



Interim Policy on Investigation and Resolution of Formal Title IX Complaints

No: SAAP 5-4

Date: August 14, 2020

| | |
|---------------------------|--|
| Authority: | Title IX of the Education Amendments of 1972 20 U.S.C. 1681 <i>et seq.</i> 34 C.F.R. 106 Wis. Stat. § 36.115 Wis. Admin. Code Chapter 4 Wis. Admin. Code Chapter 11 UW System Board of Regents Policy 14-2 UWM Policy on the Creation of University Policies (SAAP 0-1) |
| Initiator: | Chancellor |
| Responsible Party: | Title IX Coordinator |

I. Application of this policy. This policy applies to the investigation and resolution of formal Title IX complaints filed against university employees other than faculty and academic staff employees. This includes employees who otherwise do not have the right to a formal disciplinary process. The disciplinary process for investigation and resolution of formal Title IX complaints outlined in Chapter UWS 4 applies to faculty employees and the process in Chapter UWS 11 applies to academic staff employees.

The university may discipline an employee up to and including dismissal for cause for Title IX misconduct. The disciplinary process for employee sexual misconduct that is outside the scope of Title IX, and related definitions, are found in separate university policies. Investigations of sexual misconduct outside the scope of Title IX are governed by UWM Selected Academic and Administrative Policy 5-1, Discriminatory Conduct and Consensual Relationships Policy.

The disciplinary procedure in this policy for Title IX misconduct will be used only when all of the following requirements are met:

- (1) There is a formal complaint alleging Title IX misconduct on the basis of sex.
- (2) The conduct occurred in the United States.
- (3) The conduct occurred within a university education program or activity.
- (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 formal complaint.

The employee 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

university may dismiss or discipline an employee for Title IX misconduct only after due notice and hearing. The burden of proof is on the university administration.

The process for Title IX misconduct for faculty respondents is provided in Wis. Admin. Code Chapter UWS 4. The hearing committee for faculty (UWS 4.18) will consist of the hearing officer as the presiding officer and two faculty members as selected by the University Committee.

The process for Title IX misconduct for academic staff respondents is provided in Wis. Admin. Code Chapter UWS 11. The hearing committee for academic staff (UWS 11.20) will consist of the hearing officer as the presiding officer and two academic staff members as selected by the Academic Staff Committee.

II. Definitions. As used in this policy, the following terms shall have the meaning given below:

(1) “Complainant” means any individual who is alleged to be the subject of Title IX 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. 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 formal complaint only, locations, events, or circumstances at which the university exercised substantial control over both the respondent and the context in which the sexual harassment occurred, and also includes any building owned or controlled by a student organization that is officially recognized by the university.

(7) “Formal complaint” is 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 employee and requesting that the university 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 must include a physical or digital signature of the complainant or the Title IX Coordinator.

(8) “Incapacitation” means the state of being unable to physically and/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 and/or drugs affects a person’s decision-making ability; awareness of consequences; ability to make informed, rational judgments; and 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 Title IX misconduct as defined in this section.

(11) “Sexual assault” means 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 the complainant, without the consent of the complainant.
- b) Fondling: 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: 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 complainant who is under the statutory age of consent (See 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 the legal “reasonable person” standard:
 1. Is so severe, pervasive, and objectively offensive that it effectively denies the person equal access to the institution’s education program or activity.

(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.

(14) “Title IX misconduct” means sexual harassment, sexual assault, stalking, dating violence, and /or domestic violence.

III. Disciplinary Sanctions. The disciplinary sanctions that may be imposed for misconduct under this policy range from a written reprimand through dismissal.

IV. Dismissal of Formal Complaint and Related Appeal.

(1) The university must dismiss a formal complaint consisting of allegations that:

- (a) Would not constitute Title IX misconduct if proved;
- (b) Did not occur in a university program or activity; or
- (c) Did not involve actions against someone physically located in the United States.

(2) The university may dismiss a formal complaint when:

- (a) The complainant formally requests in writing to withdraw the formal complaint;
- (b) The employee is no longer employed by the university; or
- (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 thirty (30) days of receipt of the formal complaint, but the university may extend that timeline as necessary. If a formal complaint is dismissed, then the university must provide written notice of the dismissal and reasons therefore to the complainant and respondent if notified of the formal complaint. Within twenty days of receipt of the notice of dismissal, the complainant or respondent may appeal the dismissal by filing a written appeal with the chancellor’s designee (hereinafter “chancellor’s designee”). Dismissal of a Title IX formal complaint does not preclude the university from otherwise pursuing conduct charges against the employee under other university policies. The appeal process is outlined in the Appeal to Chancellor section below.

V. Investigation.

(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 complainant and the respondent with a notice of investigation. The notice must include:

- (a) The grievance process, including informal resolution options;
- (b) The allegations of Title IX misconduct with sufficient detail for the respondent to prepare a response to the allegations, including but not limited to, the identity of the complainant as well as the date and location of the incident(s) if available;
- (c) A statement affirming the respondent is presumed not responsible for the alleged violation;
- (d) The complainant and the respondent have the right to an advisor of their choice;

- (e) The complainant and respondent have the right to inspect and review the evidence; and
 - (f) Information about any code of conduct rules which prohibit the complainant and respondent from knowingly making false statements or submitting false information during the disciplinary process.
- (3) The complainant and respondent must receive an amended notice of investigation any time additional charges are added during the course of an investigation. Formal 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:
- (a) Provide both the complainant and respondent an equal opportunity to provide witnesses (including fact and expert witnesses) who may be interviewed by the investigator, and other inculpatory and exculpatory evidence;
 - (b) Not restrict the ability of either the complainant or respondent to discuss the allegations under investigation or to gather and present relevant evidence;
 - (c) Provide the complainant and respondent the same opportunity to be accompanied by an advisor of their choice during meetings relating to the investigation but may limit the participation by the advisor so long as those limits are applied equally;
 - (d) Provide both the complainant and respondent 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 a complainant, respondent, or other source, so that the complainant and respondent can meaningfully respond to the evidence prior to conclusion of the investigation.
- (5) As part of its investigation and disciplinary process, the university cannot access, consider, disclose, or otherwise use a complainant's or respondent'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 complainant or respondent, unless the university obtains the complainant's or respondent's voluntary, written consent to do so in relation to the investigation and disciplinary process.
- (6) The university's investigator generally shall complete the investigation and issue a final investigative report within ninety (90) days of the investigator's appointment. However, the investigator may extend the investigation's time frame where circumstances warrant.

VI. Review of Evidence.

- (1) Prior to completion of the final investigative report, the investigator must send to the complainant and respondent and their respective advisors, if any, the evidence gathered during the investigation for inspection and review by the complainant and respondent. 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 complainant,

respondent, or other source, to permit the complainant and respondent to meaningfully respond to the evidence prior to conclusion of the investigation.

(2) The complainant and respondent must have at least ten (10) days to submit a written response to the evidence. The investigator will consider any written responses prior to completion of the final investigative report.

VII. Final Investigative Report.

(1) The investigator shall create an investigative report that fairly summarizes relevant evidence and send the report to the complainant and the respondent (and their advisors, if any) for their review and response at least ten (10) days prior to a hearing. The written report shall be delivered simultaneously to the complainant and respondent.

(2) The university shall, upon receipt of the final investigative report, proceed to schedule a live hearing before a hearing examiner or hearing committee. A hearing shall be conducted unless both the complainant and respondent waive, in writing, the right to such a hearing.

VIII. Hearing Examiner or Hearing Committee.

(1) The chancellor shall designate a Title IX conduct hearing examiner or hearing committee to hear employee dismissal and discipline cases.

(a) The hearing committee for a respondent who is a member of the University Staff will consist of the hearing examiner as the presiding officer and two University Staff members as selected by the University Staff Council.

(b) Hearings for all other employees will be conducted by a hearing examiner.

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

IX. Hearing Process.

(1) A fair hearing for a complainant and respondent under this policy shall include the following rights:

- a) Service of written notice of a live hearing on the allegations in the formal complaint at least ten (10) days prior to the hearing;
- b) A right to the names of witnesses and of access to documentary evidence upon the basis of which dismissal or other discipline is sought;
- c) A right for the complainant and respondent to be heard on their own behalf;
- d) A right to an advisor and to offer witnesses. The university may establish restrictions regarding the extent to which the advisor may participate in the hearing, as long as the restrictions apply equally to the complainant and the respondent. The complainant's and respondent's advisors may ask all witnesses relevant questions and follow-up questions, including questions challenging credibility. Credibility determinations, however, may not

be made based on a person's status as a complainant, respondent, or witness. If the complainant or respondent does not have an advisor, the university shall provide the complainant or respondent, without charge, an advisor of the university's choice to conduct cross-examination on behalf of the complainant or respondent. The advisor may be, but is not required to be an attorney;

- e) A right to confront and cross-examine adverse witnesses. Cross-examination must be conducted directly, orally, and in real time by the complainant's or respondent's advisor. The complainant and the respondent shall not be permitted to personally conduct cross-examination. If the complainant, respondent, or a witness does not submit to cross-examination at the hearing, the hearing examiner or hearing committee must not rely on any statement of the complainant, respondent, or witness in reaching a decision. However, the hearing examiner or hearing committee shall not draw a negative inference in reaching a decision based solely on a complainant's, respondent's, or witness' absence 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 and the decision based on the hearing record. The written findings of fact and decision must include: identification of the allegations potentially constituting Title IX misconduct; a description of the procedural steps taken from the receipt of the formal complaint through the decision, including any notifications to the complainant and respondent, interviews with the complainant, respondent, and witnesses, site visits, methods used to gather evidence, and hearings held; conclusions regarding the application of the university's conduct 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; and the university's procedures and permissible bases for the complainant and the respondent to appeal;
- h) Admissibility of evidence governed by s. 227.45 (1) to (4), Stats. The hearing examiner or hearing committee shall 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. Only relevant questions may be asked of the complainant, respondent, or any witness. The hearing examiner or hearing committee 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 respondent 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 respondent 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 examiner's or hearing committee'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 complainant's or respondent's

request, the university shall provide for the hearing to occur with the complainant and respondent located in separate rooms with technology enabling all participants to simultaneously see and hear witnesses answering questions.

- j)** The burden of proof to support dismissal, or of grounds to support other discipline, is on the university administration, which shall present witnesses and evidence to meet its burden;
- k)** The standard of proof shall be a preponderance of the evidence;
- l)** No employee or other individual who participated in the investigation of the formal complaint, or who is a material witness, shall be qualified to serve as the hearing examiner or on the hearing committee in that case;
- m)** Nothing in this section shall prevent the settlement of cases by mutual agreement between the administration, the complainant, and the respondent;
- n)** Delay or adjournment of the hearing for good cause may be granted by the hearing examiner or hearing committee. Good cause includes the need to investigate evidence as to which a valid claim of surprise is made; to ensure the presence of the complainant or the respondent, their advisors, or a witness; to provide language assistance or accommodation of disabilities; and to accommodate concurrent law enforcement activity.

X. Hearing Examiner's or Hearing Committee's Findings and Recommendations.

The hearing examiner or hearing committee shall simultaneously send to the chancellor's designee, to the complainant, and to the respondent, within thirty (30) days after conclusion of the hearing, or as soon as practicable, a verbatim record of the testimony and a copy of the hearing examiner's or hearing committee's written findings of fact and recommendations.

XI. Chancellor's Designee's Decision.

(1) Within ten (10) days after receipt of the record and findings and recommendations from the hearing examiner or hearing committee, the complainant and respondent may submit written statements. The chancellor's designee shall review those materials and their decision shall be based on the record created before the hearing examiner or hearing committee without consideration of any new evidence submitted by the complainant or the respondent. The chancellor's designee shall prepare a written decision within twenty (20) days after the deadline of submission for the written statements by the complainant or the respondent. If the chancellor's designee's proposed decision differs substantially from the recommendations of the hearing examiner or hearing committee, the chancellor's designee shall promptly consult the hearing examiner or hearing committee and provide the hearing examiner or hearing committee with a reasonable opportunity for a written response prior to making a decision.

(2) The chancellor's designee may adopt the hearing examiner's or hearing committee's findings and recommendations as the chancellor's designee's decision. The chancellor's designee shall explain in the decision any substantial differences from those findings and recommendations.

(3) The chancellor's designee's decision shall be simultaneously sent to the complainant, respondent, and to the hearing examiner or hearing committee.

XII. Appeal to Chancellor. The complainant or respondent may appeal the dismissal of a formal Title IX complaint or the chancellor's designee's decision by filing a written appeal with

the chancellor within twenty (20) days of receiving the decision. The appeal to the chancellor may be made only on the following bases: procedural irregularity that affected the outcome of the matter; new evidence that was not reasonably available at the time of the hearing before the hearing examiner or hearing committee that could affect the outcome of the matter; the Title IX coordinator, investigator(s), chancellor's designee, or the hearing examiner or hearing committee had a conflict of interest or bias for or against the complainant or respondent, or against complainants and respondents generally, that affected the outcome. The complainant and the respondent shall be notified of any appeal to the chancellor.

The chancellor shall permit the complainant and respondent to file a written statement on the appeal. The chancellor shall review the appeal based on the record before the hearing examiner or hearing committee. The complainant and respondent shall be simultaneously provided the final written decision of the chancellor, which shall include the rationale for the decision.

XIII. Discretionary Review by the Board of Regents. The chancellor's decision shall be final, except that the board of regents may, at its discretion, grant a review upon the record, upon written request submitted by the complainant or the respondent within fourteen (14) days of the final university decision. If the board of regents grants a review upon the record, it will:

(1) Notify the complainant and respondent 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 review and the rationale for the result and provide the written decision simultaneously to both the complainant and respondent.

XIV. Administrative Leave. Pending the final decision on the allegations in the formal complaint, the employee/respondent may be placed on administrative leave.