

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 [082-20](#), were 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 amend UWS 11.104(1)(a) and (1)(b) and (3) and (5) and (6); repeal and recreate 11.015(intro.) and (2) and (5) and (6) and (9) and (10) and (11); and create UWS 11.01(4), 11.015(12) and (13) and (14), 11.102(5), 11.104(3)(d) and (4)(a) and (4)(b) 11.13, 11.14, 11.15, 11.16, 11.17, 11.18, 11.19, 11.20, 11.21, 11.22, 11.23, 11.24, 11.25, and 11.26, 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 11.01(4) is created to read:**

(4) Indefinite appointment academic staff dismissal for cause and lesser discipline based on allegations of Title IX misconduct as defined in s. UWS 11.14 shall be governed by ss. UWS 11.13 to UWS 11.26. Sections UWS 11.01 to UWS 11.12 may not apply to academic staff dismissal based on Title IX misconduct.

**Section 2. UWS 11.015 (intro.), (2), (5), (6), (9), (10), and (11) are repealed and recreated to read:**

**UWS 11.015 Definition. (intro.)** The following terms shall have the meaning given below and shall apply to ss. UWS 11.01 to UWS 11.12:

(2) "Complainant" means any individual who is alleged to be the subject of sexual misconduct, as defined in s. UWS 11.14.

(5) "Dating violence" means 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..

(6) "Domestic violence" means 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 person 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 complainant 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).

(9) "Sexual harassment" means conduct on the basis of sex that satisfies one or more of the following:

(a) An employee of the institution conditions the provision of an aid, benefit, or service of the institution directly or indirectly on an individual's participation in unwelcome sexual conduct.

(b) 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.

(10) "Sexual assault" means an offense that meets any of the following definitions found in 20 U.S.C. 1092(f)(6)(A)(v), 34 CFR 668.46(a):

- (a) “Rape” means 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 the complainant, without the consent of the complainant.
- (b) “Fondling” means the touching of the private body parts of the complainant for the purpose of sexual gratification, without the consent of the complainant, including instances where the complainant is incapable of giving consent because of their age or because of their temporary or permanent mental incapacity.
- (c) “Incest” means sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law as per s. 944.06, Stats.
- (d) “Statutory Rape” means sexual intercourse with a complainant who is under the statutory age of consent as per s. 948.02, Stats.

(11) “Stalking” means engaging in a course of conduct directed at the complainant that would cause a reasonable person to fear for their safety or the safety of others; or suffer substantial emotional distress.

**Section 3. UWS 11.015(12) and (13) and (14) are created to read:**

(12) “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 activity referenced in this section and s. UWS 11.14. A person is unable to give consent if the person is incapacitated because of drugs, alcohol, physical or intellectual disability, or unconsciousness.

(13) “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.

(14) “Sexual exploitation” occurs when an individual attempts, takes or threatens to take, nonconsensual sexual advantage of another person. Examples include, but are not limited to:

- (a) Engaging in the following conduct without the knowledge and consent of all participants:
  1. Observing, recording, or photographing private body parts or sexual activity of the complainant.
  2. Allowing another person to observe, record, or photograph sexual activity or private body parts of the complainant.

3. Otherwise distributing recordings, photographs, or other images of the sexual activity or private body parts of the complainant(s).
- (b) Masturbating, touching one's genitals, or exposing one's genitals in the complainant's presence without the consent of the complainant, or inducing the complainant 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 the complainant vulnerable to non-consensual sexual activity.
- (e) Coercing the complainant 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 the complainant.
  2. Other information of a sexual nature involving the complainant, including sexual history or sexual orientation.

**Section 4. UWS 11.102(5) is created to read:**

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

**Section 5. UWS 11.104(1)(a), (1)(b), (3), (5), and (6) are amended to read:**

(a) Within 3 working days of receipt of the report or information, inform the academic staff member of its receipt and, after consulting with appropriate institutional governance representatives, appoint an investigator to investigate the report or information and advise the chancellor as to whether to proceed under this section or ss. [UWS 11.02](#) to [11.10](#) or ss. [UWS 11.13](#) to [11.25](#). If the university knows the identity of an affected party, the university shall make a reasonable attempt to notify the affected party of the report or information at the same time as the academic staff member. ~~For cases involving sexual assault, dating violence, domestic violence, or stalking, the complainant shall be notified by the chancellor of the receipt of the report or information at the same time as the academic staff member.~~

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



~~complainant shall have the disqualification rights that are afforded to the academic staff member in this subsection.~~

(3) Within 3 working days of receipt of the investigator's report, the chancellor shall consult with appropriate institutional governance representatives and decide whether to seek dismissal of the academic staff member pursuant to ss. [UWS 11.101 to 11.106](#), to seek dismissal of the academic staff member pursuant to ss. [UWS 11.02 to 11.10](#), to seek dismissal of the academic staff member pursuant to ss. [UWS 11.13 to 11.25](#), to seek an alternative disciplinary sanction, or to discontinue the proceedings. ~~The charges shall be served on the academic staff member in the manner specified in s. [UWS 11.02 \(2\)](#).~~

(a) If the chancellor decides to seek dismissal of the academic staff member pursuant to ss. [UWS 11.101 to 11.106](#), the chancellor shall file charges within 2 working days of reaching the decision.

(b) If the chancellor decides to seek dismissal of the academic staff member pursuant to ss. [UWS 11.02 to 11.10](#) or ss. [UWS 11.13 to 11.26](#), the chancellor shall file charges and proceed in accordance with the provisions of those sections of this chapter and implementing institutional policies. If, during the course of proceedings under ss. [UWS 11.02 to 11.10](#) or ss. [UWS 11.13 to 11.26](#), the chancellor receives a report under s. [UWS 11.103](#) or other credible information that the academic staff member has pleaded guilty or no contest to or has been convicted of a felony of a type listed in s. [UWS 11.102 \(1\) \(a\)](#), and one or more of the factors listed in s. [UWS 11.102 \(1\) \(b\)](#) through [\(e\)](#) are present, the chancellor may, at that point, elect to follow the procedures for dismissal pursuant to this section.

(c) If the chancellor decides to seek an alternative disciplinary sanction, the procedures under ch. [UWS 13](#) or ss. [UWS 11.13 to 11.26](#), and implementing institutional policies, shall be followed.

(5) Within 3 working days of receipt of the findings and recommendation of the committee under sub. [\(4\)](#), the chancellor shall prepare a written decision on the matter. In the decision, the chancellor may order dismissal of the staff member, may impose a lesser disciplinary action, or may find in favor of the staff member. The staff member shall be notified of the chancellor's decision in writing. ~~In cases involving sexual assault, dating violence, domestic violence, or stalking, the complainant shall be notified of the chancellor's decision at the same time as the staff member.~~ If the university knows the identify of an affected party, the university shall make a reasonable attempt to provide the affected party a copy of the chancellor's final decision at the same time as the academic staff member. This decision shall be deemed final unless the board, upon request of the academic staff member, grants a review based on the record. ~~In cases involving sexual assault, dating violence, domestic violence, or stalking, the complainant shall have the same right to a review on the record as the academic staff member.~~

(6) The administration or its representatives shall have the burden of proof to show that just cause exists for dismissal under this chapter. The administration shall demonstrate by clear and convincing evidence that the academic staff member engaged in serious criminal misconduct, as defined in s. [UWS 11.102](#), ~~except in cases of sexual assault, dating violence, domestic violence, or stalking, in which the evidentiary standard shall be by a preponderance of the evidence.~~

**Section 6. UWS 11.104(3)(d) and (4)(a) and (4)(b) are created to read:**

(d) If the chancellor decides to seek dismissal of the academic staff member pursuant to ss. UWS 11.13 to 11.25, the chancellor shall file charges within 2 working days of reaching the decision.

(a) If charges seeking dismissal are filed under sub. [\(3\) \(a\)](#), the academic staff member shall be afforded a hearing before the institutional standing committee charged with hearing dismissal cases and making recommendations under s. [UWS 11.03](#). The hearing shall provide the procedural guarantees enumerated under ss. [UWS 11.05](#) to [11.06](#), except that the hearing must be concluded, and written findings and a recommendation to the chancellor must be prepared, within 15 working days of the filing of charges.

(b) If charges seeking dismissal are filed under sub. [\(3\) \(c\)](#), the academic staff member shall be afforded a hearing before the institutional standing committee or hearing examiner charged with hearing dismissal cases and making recommendations under s. [UWS 11.23](#). The hearing shall provide the procedural guarantees enumerated under ss. UWS 11.21 to 11.23, except that the hearing must be concluded, and written findings and a recommendation to the chancellor must be prepared, within 15 working days of the filing of charges.

**Section 7. UWS 11.13 is created to read:**

**UWS 11.13 Dismissal for cause or lesser discipline for Title IX misconduct.**

(1) The board may dismiss an academic staff member for cause, or impose lesser discipline on an academic staff member, for engaging in, attempting to engage in, or assisting others to engage in sexual harassment, sexual assault, stalking, dating violence, and domestic violence as those terms are defined in s. UWS 11.14 (“Title IX misconduct”):

(2) Title IX misconduct allegations against academic staff shall follow the disciplinary procedure in ss. UWS 11.13 to UWS 11.26. An academic staff member may be dismissed only for just cause and may otherwise be disciplined only for adequate cause, and only after due notice and hearing.

(3) The board's policy is that members of the academic staff are entitled to enjoy and exercise all rights of United States citizens and to perform their duties in accordance with appropriate professional codes of ethics. This policy shall be observed in determining

whether or not just cause for dismissal exists. The burden of proof of the existence of just cause for a dismissal is on the administration.

(4) The academic staff member is presumed to be not responsible for the alleged Title IX misconduct until a final decision regarding responsibility is made at the conclusion of the disciplinary process. The burden of proof of the existence of just cause for a dismissal, or of adequate cause for other discipline, is on the university administration.

#### **Section 8. UWS 11.14 is created to read:**

**UWS 11.14 Definitions.** As used in ss. UWS 11.13 to UWS 11.26, the following terms shall have the meaning given below:

(1) "Complainant" means any individual who is alleged to be the subject of sexual misconduct, as defined in this section.

(2) "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 activity referenced in this section and s. UWS 11.015. A person is unable to give consent if the person is incapacitated because of drugs, alcohol, physical or intellectual disability, or unconsciousness.

(3) "Consult" or "consulting" means thoroughly reviewing and discussing the relevant facts and discretionary issues.

(4) "Dating violence" means 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.

(5) "Domestic violence" means 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 person 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 complainant 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)

(6) "Education program or activity" means, 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 .

(7) “Formal complaint” means, 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.

(8) “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.

(9) “Preponderance of the evidence” means information that would persuade a reasonable person that a proposition is more probably true than not. It is a lower standard of proof than “clear and convincing evidence.”

(10) “Respondent” means an individual who has been reported to be the perpetrator of sexual misconduct as defined in this section.

(11) “Sexual assault” means an offense that meets any of the following definitions found in 20 U.S.C. 1092(f)(6)(A)(v), 34 CFR 668.46(a):

(a) “Rape” means 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 the complainant, without the consent of the complainant.

(b) “Fondling” means the touching of the private body parts of the complainant for the purpose of sexual gratification, without the consent of the complainant, including instances where the complainant is incapable of giving consent because of their age or because of their temporary or permanent mental incapacity.

(c) “Incest” means sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law as per s. 944.06, Stats.

(d) “Statutory Rape” means sexual intercourse with a complainant who is under the statutory age of consent as per s. 948.02, Stats.

(12) “Sexual harassment” means conduct on the basis of sex that satisfies one or more of the following:

- (a) An employee of the institution conditions the provision of an aid, benefit, or service of the institution directly or indirectly on an individual's participation in unwelcome sexual conduct.
- (b) 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.

(13) "Stalking" means engaging in a course of conduct directed at the complainant that would cause a reasonable person to fear for their safety or the safety of others; or suffer substantial emotional distress.

#### **Section 9. UWS 11.15 is created to read:**

**UWS 11.15 Application of Title IX misconduct disciplinary procedure.** This disciplinary procedure for Title IX misconduct will be used only when all of the following requirements are met:

- (1) There is a complaint alleging Title IX misconduct.
- (2) The conduct occurred in the United States.
- (3) The conduct occurred within the university's programs or activities as defined in s. UWS 4.12.
- (4) The complainant must be participating in or attempting to participate in the education program or activity of the university at the time of filing the complaint.
- (5) The complainant or Title IX Coordinator have submitted a written formal complaint as defined in s. UWS 4.12.

#### **Section 10. UWS 11.16 is created to read:**

**UWS 11.16 Dismissal of formal Title IX complaint and related appeal.**

- (1) The university shall dismiss formal complaints consisting of allegations that meet any of the following conditions:
  - (a) The conduct would not constitute sexual harassment if proved.
  - (b) The conduct did not occur in a university program or activity.

(c) The conduct did not involve actions against someone physically located in the United States.

(2) The university may dismiss formal complaints under any of the following conditions:

- (a) The complainant formally requests in writing to withdraw the formal complaint.
- (b) The academic staff member is no longer employed by the university.
- (c) Specific circumstances prevent the university from gathering evidence sufficient to reach a determination on the allegations contained in the formal complaint.

(3) The university generally shall decide whether to dismiss a formal complaint within 30 days of receipt of the formal complaint, but the university may extend that timeline as necessary. If a formal complaint is dismissed, the university shall provide notice of the dismissal and reasons therefore to the academic staff member and complainant in writing.

(4) Within 20 days of receipt of the notice of dismissal, the complainant may appeal the dismissal by filing a written appeal with the chancellor. The complainant may appeal on any of the following bases:

- (a) Procedural irregularity that affected the outcome of the matter.
- (b) New evidence that was not reasonably available at the time of the dismissal that could affect the outcome of the matter.
- (c) The university employee making the dismissal decision had a conflict of interest or bias for the academic staff member or against the complainant, or against complainants generally, that affected the dismissal decision.

(5) The chancellor shall simultaneously issue a decision to the complainant and the academic staff member within 20 days of receipt of a written appeal. The chancellor's decision on the appeal of a dismissal shall be final.

(6) Dismissal of a Title IX Complaint does not preclude the university from otherwise pursuing discipline against the academic staff member under other administrative rules or university policies.

## **Section 11. UWS 11.17 is created to read:**

### **UWS 11.17 Investigation of Title IX misconduct allegations.**

(1) Unless the university dismisses a formal complaint, the university shall appoint an investigator to conduct an investigation of the allegations in the formal complaint.

(2) The investigator shall provide the academic staff member and the complainant with a notice of investigation. The notice shall include all of the following:

- (a) Information about the grievance process, including informal resolution options.
- (b) The allegations of Title IX sexual misconduct with sufficient detail for the academic staff member to prepare a response to the allegations, including the

identity of the complainant as well as the date and location of the incident if available.

- (c) A statement affirming the academic staff member is presumed not responsible for the alleged violation until the disciplinary process finds otherwise.
- (d) The academic staff member and complainant have the right to an advisor of their choice.
- (e) The academic staff member and complainant have the right to inspect and review the evidence.
- (f) Information about any code of conduct rules which prohibit the academic staff member or the complainant from knowingly making false statements or submitting false information during the disciplinary process.

(3). The parties shall receive an amended notice of investigation any time additional charges are added during the course of an investigation. Formal Title IX Complaints involving more than one complainant or respondent may be consolidated if they arise out of the same facts or circumstances.

(4) The university's investigator shall meet all of the following requirements:

- (a) Provide both the academic staff member and the complainant an equal opportunity to provide witnesses (including fact and expert witnesses) who may be interviewed by the investigators and other inculpatory and exculpatory evidence.
- (b) Not restrict the ability of either the academic staff member or complainant to discuss the allegations under investigation or to gather and present relevant evidence.
- (c) Provide the academic staff member and complainant the same opportunity to be accompanied by an advisor of their choice during meeting relating to the investigation but may limit the participation by the advisor so long as those limits are applied equally.
- (d) Provide both the academic staff member and the complainant an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including evidence upon which the university does not intend to rely in reaching a determination regarding responsibility, and inculpatory or exculpatory evidence whether obtained from an academic staff member, complainant, or other source, so that the academic staff member and complainant can meaningfully respond to the evidence prior to conclusion of the investigation.

(5) The university's investigator generally shall complete the investigation and issue a final investigative report within 90 days of the investigator's appointment. However, the investigator may extend the investigation's time frame where circumstances warrant.

## **Section 12. UWS 11.18 is created to read:**

### **UWS 11.18 Review of Evidence.**

(1) Prior to completion of the final investigative report, the investigator shall send to the academic staff member and complainant and their respective advisors, if any, the evidence gathered during the investigation for inspection and review by the academic staff member and the complainant. The evidence may be provided in an electronic format or a hard copy. The evidence provided includes evidence upon which the university does not intend to rely in reaching a determination regarding responsibility, and inculpatory or exculpatory evidence, whether obtained from the academic staff member, complainant or other source to permit the academic staff member and complainant to meaningfully respond to the evidence prior to conclusion of the investigation.

(2) As part of its investigation and disciplinary process, the university may not access, consider, disclose, or otherwise use an academic staff member's or complainant'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 academic staff member or complainant, unless the university obtains the academic staff member's or complainant's voluntary, written consent to do so in relation to the investigation and disciplinary process.

(3) The academic staff member and the complainant shall have at least 10 days to submit a written response to the initial investigative report and related evidence. The investigator shall consider any written responses prior to completion of the final investigative report.

### **Section 13. UWS 11.19 is created to read:**

**UWS 11.19 Final Investigative Report.** The investigator shall create a final investigative report that fairly summarizes relevant evidence and send the report to the academic staff member and complainant, and their advisors, if any, for their review and response at least 10 days prior to a hearing. The written report shall be delivered simultaneously to the academic staff member and complainant. The university shall, upon receipt of the final investigative report, proceed to schedule a live hearing on the matter. A hearing shall be conducted unless the academic staff member and the complainant both waive, in writing, the right to such a hearing.

### **Section 14. UWS 11.20 is created to read:**

#### **UWS 11.20 Standing academic staff committee and hearing examiner.**

(1) The academic staff of each university shall provide a standing committee ("hearing committee") charged with hearing academic staff dismissal and discipline cases. Additionally, the chancellor of each university, in consultation with academic staff representatives, shall adopt policies providing for the designation of a Title IX conduct hearing examiner ("hearing examiner"). A hearing examiner shall be selected by the chancellor pursuant to these policies to hear academic staff dismissal and discipline



cases. The academic staff member shall have the right to decide whether the matter will be heard by a hearing examiner or a hearing committee.

(2) The hearing committee or the hearing examiner shall conduct the hearing, make a verbatim record of the hearing, and transmit such record along with factual findings and decision to the chancellor. The hearing shall be held not later than 45 days after completion of the final investigative report except that this time limit may be extended by the hearing committee or the hearing examiner.

## **Section 15. UWS 11.21 is created to read:**

### **UWS 11.21 Adequate due process.**

(1) A fair hearing for an academic staff member against whom dismissal or other discipline is sought shall include all of the following:

- (a) Service of written notice of a live hearing on the allegations in the formal complaint at least 10 days prior to the hearing.
- (b) A right to the names of witnesses and of access to documentary and other evidence upon the basis of which dismissal or other discipline is sought.
- (c) A right to be heard in his or her defense.
- (d) A right to an advisor, counsel, or other representatives, and to offer witnesses. The academic staff member's advisor or counsel may ask all witnesses relevant questions and follow-up questions, including those challenging credibility. Credibility determinations, however, may not be made based on a person's status as a complainant, respondent, or witness. If the academic staff member does not have an advisor, the university shall provide the academic staff member, without charge, an advisor of the university's choice to conduct cross-examination on behalf of the academic staff member. The advisor may be an attorney.
- (e) A right to confront and cross-examine adverse witnesses. Cross examination shall be conducted directly, orally, and in real time by the academic staff member's advisor. The academic staff member and the complainant may not personally conduct cross examination. If the academic staff member, the complainant, or a witness does not submit to cross-examination at the hearing, the hearing committee or the hearing examiner may not rely on any statement of the academic staff member, complainant, or witness in reaching its findings and recommendations. However, the hearing committee or hearing examiner may not draw a negative inference in reaching its findings and recommendations based solely on the absence of an academic staff member, complainant, or witness from the hearing or refusal to answer cross-examination or other questions.
- (f) A verbatim record of all hearings, which might be a sound recording, made available at no cost for inspection and review.
- (g) Written findings of fact supporting the decision based on the hearing record. The written findings of fact and decision shall include all of the following:
  1. Identification of the allegations potentially constituting misconduct as defined in this chapter.

2. A description of the procedural steps taken from the receipt of the formal complaint through the hearing committee's or hearing examiner's decision, including any notifications to the academic staff member and the complainant, interviews with the academic staff member, the complainant, and witnesses, site visits, methods used to gather evidence, and hearings held.

3. Conclusions regarding the application of the university's conduct rules and policies to the facts; a statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanction recommended to be imposed, and whether remedies designed to restore or preserve equal access to the university's educational program or activity will be provided to the complainant.

4. The university's procedures and permissible bases for complainant and academic staff member to appeal.

(h) Admissibility of evidence shall be governed by s. 227.45 (1) to (4), Stats. Only relevant questions may be asked of the academic staff member, the complainant, and any witnesses. The hearing committee or hearing examiner shall determine whether a question is relevant and explain the decision to exclude a question as not relevant. Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions or evidence are offered to prove that someone other than the academic staff member committed the conduct alleged by the complainant, or unless the questions or evidence concern specific incidents of the complainant's prior sexual behavior with the academic staff member and are offered to prove consent.

(i) The hearing may be conducted with all participants physically present in the same location, or at the hearing committee's or hearing examiner's discretion, any or all participants may appear at the hearing virtually, with technology enabling the participants simultaneously to see and hear each other. Upon the academic staff member's request, the university shall provide for the hearing to occur with academic staff member and complainant located in separate rooms with technology enabling the hearing committee or hearing examiner, the academic staff member, and the complainant to simultaneously see and hear witnesses answering questions.

(2) The complainant shall have all the rights provided to the academic staff member in sub. (1) (a) to (i).

## **Section 16. UWS 11.22 is created to read:**

### **UWS 11.22 Procedural guarantees.**

(1) Any hearing held shall comply with the requirements set forth in the preceding section. All of the following requirements shall also be observed:

(a) The burden of proof of the existence of just cause to support dismissal, or of adequate cause to support other discipline, is on the university administration.

(b) The standard of proof shall be a preponderance of the evidence.

(c) No academic staff member who participated in the investigation of allegations leading to the filing of a statement of charges, or who participated in the filing of a statement of charges, or who is a material witness, shall be qualified to sit on the hearing committee in that case. No university employee or other person who participated in the investigation of allegations leading to the filing of a statement of charges, or who participated in the filing of a statement of charges, or who is a material witness, shall be qualified to serve as the hearing examiner in that case.

(d) The hearing shall be closed unless the academic staff member requests an open hearing; in which case it shall be open as per subch. V of ch. 19, Stats.

(e) The hearing committee may, on motion the complainant, or the academic staff member disqualify any one of its members for cause by a majority vote. If one or more of the hearing committee members disqualify themselves or are disqualified, the remaining members may select a number of other members of the academic staff equal to the number who have been disqualified to serve, except that alternative methods of replacement may be specified in the rules and procedures adopted by the academic staff establishing the standing committee under this rule.

(f) The hearing committee or the hearing examiner may not be bound by common law or statutory rules of evidence and may admit evidence having reasonable probative value but shall exclude immaterial, irrelevant, or unduly repetitious testimony, and shall give effect to recognized legal privileges unless the person holding the privilege has waived it. The hearing committee or the hearing examiner shall follow the evidentiary rules in s. UWS 11.21(1)(h).

(g) If the hearing committee requests, the chancellor shall provide legal counsel after consulting with the hearing committee concerning its wishes in this regard. The function of legal counsel shall be to advise the hearing committee, consult with them on legal matters, and such other responsibilities as shall be determined by the hearing committee within the provisions of the rules and procedures adopted by the academic staff of the institution in establishing the standing academic staff committee under this policy.

(h) If the Title IX disciplinary process described in ss. UWS 11.13 to UWS 11.26 against an academic staff member is not concluded before the academic staff member's appointment would expire, the academic staff member may elect that such process be carried to a final decision. Unless the academic staff member so elects in writing, the process shall be discontinued at the expiration of the appointment.

(i) Nothing in this section shall prevent the settlement of cases by mutual agreement between the university administration, the complainant, and the academic staff member.

(j) Delay or adjournment of the hearing for good cause may be granted. Good cause includes any of the following:

1. The need to investigate evidence as to which a valid claim of surprise is made.
2. To ensure the presence of the academic staff member or the complainant, an advisor, or a witness.
3. To provide language assistance or accommodation of disabilities.

4. To accommodate concurrent law enforcement activity.

**Section 17. UWS 11.23 is created to read:**

**UWS 11.23 Hearing Committee or Hearing Examiner Findings and Recommendations to the Chancellor.** The hearing committee or hearing examiner shall simultaneously send to the chancellor, to the complainant, and to the academic staff member concerned, within 30 days after the conclusion of the hearing, or otherwise as soon as practicable, a verbatim record of the testimony and a copy of its factual findings and recommendations.

**Section 18. UWS 11.24 is created to read:**

**UWS 11.24 Chancellor's decision.**

(1) After reviewing the matter on record and considering arguments if submitted by the parties, the chancellor shall issue a decision. In that decision, the chancellor may order dismissal of the academic staff member, may impose a lesser disciplinary action, or may find in favor of the academic staff member. The academic staff member shall be notified of the chancellor's decision in writing. The complainant shall be notified of the chancellor's decision at the same time as the academic staff member. This decision shall be deemed final unless the board, upon request of the academic staff member, grants review based on the record.

(2) The chancellor decision shall be based on the record created before the hearing committee or hearing examiner, and the chancellor shall include the chancellor's rationale in the decision. The chancellor's decision shall be simultaneously sent to the academic staff member concerned, the complainant, and to the hearing committee or the hearing examiner within 45 days of the chancellor's receipt of the hearing committee's or hearing examiner's materials. A decision by the chancellor ordering dismissal shall specify the effective date of the dismissal.

**Section 19. UWS 11.25 created to read:**

**UWS 11.25 Appeal to the Board.**

(1) A member of the academic staff who has been dismissed for cause by the chancellor following a hearing may appeal this action to the board. Any appeal shall be made within 30 days of the date of the decision of the chancellor to dismiss. The board shall provide the academic staff member and the complainant an opportunity for filing exceptions to the chancellor's decision, and for oral arguments, unless the academic staff member and the complainant waive in writing the right to file exceptions and for oral arguments. The hearing of any oral arguments shall be closed unless the academic staff member or the complainant requests an open hearing (see subch. V of ch. 19, Stats., Open Meeting Law).

(2) The academic staff member or complainant may file exceptions to the chancellor's decision, and the board shall conduct its review of the chancellor's decision, on any of the following bases:

- (a) Procedural irregularity that affected the outcome of the matter.
- (b) New evidence that was not reasonably available at the time of the live hearing that could affect the outcome of the matter.
- (c) The Title IX coordinator, investigator(s), the chancellor, the hearing examiner, or the hearing committee members had a conflict of interest or bias for or against the academic staff member or complainant, or against complainants and respondents generally, that affected the outcome.

(3) If the board decides to take action different from the decision of the chancellor, then before taking final action the board shall consult with the chancellor.

(4) The board shall make its decision based on the record created before the hearing committee or hearing examiner. Within 60 days of receipt of the chancellor's decision, or otherwise as soon as practicable, the board shall simultaneously notify the academic staff member and the complainant of the board's final decision, which shall include the board's rationale for its decision.

(5) A decision by the board ordering dismissal of an academic staff member shall specify the effective date of the dismissal.

**Section 20. UWS 11.26 is created to read:**

**UWS 11.26 Suspension from duties in Title IX dismissal cases.** Pending the final decision as to dismissal, an academic staff member with an indefinite appointment may not be relieved of duties, except where, after consulting with the appropriate administrative officer, the chancellor finds that substantial harm may result if the staff member is continued in his or her position. Where such determination is made, the staff member may be relieved of his or her position immediately, or be assigned to another administrative unit, but his or her salary shall continue until the chancellor makes a decision as to dismissal, unless the chancellor also makes the determinations set forth in s. UWS 11.105 (1) in which case the suspension from duties may be without pay and the procedures set forth in s. UWS 11.105 shall apply.

**Section 21. 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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