

**APPROVAL OF RULE REVISIONS TO CHAPTERS UWS 4 PROCEDURES FOR
DISMISSAL OF FACULTY AND 7 DISMISSAL OF FACULTY IN SPECIAL
CASES, WIS. ADMIN. CODE**

BACKGROUND

The University of Wisconsin System (UW System) Administration seeks to modify several Board of Regents (Board) administrative rules, known as Ch. UWS 4, Wis. Admin. Code, "Procedures for Dismissal of Faculty;" Ch. UWS 7, Wis. Admin. Code, "Dismissal of Faculty in Special Cases;" Ch. UWS 11, Wis. Admin. Code, "Dismissal of Academic Staff for Cause;" and Ch. UWS 17, Wis. Admin. Code, "Nonacademic Student Misconduct."

All UW System institutions are affected by the proposed rule revisions. This document describes the general background, the procedures used to determine the proposed changes, detailed descriptions of campus comments and responses, and outlines the implications of the action requested for the adoption of Resolution I.1.b.(1), the revisions to Chs. UWS 4 and 7 under the conditions outlined in the resolution below.

The Board of Regents has statutory authority for Chs. UWS 4 and 7, as articulated in s. 36.13(3), Wis. Stats., and s. 36.13(5), Wis. Stats.

Section 36.13(3), Wis. Stats., reads as follows:

Rules. The board and its several faculties after consultation with appropriate students shall promulgate rules for tenure and probationary appointments, for the review of faculty performance and for the non-retention and dismissal of faculty members. Such rules shall be promulgated under ch. 227.

Section 36.13(5), Wis. Stats., reads as follows:

Procedural Guarantees. Any person having tenure may be dismissed only for just cause and only after due notice and hearing. Any person having a probationary appointment may be dismissed prior to the end of the person's contract term only for just cause and only after due notice and hearing. The action and decision of the board in such matters shall be final, subject to judicial review under ch. 227. The board and its several faculties shall develop procedures for the notice and hearing which shall be promulgated by rule under ch. 227.

In Summer 2014, the Board submitted a formal request to the Governor's Office for authority to propose these legislative changes by submitting Scope Statements pursuant to the Wisconsin Legislative Rulemaking Process for the four Wisconsin Administrative Codes relating to student and faculty/academic staff disciplinary procedures mentioned above. The purpose of this request was to seek the Governor's approval to initiate changes to the above UWS Chs. in order to comply with federal guidance under Title IX of the Education Amendments of 1972 ("Title IX") (guidance issued by the U.S. Department of Education, Office for Civil Rights, Dear Colleague Letter, April, 2011) and the Violence Against Women Reauthorization Act of 2013

(“VAWA”) amendments that include the Campus Sexual Violence Elimination Act (“Campus SaVE Act”). More information and background materials are available at this [link].

On August 22, 2015, the Board approved scope statements for UWS Chs. 4, 7, 11, and 17 that described which changes proposed by UWSA were within the scope approved by the Attorney General of Wisconsin. UWS Chs. 4 and 7 were presented for review in one combined scope statement because the Chs. are very similar. This is also the reason why this document contains a resolution to adopt the revisions to UWS Chs. 4 and 7 together. Executive summaries discussing the proposed changes to UWS Chs. 11 and 17 will be presented for review by the Board separately.

Any of the proposed changes to UWS Chs. 4 and 7 presented for review by the Board at this point are consistent with the narrow scope statements. The proposed changes address only those changes necessary to comply with Title IX and spell out VAWA in regard to offenses of sexual harassment, sexual assault, dating violence, domestic violence and stalking.

On August 22, 2015, the Regents also approved the creation of two drafting committees consisting of legal staff, faculty, academic staff, and student representatives, as well as UWSA staff, and others, as appropriate, to determine any changes in wording or substance of UWS Chs. 4, 7, 11, and 17. A drafting committee to review Chs. 4, 7, and 11 was convened and co-chaired by Associate Vice President Stephen H. Kolison, Jr. and Senior Vice President Al Crist.

The drafting committee’s proposed edits and changes to UWS Chs. 4 and 7 were compiled and, together with additional background materials, sent by Interim Senior Vice President Ward on December 17, 2014, as a “tracked changes” document to Chancellors, Provosts, and governance bodies at each UW institution for review and comments. Senior Vice President Crist shared the proposed changes with the Chief Business Officers and the Human Resources Directors on December 23, 2014.

Responses to the proposed changes to UWS Chs. 4, 7, 11, and 17 were received by Senior Vice President Ward by the deadline on March 6, 2015 (See Appendix A for a compilation of all campus responses received for UWS Chs. 4, 7, and 11, and, separately, for UWS Ch. 17).

On March 11, 2015, the drafting committee chaired by Associate Vice President Stephen H. Kolison, Jr. and Senior Vice President Al Crist reviewed all comments, edits, and questions received by the campuses and made recommendations for the final re-written version of UWS Chs. 4, 7, and 11.

As requested by the Regents on August 23, 2014, UWSA established the following assurances that support the requested adoption of Resolution I.1.b.(1) below.

Economic Impact

The Board of Regents hereby determines that the proposed rules shall have minimal to no economic impact locally or statewide. We hereby direct System Administration, pursuant to Wis. Stat. § 227.137, to initiate a comment period of at least fourteen (14) calendar days to solicit

information and advice from businesses, business sectors, associations representing business, local governmental units, and individuals that may be affected by the proposed rule in order to determine what, if any, economic impact the rule will have locally or statewide. UW System Administration is hereby authorized to take any and all additional action necessary to comply with this statutory requirement.

Fiscal Estimate

The Board of Regents hereby determines that the proposed rules shall have minimal to no fiscal impact or effect on county, city, village, town, school district, technical college district and sewerage district fiscal liabilities and revenues. There is minimal to no anticipated state fiscal effect during the current biennium and no projected net annualized fiscal impact on state funds. There is minimal to no anticipated fiscal effect on the private sector and no anticipated costs incurred by the private sector in complying with the rules. We hereby direct System Administration to prepare a fiscal estimate in accordance with this determination as directed under Wis. Stat. § 224.14(4). UW System Administration is also authorized to take any and all additional action necessary to comply with this statutory requirement.

Public Hearing

The Board of Regents hereby authorizes System Administration to proceed with scheduling a public hearing in accordance with Wis. Stat. § 227.17. UW System Administration is hereby authorized to take any and all additional action necessary to comply with this statutory requirement.

REQUESTED ACTION

Adoption of Resolution I.1.b.(1), approving the Revisions to Administrative Code UWS Ch. 4 Procedures for Dismissal of Faculty and Ch. 7 for pursuing dismissal of faculty in special cases of serious criminal misconduct, including sexual assault. By approving the revisions to Chs. 4 and 7, the Board determines that the proposed rules shall have minimal to no economic impact locally or statewide; minimal to no fiscal impact; that UWSA will schedule a public hearing; and that UWSA is authorized to take additional action to comply with the statutory requirement, as necessary.

DISCUSSION

Ch. UWS 4 provides a disciplinary process for pursuing dismissal of faculty for just cause and Ch. 7 provides for dismissal of faculty in special cases of serious criminal misconduct, including sexual assault. The U.S. Department of Education has reaffirmed that Title IX protects students from sexual harassment carried out by institutions of higher education employees. Whereas there are no binding federal regulations interpreting Title IX with respect to addressing allegations of sexual misconduct, the U.S. Department of Education has issued guidance through *Dear Colleague Letters*, which establishes the federal agency's expectations for institutions of higher education that receive federal funding . This guidance is being enforced by the U.S. Department of Education through the Office of Civil Rights (OCR).

A web link to the current existing versions of UWS Chs. 4 and 7 is available at [\(link\)](#)

The following (link) contains the tracked changes (redlined) version of UWS Chs. 4 and 7 with all revisions clearly marked. A third (link) contains the clean version showing how UWS Chs. 4 and 7 would read with all revisions incorporated.

Proposed Changes by Subject Matter

- A. *Definition Section:*** The proposed changes include a number of additional terms.
- “Complainant” has been added to clarify that only persons who are allegedly harmed by sexual harassment, sexual assault, stalking, domestic violence or dating violence would have the additional procedural protections under Title IX.
 - “Reporting Party” has been added to distinguish between an actual complainant versus a person who may only be filing a complaint on behalf of the complainant (e.g., the reporting party may be a dean of a college, but not the person allegedly harmed by the noted offenses).
 - “Preponderance of the Evidence” has been added to define the standard under which Title IX offenses would be adjudicated.
 - “Clear and Convincing Evidence” has been added to define the standard that applies in special cases involving serious criminal misconduct (e.g., UWS 7) and to show how the “Clear and Convincing Evidence” standard of proof differs from a “Preponderance of the Evidence” standard of proof.
 - “Dating violence,” “domestic violence,” “sexual assault,” “sexual harassment,” and “stalking” have been defined with references to state law definitions for purposes of consistency and clarity. When an alleged violation involves any of these five specific offenses, the complainant is provided with additional rights.

B. *Role of Title IX Coordinators:* Institutions must designate at least one qualified or trained employee to coordinate the institution’s efforts to comply with and carry out its responsibilities under Title IX. As stated in UWS 4 and 11, the institution must include the Title IX Coordinator in the initial processing of the complaint and investigation in cases involving sexual harassment, sexual assault, stalking, dating violence and domestic violence.

C. *Evidentiary Standard of Proof:* Allegations involving sexual harassment, sexual assault, stalking, dating violence and domestic violence shall have an evidentiary standard of proof of a preponderance of the evidence. UWS 4 and 11 states that there must be “just cause” to dismiss an employee; however, neither codes specify the standard of proof that should be used in evaluating the evidence. The Committee discussed whether to add language that would specify the use of a “clear and convincing” standard of proof for all other offenses, which would be consistent with UWS 7. However, there was a concern that such clarification would be

beyond the scope of the Committee's role. Therefore, the Committee elected only to address the standard of proof for the VAWA 5 offenses to comply with the federal guidance.

D. Access to Information during the Proceeding: Both the complainant and the accused should be afforded similar and timely access to information that will be used at a hearing. Access to this information must be provided in a manner that is consistent with state and federal privacy laws. For example, prior disciplinary action, student educational records or medical information that is revealed during an investigation or hearing process should not be disclosed to the aggrieved party unless a specific legal exception applies under state or federal law. In cases of sexual harassment, sexual assault, stalking, dating violence and domestic violence, the proposed Administrative Code would provide the complainant with the same information as the accused, unless such disclosure is prohibited by state or federal law.

E. Rights of Aggrieved Party during the Hearing Process: As stated in the OCR Guidance, during an investigation related to the VAWA 5 offenses, the complainant and the accused should be afforded equal rights. The proposed Administrative Code would provide parity of rights in the following manner:

- The complainant and the accused would have an equal opportunity to present relevant witnesses and other evidence.
- The parties would be afforded similar and timely access to any information used at the hearing, excluding information that would be excluded from disclosure under state or federal law, such as private or confidential information relating to student educational records, medical records or other employment personnel records.
- Both the complainant and the accused would be provided with written notification of the outcome of the complaint/proceedings.
- Under the existing codes, an accused party has the right to confront or cross-examine witnesses (which usually include the complainant). However, the Office for Civil Rights strongly encourages institutions to prevent the accused and the complainant from personally cross examining each other. Instead, OCR suggests that the parties be allowed to submit questions directly to a trained third party, such as the hearing committee, for consideration. The Committee determined that language should be added to give a hearing body the authority to restrict cross-examination of the parties in a manner that would allow for questioning of the parties but avoid an intimidating or hostile hearing environment.
- Both the complainant and the accused would have the right to an advisor of his/her choice during the proceedings.

In summary, these proposed revisions to UWS 4, 7 and 11 are intended to reconcile any potential inconsistencies between the Administrative Code and the federal standards regarding institutional obligations in addressing issues of sexual harassment, sexual assault, stalking, dating violence, and domestic violence.

RECOMMENDATION

Approval from the Education Committee and the full Board for revisions to Chs. UWS 4 and 7, Wis. Admin. Code, is recommended to recognize U.S. Department of Education guidance to institutions of higher education on how they should address on campus and respond to sexual misconduct and sexual assault allegations involving a student or an employee. The modifications that are proposed reflect, among other things, changes to the language contained in UWS Chs. 4 and 7 that would alter the burden of proof and evidence in disciplinary processes and the role of a complainant in those disciplinary processes.