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## WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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### CLEARINGHOUSE RULE 20-062

#### Comments

**[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Legislative Reference Bureau and the Legislative Council Staff, dated December 2014.]**

#### 2. Form, Style and Placement in Administrative Code

a. In the rule analysis, the agency should identify the adjacent states’ code provisions that address this subject matter, and identify or link to documentation of the states’ updates.

b. In the treatment clause for SECTION 1 of the proposed rule, the title “— General” should be removed, and the designation “(title)” should be inserted after “Subchapter I”. The designation “(title)” should also be inserted in the listing of affected provisions in the caption for the proposed rule. In the text of the created material, the subchapter designation and text of the title should be centered. This same comment applies to the other treatment clauses and provisions that create subchapters. [s. 1.05 (2) (a) and (3) (a), Manual.]

c. The amended and created definitions in SECTIONS 2 and 3 of the proposed rule should be reorganized to be treated in both alphabetical and numerical order. First, the new definition of “consent” should have a numerical designation that alphabetically follows “complainant” in sub. (2m), which would be sub. “(2r)” rather than sub “(2g)”. Then, the affected provisions should be revised to be treated in numeric order. This means that alternating SECTIONS will need to be used to amend s. UWS 17.02 (1) and (2m), create subs. (2r), (7m), and (8m), amend sub. (9), create sub. (9m), amend subs. (10), (11), and (12), create sub. (12m), and amend subs. (13m) and (15). [ss. 1.01 (7) (a), 1.03 (5) (b) (Example), and 1.04 (1), Manual.]

d. In s. UWS 17.05, the final underscored and stricken material should be revised to first show the stricken material, followed by the underscored material, and the final period should not

be underscored. For example, “~~in accordance with applicable institutional policies shall serve as the investigating officer.~~”.

e. In s. UWS 17.08 (1), the amendment of “s.” to “ss.” should be shown with a strike-through of the singular form of the abbreviation and then underscoring of the plural form of the abbreviation. [s. 1.06 (2), Manual.]

f. In s. UWS 17.08 (2), the abbreviation “s.” from the current text of the rule should be inserted and shown with a strike-through, and the inserted “ss.” should be shown with underscoring, in order to show the change from the current text of the rule.

g. The renumbering of s. UWS 17.09 (4) to (16) in SECTION 11 of the proposed rule should be removed. Renumbering to replace a repealed provision can lead to confusion and errors in cross-references and is not recommended. SECTION 12 of the proposed rule should be revised to refer to the next available sequential subsection number, after skipping the repealed numbers.

h. In the treatment clause for SECTION 13 of the proposed rule, the designation “(intro.)” should be inserted, and the text of pars. (a) to (j) should be removed as there do not appear to be any amendments in those paragraphs. [s. 1.04 (1) (b) 2., Manual.] The listing of affected provisions in the caption for the proposed rule should also be updated to reflect the specific provisions that are affected.

i. In the treatment clause for SECTION 14 of the proposed rule, only the subunits that are amended should be identified, and the text of subunits that are not amended should be removed. The listing of affected provisions in the caption for the proposed rule should also be updated to reflect the specific provisions that are affected. [s. 1.04 (1) (b) 2., Manual.] See, in particular, sub. (4), which appears to be amended only in sub. (4) (a) 2. and (b); the unaffected text in sub. (4) should be removed and only sub. (4) (a) 2. and (b) and the other treated subunits of s. UWS 17.11 should be identified in the treatment clause and shown in the text. The agency should review the proposed rule and correct for other instances of this issue. See, for example, s. UWS 17.08 (2) (a) and (c), which appear to be unaffected, among other instances.

j. In s. UWS 17.11 (3), the period after “respondent” should be removed and the final period should be shown without a strike-through.

k. In s. UWS 17.13 (1), the sentence should begin with striking the full word “Where”, and then showing the underscored material, ending with underscored “where”. [s. 1.06 (3), Manual.] The format for changing the beginning of a sentence should also be revised in ss. UWS 17.14 and 17.15.

l. The renumbering of s. UWS 17.13 (3) and (4) in SECTION 18 of the proposed rule should be removed. Renumbering to replace a repealed provision can lead to confusion and errors in cross-references and is not recommended. SECTION 19 of the proposed rule should be revised to refer to the original subsection numbers, without being renumbered.

m. Under subch. III of ch. UWS 17, the agency should consider inserting in-between numbers for the newly created sections, rather than renumbering existing sections and re-using those numbers for the new material. For example, the material that displaces and re-uses the designation “17.16” could instead be designated as “17.151”, “17.17” could instead be designated

as “17.152”, and so on. Alternatively, rather than re-using the existing numbers that are moved in the proposed rule, the agency could consider starting the subch. III numbering at a new s. UWS 17.20, and renumbering the existing s. UWS 17.16 to a new number that follows that material, such as “17.26”, existing “17.17” to “17.27”, and so on. [s. 1.03 (5) (b), Manual.]

n. When renumbering and amending material, the amendment should occur in the same SECTION as the renumbering. For example, SECTIONS 23 and 33 should be combined into one SECTION to renumber s. UWS 17.16 to 17.22 (or to 17.26 as suggested in the previous comment) and amend the section. [s. 1.067 (Example 2), Manual.] The agency should review the proposed rule and correct for other instances of this issue.

o. The definitions created under s. UWS 17.16 should be revised to follow the drafting conventions provided in s. 1.01 (7) of the Manual. For instance, definitions should be arranged alphabetically, should be in the form of a complete sentence, and the use the terms “means” or “includes”. This provision should be redrafted to conform to the definitions requirements of s. 1.01 (7) of the Manual.

p. In s. UWS 17.18 (4) (c) 2., the designations for the subdivision paragraphs should be revised from “i.” and “ii.” to “a.” and “b.”. [s. 1.03 (1) (Example), Manual.]

q. In s. UWS 17.23 (2), the underscored insertion of “17.24” should be moved to follow the stricken “17.18”.

r. In s. UWS 17.25 (6), the cross-reference from the current text of the rule should be inserted and shown with a strike-through before the new underscored cross-reference that is shown.

s. In SECTION 38 of the proposed rule, the effective date provision should be revised to specify that the rule takes effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22 (2) (intro.), Stats., or some other specified date. [s. 1.02 (4), Manual.]

### **3. Conflict With or Duplication of Existing Rules**

Generally, Clearinghouse Rules 20-059, 20-060, 20-061, and 20-062, and chs. UWS 4, 7, 11, and 17 should be reviewed for consistency with one another. For example, Clearinghouse Rule 20-062, in s. UWS 17.16 (2), provides different wording for the introduction to the definition of “sexual assault” from Clearinghouse Rule 20-061, in s. UWS 11.015 (9).

### **4. Adequacy of References to Related Statutes, Rules and Forms**

a. In s. UWS 17.02 (12m), the definition of “Party” refers to “this Subchapter III”. In accordance with s. 1.07 (1) of the Manual, do not use general terms, such as “of this chapter” when making references to another rule or part of a rule. The agency should make the reference specific, or, if there is no specific reference, it should be rephrased as “this subchapter”. [s. 1.07 (2) (Table), Manual.]

b. In s. UWS 17.16 (2) (intro.), the definition of “Sexual Assault” contains references to federal statute and federal regulations provisions. What is the purpose of the citation to “20 U.S.C. 1092(f)(6)(A)(v), 34 CFR 668.46(a)”?. It is not clear that the definitions used are specifically

derived from the federal definitions. The citations require further explanation for the clarity of the reader. For example, it appears that the citations could be moved to a note, as the definition is provided in the text of the subunits, or could be put in the form of a sentence with an explanation of the relationship to the provision.

c. In s. UWS 17.17 (5) (intro.), it appears that the reference to “sub. (5)” is intended to instead reference “sub. (6)”. Also, consider revising the phrase “as defined in” to “as described in”, as sub. (6) does not provide a definition.

d. Section UWS 17.18 (4) (c) 3. refers the reader to legal privileges described in s. UWS 17.17 (3) (e), which does not appear to describe legal privileges.

e. In s. UWS 17.18 (8) (f), it is not necessary to identify “(a) to (j)”, as there are no other paragraphs in the identified subsection.

f. In the following provisions, the format for the cross-references should be corrected as follows:

- (1) In s. UWS 17.02 (9), revise “or UWS 17.18” to “or 17.18”, as the “UWS” designation should not be repeated. The agency should review the proposed rule and correct for other instances of this issue.
- (2) In s. UW 17.10 (1) (intro.), revise “and ss. 17.17 to 17.19” to “and 17.17 to 17.19”.
- (3) In s. UWS 17.16 (intro.), revise “s. UWS 17.16” to “this section”.
- (4) In s. UWS 17.17 (1) (b), revise “s. UWS 17” to “this chapter”.
- (5) In s. UWS 17.17 (2) (intro.), revise “17.02 (8m)” to “s. UWS 17.02 (8m)”.
- (6) In s. UWS 17.17 (3) (g), revise “ch. UWS 17” to “this chapter”. The agency should review the proposed rule and correct for other instances of this issue.
- (7) In s. UWS 17.18 (4) (6), revise “sub (5)(d).” to “sub. (5) (d).”.
- (8) In s. UWS 17.21 (2), revise “subsection (1)” to “sub. (1)”.

## **5. Clarity, Grammar, Punctuation and Use of Plain Language**

a. The term “Incapacitation” is defined in s. UWS 17.02 (9m) and is used elsewhere in the proposed rule. However, the term “incapacitated”, rather than “incapacitation”, is used in the definition of “Consent”. In the definition of “Consent”, replacing the term “incapacitated” with “in a state of incapacitation” would be more consistent with the proposed definition of “Incapacitation”.

b. SECTION 7 of the proposed rule modifies s. UWS 17.08 (2) (b), substituting the singular “himself, herself” for the plural “themselves”. This also occurs in SECTION 15 under proposed UWS 17.12 (4) (b) with the use of “their” and “them”, as well as a number of other locations throughout the proposed rule. While s. 1.01 (3) of the Manual does promote the elimination of all terminology that is not sex-neutral, it does not recommend the mixing of the singular and plural case to resolve the issue. The recommended resolution is to replace the pronoun with the noun to which the non-sex-neutral pronoun initially refers. For example, in SECTION 7, replace “himself,

herself” with “the student” rather than “themselves”. Repeat this change throughout the remainder of the proposed rule.

c. In s. UWS 17.12 (1), it appears that a comma should be inserted before the phrase “for conduct”.

d. Sections UWS 17.17 (1), (2), (5), and (6), and 17.18 (5) would benefit from introductory material describing the context of the paragraphs following the subsection. For example, under s. UWS 17.17 (1), the subsection on process could end by stating something similar to “In conducting an investigation, the university may take any of the following actions:” or by stating something similar to “Dismissals will be handled as follows:” prior to pars. (a) through (d) of UWS 17.17 (2). [s. 1.03 (3), Manual.]

e. In s. UWS 17.17 (3) (intro.), the phrase “Notice of Investigation” should not be capitalized. Other instances of this phrase should also be revised.

f. In s. UWS 17.17 (3) (a), the word “The” should precede “Details”.

g. In s. UWS 17.17 (3) (d), the purpose of giving notice of UWS 19.09 (9) is unclear. Presumably, this is to notify the complainant and respondent that forgery or falsification is subject to disciplinary action on its own, but this should be clarified.

h. In s. UWS 17.17 (4) (c), the word “however” should be relocated between “may” and “establish”.

i. In UWS 17.18 (4) (c) 2. ii., eliminate the word “If”.

j. In SECTION 27, the sentence structure of proposed s. UWS 17.18 (4) (c) 4. is awkward. Consider restructuring the sentence for clarity or eliminate the phrase “however, whatever procedure is adopted”.

k. In s. UWS 17.18 (8) (f), the grammatical structure does not conform to the remainder of the list. It should read something like “One or more of the disciplinary sanctions listed in s. UWS 17.10 (1), if imposed by the hearing examiner or committee”.

l. In s. UWS 17.24, it will improve clarity if “the institution from which the respondent” is inserted between “institution,” and “is”.

m. Also in s. UWS 17.24, the last sentence is a run-on sentence and is very confusing as written. For the purposes of reader clarity, it should be presented as three separate sentences.

## **6. Potential Conflicts With, and Comparability to, Related Federal Regulations**

In s. UWS 17.02 (8m), under the definition of Formal Title IX Complaint, it states “A formal Title IX complaint may be filed in person, by mail, by electronic mail, or any other method designated by the university”. It appears that 34 CFR s. 106.8 (a) specifically requires that an institution must be able to receive complaints by “telephone number” as well.