

STATEMENT OF SCOPE

The Board of Regents of the University of Wisconsin System

Rule No.: Chapter UWS 17

Relating to: Nonacademic Student Misconduct

Rule Type: Both Permanent and Emergency

1. Finding/nature of emergency (Emergency Rule only):

On May 6, 2020, the Federal Government released new, comprehensive Title IX regulations addressing sexual harassment and sexual violence with respect to university students. The regulations go into effect on August 14, 2020. An emergency rule is required for the University of Wisconsin System to be compliant with these new federal regulations by August 14, 2020, to ensure the safety and welfare of the University's students and to avoid jeopardizing access to federal funding, which is critical to supporting the University's students.

2. Detailed description of the objective of the proposed rule:

The Board of Regents of the University of Wisconsin System seeks to modify Chapter UWS 17, regarding Student Nonacademic Misconduct, to comply with new Title IX regulations the U.S. Department of Education has published relating to the manner in which higher education institutions address and respond to sexual harassment and sexual violence misconduct allegations involving students. Specifically, the Board seeks to amend Chapter UWS 17 to modify and add certain sections to ensure the process under which such allegations would be addressed by University of Wisconsin System institutions is compliant with the new federal Title IX regulations and to ensure institutions are able to continue to properly respond to allegations of sexual misconduct in light of these required changes. This will involve issuing an emergency rule followed by the promulgation of a permanent rule.

3. Description of the existing policies relevant to the rule, new policies proposed to be included in the rule, and an analysis of policy alternatives:

The current version of Chapter UWS 17 provides a student disciplinary process for handling student misconduct allegations, including allegations of sexual misconduct. This process has been fair and effective since it was first published in 1996. In 2009 and 2015, the Chapter was updated and amended through the administrative rule-making process. The Chapter authorizes each institution of the University of Wisconsin System to adopt consistent policies and procedures, and UW institutions have adopted such policies and procedures.

The modifications contemplated by this rulemaking would incorporate into law changes necessary to conform Chapter UWS 17 to the new federal Title IX regulations. Institutions would adopt policies consistent with the revised Chapter.

The new federal regulations are contained in 34 CFR Part 106. 34 CFR Part 106.30 requires use of certain definitions, including Title IX-specific definitions for sexual harassment, stalking, sexual assault, and other Title IX-covered violations. However, the federal regulations also permit UW institutions to continue to address sexual violence and harassment that fall outside of Title IX's scope and related definitions, allowing institutions to continue to address a broader scope of conduct under their own policies. Thus, the University of Wisconsin System will consider modifying or adding definitions of sexual misconduct to Chapter UWS 17.09 to ensure institutions are able to appropriately address all sexual misconduct allegations, including those outside the scope of Title IX.

Requirements in the federal regulations (34 CFR Part 106.45) relate to the grievance process for formal complaints, including investigations, informal resolution options, live hearings, and appeals. Among other things, these requirements include:

- providing, upon request, an advisor to complainants and respondents to conduct cross-examination
- providing specific notice of allegations to respondents
- application of a relevance standard by the hearing body

These revisions will likely result in revisions to Chapter UWS 17.12. The basis for appeal in 34 CFR 106.45(b)(8) likely will require revisions to Chapter UWS 17.13.

An alternative to modifying Chapter 17 would be to continue to operate with both the current Chapter UWS 17 and the new federal Title IX regulations. However, this would seem to be in conflict with the language in the federal rules (see 34 CFR 106.45(h)) preempting conflicting state laws and regulations. It could lead to confusion and exposure to federal enforcement action and third-party litigation, as well as complicated and confusing procedures for students.

More specifically, failure to comply with Title IX may result in cutoff of federal funds to a higher education institution. Additionally, a higher education institution that fails to have Title IX policies and procedures that are compliant with the regulations and available to complainants and respondents likely will be considered to have been deliberately indifferent to its Title IX obligations and therefore exposed to liability through private-party lawsuits filed by respondent and complainant students.

4. Detailed explanation of statutory authority for the rule (including the statutory citation and language):

Wisconsin Statutes, Section 36.35 states, "The board shall promulgate rules under ch.227 governing student conduct and the procedures for the administration of violations." These rules will govern student conduct related to sexual harassment and sexual violence and set forth the procedures for addressing violations.

5. Estimate of amount of time that state employees will spend developing the rule and of other resources necessary to develop the rule:

100 hours.

6. List with description of all entities that may be affected by the proposed rule:

All University of Wisconsin System institutions and the students thereof.

7. Summary and preliminary comparison with any existing or proposed federal regulation that is intended to address the activities to be regulated by the proposed rule:

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.” Currently, there are no federal regulations interpreting this law with respect to addressing allegations of student sexual misconduct. However, the U.S. Department of Education has issued new federal regulations effective August 14, 2020, with respect to how institutions of higher education that receive federal funding must address allegations of sexual misconduct. The U.S. Department of Education through its Office for Civil Rights enforces these regulations.

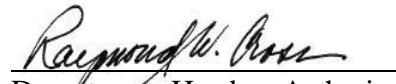
The new federal Title IX regulations found at 34 CFR Part 106 mandate substantive and procedural requirements for a university’s investigation and adjudication of formal complaints of sexual harassment or sexual violence against students. The new regulations are intended to effectuate Title IX’s prohibition against sex discrimination. As stated in the regulations, universities are obligated to respond promptly and supportively to persons alleged to have been victimized by sexual harassment or sexual violence, to resolve allegations of sexual misconduct promptly and accurately through a predictable and fair grievance process that provides due process protections to alleged victims and alleged perpetrators of sexual misconduct and effectively implements remedies for victims. Chapter UWS 17 currently complies with many of the new federal requirements. However, certain amendments need to be made to the Chapter to bring it into full compliance, including but not limited to changes to investigative procedures, hearing procedures, and appeals.

8. Anticipated economic impact of implementing the rule (note if the rule is likely to have a significant economic impact on small businesses):

There may be an economic impact on UW institutions, given the University is required by the regulations to provide additional resources to support students, advisors, hearing officers, and additional trainings. The University will continue to offer mental health services and other support and resources to all victims of sexual harassment and assault, regardless of whether they choose to file a formal Title IX complaint.

The University will continue to evaluate any potential economic impacts as it begins drafting rule language and will include more detailed analysis in its EIA. There is no anticipated significant economic impact on small businesses.

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Department Head or Authorized Signature

June 18, 2020
Date Submitted