

SOUTH DAKOTA BOARD OF REGENTS

Full Board

**REVISED
AGENDA ITEM: 15**

DATE: August 12, 2015

SUBJECT: Board Policy No. 1:18(10)(D) and Board Policy No. 3:4 – Student Conduct Code

At the Board’s May 12-13, 2015 meeting, it adopted a series of policy changes to implement evolving United States Department of Education Regulation and Guidance. As was discussed at the May Board meeting, Board Policy No. 3:4 remains under review and will be brought in revised form to the Board at its October 6-8, 2015 meeting for its consideration.

Attached are two additional revisions that are brought to the Board at this time as interim measures that will assure coordination of Board policies with one another and with federal rule and guidance. The Board staff and institutional leadership fully appreciates the abiding interest of the Board in considering more fully whether to create enhanced procedural rights in connection with certain kinds of alleged misconduct. Adoption of the attached interim measures will avoid unintended inconsistencies and will assure compliance with current guidance and newly effective regulations, but will not preclude due deliberation of proposals to enhance procedural rights for students in certain instances.

The first change corrects an oversight in Board Policy No. 1:18(10)(D). As adopted in May, this provision creates a special right for complainants and accuseds where sexual violence has been alleged. As adopted, in such proceedings, “both a complainant or an accused may bring a representative of their choosing to any meeting or proceeding that they are required or permitted to attend.” This was intended to track 34 C.F.R. § 688.46(k)(2)(iii) and (iv), which requires that institutional polices:

(iii) Provide the accuser and the accused with the same opportunities to have others present during any institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the *advisor* of their choice;

(iv) Not limit the choice of *advisor* or presence for either the accuser or the accused in any meeting or institutional disciplinary proceeding; however, the institution may establish restrictions regarding the extent to which the *advisor* may participate in the proceedings, as long as the restrictions apply equally to both parties;(emphasis added).

(Continued)

RECOMMENDED ACTION OF THE EXECUTIVE DIRECTOR

Adopt the proposed changes to Board Policy No. 3:4.

The Board Policy 1:18 formulation used “representative” rather than “advisor.” Board Policy No. 3:4 employs the term “advisor” rather than “representative.” Hence, in order to make the two related policies consistent, while correctly meeting the requirements of the new regulation, the proposed revision to Board Policy No. 1:18(10)(D) strikes “representative,” inserts “advisor” and effects certain stylistic changes.

The additional changes respond to an Education Department statement in the preface to the Final Rule. The Education Department specifies that rule “does not require an advisor to be present but merely requires that each party have the same opportunity to have an advisor present. An institution would not need to cancel or delay a meeting simply because an advisor could not be present, so long as the institution gave proper notice of the meeting under Sec. 668.46(k)(3)(i)(B)(2); however we encourage institutions to consider reasonable requests to reschedule.” United States Department of Education, Office of Postsecondary Education, Violence Against Women’s Act, Final Rule, 79 Fed.Reg. 62752, 62773 (October 20, 2014). Accordingly, language was added to pick up the notice requirements in 34 C.F.R. § 668.46(k)(3)(i)(B)(2) which requires “Includes timely notice of meetings at which the accuser or accused, or both, may be present.”

Proposed changes to Board Policy No. 3:4 address a limited range of issues.

- They require that conduct body members be employees rather than students.
- They update references to federal regulations that incorporate certain definitions of serious crimes.
- They incorporate the Board Policy No. 1:17.1 definition of consent and descriptions for the categories of sexual violence.
- They coordinate procedures between Board Policies No. 1:18 and No. 3:4 by defaulting to Board Policy No. 1:18 procedures where allegations arise under Board Policy No. 1:18.

SOUTH DAKOTA BOARD OF REGENTS

Policy Manual

SUBJECT: Human Rights Complaint Procedures

NUMBER: 1:18

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10. Confidentiality

Reasonable efforts will be made to maintain the confidentiality of the complaints. Complainants and witnesses must understand that it may become necessary to disclose their identities, either directly or indirectly, in the course of investigation. Institutions are required to respond to and investigate allegations of discrimination.

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- D. Where the complaint involved conduct proscribed under Board Policy No. 1:17.1, and, upon request, both a complainant or an accused complainants and accuseds may bring a representative advisors of their choosing to any meeting or proceeding that they are required or permitted to attend institutional disciplinary proceeding or any related meeting or proceeding that they are required or permitted to attend. Both complainants and accuseds will be given written notice of meetings at which one or the other or both may be present and accompanied by their chosen advisors. The notice will be given with reasonable time to allow complainants and accuseds opportunity to make arrangements for the advisor to attend, but the institution need not cancel or delay a meeting simply because an advisor could not be present, so long as the institution gave timely, written notice of the meeting. Electronic notification may be used if permitted under the relevant disciplinary procedures.

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SOURCE: BOR Oct. 1991, BOR, October, 1992; BOR, January 1995; BOR, March-April 2011; BOR, December 2013; BOR, June 2015.

SOUTH DAKOTA BOARD OF REGENTS

Policy Manual

SUBJECT: Student Conduct Code

NUMBER: 3:4

1. Definitions

The following terms have the stated meanings in this code:

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J. The phrase “student conduct body” means any ~~person or persons~~ institutional employee or employees or independent contractor authorized by the senior student affairs officer to determine whether a student has violated the Student Code and to recommend imposition of sanctions.

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T. The term “crime of violence” means an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. It includes, but is not limited to, the following offenses: criminal homicide, forcible sex offense, robbery, aggravated assault, and arson, as these terms are defined in ~~1999 Appendix E~~ 2015 APPENDIX A TO SUBPART D to 34 CFR part 668, which is attached hereto as an appendix, as well as burglary of an occupied structure or dwelling and kidnapping.¹

¹ ~~Appendix E to Part 668—Crime Definitions in Accordance with the Federal Bureau of Investigation's Uniform Crime Reporting Program~~

~~The following definitions are to be used for reporting the crimes listed in Sec. 668.47, in accordance with the Federal Bureau of Investigation's Uniform Crime Reporting Program. The definitions for murder, robbery, aggravated assault, burglary, motor vehicle theft, weapon law violations, drug abuse violations and liquor law violations are excerpted from the Uniform Crime Reporting Handbook. The definitions of forcible and nonforcible sex offenses are excerpted from the National Incident Based Reporting System Edition of the Uniform Crime Reporting Handbook.~~

~~Crime Definitions From the Uniform Crime Reporting Handbook~~

~~**Murder:** The willful (nonnegligent) killing of one human being by another.~~

~~**Robbery:** The taking or attempting to take anything of value from the care, custody, or control of a person or persons by force or threat of force or violence and/or by putting the victim in fear.~~

~~**Aggravated Assault:** An unlawful attack by one person upon another for the purpose of inflicting severe or aggravated bodily injury. This type of assault usually is accompanied by the use of a weapon or by means likely to produce death or great bodily harm. (It is not necessary that injury result from an aggravated assault when a gun, knife, or other weapon is used which could and probably would result in serious personal injury if the crime were successfully completed.)~~

Burglary: The unlawful entry of a structure to commit a felony or a theft. For reporting purposes this definition includes: unlawful entry with intent to commit a larceny or felony; breaking and entering with intent to commit a larceny; housebreaking; safecracking; and all attempts to commit any of the aforementioned.

Motor Vehicle Theft: The theft or attempted theft of a motor vehicle. (Classify as motor vehicle theft all cases where automobiles are taken by persons not having lawful access even though the vehicles are later abandoned including joyriding.)

Weapon Law Violations: The violation of laws or ordinances dealing with weapon offenses, regulatory in nature, such as: manufacture, sale, or possession of deadly weapons; carrying deadly weapons, concealed or openly; furnishing deadly weapons to minors; aliens possessing deadly weapons; and all attempts to commit any of the aforementioned.

Drug Abuse Violations: Violations of State and local laws relating to the unlawful possession, sale, use, growing, manufacturing, and making of narcotic drugs. The relevant substances include: opium or cocaine and their derivatives (morphine, heroin, codeine); marijuana; synthetic narcotics (demerol, methadones); and dangerous nonnarcotic drugs (barbiturates, benzedrine).

Liquor Law Violations: The violation of laws or ordinances prohibiting: the manufacture, sale, transporting, furnishing, possessing of intoxicating liquor; maintaining unlawful drinking places; bootlegging; operating a still; furnishing liquor to a minor or intemperate person; using a vehicle for illegal transportation of liquor; drinking on a train or public conveyance; and all attempts to commit any of the aforementioned. (Drunkness and driving under the influence are not included in this definition.)

Sex Offenses Definitions From the National Incident-Based Reporting System Edition of the Uniform Crime Reporting Program

Sex Offenses — Forcible: Any sexual act directed against another person, forcibly and/or against that person's will; or not forcibly or against the person's will where the victim is incapable of giving consent.

A. ~~Forcible Rape~~ The carnal knowledge of a person, forcibly and/or against that person's will; or not forcibly or against the person's will where the victim is incapable of giving consent because of his/her temporary or permanent mental or physical incapacity (or because of his/her youth).

B. ~~Forcible Sodomy~~ Oral or anal sexual intercourse with another person, forcibly and/or against that person's will; or not forcibly against the person's will where the victim is incapable of giving consent because of his/her youth or because of his/her temporary or permanent mental or physical incapacity.

C. ~~Sexual Assault With An Object~~ The use of an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, forcibly and/or against that person's will; or not forcibly or against the person's will where the victim is incapable of giving consent because of his/her youth or because of his/her temporary or permanent mental or physical incapacity.

D. ~~Forcible Fondling~~ The touching of the private body parts of another person for the purpose of sexual gratification, forcibly and/or against that person's will; or, not forcibly or against the person's will where the victim is incapable of giving consent because of his/her youth or because of his/her temporary or permanent mental incapacity.

Sex Offenses — Nonforcible: Unlawful, nonforcible sexual intercourse.

A. ~~Incest~~ Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.

B. ~~Statutory Rape~~ Nonforcible sexual intercourse with a person who is under the statutory age of consent.

59 FR 22320, Apr. 29, 1994

APPENDIX A TO SUBPART D OF PART 668--CRIME DEFINITIONS IN ACCORDANCE WITH THE FEDERAL BUREAU OF INVESTIGATION'S UNIFORM CRIME REPORTING PROGRAM

The following definitions are to be used for reporting the crimes listed in Sec. 668.46, in accordance with the Federal Bureau of Investigation's Uniform Crime Reporting (UCR) Program. The definitions for murder, rape, robbery, aggravated assault, burglary, motor vehicle theft, weapons: carrying, possessing, etc., law violations, drug abuse violations, and liquor law violations are from the "Summary Reporting System (SRS) User Manual" from the FBI's UCR Program. The definitions of fondling, incest, and statutory rape are excerpted from the "National Incident-Based Reporting System (NIBRS) User Manual" from the FBI's UCR Program. The definitions of larceny-theft (except motor vehicle theft), simple assault, intimidation, and destruction/damage/vandalism of property are from the "Hate Crime Data Collection Guidelines and Training Manual" from the FBI's UCR Program.

Crime Definitions From the Summary Reporting System (SRS) User Manual From the FBI's UCR Program

Arson

Any willful or malicious burning or attempt to burn, with or without intent to defraud, a dwelling house, public building, motor vehicle or aircraft, personal property of another, etc.

Criminal Homicide--Manslaughter by Negligence

The killing of another person through gross negligence.

Criminal Homicide--Murder and Nonnegligent Manslaughter

The willful (nonnegligent) killing of one human being by another.

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 another person, without the consent of the victim.

Robbery

The taking or attempting to take anything of value from the care, custody, or control of a person or persons by force or threat of force or violence and/or by putting the victim in fear.

Aggravated Assault

An unlawful attack by one person upon another for the purpose of inflicting severe or aggravated bodily injury. This type of assault usually is accompanied by the use of a weapon or by means likely to produce death or great bodily harm. (It is not necessary that injury result from an aggravated assault when a gun, knife, or other weapon is used which could and probably would result in serious personal injury if the crime were successfully completed.)

Burglary

The unlawful entry of a structure to commit a felony or a theft. For reporting purposes this definition includes: unlawful entry with intent to commit a larceny or felony; breaking and entering with intent to commit a larceny; housebreaking; safecracking; and all attempts to commit any of the aforementioned.

Motor Vehicle Theft

The theft or attempted theft of a motor vehicle. (Classify as motor vehicle theft all cases where automobiles are taken by persons not having lawful access even though the vehicles are later abandoned--including joyriding.)

Weapons: Carrying, Possessing, Etc.

The violation of laws or ordinances prohibiting the manufacture, sale, purchase, transportation, possession, concealment, or use of firearms, cutting instruments, explosives, incendiary devices, or other deadly weapons.

Drug Abuse Violations

The violation of laws prohibiting the production, distribution, and/or use of certain controlled substances and the equipment or devices utilized in their preparation and/or use. The unlawful cultivation, manufacture, distribution, sale, purchase, use, possession, transportation, or importation of any controlled drug or narcotic substance. Arrests for violations of State and local laws, specifically those relating to the unlawful possession, sale, use, growing, manufacturing, and making of narcotic drugs.

U. Consent has the same meaning assigned to it in Board Policy No. 1:17.1(3)(E):

Consent may be implied from the facts and circumstances surrounding the commission of an act. Consent will not be found where an act has been done through the use of force, coercion, or threats of immediate and great bodily harm. Submission does not equal consent, and to establish consent, a party charged must

Liquor Law Violations

The violation of State or local laws or ordinances prohibiting the manufacture, sale, purchase, transportation, possession, or use of alcoholic beverages, not including driving under the influence and drunkenness.

Crime Definitions From the National Incident-Based Reporting System (NIBRS) User Manual from the FBI's UCR Program

Sex Offenses

Any sexual act directed against another person, without the consent of the victim, including instances where the victim is incapable of giving consent.

A. Fondling--The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity.

B. Incest--Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.

C. Statutory Rape--Sexual intercourse with a person who is under the statutory age of consent.

Crime Definitions From the Hate Crime Data Collection Guidelines and Training Manual From the FBI's UCR Program

Larceny-Theft (Except Motor Vehicle Theft)

The unlawful taking, carrying, leading, or riding away of property from the possession or constructive possession of another. Attempted larcenies are included. Embezzlement, confidence games, forgery, worthless checks, etc., are excluded.

Simple Assault

An unlawful physical attack by one person upon another where neither the offender displays a weapon, nor the victim suffers obvious severe or aggravated bodily injury involving apparent broken bones, loss of teeth, possible internal injury, severe laceration, or loss of consciousness.

Intimidation

To unlawfully place another person in reasonable fear of bodily harm through the use of threatening words and/or other conduct, but without displaying a weapon or subjecting the victim to actual physical attack.

Destruction/Damage/Vandalism of Property

To willfully or maliciously destroy, damage, deface, or otherwise injure real or personal property without the consent of the owner or the person having custody or control of it.

utterly negate any element of force, coercion, or threat. Consent, once given, may be retracted. Consent will not be found under any of the following circumstances:

- 1) if the victim is less than thirteen years of age; or
- 2) through the use of force, coercion, or threats of immediate and great bodily harm against the victim or other persons within the victim's presence, accompanied by apparent power of execution; or
- 3) if the victim is incapable, because of physical or mental incapacity, of giving consent to such act; or
- 4) if the victim is incapable of giving consent because of any intoxicating, narcotic, or anesthetic agent or hypnosis; or
- 5) if the victim is thirteen years of age, but less than sixteen years of age, and the perpetrator is at least three years older than the victim.

2. Proscribed Conduct

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B. Conduct – Rules and Regulations

Members of the institutional community reasonably expect that they shall be able to live, study, work, and relax in a safe and orderly environment that is conducive to achievement of the educational, scholarly, and public service missions of the institution. The following regulations, while not all-inclusive, identify forms of conduct that infringe upon those expectations, disrupt the orderly progress of institutional activities and, so, expose the actors to conduct sanctions.

Any student, group of students, or student organization found to have committed the following misconduct is subject to the conduct sanctions outlined in Section 3, Student Conduct Policies.

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- 6) Discriminatory conduct proscribed under Board Policies 1:17, 1:17.1 and 1:18 includes sexual harassment, racial harassment, harassment on other grounds identified in Board Policy 1:17, or harassment on any other grounds, directed against individuals. Additionally, Board Policy No. 1:17.1 proscribes conduct that would constitute dating violence, sexual assault, domestic violence and stalking, ~~as defined under law.~~

3. Judicial Policies

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A. Allegations and Hearings

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- 3) Allegations arising under the human relations policy shall be handled as provided in Board Policy 1:18. In particular, though without limitation, student complainants and accused shall have the rights provided under Board Policy No. 1:18(7) to trained investigators and hearing officers and to challenge the bias or conflict of interest of investigators or hearing officers, and they shall have the rights provided Board Policy No. 1:18(10), in the case of complainants to request confidentiality or forbearance, and with respect to complainants and accuseds to receive information relating to the conduct proceedings and outcomes.

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- 6) Within fifteen workings days of the filed complaint, the student conduct officer shall present all allegations to the student charged in written form and shall identify with specificity each section of the conduct code under which allegations are brought, the ~~faculty~~ fact allegations that support the allegations and those persons whose testimony shall be used to establish the allegations.

SOURCE: BOR, February 1969; RR, 12:06, 1977; BOR, 1980; BOR, April 1987; BOR, June 1990; BOR, December 1994; BOR, October 1996; BOR, December 1999; BOR, March 2006; BOR, December 2006: BOR, August 2009; BOR, August 2011; BOR, December 2013; BOR, June 2014.