**Problem**

The Washington State Administrative Procedures Act (APA), Chapter 34.05 RCW, is not designed to permit higher education to promptly address alleged violations of their respective codes of student conduct. It also obstructs higher education institutions from fulfilling their educational mission to teach students accountability and responsibility while simultaneously complying with rapidly-evolving federal and state civil rights laws.

**Proposal**

Create legislation that provides the framework for a higher education model for student conduct proceedings. One that provides for a fair and equitable process for students and that reflects the unique needs of students and institutions of higher education. This is accomplished by utilizing the December 2016 recommendations of Campus Sexual Violence Prevention Task Force Student Conduct Process subcommittee to:

* Amend Chapter 34.05 RCW Administrative Procedures Act to exclude student conduct proceedings from Part IV, Adjudicative Proceedings; and
* Add a new section to Chapter 28B RCW Higher Education Act to create a higher education model for student conduct proceedings at public institutions of higher education, designed to address the unique nature of student conduct proceedings, the educational goal of those proceedings, and the unique relationship of these institutions with their students and their communities.

If this proposal is implemented, student conduct proceedings would be excluded from the Adjudicative Proceedings section of the APA. However, public institutions of higher education institutions in Washington State would remain subject to other parts of the APA. This includes the rulemaking provision in Part III of the APA, meaning that they must utilize the state rulemaking procedures to formulate and adopt regulations relating to student conduct for the Washington Administrative Code. Additionally, outcomes from student conduct proceedings would still be subject to judicial review under Part V of the APA, if a student requests it.

Removing student conduct proceedings from the APA (or certain provisions of the APA) is not unique to the state of Washington. Other states vary in regard to whether student conduct proceedings explicitly do not fall within their state administrative procedures act or whether they fall within some or all provisions.

**Comparisons between a Higher Education Model and the APA**

The current framework of the APA needs to be amended to better serve all students. Elongated and complex proceedings, which lead to negative consequences such as academic disruption and high costs, illustrate the problematic structure of student conduct proceedings and why the APA is not an effective model for public higher education institutions. Students become subject to APA proceedings when someone alleges that they have engaged in conduct in violation of public institutions’ codes of student conduct, which ranges in situations from cheating on an exam to causing injury to another. Public institutions are expected to complete a formal adjudicative proceeding under the APA in certain conduct proceedings, including when a student is subject to a suspension of 10 days or more or dismissal. Given the structure of formal adjudicative proceedings, student conduct adjudication processes have become complex and lengthy. As a result, institutions are struggling to design processes that effectively protect the rights of all students involved.

The design of the APA is based on certain premises regarding agency decision-making that conflict with a higher education model and higher education’s responsibilities to students in conduct proceedings:

**Formal Hearing vs. Investigative Process**

The agency is motivated to protect its decisions, so layers of review and a formal hearing are necessary to protect citizens; whereas a higher education model supports student success, which includes holding students appropriately accountable for their choices that are inconsistent with expected standards of conduct and providing a structure where students can learn from those choices.

Under the APA, a formal hearing is, essentially, conducted as a tribunal that is convened before a decision maker who evaluates evidence and testimony presented by the parties during the tribunal, then renders a decision. In a student conduct proceeding, the formal hearing model can create an intimidating setting, particularly when the hearing is the student’s sole opportunity to provide testimony and respond to questions by the decision maker. Because of this, the outcomes are potentially influenced more by whether the student had the skillset and expertise in preparing their case and in speaking before the tribunal as opposed to students who are inexperienced, nervous, or not sufficiently articulate in effectively sharing information and presenting their case.

In contrast, a higher education model, which is more reflective of an investigation, is more effective for students. It permits an iterative process where students meet with a neutral and objective conduct professional (possibly multiple times). Typically, in these meetings, students have the opportunity to tell their story, learn about and respond to information gathered from other sources, and have an opportunity to provide questions for the conduct professional to ask others. In this model, the conduct professional is responsible for collecting and objectively evaluating all the necessary information and, once it is collected through this iterative process, rendering a decision. If this higher education model is adopted, it should permit institutions to implement it in a way that is most effective with their culture and needs (such as whether to utilize individuals or panels for decision-making or completing internal reviews).

**Agency Head vs. Conduct Professionals**

Under the APA, the agency head is considered the most knowledgeable of the agency’s standards and, therefore, holds the final decision making authority; whereas the conduct professionals who are appointed by institutions of higher education to complete conduct proceedings have extensive specialized education, training, and expertise. Typically, conduct professionals hold advanced degrees and actively engage in relevant training and professional development, such as in student development, effective investigation techniques, and relevant laws and regulations relating to student conduct proceedings.

**Agency Timelines vs. Higher Education Timelines**

The APA permits generous timelines for agency decision-making and layers of review, which result in a lengthy timeframe to complete the proceeding; whereas a lengthy conduct proceeding that spans multiple quarters or academic years emotionally and academically impacts students because they must re-engage in the process at each stage while trying to continue their educational pursuits despite the lack of closure. Under the formal adjudicative proceedings provisions of the APA, a conduct proceeding could take five months and, at its least efficient rate, a year. There are various reasons for this, including that the APA requires layers of internal review and provides for unwarranted administrative complexities.

**Benefits for Students**

Creating a higher education model by implementing the recommendations of the Task Force will have the following benefits for our students:

**Protects the Rights of Students and Others in Conduct Proceedings**

The rights of students who are alleged to have engaged in misconduct are protected, particularly when they contest responsibility and may be subject to serious sanctions, such as suspension or dismissal. In this model, the educational purpose of student conduct proceedings and the tenets of constitutional due process will align to include notice of the allegations, an opportunity to be heard, and an opportunity to respond to information presented by others.

Consistent with federal law, the new model will also provide victims of sexual violence with standing and rights to participate equitably in student conduct proceedings as they choose, including the right to seek judicial review of a final outcome of a conduct proceeding.

**Reduces Timelines and Layers of Review**

Timelines will be more consistent with the academic calendar of public higher education institutions and the needs of students. Although the subcommittee supported providing for an internal review process, it recommended avoiding a multi-layered review process that creates uncertainty and redundancies for students and, also, extends timelines.

**Clarifies Role of Attorneys**

Students are optionally permitted to have an attorney advise them in the conduct proceeding if they choose, which avoids a model where the attorney acts in lieu of the student. This undermines the educational goal of the proceeding and places students who cannot afford legal representation at a disadvantage, particularly in a civil rights matter. The model should also avoid importing courtroom techniques and procedures that “over-judicialize” the proceedings and run counter to the educational goal of the process.

**Specifies a Standard of Proof**

Through legislation, the applicable standard of proof in student conduct proceedings will also be specified to avoid potentially inconsistent decisions on judicial review. Well-settled APA case law has established that a preponderance of the evidence standard is applicable to similar agency actions and is appropriately applied in the educational setting.