

Chapter 28B.112 RCW
CAMPUS SEXUAL VIOLENCE

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RCW 28B.112.005 Findings. The legislature finds that the issue of campus sexual violence is a serious issue for many students as well as poses a challenge to all of our institutions of higher education. Several high profile cases in recent years garnered national attention, with more than ninety colleges and universities nationwide currently under investigation by the United States department of education's office for civil rights for violation of Title IX relating to how they have handled sexual violence cases.

In 2014, the White House convened a task force designed to protect students from sexual assault. The task force has recommended that schools conduct campus climate assessments and provided a sample memorandum of understanding for institutions to enter into with local law enforcement.

At the same time, the federal government and several states have moved forward to address campus sexual violence policies regarding prevention, investigation, and disciplinary action. These actions include the statewide adoption of policies at the public four-year universities in New York and all schools receiving state financial aid in California. It also includes new requirements included in the federal violence against women act amendments to the Clery act, 20 U.S.C. Sec. 1092(f).

The legislature further finds the state's public two and four-year institutions of higher education are taking steps to improve their institutional policies around campus sexual violence, including being represented at a statewide conference held in October 2014.

In order to complement federal policy and ensure the safety of all our students, the legislature finds it necessary to establish minimum standards for all institutions pertaining to campus sexual violence policies and procedures and encourages institutions of higher education to share with all students and current employees, especially survivors of sexual violence, the protections, resources, and services available to them if they are a victim of sexual assault, domestic violence, dating violence, or stalking. Institutions should endeavor to prevent retaliation and prevent the student from having to undergo unnecessary or duplicative retellings of the incident. [2015 c 92 § 1.]

RCW 28B.112.010 Disciplinary processes. All institutions of higher education shall refrain from establishing a different

disciplinary process on the same campus for a matter of sexual violence, based on the status or characteristics of the student involved in that disciplinary proceeding, including characteristics such as a student's membership on an athletic team, membership in a fraternity or sorority, academic year, or any other characteristics or status of a student. [2015 c 92 § 2.]

RCW 28B.112.020 Availability of institutions' policies, procedures, and resources. (1) Institutions of higher education shall make information available on an annual basis to all current and prospective students and employees regarding the institution's policy and procedures, the responsible employee to receive complaints, and compliance with campus sexual violence confidentiality and reporting requirements set forth in 34 C.F.R. Sec. 668.46(b)(11)(iii).

(2) Institutions of higher education shall make the resources in subsection (1) of this section and other information and support available on a confidential basis to all campus sexual assault survivors, regardless of whether the survivor chooses to proceed with a formal report of sexual assault. [2015 c 92 § 3.]

RCW 28B.112.030 Campus-affiliated advocates—Confidentiality of records. (1) Survivor communications with, and records maintained by, campus-affiliated advocates, shall be confidential.

(2) Records maintained by a campus-affiliated advocate are not subject to public inspection and copying and are not subject to inspection or copying by an institution of higher education unless:

- (a) The survivor consents to inspection or copying;
- (b) There is a clear, imminent risk of serious physical injury or death of the survivor or another person;
- (c) Inspection or copying is required by federal law; or
- (d) A court of competent jurisdiction mandates that the record be available for inspection or copying.

(3) The definitions in this subsection apply throughout this section and RCW 42.56.240(16) unless the context clearly requires otherwise.

(a) "Campus-affiliated advocate" means a "sexual assault advocate" or "domestic violence advocate" as defined in RCW 5.60.060 or a victim advocate, employed by or volunteering for an institution of higher education.

(b) "Survivor" means any student, faculty, staff, or administrator at an institution of higher education that believes they were a victim of a sexual assault, dating or domestic violence, or stalking. [2017 c 72 § 2.]

Finding—Intent—2017 c 72: "The legislature finds that the state, along with the federal government and the state's public colleges and universities, plays an important role in protecting college students on and off campus from violence, including sexual assault. This role includes protecting students from repeat offenders and ensuring that survivors can trust that their college or university has education record protocols that prioritize their safety on and off campus.

The legislature commends the final report produced by the task force established by Substitute Senate Bill No. 5719 in 2015. The task force brought together experts across a range of fields to highlight

ways in which both institutions of higher education and the state can enact stronger policies around the issue of campus sexual assault. As representatives of our state's public colleges and universities said two years ago, this subject needs to be a high priority for the state and existing state law has gaps that need to be fixed. Therefore, the legislature intends to enact changes based on several recommendations contained within the report to the legislature." [2017 c 72 § 1.]

RCW 28B.112.040 Sexual misconduct—Definitions. The definitions in this section apply throughout this section and RCW 28B.112.050 through 28B.112.080 unless the context clearly requires otherwise.

(1) "Applicant" means a person applying for employment as faculty, instructor, staff, advisor, counselor, coach, athletic department staff, and any position in which the applicant will likely have direct ongoing contact with students in a supervisory role or position of authority. "Applicant" does not include enrolled students who are applying for temporary student employment with the postsecondary educational institutions, unless the student is a graduate student applying for a position in which the graduate student will have a supervisory role or position of authority over other students. "Applicant" does not include a person applying for employment as medical staff or for employment with an affiliated organization, entity, or extension of a postsecondary educational institution, unless the applicant will have a supervisory role or position of authority over students.

(2) "Association" means a scholarly or professional organization or learned society that sponsors activities or events for the benefit of individuals affiliated with postsecondary educational institutions, with a code of conduct forbidding sexual misconduct at such activities or events, and established investigative procedures for allegations that the code of conduct has been violated.

(3) "Employee" means a person who is receiving or has received wages as an employee from the postsecondary educational institutions and includes current and former workers, whether the person is classified as an employee, independent contractor, or consultant, and is in, or had, a position with direct ongoing contact with students in a supervisory role or position of authority. "Employee" does not include a person who was employed by the institution in temporary student employment while the person was an enrolled student unless the student, at the time of employment, is or was a graduate student in a position in which the graduate student has or had a supervisory role or authority over other students. "Employee" does not include a person employed as medical staff or with an affiliated organization, entity, or extension of a postsecondary educational institution, unless the employee has or had a supervisory role or position of authority over students. A person who would be considered an "employee" under this subsection, remains an "employee" even if the person enrolls in classes under an institution's employee tuition waiver program or similar program that allows faculty, staff, or other employees to take classes.

(4) "Employer" includes postsecondary educational institutions in this or any other state.

(5) "Investigation" means a procedure initiated in response to a formal complaint, as defined in 34 C.F.R. Sec. 106.30, provided that

the procedure fully complies with the provisions of 34 C.F.R. Sec. 106.45.

(6) "Postsecondary educational institution" means an institution of higher education as defined in RCW 28B.10.016, a degree-granting institution as defined in RCW 28B.85.010, a private vocational school as defined in RCW 28C.10.020, or school as defined in RCW 18.16.020, that participates in the state student financial aid program.

(7) "Sexual misconduct" includes, but is not limited to, unwelcome sexual contact, unwelcome sexual advances, requests for sexual favors, other unwelcome verbal, nonverbal, electronic, or physical conduct of a sexual nature, sexual harassment, and any misconduct of a sexual nature that is in violation of the postsecondary educational institution's policies or has been determined to constitute sex discrimination pursuant to state or federal law.

(8) "Student" means a person enrolled at a postsecondary educational institution and for whom educational records are maintained.

(9) "Substantiated findings" means a written determination regarding responsibility as described in 34 C.F.R. Sec. 106.45(b) (7) prepared at the conclusion of an investigation, as amended by any appeals process. [2023 c 79 § 2; 2020 c 335 § 2.]

Intent—2023 c 79: See note following RCW 28B.112.080.

Findings—Intent—2020 c 335: "The legislature recognizes that Washington's postsecondary educational institutions are some of the best schools in the nation, offering high quality education and life experiences for thousands of students. Washington institutions strive to create learning environments where all students can reach their full potential. The legislature also recognizes that in instances in which an employee of an institution engages in sexual misconduct against a student, institutions do not consistently disclose that information. The legislature declares that disclosure of such information is a matter of public safety for all Washington students as well as for students on campuses across the nation. The legislature finds that sexual misconduct, which may include harassment or assault, has serious public health and safety effects on students in Washington. These effects may deprive students of their opportunities to obtain an education which would otherwise improve their lives and health, and that of their own children. Other effects include an employee in a position of power and authority over students causing irreversible harm to the physical and mental health of students from sexual misconduct. The legislature finds that students of any postsecondary educational institution in Washington should be protected from their institution hiring an employee who has been found to have committed sexual misconduct at another postsecondary educational institution. The legislature, therefore, also finds that postsecondary educational institutions in Washington need to know if a prospective employee has been found to have committed sexual misconduct while employed at another institution. Therefore, the legislature intends to require postsecondary educational institutions to inquire about and conduct reference checks on any applicant the institution intends to extend an offer of employment to, regarding whether the applicant has ever been found to have committed, or is being investigated for, sexual misconduct. The legislature finds that

nondisclosure agreements which prevent an institution from disclosing that an employee has committed sexual misconduct create a high potential for students in jeopardy of being victimized. Therefore, the legislature finds such nondisclosure agreements between an employee and institution, pursuant to which the institution agrees not to disclose findings of sexual misconduct supported by a preponderance of evidence or not to complete an investigation, are against public policy and should not be entered into by any Washington postsecondary educational institution and should not be enforced by Washington courts. Therefore, the legislature intends to provide clarity and direction to postsecondary educational institutions for disclosing substantiated findings of sexual misconduct committed by its employees against students." [2020 c 335 § 1.]

RCW 28B.112.050 Sexual misconduct—Report. (Expires June 1, 2024.) (1) By December 1, 2023, the public four-year institutions of higher education shall report the following to the governor and the appropriate committees of the legislature:

(a) Summaries of any campus climate assessments conducted since June 11, 2020, that are designed to gauge the prevalence of sexual misconduct on college and university campuses;

(b) Efforts to reach out to and capture information from students who have traditionally been marginalized or experience disproportionate impacts of systemic oppression based on, for example, race, ethnicity, nationality, sexual orientation, gender identity, gender expression, and disability;

(c) How information obtained in the assessments was used to design and improve policies, programs, and resources for the campus community; and

(d) The impacts of chapter 335, Laws of 2020 on institutional hiring practices, campus safety, and other relevant considerations.

(2) This section expires June 1, 2024. [2020 c 335 § 3.]

Findings—Intent—2020 c 335: See note following RCW 28B.112.040.

RCW 28B.112.060 Sexual misconduct—Settlement agreements. (1) Except as provided in subsection (2) of this section, any provision of a settlement agreement executed subsequent to June 11, 2020, between a postsecondary educational institution and an employee is against public policy and void and unenforceable if the provision prohibits the employee, the institution, a survivor, or any other person from disclosing that the employee has either:

(a) Been the subject of substantiated findings of sexual misconduct; or

(b) Is the subject of an investigation into sexual misconduct that is not yet complete.

(2) A settlement agreement may contain provisions requiring nondisclosure of personal identifying information of persons filing complaints or making allegations and of any witnesses asked to participate in an investigation of the allegations.

(3) Personal identifying information in a settlement agreement that reveals the identity of persons filing complaints or making allegations and of any witnesses asked to participate in an

investigation of the allegations is exempt from public disclosure pursuant to RCW 42.56.375. [2020 c 335 § 4.]

Findings—Intent—2020 c 335: See note following RCW 28B.112.040.

RCW 28B.112.070 Sexual misconduct—Investigations, records. (1) Unless the victim of the alleged sexual misconduct requests otherwise, when a postsecondary educational institution investigates a complaint or allegation of sexual misconduct committed by an employee against a student of the institution, the institution shall complete the investigation whether or not the employee voluntarily or involuntarily leaves employment with the institution. When the institution completes its investigation, the institution shall make written findings of whether the complaint or allegation is substantiated.

(2) (a) A postsecondary educational institution shall include in the employee's personnel file or employment records any substantiated findings of sexual misconduct committed by the employee while the employee was employed with the postsecondary educational institution.

(b) When disclosing records included in an employee's personnel file or employment records under this section, the institution shall keep personal identifying information of the complainant and any witnesses confidential, unless disclosure of identifying information is agreed to by the complainant or witnesses or required under law.

(c) Personal identifying information in an employee's file or employment records that reveals the identity of the complainant and any witnesses is exempt from public disclosure pursuant to RCW 42.56.375.

(3) For purposes of this section, postsecondary educational institutions shall use a preponderance of the evidence standard when determining whether findings are substantiated.

(4) For purposes of this section and RCW 28B.112.080, "substantiated" means the employee has committed sexual misconduct. [2020 c 335 § 5.]

Findings—Intent—2020 c 335: See note following RCW 28B.112.040.

RCW 28B.112.080 Sexual misconduct—Offers of employment—Requirements. (1) Beginning October 1, 2020, prior to an official offer of employment to an applicant, a postsecondary educational institution shall request the applicant to sign a statement:

(a) Declaring whether the applicant is the subject of any substantiated findings of sexual misconduct in any current or former employment or by any association with which the applicant has, or has had, a professional relationship, is currently being investigated for, or has left a position during an investigation into, a violation of any sexual misconduct policy at the applicant's current and past employers, and, if so, an explanation of the situation;

(b) Authorizing the applicant's current and past employers or relevant associations to disclose to the hiring institution any sexual misconduct committed by the applicant and making available to the hiring institution copies of all documents in the previous employer's personnel, investigative, or other files relating to sexual misconduct, including sexual harassment, by the applicant; and

(c) Releasing the applicant's current and past employers or relevant associations, and employees acting on behalf of that employer or association, from any liability for providing information described in (b) of this subsection.

(2) Beginning July 1, 2021, prior to an official offer of employment to an applicant, a postsecondary educational institution shall:

(a) Request in writing, electronic or otherwise, that the applicant's current and past postsecondary educational institution employers, or relevant associations when a finding has been declared by the applicant, provide the information, if any, described in subsection (1)(b) of this section. The request must include a copy of the declaration and statement signed by the applicant under subsection (1) of this section; and

(b) Ask the applicant if the applicant is the subject of any substantiated findings of sexual misconduct, or is currently being investigated for, or has left a position during an investigation into, a violation of any sexual misconduct policy at the applicant's current and past employers, and, if so, an explanation of the situation.

(3)(a) Pursuant to (c) of this subsection, after receiving a request under subsection (2)(a) of this section, a postsecondary educational institution shall provide the information requested and make available to the requesting institution copies of documents in the applicant's personnel record relating to substantiated findings of sexual misconduct.

(b) Pursuant to (c) of this subsection, if a postsecondary educational institution has information about substantiated findings of a current or former employee's sexual misconduct in the employee's personnel file or employment records, unless otherwise prohibited by law, the institution shall disclose that information to any employer conducting reference or background checks on the current or former employee for the purposes of potential employment, even if the employer conducting the reference or background check does not specifically ask for such information.

(c) If, by June 11, 2020, a postsecondary educational institution does not have existing procedures for disclosing information requested under this subsection, the institution must establish procedures to begin implementing the disclosure requirements of this subsection no later than July 1, 2021.

(4)(a) The postsecondary educational institution or an employee acting on behalf of the institution, who discloses information under this section is presumed to be acting in good faith and is immune from civil and criminal liability for the disclosure.

(b) A postsecondary educational institution is not liable for any cause of action arising from nondisclosure of information by an employee without access to official personnel records who is asked to respond to a reference check.

(c) The duty to disclose information under this section is the responsibility of the postsecondary educational institution to respond to a formal request for personnel records relating to a current or prior employee when requested by another employer.

(5)(a) When disclosing information under this section, the postsecondary educational institution shall keep personal identifying information of the complainant and any witnesses confidential, unless the complainant or witnesses agree to disclosure of their identifying information.

(b) Personal identifying information that reveals the identity of the complainant and any witnesses is exempt from public disclosure pursuant to RCW 42.56.375.

(6) Beginning October 1, 2020, a postsecondary educational institution may not hire an applicant who does not sign the statement described in subsection (1) of this section.

(7) Information received under this section may be used by a postsecondary educational institution only for the purpose of evaluating an applicant's qualifications for employment in the position for which the person has applied.

(8) This section does not restrict expungement from a personnel file or employment records of information about alleged sexual misconduct that has not been substantiated.

(9) Public institutions of higher education shall share best practices with all faculty and staff who are likely to receive reference check requests about how to inform and advise requesters to contact the institution's appropriate official office for personnel records.

(10) The student achievement council shall convene a work group and report to the legislature by November 30, 2024, regarding the ability of institutions of higher education to consider if applicants or current employees have committed sexual misconduct at meetings or conferences of academic and professional associations; and, how institutions of higher education and Washington agencies may encourage adoption of policies and procedures regarding sexual misconduct committed at such association events. [2023 c 79 § 3; 2020 c 335 § 6.]

Intent—2023 c 79: "In 2020 the legislature established RCW 28B.112.080 requiring colleges and universities statewide, both public and private, to ask job applicants to declare whether they had been the subject of substantiated findings of sexual misconduct by a current or previous employer, whether they are the subject of current investigations of sexual misconduct by their employer, or whether they resigned employment during an ongoing investigation. It requires postsecondary educational institutions to request documentation of substantiated findings or investigations prior to extending an offer of employment,

In academic settings, sexual misconduct can take place outside the context of employment. For example, an employee of one university might harass a student or employee of a different university in a professional setting such as a conference or meeting. A growing number of scholarly associations sponsoring conferences or other events have adopted codes of conduct and investigative procedures to address the problem of sexual misconduct in these contexts. The legislature intends to expand the declaration required of applicants for employment to include substantiated findings by scholarly associations. Further, the legislature intends to expand the requirement to request documentation to include substantiated findings generated by scholarly associations." [2023 c 79 § 1.]

Findings—Intent—2020 c 335: See note following RCW 28B.112.040.