

Clearinghouse Rule 20-060

STATE OF WISCONSIN
BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM

<p>IN THE MATTER OF RULEMAKING PROCEEDINGS BEFORE THE BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM</p>	<p>ORDER OF THE BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM AMENDING AND ADOPTING PERMANENT RULES</p>
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The statements of scope for this rule, SS [084-20](#), was approved by the Governor on June 11, 2020, published in Register [774A4](#) on June 19, 2020, and approved by Board of Regents of the University of Wisconsin System on July 20, 2020.

ORDER

An order of the Board of Regents of the University of Wisconsin System to amend UWS 7.01, 7.02(1)(d), 7.03, and 7.05(1)(a) and (1)(b) and (3) and (5)(c) and (6) and (8); and repeal and recreate 7.015(2), relating to addressing allegations of sexual misconduct against faculty of the University of Wisconsin System.

Analysis prepared by the Board of Regents and the University of Wisconsin System.

ANALYSIS

Statutes interpreted: s. [36.09 \(1\)\(a\)](#), Stats.

Statutory authority: s. [36.09 \(1\)\(a\)](#), Stats.

Explanation of agency authority:

s. [36.09 \(1\)\(a\)](#), Stats.: “The primary responsibility for governance of the system shall be vested in the board which shall enact policies and promulgate rules for governing the system.”

Related statute or rule: N/A

Plain language analysis:

Title IX Sexual Misconduct and Non-Title IX Sexual Misconduct

The new federal regulations narrow the scope of conduct to which Title IX protections apply. However, the federal regulations specify that schools are not prohibited from

addressing a broader scope of conduct under institutional codes of conduct. Under the new rule, allegations of sexual misconduct that do not fall within the scope of Title IX will continue to be addressed using student and employee conduct codes.

Definitions

The current rule defines sexual misconduct, such as sexual harassment and sexual assault, under the corresponding statutory definitions in the Wisconsin Statutes. The new federal regulations require adoption of definitions for sexual assault, dating violence, domestic violence, and stalking from the federal Clery and Violence Against Women Acts. Additionally, the new federal regulations define sexual harassment for Title IX purposes to include quid pro quo sexual harassment and hostile environment sexual harassment consisting of unwelcome conduct that a reasonable person would determine is severe, pervasive, and objectionably offensive.

The current rule allows University of Wisconsin System institutions to address allegations of sexual misconduct when the conduct occurs on university property, at university-sponsored events, or the conduct affects a substantial university interest. The new federal regulations narrow that definition to the following elements: (1) the school has actual knowledge of sexual harassment; (2) that occurred within the school's education program or activity; (3) against a person in the United States. The regulations go on to define "education program or activity" to include situations over which the school exercised substantial control as well as buildings owned or controlled by student organizations officially recognized by a university, such as many fraternity and sorority houses. The new rule specifies the procedures University of Wisconsin System institutions must use in addressing sexual misconduct that meets the new definition and scope of the new federal regulations, as well as the procedures to be used in addressing sexual misconduct that falls outside of the scope of the regulations.

The current rule contains no definition for "sexual exploitation." The new rule adds a definition of "sexual exploitation" to the list of sexual misconduct that University of Wisconsin System institutions address.

Title IX Sexual Misconduct Procedures

Notice

The current rule mentions several instances in which employees involved in an investigation of sexual misconduct must receive notice. The new federal regulations require notice to parties of formal Title IX complaints in more instances and in greater detail than the current rule provides. The new rule will update notice requirements to comply with the new federal regulations.

Mandatory Dismissal and Discretionary Dismissal

The current rule states that University of Wisconsin System institutions may or must dismiss complaints of sexual misconduct under certain circumstances. The new federal regulations define certain instances in which universities must or may dismiss complaints of sexual misconduct. For example, universities must dismiss allegations that do not meet the definitions of sexual misconduct under Title IX and may dismiss allegations if a complainant wishes to withdraw the complaint. A university may still address these dismissed complaints under other code of conduct provisions. The new regulations also grant the parties the right to appeal the university's dismissal of allegations. The new rule incorporates changes to comply with these requirements under the federal regulations.

Investigation

Under the current rule, University of Wisconsin System institutions investigate allegations of sexual misconduct through formal investigations, the investigator provides the opportunity for both parties to meet with the investigator to discuss the allegations, the investigator provides the chancellor with a written report that may include recommended sanctions against the respondent, the chancellor, if appropriate, files dismissal charges against the faculty member and the faculty member is entitled to a hearing before a faculty committee. Under the federal regulations, universities must conduct investigation of formal Title IX complaints via an assigned investigator and must allow the parties an opportunity to present witnesses and evidence as well as review the evidence provided. Investigators must not make official findings of responsibility but may make recommended findings. The new rules incorporate changes to comply with these requirements under the federal regulations.

Hearing

The current rule provides a faculty member facing charges of dismissal related to allegations of sexual misconduct with the right to a hearing before a faculty committee. The federal regulations require universities conduct live hearings with cross-examination conducted directly, orally, and in real time for all Title IX cases. At a live hearing, if a party does not have an advisor, the institution must provide, without fee or charge, an advisor of the school's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party. The parties' advisors must perform cross-examination. A hearing officer or hearing committee must preside over the hearing and determine the relevance of each question and explain any decision to exclude a question. The new rule incorporates changes to comply with these requirements under the federal regulations.

Summary of, and comparison with, existing or proposed federal regulation:

Title IX of the Education Amendments of 1972 provides that "[N]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." The U.S. Department of Education has issued guidance through Dear Colleague Letters or other informal guidance over the years which

established the federal agency's expectations for institutions of higher education that receive federal funding. The new federal regulations are the first to interpret this law with respect to addressing allegations of sexual misconduct and override any guidance provided in the previous Dear Colleague Letters or other informal guidance. Please see the Plain Language Analysis for further information related to the specific provisions under the new federal regulations.

Comparison with rules in adjacent states:

The new federal regulations require all universities that receive federal funding to comply with the regulations or risk losing federal funding. All universities that receive federal funding are required to revise policies and procedures to comply with the federal regulations.

Summary of factual data and analytical methodologies:

Consulting with UW System and UW System institutions to determine how many Title IX cases are anticipated for this year, as well as the cost of advisors and hearing officers.

Analysis and supporting documents used to determine effect on small business:

UW System posted its Economic Impact Analysis and Fiscal Estimate on its website to make it available for comment. UW System also informed the UW System institutions that it had posted these documents. The documents remained posted on the website for 14 days from October 12, 2020 through October 26, 2020. No comments on the economic impact or fiscal estimate were received.

Fiscal Estimate:

See attached Economic Impact Analysis and Fiscal Estimate.

Effect on small business:

The new rule will not have an economic impact on small businesses. The new rules apply specifically to University of Wisconsin System institutions only.

Agency contact person:

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Public Comments:

The Board of Regents will hold a public hearing on November 30, 2020 preceded by a public comment period related to the proposed rule. During the comment periods, comments could be submitted to the agency in any of the following ways: (1) on the web at <https://www.wisconsin.edu/regents/public-comment-form/> or adminrules.wisconsin.gov; (2) by email to compliance@uwsa.edu; (3) at the public hearing; or (4) by mail to Jess Lathrop, Executive Director, Office of the Board of Regents, 1860 Van Hise Hall, 1220 Linden Drive, Madison, Wisconsin.

TEXT OF RULE

Section 1. UWS 7.01 is amended to read:

UWS 7.01 Declaration of policy. University faculty members are responsible for advancing the university's missions of teaching, research, and public service. The fulfillment of these missions requires public trust in the integrity of the institution and in all members of the university community. The university's effectiveness, credibility, and ability to maintain public trust are undermined by criminal activity that poses a substantial risk to the safety of others, that seriously impairs the university's ability to fulfill its missions, or that seriously impairs the faculty member's fitness or ability to fulfill ~~his or her~~ the faculty member's duties. Situations involving such serious criminal misconduct by faculty members shall be addressed and resolved promptly to ensure that public trust is maintained, and that the university is able to advance its missions. The Board of Regents therefore adopts the procedures in this chapter for identifying and responding to those instances in which a faculty member has engaged in serious criminal misconduct.

Section 2. UWS 7.015(2) is repealed and recreated to read:

(2) "Affected party" means any student, employee, visitor, or an individual participating in a university program or activity, who is a victim of a faculty member's serious criminal misconduct.

Section 2. UWS 7.02(1)(d) is amended to read:

(d) The faculty member's fitness or ability to fulfill the duties of ~~his or her~~ the faculty member's position is seriously impaired.

Section 3. UWS 7.03(1) is amended to read:

(1) Any faculty member having tenure may be dismissed only by the board and only for just cause and only after due notice and hearing. Any faculty member having a probationary appointment may be dismissed prior to the end of ~~his or her~~ the term of appointment only by the board and only for just cause and only after due notice and hearing.

Section 4. UWS 7.05(1)(a), (1)(b), (3), (5)(c), (6), and (7) is amended to read:

(1)

(a) Within 3 working days of receipt of the report or information, inform the faculty member of its receipt and, after consulting with appropriate institutional governance representatives, appoint an investigator to investigate the report or information and to advise the chancellor as to whether to proceed under this section or ch. UWS 4. ~~In cases involving sexual assault, dating violence, domestic violence, or stalking, the affected party complainant shall be notified by the chancellor of the receipt report or information at the same time as the faculty member. If the university knows the identity of an affected party, the university shall make a reasonable attempt to notify the affected party of the report or information at the same time as the faculty member.~~

(b) Upon appointing an investigator and notifying the faculty member, afford the faculty member 3 working days in which to request that the investigator be disqualified on grounds of lack of impartiality or other cause. In the event that the chancellor determines that a request for disqualification should be granted, the chancellor shall, within 2 working days of the determination, appoint a different investigator. The faculty member shall have the opportunity to request that any second or subsequent investigators be disqualified on grounds of lack of impartiality or other cause. ~~In cases involving sexual assault, dating violence, domestic violence, or stalking, the complainant shall have the disqualification rights that are afforded to the faculty member in this subsection.~~

(3) Within 3 working days of receipt of the investigator's report, the chancellor shall consult with appropriate institutional governance representatives and decide whether to seek dismissal of the faculty member pursuant to this chapter, to seek dismissal of the faculty member pursuant to ch. UWS 4, to seek an alternative disciplinary sanction, or to discontinue the proceedings. ~~The charges shall be served on the faculty member in the manner specified in UWS 4.02(3).~~

(a) If the chancellor decides to seek dismissal of the faculty member pursuant to this chapter, the chancellor shall file charges within 2 working days of reaching the decision.

(b) If the chancellor decides to seek dismissal of the faculty member pursuant to ch. UWS 4, the chancellor shall file charges and proceed in accordance with the provisions of that chapter and implementing institutional policies. If, during the course of such proceedings under ch. UWS 4, the chancellor receives a report under s. UWS 7.04 or other credible information that the faculty member has pleaded guilty or no contest to or has been convicted of a felony of a type listed in s. UWS 7.02 (1) (a), and one or more of the conditions listed in s. UWS 7.02 (1) (b) through (e) are present, the chancellor may, at that point, elect to follow the procedures for dismissal pursuant to this chapter.

(c) If the chancellor decides to seek an alternative disciplinary sanction, the procedures under chs. UWS 4 and 6, and implementing institutional policies, shall be followed.

(5)

(c) Disciplinary action other than dismissal may be taken by the chancellor, whose decision shall be final, unless the board at its option grants a review on the record at the request of the faculty member. The faculty member shall receive a copy of the chancellor's final decision. The faculty member shall receive a copy of the chancellor's final decision. ~~In cases involving sexual assault, dating violence, domestic violence, or stalking, the complainant~~ If the university knows the identity of an affected party, the university shall make a reasonable attempt to shall receive provide the affected party a copy of the chancellor's final decision at the same time as the faculty member and shall have the same right to a review of the record as the faculty member.

(6) Upon receipt of the chancellor's recommendation, the full board shall review the record before the institutional hearing committee and shall offer an opportunity for filing exceptions to the recommendation, as well as for oral argument. ~~In cases involving sexual assault, dating violence, domestic violence, or stalking, the complainant shall have all the rights provided to the faculty member in this paragraph.~~ The full board shall issue its decision on the matter within 15 working days of receipt of the chancellor's recommendation. If the university knows the identity of an affected party, the board shall make a reasonable attempt to notify the affected party of its decision at the same time as the faculty member.

(8) The administration or its representatives shall have the burden of proof to show that just cause exists for dismissal under this chapter. The administration shall demonstrate by clear and convincing evidence that the faculty member engaged in serious criminal misconduct, as defined in s. UWS 7.02., ~~except in cases involving sexual assault, dating violence, domestic violence, or stalking, in which the evidentiary standard shall be by a preponderance of the evidence.~~

Section 5. Effective Date. This rule shall take effect upon approval of the Governor and the Legislature.

(END OF TEXT OF RULE)
