UWS Chapters 4, 7, and 11 Rulemaking

I. General Summary:

This past summer, the Board of Regents of the University of Wisconsin System ("Board") submitted a formal request to the Governor’s Office for authority to propose legislative changes (Scope Statements pursuant to the Wisconsin Legislative Rulemaking Process) to four (4) separate Wisconsin Administrative Codes relating to student and faculty/academic staff disciplinary procedures:

- Chapter UWS 4 (Procedures for Dismissal of Faculty)
- Chapter UWS 7 (Dismissal of Faculty in Special Cases)
- Chapter UWS 11 (Dismissal of Academic Staff for Cause)
- Chapter UWS 17 (Student Nonacademic Misconduct Disciplinary Procedures)

The purpose of this request was to seek the Governor’s approval to initiate changes to the above UWS chapters 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"). Any proposed changes to the UWS chapters must be consistent with the narrow scope statements that intend to address only those changes necessary to comply with Title IX and VAWA in regard to offenses of sexual harassment, sexual assault, dating violence, domestic violence and stalking (what the committee has internally referred to as the “VAWA 5”).

II. Applicable federal law and guidance

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, which establish the federal agency's expectations as to how institutions of higher education will respond, address and prevent sexual violence on campus. This guidance is being enforced by the U.S. Department of Education through the Office for Civil Rights.

The Violence Against Women Reauthorization Act of 2013 (VAWA) includes provisions affecting institutions of higher education, known as the Campus SaVE Act (Campus Sexual Violence Elimination Act). Institutions are now required to report statistics for domestic
violence, dating violence, and stalking and provide certain rights to alleged victims and those accused of these offenses throughout the investigation and conduct proceedings.

Many higher education institutions have already modified their practices to be consistent with Title IX and VAWA. Several institutions such as SUNY, the University of Montana, and Yale have been subject to investigative findings and resolution agreements with the Office for Civil Rights, which required these institutions to modify their policies and procedures to be in compliance with Title IX and VAWA.

III. 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 specific 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 to only address the standard of proof for the VAWA 5 offenses to comply with the federal guidance.

D. Access to Information During Proceeding: Both the complainant and 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 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.
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.