

**RECORD OF THE SPECIAL MEETING OF THE
UNIVERSITY OF WISCONSIN SYSTEM BOARD OF REGENTS**

Monday, July 20, 2020
2:30 p.m.

By WebEx Videoconference
1860 Van Hise Hall
1220 Linden Drive
Madison, Wisconsin

-President Petersen presiding-

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The recording of this meeting's open session is available at: [July 20, 2020 Webcast](#)

CALLING OF THE ROLL

PRESENT: Regents Robert Atwell, Scott Beightol, Amy Bogost, Michael Grebe, Eve Hall, Mike Jones, Tracey Klein, Becky Lezvow, Edmund Manydeeds, Andrew Petersen, Cris Peterson, Kyle Weatherly, and Olivia Woodmansee. Regents José Delgado, Corey Saffold, and Karen Walsh joined the meeting following the roll call.

UNABLE TO ATTEND: Regents Héctor Colón and Carolyn Stanford Taylor.

DECLARATION OF CONFLICTS

[\[00:02:27\]](#)

Before considering any items on the open session agenda, President Petersen asked if any Board members wished to declare any conflicts of interest as per Regent Policy Document 2-4, "Ethics and Conflict of Interest Policy for the UW System Board of Regents." No conflicts were declared.

APPROVAL OF ADMINISTRATIVE CODE SCOPE STATEMENTS FOR CHAPTERS UWS 4, 7, 11 AND 17 PERMANENT AND EMERGENCY RULES

[\[00:02:39\]](#)

President Petersen stated that in order to comply with the new Title IX regulations discussed at the Board's July 9, 2020 meeting, UW System Administration staff have deemed it necessary to seek rule changes to Chapters UWS 4, 7, 11, and 17 of the Wisconsin Administrative Code.

On July 9th, the Board approved the notice for a preliminary hearing and public comment period on the scope statements for these proposed rule changes. President Petersen stated that no comments were received on the scope statements during the public comment period or in response to the preliminary hearing held on July 16, 2020.

President Petersen said the next step in the process is for the Board to take action on the scope statements and provide staff with guidance on drafting the new rules.

Introduction by Interim System President Tommy G. Thompson

[\[00:03:38\]](#)

Before discussing the Title IX rule changes, Interim System President Thompson briefly updated Regents on the biennial budget process and plans for returning to campuses for the Fall 2020 semester.

First, President Thompson announced that the Governor's Office will not grant an extension to the UW System for submitting its biennial budget request, but will allow the System to submit a supplemental budget request after September 15th.

Second, President Thompson stated that following discussions with the City of Milwaukee Commissioner of Health Dr. Jeanette Kowalik, it has been agreed that UW-Milwaukee will start school on September 2nd with no more than 25% of classes held in person.

Returning to the new federal regulations on how universities and colleges must respond to complaints of sexual misconduct, President Thompson said this is a complicated issue that presents a tight turnaround for the UW System to come into compliance by August 14, 2020.

The new Title IX regulations add a number of steps to the process that are designed to protect the due process rights of all parties involved, including live hearings, cross examination, and university-provided advisors. President Thompson indicated that a significant effort will be required on the UW System's part to adapt current policies and

procedures to comply with these new regulations, as well as to provide training and resources to administrators, employees, faculty and students.

President Thompson proposed that the best way to bring the UW institutions into compliance while keeping costs manageable is to seek uniformity, consistency and standardization across the System, sharing resources and expertise in an effort led by the UW System Office of Compliance and Integrity.

President Thompson concluded, "In these challenging times where we've all been asked to do more with less, I think this System-led approach is the best way to support the campuses on Title IX. What it comes down to is we cannot afford not to prioritize the safety of our students and employees in this area. It's too important."

Overview by UW System Offices of General Counsel and Compliance & Integrity

[\[00:07:55\]](#)

President Thompson asked General Counsel Quinn Williams and Director of Compliance & Integrity Katie Ignatowski to provide a summary of the scope statements and rulemaking process.

Director Ignatowski noted that Wisconsin is somewhat unique in that the UW System's conduct procedures are largely required to be promulgated in Administrative Code, which have the effect of state law. The UW System is required to undergo a lengthy process to ensure the Board has proper authority to take these actions, as well as to provide an opportunity for public involvement and oversight by the legislature and Governor's Office.

Director Ignatowski explained that Board of Regents approval is required at multiple points in the process for the UW System to move forward with rulemaking. She then provided an overview of the major provisions of the new federal Title IX regulations, as well as a walkthrough of the System's plan to comply with the new regulations by August 14th.

Changes to Scope of Conduct Covered by New Title IX Regulations

[\[00:10:26\]](#)

In FY2019 the UW System had 161 Title IX cases went through the investigative process. Director Ignatowski noted that this number does not include cases where individuals sought resources like counseling, protective measures, or other support services, but ultimately chose not to file a formal complaint.

Director Ignatowski said of the most significant changes in the new Title IX regulations is a narrower definition of covered conduct and a more limited geographic jurisdiction for the university. Under the current law, covered conduct must be "severe or pervasive." Under the new law, covered conduct must be "severe, pervasive, and objectively offensive."

Also significant is that the new regulations only require institutions to respond to conduct that occurs as part of an official university program or activity within the U.S. Director Ignatowski noted that this would exclude most off-campus activity, including study abroad programs. She indicated that fraternities or sororities likely will be covered under the Title IX regulations if they are officially recognized by the university and a registered student organization owns the property, which may vary among UW institutions.

Director Ignatowski stated that although the new regulations narrow the scope of conduct that must be addressed under Title IX, they do not prohibit universities from maintaining a broader definition of sexual misconduct in their own rules and procedures.

Changes to Title IX Investigative Process

[\[00:13:38\]](#)

Director Ignatowski said the new regulations add a number of new steps to the process institutions are required to use when responding to Title IX-covered conduct. In addition to existing due process requirements, the new regulations also require a live hearing prior to the finding of responsibility; prohibit a single official from investigating, adjudicating, and issuing disciplinary sanctions; require an opportunity for cross-examination by both parties' advisors; and require the university to provide advisors if the parties cannot obtain their own.

Director Ignatowski said there is ongoing discussion nationwide about what the advisor role should look like and whether it should be filled by licensed attorneys or internal staff or faculty. UW System staff have reached out to colleagues at peer institutions and have found others are using varying approaches: some are choosing to provide advisors who can offer a fuller scope of services to the parties, while others are limiting the role of an advisor to merely asking questions during cross examination.

Director Ignatowski indicated that System-level staff are working with the campuses to determine what the proper role of the advisor should be in these cases. She added that they aim to create a Systemwide pool of advisors for campuses to use, which could mean outside attorneys providing their services pro bono or at a reduced cost, or a pool of internal staff or faculty who are able to assist students and employees throughout these proceedings.

System Efforts to Support Campus Compliance

[\[00:17:25\]](#)

Director Ignatowski recommended moving forward with the emergency rulemaking process to bring the UW System into compliance by August 14th. System staff will spend the next 6-9 months continuing to analyze and evaluate how these changes work in

practice before drafting the permanent rule changes. She indicated that the System plans to return to the Board in the fall or winter with more information about what the permanent rule changes might be. Permanent rule changes are expected to be in place by Spring 2021.

Director Ignatowski said the emergency rules for employee misconduct will adopt the new Title IX procedures for conduct that falls within the new Title IX definition, and will retain the UW System's current procedures for sexual misconduct that falls outside the new Title IX definition. She explained that this strategy will provide time for UW System to examine how the current procedures differ from the new rules, seek shared governance input on the campus-level policies, and determine how the different policies for faculty, academic staff, and university staff compare to the UW System's other obligations under employment law, such as Title VII.

Director Ignatowski said the emergency rules for student misconduct will adopt the new Title IX procedures for conduct covered by the new Title IX definition, and will apply the same or similar procedures to complaints of sexual misconduct that fall outside that definition.

Director Ignatowski said the UW System also plans to add a definition of "sexual exploitation" to its current policies. She explained that a prohibition against sexual exploitation would apply when one person takes nonconsensual sexual advantage of another person.

Director Ignatowski concluded by emphasizing that transparency and engagement with internal and external stakeholders is critical as the UW System takes on this work. She indicated that System staff will find ways to seek input from faculty, staff and students about how these new policies work, and to make sure these groups are fully informed about existing reporting options and support services that are available at all campuses. She added that the Office of Compliance & Integrity plans to work with Title IX and student affairs personnel and Regent Olivia Woodmansee to determine ways to get information out to student groups and answer any questions about the new procedures.

Director Ignatowski said the Board's approval of the scope statements will enable staff to begin drafting the emergency rules and policies which will come back to the Board for approval in early August, with plans to discuss the permanent rules in the fall.

Discussion

[\[00:22:41\]](#)

Vice President Grebe made a motion to adopt Resolution 11473. The motion was seconded by Regent Hall. President Petersen opened the floor to discussion.

Responding to a question from Regent Atwell about the availability of Systemwide data on Title IX cases, Director Ignatowski said the System currently produces a number of reports but suggested that there is room of improvement. She proposed that setting up uniform protocols, definitions and standards as well as creating a Systemwide case management database would provide greater access to and increased confidence in the data on Title IX cases.

Regent Atwell asked whether there has been any resistance from the campuses in providing this data to the UW System. Director Ignatowski answered that there has not been any resistance, but added that an internal audit conducted in the previous year showed a need for more structure and standardization of definitions to make it easier for campuses to provide this data.

Director Ignatowski confirmed for Regent Klein that the Board was being asked to approve the scope statements during today's meeting, and then would be asked to approve emergency regulations at another meeting prior to August 14, with permanent rulemaking to follow.

Responding to a question from Regent Klein, General Counsel Williams said the effect of a federal injunction, if granted, on the UW System's rulemaking process would depend on the exact language of the injunction and how long it would remain in effect.

In response to another question from Regent Klein regarding how the new rules would impact codes of conduct at the campuses, Director Ignatowski explained that the new Title IX regulations require institutions to use the new process in Title IX cases, but do not prohibit institutions from using the same process for non-Title IX cases.

Regent Bogost asked if there is data available on how many hearings related to Title IX cases were held across the UW System in 2019. UW System Title IX and Clery Administrator Sarah Harebo said 161 Title IX cases went through the investigative process in 2019. Director Ignatowski said her office could pull together information about the number of hearings.

Regent Bogost noted several concerns with the new Title IX regulations, including the speed with which universities are expected to act with new and complex regulations, lack of clarity on the "advocate" role, the complication of having dual processes for Title IX and non-Title IX cases, and questions about how the "clear and convincing" rule of evidence for Title IX cases might fit with the "preponderance of evidence" rule used in the UW System's code of conduct.

Noting that the last revision of the UW System's sexual violence and sexual harassment policies in 2017 followed a lengthy review process, Regent Bogost asked if the Board could

wait to act until after the July 26th preliminary injunction hearing in a federal case challenging the new Title IX regulations.

Director Ignatowski acknowledged that analyzing the over 2,000 pages of new regulations is a “heavy lift” for System staff, but added that there will be time during the permanent rulemaking process for the Board to fully evaluate the changes and decide how to move forward.

General Counsel Williams noted that the rulemaking timeline can be revisited if federal courts issue a stay against the new regulations, but warned that failure to comply with the August 14th deadline would open the UW System to significant risk of fines and sanctions, including the loss of federal funding.

In response to a question from Regent Bogost about how the UW System’s peer institutions are responding to the new rules, General Counsel Williams said the University of Minnesota’s Board passed new policies the previous week, and the University of Texas System is also moving forward with new policies. He reiterated Director Ignatowski’s earlier point that the UW System’s situation is unique due to the additional legislative process required to approve new rules.

Regent Klein noted that the American Council on Education asked that implementation of the new regulations be delayed due to the COVID-19 pandemic, and she expressed concerns about the rushed timing required for implementing the new rules. She added that she wants to be a good fiduciary to the UW System, and recognizes that federal dollars may be on the line; however, Title IX is not a matter of legal compliance and checking a box for her.

Noting that much has changed since 1972, when Title IX was passed and she came of age, Regent Klein explained that Title IX changed the world for women, in terms of what courses women could take. She stated that any changes in Title IX are a big deal and need to be considered carefully. When looking at the Title IX changes holistically, Regent Klein said she does not know how it will affect students and policies. She indicated that she finds the standard for harassment particularly problematic, and needs know how the proposed dual system is going to work.

Regent Klein stated that to rush this through on the eve of an election, during the middle of a pandemic, is not good governance. She then made a motion to table the item until after the hearing on injunctive relief.

Regent Bogost seconded what Regent Klein was saying, adding that from her personal experience Title IX needs to be strengthened in many ways. She expressed her concern that the Board could miss something if rushed to draft new rules.

Vice President Grebe noted that the current request before the Board is for approval of the scope statements, which will allow the Office of General Counsel to begin drafting rules. He pointed out that the Board will be able to review the rules and discuss the merits of proceeding at future meetings.

President Petersen clarified that the Office of General Counsel will first draft emergency rules which, if approved by the Board, will take immediate effect while staff continue work on the permanent rules.

Vice President Grebe suggested that Regent Klein might have intended to make a motion to postpone consideration to a later date, rather than a motion to table which would simply put off a vote until later in the meeting. Regent Klein agreed that a motion to postpone consideration is what she intended.

Regent Beightol asked whether Governor Evers had already approved the scope statements. General Counsel Williams confirmed that the Governor did give his approval.

Regent President Petersen summarized that the motion offered by Regent Klein would postpone consideration of the scope statements until after the federal court's hearing takes place on July 24. General Counsel Williams noted that the Department of Justice has not indicated whether any decisions will be made at the federal court's preliminary hearing. He stated that delaying Board action until after July 24th would result in UW System staff being unable to meet the August 14th deadline for drafting and implementing the new rules.

Regent Klein asked whether the Board could approve the scope statements and the drafted rules simultaneously. Director Ignatowski noted that staff are prohibited from beginning to draft rules until after the scope statements are approved. General Counsel Williams also noted that the rulemaking process includes public notice and comment periods on the rules.

Regent Klein said that while she does not want to hold up compliance, she does feel strongly that the Board does not need to be on record as approving changes to the rules that may not be a good idea. She reiterated that she feels like this process is being rushed, and the changes are not being considered properly, and she is not sure she wants to be on record as approving the scope statement.

Regent Klein asked if the Board could approve the scope statement and the emergency rules simultaneously, in the event the request for injunctive relief is not granted. General Counsel Williams indicated that approval of a scope statement is required before rules can be drafted. In addition, there are notice periods for hearings required by state statutes. Director Ignatowski added that the UW System is prohibited from drafting rules until the Board approves the scope statements. Pending Board approval of the scope statements,

staff plan to begin drafting the new rules immediately, and then provide a one-week public comment period on the rules.

Regent Klein indicated that she would not object to moving forward with the rulemaking process with the understanding that the Board will have an opportunity for a complete review of how the new Title IX changes will impact the UW System's code of conduct.

Regent Walsh questioned why no public comments were received regarding the scope statements. President Petersen noted that there will be additional opportunities for public input throughout the rulemaking process. Director Ignatowski said that the scope statements are brief and more public involvement is anticipated once the rules are drafted. She indicated that the Office of Compliance & Integrity will work with the University Relations team to push communications about the draft rules through social media and other channels for each of the campuses, as well as with System-led leadership groups including Provosts and student affairs personnel, Chief Business Officers, Title IX coordinators, and student groups.

Vice President Grebe observed that previous rulemaking processes also received minimal feedback in response to the scope statements and predicted that there would be a significant increase in comments on the new Title IX changes following the release of the draft rules.

President Petersen stated that the long rulemaking process is one example of how the UW System is one of the most highly-regulated systems of higher education, and is particularly difficult to manage when faced with a truncated timeline like the current deadline for implementing the new Title IX obligations.

Responding to questions from Regent Klein and Regent Bogost about how the dual process approach for Title IX and non-Title IX conduct would work for employee and student cases, General Counsel Williams and Director Ignatowski stated that these details are among the issues staff will need to examine further during the permanent rulemaking process. Director Ignatowski offered to provide additional materials about how the processes would work prior to the Board's next meeting in early August.

President Petersen encouraged Board members to provide additional insights and comments to the Office of General Counsel throughout the rulemaking process. Noting that the Board is expected to meet in early August to act on the proposed emergency rules and again in the fall or winter to discuss proposed permanent rules, President Petersen reiterated that no rules will take effect without Board approval.

In response to additional questions from Regent Klein, Director Ignatowski stated that other institutions across the country are also retaining broader definitions of sexual

misconduct in their codes of conduct to address cases that fall outside the Title IX definition.

With no further discussion, Resolution 11473 was approved on a voice vote.

Approval of Administrative Code Scope Statements for Chapters UWS 4, 7, 11 and 17
Permanent and Emergency Rules

Resolution 11473 That, upon the recommendation of the President of the University of Wisconsin System, the Board of Regents approves the Administrative Code Scope Statements for Wisconsin Administrative Code, Chs. UWS 4 (“Procedures for Dismissal”); UWS 7 (“Dismissal of Faculty in Special Case”); UWS 11 (“Dismissal of Academic Staff for Cause”); and UWS 17 (“Student Nonacademic Disciplinary Procedures”).

The meeting was adjourned at 3:52 p.m.

Submitted by:

/s/ Jess Lathrop

Jess Lathrop
Executive Director & Corporate Secretary
Office of the Board of Regents
University of Wisconsin System