money and not have to litigate
16 the stay issue and maybe we can reach an agreement.

17 THE COURT: Yeah, that sounds reasonable. Mr. Jackson,
18 are you in agreement with that?

19 MR. JACKSON: Yes, Judge, thank you.

20 THE COURT: And, Ms. Nelson, does that sound --

21 MS. NELSON: As long as provided we can have this
22 conversation in a short amount of time so that Western wants
23 to be in compliance with the court orders until there is a
24 stay whether agreed or court imposed, Western is under
25 obligation to release the records.

1 MR. CRITTENDEN: Is there some sort of an agreed stay that
2 stays in effect until the order is entered? I haven't
3 looked back in the file, but I thought we took care of that.

4 MS. NELSON: Well, we wouldn't release the records until
5 this order is entered.

6 MR. CRITTENDEN: Oh, okay.

7 MS. NELSON: But if we aren't able to negotiate and agree
8 on the stay but we enter this. I just want to make sure
9 that we move things along and everybody is on the same page.

10 MR. CRITTENDEN: I would need to discuss -- I can workout
11 the language of the ruling today, but I would need to talk
12 to my client about the stay.

13 THE COURT: And given some of the complications we
14 encountered earlier this year, counsel has been able to work
15 exceptionally well together, all five parties. So I'm
16 confident that you all will be able to at least work out an
17 agreed order here and note it up if we need to address the
18 issue of stay before that order is entered. The Court can
19 certainly have that noted up on a special set if the parties
20 can't come up with an agreement as far as a stay is
21 concerned. So I'll just expect an agree to order reflecting
22 my ruling today. And if the parties can negotiate a stay,
23 that's great. If not, then we'll get a special set put on
24 before entry of order.

25 MR. MAYBROWN: Thank you, Your Honor, that's agreeable to

1 Bill Querin (phonetic). Obviously, we will work as quickly
2 as we can with all the parties to come to an agreement if at
3 all possible.

4 THE COURT: Okay. All right. Thank you, everyone.

5 MR. CRITTENDEN: Thank you.

6 MS. NELSON: Thanks, Judge.

7 THE COURT: Unless there's anything further, we can be
8 adjourned.

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10 (Conclusion of hearing)

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C E R T I F I C A T E

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STATE OF WASHINGTON)
) ss
COUNTY OF KING)

I, the undersigned, do hereby certify under penalty of perjury that the foregoing court proceedings were transcribed under my direction as a certified transcriptionist; and that the transcript is true and accurate to the best of my knowledge and ability, including any changes made by the trial judge reviewing the transcript; that I received the electronic recording directly from the trial court conducting the hearing; that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially interested in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand
this 24th day of November, 2020





Bonnie Reed, CET

APPENDIX G

A P P E A R A N C E S

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1 -o0o-

2 October 22, 2020

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4 THE CLERK: The Superior Court of the State of Washington
5 in and for Whatcom County is now in session with the
6 Honorable David Freeman presiding.

7 THE COURT: Thank you.

8 THE CLERK: Baxter et al versus Western Washington
9 University, Case No. 19-2-00855-37.

10 THE COURT: Good morning, everyone. We are on for entry
11 of orders this morning. I am going to attempt to get into
12 the go to meetings here.

13 All right. We're just going to run through what I
14 received prior to court just to make sure I have everything.
15 Essentially, what I received from the Western Washington
16 University was a proposed order. I did not receive any
17 memorandum with that. From the plaintiffs I received both a
18 memorandum and a proposed order. And from Mr. Maybary (sic)
19 or Maybrown, I'm sorry, I received a memorandum, but no
20 proposed order. And I think that is everything either
21 through Odyssey or through judge's copies that were provided
22 to me.

23 So I see Mr. Jackson and Mr. Graham was there -- is there
24 anything that I'm missing here this morning?

25 MR. JACKSON: Not that I'm aware of, Judge, and just for

1 what it's worth, those are joining Mr. Maybrown's memorandum
2 that he submitted.

3 THE COURT: That was my impression, I just wanted to make
4 sure I had everything. Mr. Graham, anything I am missing
5 from your perspective?

6 MR. GRAHAM: No, Your Honor.

7 THE COURT: Okay, all right. I may go slightly out of
8 order here just because it seems to me that both the
9 plaintiffs and the interveners generally agree with respect
10 to the plaintiff's proposed order. So I think I'm going to
11 have Mr. Crittenden go first. And then I'll hear from the
12 intervenors, and then I will hear from Western.

13 MR. CRITTENDEN: Thank you, Your Honor, William John
14 Crittenden representing plaintiffs Baxter et al. We've been
15 waiting to enter an order in this case for a while.
16 Everyone agrees we should preserve the status quo while
17 there is an appeal on the bench and ruling. The sticking
18 point is, of course, whether or not my clients, who are on a
19 contingent fee and want the records yesterday, should be
20 required to proceed with their PRA claims against Western
21 while the case just sits there and Does get free delay
22 because the appeal hasn't started yet.

23 We have not been able to reach an agreement because,
24 frankly, the other parties want to have their cake and eat
25 it too. Even though they lost, they seem to think it's fair

1 and equitable for my client to have to do a bunch more work
2 before they even have to start an appeal they think they are
3 going to prevail on.

4 The suggestion that this promotes judicial economy is
5 simply false. They keep quoting cases to me about this but
6 the fact remains, if you don't stay the penalties, we have
7 to brief and argue it once in this court and then we have to
8 do it again on appeal. And the whole thing might become
9 moot if your judgment ruling is not maintained. So judicial
10 economy does not get them (inaudible) at all, that's
11 nonsense.

12 Second of all, they say, well, we're entitled to a stay.
13 I'm sorry, there's no case law before the Court that says
14 their right to nondisclosure costs my client's First
15 Amendment rights as journalist to get this information. And
16 there's no motion before the court on that issue. And even
17 if there were, as we pointed out, the supercede is then
18 stayed is based on the fairness and balance to both parties.
19 And you can't make the argument that fairness requires a
20 stay so that these Does can have their day in court in court
21 of appeals, but also makes my client do a whole bunch of
22 unnecessary work that may become moot and just give the Does
23 a whole bunch of free delay. There's no basis for that
24 whatsoever. It's just absolute overreach by the other
25 parties. It's pure speculation that such order would even

1 be granted. And, frankly, there's no motion before the
2 Court. I warned these guys. I said, I'm going to court and
3 if you don't have a motion to stay these, I'm going to tell
4 the Judge to either enter order or give me the records. And
5 that's my position this morning.

6 Now, they admit that my 54(b) order will work. So why are
7 we even having this conversation? There's no motion before
8 the Court to do it any other way. They admit my way will
9 work. My way is the fair way. Let's just cut to the chase
10 and do it.

11 Now, I haven't heard any objection from anybody about
12 these specific provisions of my order because I'm pretty
13 sure that we did them in a way that makes the order quite
14 fair. I don't know if you have any questions about it, but
15 basically it says the Does lost, here's your partial
16 judgment. You can appeal, the penalties and disclosure are
17 stayed and we will see what happens on appeal. And I just
18 can't believe that this wasn't done by stipulation. And the
19 only reason I can suggest it wasn't is that Western wants to
20 make me do more work and Does want more delay. And anything
21 else they tell you is just (inaudible).

22 THE COURT: Thank you, counsel. Mr. Maybrow.

23 MR. MAYBROWN: Thank you, Your Honor. Actually we're
24 stuck in the middle here. We have said from the beginning
25 that we were intending to appeal. And we actually asked the

1 Court to stay or at least allow us to have a discussion with
2 the parties so we can reach an agreement on the stay at the
3 last hearing. We put in our initial pleading that we would
4 suggest until one of the parties appeal that it was going to
5 be a stay. The dispute is between Western and the
6 plaintiffs. So as to whether we should resolve the entire
7 case before the appeal or whether we should have an
8 interlocutory appeal.

9 We actually gave the Court a (inaudible) view, which sets
10 forth all the options the Court has. We only ask the Court
11 maintain the status quo so our appeal doesn't become moot.
12 And frankly whatever the Court decides in terms of whether
13 there should be finality or an interlocutory appeal, we will
14 then move forward and present either an appropriate order or
15 a notice of appeal. But we're completely stuck in the
16 middle.

17 And we have made it very clear, actually as set forth in
18 our memo what the dispute was. The dispute is not between
19 the Does and either of the parties. The dispute is between
20 Western and the plaintiffs. Plaintiffs don't want to do any
21 more work now, they want the appeal to go first. Western
22 wants the entire case to be resolved, and then we'll have
23 one unified appeal. We'll defer to the Court on that issue.
24 And that's where this stands. We have not done anything but
25 try to reach an agreement and they can't agree. That's

1 where I stand.

2 THE COURT: Thank you. Either Mr. Jackson or Mr. Graham
3 want to be heard? No from Mr. Jackson. Mr. Graham?

4 MR. GRAHAM: No, sir.

5 THE COURT: Ms. Nelson.

6 MS. NELSON: Yes, Your Honor, good morning.

7 THE COURT: Good morning.

8 MS. NELSON: I think we all have tried really hard to come
9 up to an agreed order and it just isn't possible. I don't
10 think it's because anyone's being unreasonable. I think
11 it's just because we have differing positions about what
12 happened and what's appropriate. The order that Western
13 proposed attempts to accurately reflect the Court's actual
14 decision from the August 10th hearing. And in that allowed
15 time for an appeal before the records are released.
16 Plaintiff's position isn't unreasonable. It's not trying to
17 impose an additional burden on the journalist, it's, to us,
18 it's most sufficient to litigate everything now and have one
19 appeal.

20 I think the issue that kind of came up in terms of
21 negotiating an agreed order is that CR 54(b) requires some
22 specific findings and these weren't addressed. There isn't
23 a record to support those findings from at the hearing. The
24 Fox case and the rule both require that there be a finding
25 of no reason for delay. And under the Fox case, the Court

1 must have a record to support the findings, it can't just be
2 pro forma findings. Likewise, we're at 2.2(d) allows for
3 express direction from the Court for entry of the judgment.
4 They're not express determination must be supported by
5 written findings that there is no reason for delay. So I
6 think it is important in this case if we're looking at
7 appeal to have a record that accurately reflects what
8 happened and that we're following the rules.

9 I think our proposed order is accurate and -- but I would
10 defer to the Court. I understand there are competing
11 interests and I also do believe that some type of a stay
12 would be appropriate because without a stay, the -- any
13 appeal by the Does would be moot.

14 THE COURT: And, Ms. Nelson, just so I'm aware, you did
15 not file a memorandum, correct?

16 MS. NELSON: I did not file a memorandum, Your Honor.

17 THE COURT: Okay. And you cited two cases, I think one of
18 which might have been cited in one of the briefs I read, but
19 I'm not sure the other one was. Can you give me the
20 citations on both of those?

21 MS. NELSON: Yeah, the -- I cited to Fox versus Sunmaster
22 which is 115 Washington 2d 498, it's a 1990 case. And then
23 the other case -- I'm not sure I actually cited to another
24 case. But the Fox case is cited in the primary case that
25 Mr. Maybrown cited. And I believe -- if I can find my

1 notes.

2 THE COURT: I do recall it being cited by Mr. Maybrow.

3 MS. NELSON: Yeah, I'm sorry, I think -- it's hard for me
4 to find things right now. But the Fox versus Sunmaster
5 product is the case that I referred to.

6 Mr. Maybrow, do you recall the name of the case that you
7 cited in your case regarding 54(b)?

8 MR. MAYBROWN: I think I cited many cases in my brief
9 regarding 54(b) and I don't have a copy with me because I'm
10 home at the present, but I can look at it on screen if you
11 would like me to. But I think the court has it --

12 THE COURT: Yeah, I --

13 MS. NELSON: Your Honor, I think it was Washburn versus
14 Beatt Equipment, 120 Washington 2d 246.

15 THE COURT: Okay. I'm pulling that up now. I didn't get
16 a judge's copy on Mr. Maybrow's brief. So I don't have a
17 printed copy in front of me. So I'm just pulling that up on
18 Odyssey. I do recall it being cited -- well, I shouldn't
19 say that. I recall the Fox case being cited.

20 MR. MAYBROWN: Your Honor, the Washburn case has to do
21 with a certification under the RAP 2.3. We did not cite the
22 Fox case, I believe. I'm looking at my brief. I think it
23 might have been cited by the plaintiffs because they've been
24 advocating for a 54(b) finding. Frankly, if the Court
25 doesn't mind, I've been involved in many proceedings before

1 that post decision the court enters either a stay provision
2 under CR 62 or the Court might enter an interlocutory
3 proposal based on the discussion of the parties. So I'm not
4 sure what additional record needs to be made here. I think
5 it's very clear to the Court why the parties dispute how the
6 appeal should happen.

7 But everybody seems to be saying the same thing, there
8 should be an appeal. The question is, should it be today or
9 should it be in a month or however long it takes for them to
10 resolve the other issues. And we're agnostic. Whatever the
11 Court proposes then we can come up with it, an agreed plan
12 and move this case along, that's all.

13 THE COURT: All right, thank you.

14 MR. CRITTENDEN: Your Honor, if I may reply briefly?

15 THE COURT: Yeah, go ahead.

16 MR. CRITTENDEN: First of all, I object to any argument
17 from Western because they didn't file a brief. And I told
18 these guys, you want to come into court and make an
19 argument, file a brief, they didn't.

20 Second of all, this is not interlocutory. If you enter a
21 judgment, it is an appealable order. These parties just
22 simply misusing the power of terminology and making stuff
23 up. This if you enter a CR 54(b) order, which everyone
24 admits will work, except for Ms. Nelson who talks about a
25 bunch of stuff, I couldn't even tell whether she was

1 objecting on it. Western has no skin in the game. They're
2 just jerking me around. They keep saying it's more
3 efficient, but they will not address the actual facts of the
4 case, which are you are going to try to make me do a bunch
5 of work twice when that work might become moot. That's the
6 third time they made their argument.

7 There's no response from Western or any of the Does.
8 They're just hoping that they can dupe you into making me do
9 a bunch of work when it's not fair. There's no motion for
10 what these people are asking for. They admit my order is
11 proper, let's just get it done.

12 THE COURT: All right. I do agree with you in part, but
13 this -- with not being an interlocutory appeal if I proceed
14 with your order. At the same time, I don't think it's as
15 simple, counsel, as you're making it out to be with Western.
16 And I do see some concern there when it comes to judicial
17 economy. And I think Western can say the exact same thing,
18 that they're going to have to do this twice. Whereas the
19 Does are quite up front that they don't have any issue with
20 this as long as a stay is ordered, they don't really have a
21 risk here. All that being said, and I'm just confirming
22 something under 54 because, again, it wasn't thoroughly
23 briefed.

24 I just want to make sure any findings are -- all right.
25 I'm going to go head and give my ruling on the record here

1 this morning, but I do want to double check something so
2 I'll hold off on signing the proposed order until I've had a
3 chance to confirm that all proper findings are contained in
4 it. But, I'm inclined to agree with the position of the
5 plaintiffs. I think this is the most efficient when it
6 comes to judicial economy this being heard. I do understand
7 the objections when it comes to Western, and I don't think
8 they're baseless when it comes to judicial economy based on
9 their position and essentially the work that the defendants
10 will have to do going into this.

11 At the same time, I think for the plaintiffs as well as
12 the interveners, this is the most efficient method to go
13 forward. And I am prepared to enter an order under 54(b) or
14 a partial order under 54(b) in order for this to go up on
15 appeal. As I stated, when I made my ruling previously, I do
16 think this is a bit of a novel issue. I don't think there
17 is clear case law on this. And I believe that reasonable
18 minds could differ on an outcome here. So I think it is
19 important to have this heard on the merits in the court of
20 appeals which is why the stay is also proper. So I'm going
21 to go ahead and likely sign that as proposed. I just want
22 to double check and make sure all the findings that need to
23 be made are made in that proposed order. Any questions?
24 I'll start with plaintiffs?

25 MR. CRITTENDEN: No, I think I'm fine. But I can help you

1 answer questions by my order if you've got any.

2 THE COURT: I don't think so, I just want to -- based on
3 what Ms. Nelson had indicated, I wanted to take a quick look
4 at the Fox case and review that and make certain that any
5 findings necessary are included in your proposed order. So
6 if you have any comments on that, then go ahead.

7 MR. CRITTENDEN: Frankly, Your Honor, I have been working
8 on this case in an unrelated matter. And there's a nuance
9 to the CR 54(b), which your express finding that you are
10 entering judgment is a jurisdictional requirement. And that
11 is why it's in my proposed order. Everything else is
12 harmless error, the court of appeals will get upset if you
13 send the case up and they cannot tell why and your findings
14 are unclear. In this case, it will be obvious you are
15 sending up one salient important legal issue to the court of
16 appeals however you see fit. I don't see this having any
17 trouble at the court of appeals whatsoever.

18 THE COURT: Okay. Mr. Maybrown's going to have a stake in
19 this one. So I doubt he's going to have anything to say
20 anything about that, but I'll give Ms. Nelson one more
21 chance to address that issue as far as findings on the CR 54
22 issue.

23 MS. NELSON: Your Honor, again, my concern is that at the
24 hearing CR 54(b) was not addressed, and I don't think
25 there's any record about the delay. But I respect the

1 Court's decision.

2 THE COURT: Okay. Thank you, Ms. Nelson. All right. I
3 should be signing this at some point today once I have a
4 chance to take a look at those two things. So unless
5 there's anything further, we can be adjourned.

6 MR. CRITTENDEN: Will the Court be emailing a copy to the
7 parties?

8 THE COURT: I think my judicial assistant will be in later
9 today so she should be able to provide you a copy later
10 today.

11 MR. CRITTENDEN: Okay, no worries. Thank you.

12 THE COURT: All right. Thank you all, I appreciate it.

13 MR. CRITTENDEN: Thank you.

14 MR. GRAHAM: Thank you.

15 MS. NELSON: Thank you.

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17 (Conclusion of hearing)

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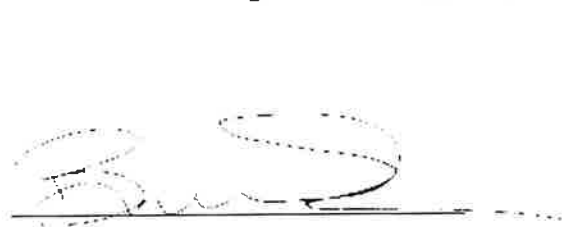
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STATE OF WASHINGTON)
) ss
COUNTY OF KING)

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IN WITNESS WHEREOF, I have hereunto set my hand
this 24th day of November, 2020





Bonnie Reed, CET

ALLEN, HANSEN, MAYBROWN, OFFENBECHER

January 26, 2022 - 10:55 AM

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