

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

<b>IN THE MATTER OF RULEMAKING PROCEEDINGS BEFORE THE BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM</b>	<b>ORDER OF THE BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM AMENDING AND ADOPTING EMERGENCY RULES</b>
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The statements of scope for this rule, SS [081-20](#), 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. This emergency rule was approved by the Governor on August 7, 2020.

ORDER

An order of the Board of Regents of the University of Wisconsin System to repeal 17.09(2) and (3) and (17) and (18), and 17.13(3) and (5) and (6); renumber UWS 17.09 (4) and (5) and (6) and (7) and (8) and (9) and (10) and (11) and (12) and (13) and (14) and (15) and (16), 17.13(3) and (4), 17.16, 17.17, 17.18, and 17.19 to 17.09(2) and (3) and (4) and (5) and (6) and (7) and (8) and (9) and (10) and (11) and (12) and (13) and (14), 17.13(2) and (3), 17.22, 17.23, 17.24, and 17.25 respectively; amend UWS 17.02(1) and (2m) and (10) and (11) and (12) and (13m) and (15), 17.05, 17.06(2), 17.07(2), 17.08(1) and (2), 17.09, 17.10(1), 17.11, 17.12(1) and (3) and (4), 17.13(1), 17.14, 17.15, 17.22, 17.23(2) and (3) and (5), and 17.24; and create UWS 17.02(2g) and (7m) and (8m) and (9m) and (12m), 17.09(15), 17.16, 17.17, 17.18, 17.19, 17.20, 17.21, and 17.25(2)(d), relating to addressing allegations of sexual misconduct against faculty, academic staff, and students of the University of Wisconsin System.

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

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FINDING OF EMERGENCY

The Board of Regents of the University of Wisconsin System finds that an emergency exists and that this rule is necessary for the immediate preservation of the public peace, health, safety, or welfare. A statement of facts constituting the emergency is:

The U.S. Department of Education published new regulations on May 5, 2020 which take effect August 14, 2020. These regulations update the definitions of sexual misconduct and add additional process requirements for when universities respond to allegations of sexual misconduct against students and employees under Title IX of the Education Amendments of 1972. The University of Wisconsin Systems current policies for addressing allegations under Title IX reside within the Wisconsin Administrative Code and are structured on the basis of federal guidance issued prior of the new regulations,

and several of these sections of the Code do not comply with the new regulations. Noncompliance with these regulations could result in loss of federal funding for the University of Wisconsin System, as well as potential litigation, which would threaten the welfare of the University of Wisconsin System.

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### ANALYSIS

**Statutes interpreted:** ss. [36.09 \(1\)\(a\)](#) and [36.11 \(1\)\(a\)](#), Stats.

**Statutory authority:** ss. [36.09 \(1\)\(a\)](#) and [36.11 \(1\)\(a\)](#), 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.”

s. [36.11 \(1\)\(a\)](#), Stats.: “The board may promulgate rules under ch. 227 to protect the lives, health and safety of persons on property under its jurisdiction and to protect such property and to prevent obstruction of the functions of the system.”

**Related statute or rule:** N/A

**Plain language analysis:**

*Title IX Sexual Misconduct and Non-Title IX Sexual Misconduct*

The current rule treats all allegations of sexual misconduct the same. 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 and “unwelcome conduct that a reasonable person would determine is so 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 should 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 students and 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 of a complainant wishes to withdraw the complaint. A university may still address these dismissed complaints under other code of conduct provisions or state law. 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 recommends sanctions against the respondent, and a governing body within the university confirms or amends these sanctions, which it may do without a hearing under certain circumstances. 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 allows University of Wisconsin System institutions to hold hearings related to allegations of sexual misconduct, but the rule does not always require them. 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, 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 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 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. 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 the federal funding. All universities that receive federal funding are required to revise policies and procedures to comply with federal regulations.

### **Summary of factual data and analytical methodologies:**

N/A

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

N/A

**Fiscal Estimate:**

The new rule requires University of Wisconsin System institutions to hold live hearings in response to formal Title IX complaints and to provide parties with advisors, free of charge or fee, for the purposes of cross-examination during these hearings. We anticipate potential costs associated with the requirement to hold hearings and provide advisors.

**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 held a public hearing on July 16, 2020 preceded by a public comment period related to the scope statement. The Board of Regents also held a public comment period on the drafts of the proposed rule, which concluded on July 31, 2020. 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](https://adminrules.wisconsin.gov); (2) by email to [board@uwsa.edu](mailto:board@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.

The Board of Regents intends to hold a public hearing on the concurrent emergency and permanent rules at a future date and time to be determined.

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TEXT OF RULE

**Section 1. UWS 17.02(1), (2m), (10), 11, 12, (13m), and (15) are amended to read:**

(1) "Chief administrative officer" means the chancellor of an institution ~~or dean of a campus~~ or their designees.

**(2m)** “Complainant” means any individual who is ~~reported to have been subjected to sexual harassment, sexual assault, dating violence, domestic violence, or stalking~~ alleged to be the subject of sexual misconduct, as defined in s. ~~UWS 17.09~~ UWS 17.16.

**(10)** “Institution” means any university, or an organizational equivalent designated by the board, ~~and the University of Wisconsin colleges.~~

**(11)** “Investigating officer” means an individual, or ~~his or her~~ their designee, appointed by the chief administrative officer of each institution, to conduct investigations of nonacademic misconduct under this chapter.

**(12)** “Nonacademic misconduct hearing committee” or “committee” means the committee appointed pursuant to s. UWS 17.07 to conduct hearings under s. UWS 17.12 or UWS 17.18.

**(13m)** “Respondent,” for conduct defined in s. UWS 17.09 means any student who is ~~accused of violating any provision of this chapter, and~~ was registered for study in an institution for the academic period, or between academic periods for continuing students, when the misconduct occurred and has been reported to have violated s. UWS 17.09 or UWS 17.16.

**(15)** “Student affairs officer” means the dean of students or student affairs officer or other personnel designated by the chief administrative officer to coordinate disciplinary hearings and carry out duties described in this chapter.

**Section 2. UWS 17.02(2g) and (7m) and (8m) and (9m) and (12m) are created to read:**

**(2g)** “Consent” means words or overt actions by a person who is competent to give informed consent, indicating a freely given agreement to engage in sexual activity or other conduct defined in s. UWS 17.16. A person is unable to give consent if the person is incapacitated because of drugs, alcohol, physical or intellectual disability, or unconsciousness.

**(7m)** “Education program or activity” includes, for purposes of a Title IX Complaint only, locations, events, or circumstances over which the university exercised substantial control over both the respondent and the context in which the relevant misconduct occurs, and also includes any building owned or controlled by a student organization that is officially recognized by the university.

**(8m)** “Formal complaint” is, for the purposes of a Title IX complaint only, a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment, sexual assault, dating violence, domestic violence, or stalking against an academic staff member and requesting that the institution investigate the allegations. At the time of filing of the formal complaint, the complainant must be participating in or attempting to participate in an educational program or activity. A formal complaint may be filed in

person, by mail, or electronic mail, or any other method designated by the university. A formal complaint shall include a physical or digital signature of the complainant or the Title IX Coordinator.

(9m) “Incapacitation” means the state of being unable to physically or mentally make informed rational judgments and effectively communicate, and may include unconsciousness, sleep, or blackouts, and may result from the use of alcohol or other drugs. Where alcohol or other drugs are involved, evaluation of incapacitation requires an assessment of how the consumption of alcohol or drugs affects a person’s decision-making ability; awareness of consequences; ability to make informed, rational judgments; capacity to appreciate the nature and quality of the act; or level of consciousness. The assessment is based on objectively and reasonably apparent indications of incapacitation when viewed from the perspective of a sober, reasonable person.

(12m) “Party” refers to a respondent or complainant involved in a disciplinary procedure under 17.12 or 17.18.

**Section 3. UWS 17.05 is amended to read:**

**UWS 17.05 Designation of investigating officer.** The chief administrative officer of each institution shall designate an investigating officer or officers for allegations of student nonacademic misconduct. The investigating officer shall investigate student nonacademic misconduct and initiate procedures for nonacademic misconduct under ss. [UWS 17.11](#) and [UWS 17.17](#). For allegations involving ~~sexual assault, domestic violence, dating violence, stalking, or sexual harassment~~ sexual misconduct, as defined in s. UWS 17.16, the ~~chief administrative officer shall involve the Title IX Coordinator,~~ or designee shall serve as the investigating officer, ~~in accordance with applicable institutional policies.~~

**Section 4. UWS 17.06(2) is amended to read:**

(2) A hearing examiner shall be selected by the chief administrative officer ~~from the faculty and staff of the institution,~~ pursuant to the policies adopted under sub. (1).

**Section 5. UWS 17.07(2) is amended to read:**

(2) A student nonacademic misconduct hearing committee shall consist of at least three persons, including at least one student, except that no such committee shall be constituted with a majority of members who are students. The presiding officer, who may be the hearing examiner designated pursuant to s. UWS 17.06, shall be appointed by the chief administrative officer. The presiding officer and at least one other member shall constitute a quorum at any hearing held pursuant to due notice.

**Section 6. UWS 17.08(1) and (2) is amended to read:**

**UWS 17.08 Nonacademic misconduct occurring on or outside of university lands.**

(1) MISCONDUCT ON UNIVERSITY LANDS. Except as provided in s. [UWS 17.08 \(2\)](#), the provisions contained in this chapter shall apply to the student conduct described in ss. [UWS 17.09](#) and [UWS 17.16](#) that occurs on university lands or at university-sponsored events.

(2) MISCONDUCT OUTSIDE OF UNIVERSITY LANDS. The provisions contained in this chapter may apply to the student conduct described in ss. [UWS 17.09](#) and [UWS 17.16](#) that occurs outside of university lands only when, in the judgment of the investigating officer, the conduct adversely affects a substantial university interest. In determining whether the conduct adversely affects a substantial university interest, the investigating officer shall consider whether the conduct meets one or more of the following conditions:

- (a) The conduct constitutes or would constitute a serious criminal offense, regardless of the existence of any criminal proceedings.
- (b) The conduct indicates that the student presented or may present a danger or threat to the health or safety of ~~himself, herself~~ themselves or others.
- (c) The conduct demonstrates a pattern of behavior that seriously impairs the university's ability to fulfill its teaching, research, or public service missions.

**Section 7. UWS 17.09(intro.) amended to read:**

**UWS 17.09 Conduct subject to disciplinary action (intro.).** In accordance with s. [UWS 17.08](#), the university may discipline a student for engaging in, attempting to engage in, or assisting others to engage in any of the following types of nonacademic misconduct. Conduct defined in s. UWS 17.09 shall use the disciplinary procedure, hearing, appeal, and settlement processes detailed in ss. UWS 17.11 to 17.15. However, at the university's discretion, conduct defined in s. UWS 17.09, when arising out of the same facts and circumstances as sexual misconduct defined in s. 17.16, may be consolidated with such charges and addressed with the disciplinary procedure, hearing, appeal, and settlement processes detailed in ss. UWS 17.17 to 17.21.

**Section 8. UWS 17.09(2) and (3) and (17) and (18) are repealed.**

**Section 9. UWS 17.09 (4) to (16) are renumbered UWS (2) to (14).**

**Section 10. UWS 17.09(15) is created to read:**

(15) RETALIATION. Intimidation, threats, coercion, or discrimination against any individual for the purpose of interfering with any right or privilege secured in ss. UWS 17.17 to 17.21, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under ss. UWS 17.17 to 17.21.



**Section 11. UWS 17.10(1) is amended to read:**

(1) The disciplinary sanctions that may be imposed for nonacademic misconduct, in accordance with the procedures of ss. UWS 17.11 to 17.13, and ss. 17.17 to 17.19, are any of the following:

**Section 12. UWS 17.11 is amended to read:**

**UWS 17.11 Disciplinary procedure.**

(1) PROCESS. The investigating officer may proceed in accordance with this section to impose, subject to hearing and appeal rights, one or more of the disciplinary sanctions listed in s. UWS 17.10 (1) for conduct defined in s. UWS 17.09.

(2) CONFERENCE WITH RESPONDENT. When the investigating officer concludes that proceedings under this section are warranted, the investigating officer shall promptly contact the respondent in person, by telephone, or by electronic mail to offer to discuss the matter, review the investigating officer's basis for believing that the respondent engaged in nonacademic misconduct, and to afford the respondent an opportunity to respond. If the respondent fails to respond to the investigating officer, the investigating officer may proceed to decide on the basis of the available information. ~~A complainant shall have all the rights provided to the respondent in this subsection.~~

(3) DETERMINATION BY THE INVESTIGATING OFFICER THAT NO DISCIPLINARY SANCTION IS WARRANTED. If, as a result of a discussion under sub. (2) or review of available information, the investigating officer determines that nonacademic misconduct did not in fact occur, or that no disciplinary sanction is warranted under the circumstances, the matter will be considered resolved without the necessity for further action. The investigating officer shall ~~simultaneously notify the respondent, and the complainant of this outcome and offer to discuss it separately with either one. If the investigating officer determines that nonacademic misconduct did not occur or that no disciplinary sanction is warranted, the complainant may appeal this decision in accordance with s. UWS 17.13.~~

(4) PROCESS FOLLOWING DETERMINATION BY THE INVESTIGATING OFFICER THAT NONACADEMIC MISCONDUCT OCCURRED.

- (a) If, as a result of a discussion under sub. (2) or review of available information, the investigating officer determines that nonacademic misconduct did occur and that one or more of the disciplinary sanctions listed under s. UWS 17.10 (1) should be recommended, the investigating officer shall prepare a written report which shall contain all of the following:

1. A description of the alleged misconduct.
2. A description of all information available to the university regarding the alleged misconduct. ~~Such information shall be available to the complainant and the respondent, except as may be precluded by applicable state or federal law.~~
3. Specification of the sanction sought.
4. Notice of the respondent's right to a hearing.
5. A copy of this chapter and of the institutional procedures adopted to implement this section.

(b) The written report shall be delivered ~~simultaneously to the respondent and complainant, excluding any information that may be precluded by applicable state or federal law.~~

(c) A respondent who receives a written report under this section has the right to a hearing under s. UWS 17.12 to contest the determination that nonacademic misconduct occurred, the choice of disciplinary sanctions, or both.

1. Where the disciplinary sanction sought is one of those listed in s. UWS 17.10 (1) (a) to (g), and if the respondent desires a hearing, the respondent shall file a written request with the student affairs officer within 10 days of the date the written report is delivered to the respondent. If the respondent does not request a hearing within this period, the determination of nonacademic misconduct shall be regarded as final, and the disciplinary sanction sought shall be imposed.

2. Where the disciplinary sanction sought is one of those listed in s. UWS 17.10 (1) (h) to (j), the investigating officer shall forward a copy of the written report under par. (b) to the student affairs officer. The student affairs officer shall, upon receipt of the written report, proceed under s. UWS 17.12 to schedule a hearing on the matter. A hearing shall be conducted unless the respondent waives, in writing, the right to such a hearing.

### **Section 13. UWS 17.12(1), (3), and (4) are amended to read:**

**(1)** A respondent who requests a hearing, or for whom a hearing is scheduled under s. UWS 17.11 (4) (c) 2. for conduct defined in s. UWS 17.09, shall have the right to decide whether the matter will be heard by a hearing examiner or a hearing committee. ~~In cases of sexual assault, dating violence, domestic violence, stalking, or sexual harassment the university shall have the right to decide whether the matter will be heard by a hearing examiner or a hearing committee.~~

**(3)** No less than 5 days in advance of the hearing, the hearing examiner or committee shall obtain from the investigating officer, in writing, a full explanation of the facts upon

which the determination of misconduct was based, and shall provide the respondent ~~and the complainant~~ with access to or copies of the investigating officer's explanation, together with any other materials provided to the hearing examiner or committee by the investigating officer, including any additional available information of the type described in s. UWS 17.11 (4) (a) 2.

(4) The hearing shall be conducted in accordance with all of the following guidance and requirements:

(a) The hearing process shall further the educational purposes and reflect the university context of nonacademic misconduct proceedings. The process need not conform to state or federal rules of criminal or civil procedure, except as expressly provided in ch. UWS 17.

(b) The respondent shall have the right to question adverse witnesses, the right to present information and witnesses, the right to be heard on ~~his or her~~ their own behalf, and the right to be accompanied by an advisor of the respondent's choice. The advisor may be a lawyer. In cases where the recommended disciplinary sanction is identified in s. UWS 17.10 (1) (a) to (h), the advisor may counsel the respondent but may not directly question adverse witnesses, present information or witnesses, or speak on behalf of the respondent except at the discretion of the hearing examiner or committee. In cases where the recommended disciplinary sanction is identified in s. [UWS 17.10 \(1\) \(i\)](#) or [\(j\)](#), or where the respondent has been charged with a crime in connection with the same conduct for which the disciplinary sanction is sought, the advisor may question adverse witnesses, present information and witnesses, and speak on behalf of the respondent. In accordance with the educational purposes of the hearing, the respondent is expected to respond on ~~his or her~~ their own behalf to questions asked of ~~him or her~~ them during the hearing. ~~The complainant shall have all the rights provided to the respondent in this subsection.~~

(c) The hearing examiner or committee:

1. Shall admit information that has reasonable value in proving the facts, but may exclude immaterial, irrelevant, or unduly repetitious testimony.
2. Shall observe recognized legal privileges.
3. May take reasonable steps to maintain order, and to adopt procedures for the questioning of a witness appropriate to the circumstances of that witness's testimony, provided, however, whatever procedure is adopted, the ~~complainant and respondent are~~ is allowed to effectively question the witness.

(d) The hearing examiner or committee shall make a record of the hearing. The record shall include a verbatim record of the testimony, which may be a sound recording, and a file of the exhibits offered at the hearing. The respondent ~~and the~~

~~complainant~~ may access the record, except as may be precluded by applicable state or federal law.

(e) The hearing examiner or committee shall prepare written findings of fact and a written statement of its decision based upon the record of the hearing.

(f) A hearing examiner's or committee's finding of nonacademic misconduct shall be based on one of the following:

1. Clear and convincing evidence, when the sanction to be imposed is one of those listed in s. UWS 17.10 (1) (h) to (j).

2. A preponderance of the evidence, when the sanction to be imposed is one of those listed in s. UWS 17.10 (1) (a) to (g).

(g) The hearing examiner or committee may impose one or more of the disciplinary sanctions listed in s. UWS 17.10 (1) (a) to (g) that differs from the recommendation of the investigating officer. Sanctions under s. UWS 17.10 (1) (h) to (j) may not be imposed unless previously recommended by the investigating officer.

(h) The hearing shall be conducted by the hearing examiner or committee, and the university's case against the respondent shall be presented by the investigating officer or their designee.

(i) The decision of the hearing examiner or committee shall be prepared within 14 days of the hearing, and delivered to the respondent, excluding information that may be precluded by state or federal law. The decision shall become final within 14 days of the date on the written decision unless an appeal is taken under s. UWS 17.13.

(j) If the respondent fails to appear at a scheduled hearing and to proceed, the hearing examiner or committee may issue a decision based upon the information provided.

(k) Disciplinary hearings are subject to the Wisconsin open meetings law and may be closed if the respondent requests a closed hearing or if the hearing examiner or committee determines that it is necessary to hold a closed hearing, as permitted under the Wisconsin open meetings law. Deliberations of the committee shall be held in closed session, in accordance with s. 19.85, Stats. As such, proper notice and other applicable rules shall be followed.

#### **Section 14. UWS 17.13(1) is amended to read:**

(1) ~~For conduct defined in s. UWS 17.09, w~~Where the sanction prescribed by the hearing examiner or committee is one of those listed in s. UWS 17.10 (1) (h) to (j), the respondent may appeal in writing to the chief administrative officer within 14 days of the date of the written decision to review the decision of the hearing examiner or committee, based upon the record. ~~In cases involving sexual assault, dating violence, domestic violence, stalking, or sexual harassment, the complainant shall be notified of the appeal.~~

**Section 15. UWS 17.13(3), (5), and (6) are repealed.**

**Section 16. UWS 17.14 is amended to read:**

**UWS 17.14 Discretionary appeal to the Board of Regents.** For conduct defined in s. UWS 17.09, institutional decisions under ss. UWS 17.11 to 17.13 shall be final, except that the board of regents may, at its discretion, grant a review upon the record, upon written request submitted by respondent within 14 days of the final institutional decision. ~~In cases involving sexual assault, dating violence, domestic violence, stalking, or sexual harassment, the non appealing party shall receive notice of the appeal.~~

**Section 17. UWS 17.15 is amended to read:**

**UWS 17.15 Settlement.** For conduct defined in s. UWS 17.09, ~~t~~The procedures set forth in this chapter allow the university and a respondent to enter into a settlement agreement regarding the alleged misconduct, after proper notice has been given. Any such agreement and its terms shall be in writing and signed by the respondent and the investigating officer or student affairs officer. The case is concluded when a copy of the signed agreement is delivered to the respondent. ~~The investigating officer shall confer with the complainant regarding the proposed settlement and provide notice of the outcome.~~

**Section 18. UWS 17.16 is renumbered to UWS 17.22.**

**Section 19. UWS 17.16 is created to read:**

**UWS 17.16 Sexual Misconduct subject to disciplinary action.** In accordance with s. UWS 17.08, the university may discipline a student for engaging in, attempting to engage in, or assisting others to engage in any of the following types of nonacademic misconduct. Conduct, as defined in s. UWS 17.16 (“sexual misconduct”), shall use the disciplinary procedure, hearing, appeal, and settlement processes detailed in ss. UWS 17.17 to 17.21.

(1) **SEXUAL HARASSMENT.** When on the basis of sex, unwelcome conduct of a sexual nature directed towards a student, an employee, or a person participating in a program or activity of the university that when using any of the following legal “reasonable person” standards:

1. The conduct is so severe, pervasive, and objectively offensive that it effectively denies the person equal access to the institution’s education program or activity.
2. The conduct is so severe, pervasive, or objectively offensive that it has the purpose or effect of unreasonably interfering with an individual’s academic or work performance or participation in an institution’s education program or activity, or creates an intimidating, hostile, or offensive academic, working, or program or activity related environment.

- (2) **SEXUAL ASSAULT.** An offense that meets the definition of rape, fondling, incest, or statutory rape as defined below. 20 U.S.C. 1092(f)(6)(A)(v), 34 CFR 668.46(a).
- (a) Rape: The penetration, no matter how slight, of the vagina or anus, with any body part or object, or oral penetration by a sex organ of another person, without the consent of the complainant.
  - (b) Fondling: The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the complainant, including instances where the complainant is incapable of giving consent because of age or because of temporary or permanent mental incapacity.
  - (c) Incest: Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law (See s. 944.06, Stats.)
  - (d) Statutory Rape: Sexual intercourse with a person who is under the statutory age of consent (See s. 948.02, Stats.)
- (3) **DATING VIOLENCE.** Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the complainant; and where the existence of such a relationship shall be determined based on a consideration of the following factors: the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.
- (4) **DOMESTIC VIOLENCE.** Felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the complainant, by a person with whom the complainant shares a child in common, by a persons who is cohabitating with or has cohabitated with the complainant as a spouse or intimate partner, by a person similarly situated to a spouse of the complainant under the domestic or family violence laws of Wisconsin, or by any other person against an adult or youth individual who is protected from that person's acts under the domestic or family violence laws of Wisconsin. (See ss. 813.12(1)(am) and 968.075)
- (5) **STALKING.** Engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for their safety or the safety of others; or suffer substantial emotional distress.
- (6) **SEXUAL EXPLOITATION.** Attempting, taking, or threatening to take nonconsensual sexual advantage of another person. Examples include, but are not limited to:
- (a) Engaging in any of the following conduct without the knowledge and consent of all participants:
    - 1. Observing, recording, or photographing private body parts or sexual activity of one or more persons.
    - 2. Allowing another person to observe, record, or photograph sexual activity or private body parts of one or more persons.
    - 3. Otherwise distributing recordings, photographs, or other images of the same of one or more persons.

- (b) Masturbating, touching one’s genitals, or exposing one’s genitals in another person’s presence without the consent of that person, or inducing another person to do the same.
- (c) Dishonesty or deception regarding the use of contraceptives or condoms during the course of sexual contact or sexual intercourse.
- (d) Inducing incapacitation through deception for the purpose of making another person vulnerable to non-consensual sexual activity.
- (e) Coercing another person to engage in sexual activity for money or anything of value.
- (f) Threatening distribution of any of the following, to coerce someone into sexual activity or providing money or anything of value:
  - 1. Photos, videos, or recordings depicting private body parts or sexual activity of one or more persons.
  - 2. Other information of a sexual nature, including sexual history or sexual orientation.

**Section 20. UWS 17.17 is renumbered to UWS 17.23.**

**Section 21. UWS 17.17 is created to read:**

**UWS 17.17 Sexual misconduct disciplinary procedure.**

**(1) PROCESS.**

(a) The investigating officer may proceed in accordance with this section to impose, subject to hearing and appeal rights, one or more of the disciplinary sanctions listed in s. UWS 17.10 (1), for sexual misconduct defined in s. UWS 17.16, and conduct described in s. UWS 17.09 when consolidated with sexual misconduct charges pursuant to this section and consistent with s. UWS 17.08

(b) As required by 34 CFR Part 106, a sexual misconduct disciplinary procedure shall also be considered a “Title IX Complaint” when all of the following requirements are met:

1. A “formal complaint,” as defined in 17.02(8m), is either filed by a complainant or signed by the Title IX Coordinator.
2. The alleged conduct meets the definitions of sexual harassment as defined in s. UWS 17.16(1)(a) or sexual assault, dating violence, domestic violence, or stalking as defined in s. UWS 17.16 (2) to (5).
3. The alleged conduct occurred within a university “education program or activity,” as defined in s. UWS 17.02(7m).
4. The alleged conduct occurred against the complainant while in the United States.
5. The complainant is participating in or attempting to participate in the university’s education program or activity at the time they file the complaint.

(c) The university shall dismiss a Title IX Complaint that does not meet all the requirements of s. sub. (1) (a) 1. to 5.

- (d) The university may dismiss a Title IX Complaint if any of the following conditions are met at any time during the disciplinary procedure or hearing:
1. The complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the Title IX complaint or any allegations therein.
  2. The respondent is no longer enrolled by the university.
  3. Specific circumstances prevent the university from gathering evidence sufficient to reach a determination as to the Title IX Complaint or allegations therein.

(e) Upon dismissal of a Title IX Complaint, the university shall promptly send written notice of the dismissal and reason therefore simultaneously to the complainant and respondent.

(f) Dismissal of a Title IX Complaint does not preclude other university action under ch. UWS 17.

(g) The university may consolidate disciplinary procedures as to allegations of sexual misconduct, as defined in s. UWS 17.16, against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual misconduct arise out of the same facts or circumstances.

**(2) NOTICE OF INVESTIGATION.** When the investigating officer concludes that proceedings under this section are warranted, the investigating officer shall promptly distribute a written Notice of Investigation in person, by telephone or by electronic mail, to the complainant and respondent. The Notice of Investigation shall include all of the following:

(a) Details known at the time of issuing notice, including the following:

1. The identities of the complainant and respondent involved in the incident, if known.
2. The conduct allegedly constituting sexual misconduct.
3. The date and location of alleged incident, if known.

(b) Notice to the complainant and respondent that they may have an advisor of their choice, who may be an attorney.

(c) Notice to the complainant and respondent that they may inspect and review evidence collected during the investigation.

(d) Notice of s. UWS 17.09(9), false statement or refusal to comply regarding a university matter.

(e) Notice that the respondent is presumed not responsible for the alleged sexual misconduct until a determination regarding responsibility is made at the conclusion of the disciplinary procedure.

(f) Notice if the sexual misconduct disciplinary procedure also involves a Title IX Complaint.

(g) Information about the nonacademic misconduct process available in ch. UWS 17 and about any available informal resolution process.

(h) If, during the course of an investigation, the university decides to investigate allegations that are not included in the Notice of Investigation, the university shall send an amended Notice of Investigation with additional allegations.



**(3) INVESTIGATION.** During the investigation, the investigating officer shall meet all of the following requirements:

- (a) Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence.
- (b) Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.
- (c) Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding; however, the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties.
- (d) Provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate.
- (e) Not access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the university obtains that party's voluntary, written consent to do so for a grievance process under this section.

**(4) REVIEW OF EVIDENCE.** Prior to completion of the final investigative report, as defined in sub. (5), the university shall provide the complainant and respondent and their advisors, if any, the evidence gathered during the university's investigation that is directly related to the allegations of sexual misconduct in an electronic format or hard copy.

- (a) The evidence subject to review includes information upon which the university does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation.
- (b) The complainant and respondent shall be afforded at least 10 days to submit a written response to the evidence, which the investigator shall consider prior to completion of the final investigative report.

**(5) FINAL INVESTIGATIVE REPORT.** The investigator shall create an investigative report that fairly summarizes relevant evidence.

- (a) The final investigative report shall be delivered simultaneously to the respondent and complainant and their advisors, if any, for their review and response at least 10 days prior to a hearing.
- (b) The final investigative report may contain recommended determinations as to whether sexual misconduct occurred, and specification of any sanction recommended.

(c) After receipt of the final investigative report, the complainant and respondent have the right to a hearing under s. UWS 17.18 for a formal determination as to whether sexual misconduct occurred, potential disciplinary sanctions, or both.

(d) Upon distribution of the final investigative report to the complainant and respondent, the university shall proceed under s. UWS 17.18 to schedule a hearing on the matter. A hearing shall be conducted unless the complainant and respondent waive, in writing, the right to such a hearing or otherwise voluntarily choose to proceed with a settlement agreement (or informal resolution) under s. UWS 17.21.

**Section 22. UWS 17.18 is renumbered to UWS 17.24.**

**Section 23. UWS 17.18 is created to read:**

**UWS 17.18 Hearing (Sexual Misconduct).**

(1) The university shall have the right to decide whether the matter will be heard by a hearing examiner or a hearing committee.

(2) The university shall take the necessary steps to convene the hearing and shall schedule it within 15 days of the distribution of the final investigative report. The hearing shall be conducted within 45 days of the distribution of the final investigative report, unless a different time period is mutually agreed upon by the complainant, respondent and university or is ordered or permitted by the hearing examiner or committee.

(3) No less than 10 days in advance of the hearing, the hearing examiner or committee shall obtain from the investigating officer, in writing, the final investigative report and any additional available information of the type described in s. UWS 17.17(4).

(4) The hearing shall be conducted in accordance with all of the following guidance and requirements:

(a) The hearing process shall further the educational purposes and reflect the university context of nonacademic misconduct proceedings. The process need not conform to state or federal rules of criminal or civil procedure, except as expressly provided in ch. UWS 17.

(b) Both the complainant and respondent shall have the right to question adverse witnesses, the right to present information and witnesses, the right to be heard on their own behalf, and the right to be accompanied by an advisor of their choice. The advisor may be a lawyer. In accordance with the educational purposes of the hearing, the complainant and respondent are expected to respond on their own behalf to questions asked of them during the hearing.

(c) The hearing examiner or committee:

1. Shall admit information that has reasonable value in proving the facts, but may exclude immaterial, irrelevant, or unduly repetitious testimony.
2. May not permit questions and evidence about the complainant's sexual predisposition or prior sexual behavior unless:

- i. Such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
- ii. If the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

3. Shall observe recognized legal privileges including those described in s. UWS 17.17(3)(e).

4. May take reasonable steps to maintain order, and to adopt procedures for the questioning of a witness appropriate to the circumstances of that witness's testimony, provided, however, whatever procedure is adopted, the advisors for the complainant and respondent are allowed to effectively question the party or witness.

(5) Cross examination shall be conducted directly, orally, and in real time by the party's advisor and never by a party personally.

(a) If a party does not have an advisor at the hearing to conduct cross-examination, the university shall provide someone, without fee or charge, who may or may not be an attorney, to conduct cross-examination.

(b) Before a party or witness answers a cross-examination or other question, the hearing examiner or committee shall first determine whether a question is relevant or not and explain any decision to exclude those questions as not relevant.

(c) The hearing examiner or committee may not draw an inference regarding responsibility based solely on a party's or a witness's absence from the hearing or refusal to answer cross-examination questions

(d) At hearings involving a Title IX Complaint, if a party or a witness does not submit to cross-examination at the hearing, then the hearing examiner or committee may not rely on any statement of that party or witness made prior to or during the hearing in reaching a determination regarding responsibility.

(6) If a party fails to appear at a scheduled hearing and to proceed, the hearing examiner or committee may issue a decision based upon the information provided except as described in sub (5)(d).

(7) The hearing examiner or committee shall make a record of the hearing. The record shall include a verbatim record of the testimony, which may be a sound recording, and a file of all evidence presented at the hearing. The respondent and the complainant may access the record, except as may be precluded by applicable state or federal law.

(8) The hearing examiner or committee shall prepare written findings of fact and a written statement of its decision based upon the record of the hearing, using the preponderance of the evidence standard. The written report shall include all of the following:

(a) Identification of the allegations potentially constituting sexual misconduct

(b) A description of the procedural steps taken from the receipt of the initial complaint through the determination, including any notifications to the

complainant and respondent, interviews with the complainant and respondent and witnesses, site visits, methods used to gather other evidence, and hearings held.

(c) Findings of fact supporting the determination.

(d) Conclusions regarding the application of this chapter to the facts.

(e) A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility under this chapter and any Title IX Complaint, any disciplinary sanctions the university imposes on the respondent, and whether remedies designed to restore or preserve equal access to the university's education program or activity will be provided by the university to the complainant.

(f) The hearing examiner or committee may impose one or more of the disciplinary sanctions listed in s. UWS 17.10 (1) (a) to (j).

(g) Procedures and permissible bases for the complainant and respondent to appeal.

(9) The decision of the hearing examiner or committee shall be prepared within 14 days of the hearing, and delivered simultaneously to the respondent and the complainant, excluding information that may be precluded by state or federal law. The decision regarding responsibility becomes final either on the date that the university provides the complainant and respondent with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.

(10) Disciplinary hearings are subject to the Wisconsin open meetings law and may be closed if the respondent or complainant requests a closed hearing or if the hearing examiner or committee determines that it is necessary to hold a closed hearing, as permitted under the Wisconsin open meetings law. Deliberations of the committee shall be held in closed session, in accordance with s. 19.85, Stats. As such, proper notice and other applicable rules shall be followed.

**Section 24. UWS 17.19 is renumbered to UWS 17.25.**

**Section 25. UWS 17.19 is created to read:**

**UWS 17.19 Appeal to the chancellor (Sexual Misconduct).**

(1) The respondent or complainant may appeal in writing to the chief administrative officer within 14 days of the date of the written decision for a review, based on the record, of the following:

(a) A dismissal of a Title IX Complaint.

(b) The written decision of the hearing examiner or committee.

(2) The chief administrative officer has 30 days from receipt of an appeal to respond in writing simultaneously to both the complainant and respondent and shall sustain the decision unless the chief administrative officer finds any of the following:

(a) The information in the record does not support the findings or decision.

(b) A procedural irregularity affected the outcome of the matter.

- (c) The decision was based on factors proscribed by state or federal law.
- (d) New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made that could affect the outcome of the matter.
- (e) The Title IX Coordinator, investigator, hearing examiner, or a member of the hearing committee had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

(3) If the chief administrative officer makes a finding under sub. (2), the chief administrative officer may return the matter for consideration, or may invoke an appropriate remedy of their own. The chief administrative officer's written decision describing the result of the appeal and the rationale for the result shall be communicated simultaneously to the respondent and complainant.

(4) When an appeal is filed, the chief administrative officer shall notify the other party in writing and give both the complainant and respondent a reasonable, equal opportunity to submit a written statement supporting or challenging the outcome.

**Section 26. UWS 17.20 is created to read:**

**UWS 17.20 Settlement (Sexual Misconduct).** The procedures set forth in this chapter allow the university, the respondent, and the complainant to voluntarily enter into a settlement agreement (or informal resolution) regarding the alleged misconduct, after written notice has been given to the complainant and respondent and prior to any final determination regarding responsibility. Any such agreement and its terms shall be in writing and signed by both the complainant and respondent and the Title IX Coordinator or designee. If there is no identified complainant or the complainant declined to participate in the disciplinary procedure, the agreement and its terms shall be in writing and signed by only the respondent and Title IX Coordinator or designee. The case is concluded when a copy of the signed agreement is delivered to the complainant and respondent. At any time prior to agreeing to a resolution, either party has the right to withdraw from the settlement process and resume the process under ss. UWS 17.17 to 17.21.

**Section 27. UWS 17.21 is created to read:**

**UWS 17.21 Discretionary appeal to the Board of Regents (Sexual Misconduct).** University decisions under ss. UWS 17.17 to 17.19 shall be final, except that the board of regents may, at its discretion, grant a review upon the record, upon written request submitted by any party within 14 days of the final university decision. If the board of regents grants a review upon the record, it shall do all of the following:

(1) Notify the other party in writing and give both the complainant and respondent a reasonable, equal opportunity to submit a written statement supporting or challenging the outcome.

(2) Issue a written decision describing the result of the appeal and the rationale for the result and provide the written decision simultaneously to both the complainant and respondent.

**Section 28. UWS 17.22 is amended to read:**

**UWS 17.22 Effect of discipline within the institution.** A respondent who, at the time of commencement, is subject to a continuing disciplinary sanction under s. UWS 17.10 (1) or unresolved disciplinary charges as a result of a report under s. UWS 17.11 or UWS 17.17, shall not be awarded a degree during the pendency of the sanction or disciplinary proceeding.

**Section 29. UWS 17.23(2), (3), and (5) are amended to read:**

(2) An individual who is suspended from one institution in the University of Wisconsin System may not enroll in another institution in the system until the suspension has expired by its own terms, except as provided in s. UWS 17.24 17.18.

(3) An individual who is expelled from one institution in the University of Wisconsin System may not enroll in another institution in the system, except as provided in s. UWS 17.18-17.24.

(5) Upon completion of a suspension period, an individual who is academically eligible may re-enroll in the institution which suspended ~~him or her~~them, provided all conditions from previous disciplinary sanctions have been met.

**Section 30. UWS 17.24 are amended to read:**

**UWS 17.24 Petition for restoration of rights after suspension or expulsion.** A respondent who has been suspended may petition to have their student status, rights, and privileges restored before the suspension has expired by its own terms under s. UWS ~~17.17(2)~~ 17.23 (2). A respondent who has been expelled may petition for the right to apply for readmission. The petition shall be in writing and directed to the chief administrative officer of the institution from which the respondent was suspended or expelled or of a different University of Wisconsin institution to which the respondent seeks admission. The chief administrative officer shall make the readmission decision. In cases of sexual misconduct, the readmission decision should be made in consultation with the Title IX Coordinator and the complainant should be notified of any change to the disciplinary outcome, and shall be provided opportunity to respond regarding any review of responsibility findings.

**Section 31. UWS 17.25(2)(d) is created to read:**

(d) In cases of sexual misconduct as defined in s. UWS 17.16, the chief administrative officer makes reasonable attempts to consult with the complainant and offer protective measures.

**Section 32. Effective Date. This emergency rule shall take effect upon publication in the official state newspaper.**

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(END OF TEXT OF RULE)  
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