

SOUTH DAKOTA BOARD OF REGENTS

Academic & Student Affairs

AGENDA ITEM: 4 – H

DATE: October 7-8, 2015

SUBJECT: A proposal to elicit support for legislation to amend South Dakota’s misprision of felony statute in order to permit postsecondary institutions to create confidential advisors to assist victims of sexual violence.

As noted elsewhere on the agenda, the Board and the universities that it governs have invested, and continue to invest, substantial time and resources to the issue of sexual violence at postsecondary institutions. The present item involves a change to South Dakota statutes that should make it easier for victims of sexual violence to obtain aid without finding themselves forced to participate in criminal justice procedures.

Victim reluctance to being drawn into criminal investigations and proceedings over which they have no control numbers among the circumstances that dissuade many victims from making reports to university personnel or from seeking any assistance whatever. Attachment I, p. . The United States Military Academies sought to break this pattern of silence by adopting a broad range of policy initiatives including policies that permitted victims to make confidential reports and to obtain assistance and support from institutional personnel. The experience of the academies suggests that allowing for confidential reports to university officials may actually increase the number of reports that are provided to law enforcement and that can subsequently be prosecuted. Attachment I, pp. 4-5.

At present, South Dakota’s misprision of felony statute, SDCL § 22-11-12, prevents South Dakota universities, colleges and technical institutes from adopting policies that have proven their worth at the military academies. Misprision of felony originated under the common law of England as a criminal offense, “generally Mifprifion of Felony is taken for a

(Continued)

RECOMMENDED ACTIONS

I move to authorize the Executive Director to introduce legislation to enable South Dakota postsecondary institutions to provide for limited confidential reporting of incidents involving sexual violence.

Concealment of Felony, or a procuring of the Concealment thereof, whether it be Felony by the Common Law, or by Statute.” William Hawkins, *TREATISE OF THE PLEAS OF THE CROWN: OR, A SYSTEM OF THE PRINCIPAL MATTERS RELATING TO THAT SUBJECT, DIGESTED UNDER PROPER HEADS* (3d ed.) (1739), p. 125. South Dakota’s version of this ancient doctrine provides that:

Any person who, having knowledge, which is not privileged, of the commission of a felony, conceals the felony, or does not immediately disclose the felony, including the name of the perpetrator, if known, and all of the other relevant known facts, to the proper authorities, is guilty of misprision of a felony. Misprision of a felony is a Class 1 misdemeanor. There is no misprision of misdemeanors, petty offenses, or any violation of § 22-42-5.1.
SDCL § 22-11-12.

The provisions of South Dakota’s misprision of felony statute retain the essential characteristics of its common law ancestors. Since many reports of sexual violence will involve conduct that may be felonious, SDCL § 22-11-12 obstructs the ability of South Dakota postsecondary institutions to adopt the best practices that guide military academy efforts to prevent sexual violence and to respond effectively where incidents occur.¹

While it is certainly true that an incident involving sexual violence may result in misdemeanor level charges rather than felony charges,² from the practical standpoint, the person who receives the report from the victim may not be able to know at the onset whether the facts would support a criminal action, let alone what charges or what level of charges might be brought. Hence, at the point of first contact, the institutional staff members could not know whether they could offer to safeguard a student’s report in confidence or whether they would be

¹ Federal authorities consistently urge that colleges and universities to provide victims of sexual assault with an avenue to make confidential reports. “In recent years, some schools have directed nearly all their employees (including those who typically offer confidential services, like rape crisis and women’s centers) to report all the details of an incident to school officials – which can mean that a survivor quickly loses control over what happens next. That practice, however well-intentioned, leaves survivors with fewer places to turn. This is, by far, the problem we heard most about in our listening sessions.” *The First Report of the White House Task Force to Protect Students From Sexual Assault*, (April 2014), http://www.whitehouse.gov/sites/default/files/docs/report_0.pdf, p. 11; United States Education Department, Office of Civil Rights, *Questions and Answers on Title IX and Sexual Violence*, April 29, 2014, <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>, pp., 18-24; United States Education Department, Office of Civil Rights, released a *Dear Colleague Letter on Sexual Violence*, April 4, 2011, <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>, p. 5.

² Not all crimes classified as sexual violence for purposes of postsecondary institution obligations under Title IX and Violence Against Women’s Reauthorization Act are classified as felonies. Rape and other violations of SDCL ch 22-22, except for certain acts between minors, constitute felony level offenses. Violations of protection orders may be felonies if the violated acted in ways that would violate criminal assault or stalking statutes. SDCL § 25-10-13. A second conviction for stalking within ten years of an earlier conviction is also a felony offense. SDCL § 22-19A-1.

obligated to make a report to law enforcement. Given the uncertainty, making a report in every instance is the only way to assure compliance with SDCL §22-11-12.

Mindful that the United States military academies, and the armed forces generally, have established confidential reporting systems as part of their overall efforts to reduce the incidence of sexual violence and have achieved degrees of success, the Board staff, in consultation with institutional personnel, developed a rationale for amending, and drafted legislation to amend, SDCL ch 22-11 to afford South Dakota postsecondary institutions a conditional exemption from requirements to refer all instances of sexual violence to law enforcement authorities. *See*, Attachments I and II. The exemption would only apply if institutions established policies and practices, and trained employees to administer them, modeled on those employed by the United States service academies. Postsecondary institutions that failed to meet such standards would not be exempt from the mandate of SDCL § 22-11-12. Moreover, no institution would be exempt from mandatory reports of sexual violence directed towards minors.



BOARD OF REGENTS

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OFFICE OF THE EXECUTIVE DIRECTOR

September 28, 2015

MEMORANDUM

TO: The Honorable Dennis Daugaard, Governor
 The Honorable Marty Jackley, Attorney General
 The Honorable Corey Brown, Senator
 The Honorable Craig Tieszen, Senator
 The Honorable David Novstrup, Senator
 The Honorable Deb Soholt, Senator
 The Honorable Brian Gosch, Representative
 The Honorable Steve Westra, Representative
 The Honorable G. Mark Mickelsen, Representative
 The Honorable Mike Stevens, Representative
 The Honorable Peggy Gibson, Representative
 The Honorable Kristin A. Conzet, Representative
 Thomas C. Barnett, Jr., South Dakota Bar Association
 Ann Hoffman, South Dakota Bar, South Dakota Bar Assn Women in Law
 Committee
 Krista Heeren-Graber, South Dakota Network Against Family Violence and
 Sexual Assault
 Aaron McGowen, South Dakota State’s Attorneys Association
 Andy Howe, South Dakota Sheriff’s Association
 Greg Swanson, South Dakota Peace Officers Association

FROM: Michael G. Rush
 Executive Director and
 Chief Executive Officer

RE: Draft Legislation to Enable Confidential Reporting of Sexual Violence

The Board of Regents is considering draft legislation which would create a limited exemption from SDCL § 22-11-12 for reports involving sexual violence. The attached bill draft was framed largely with reference to Department of Defense policies employed at the United

States Air Force Academy^[1] and to practices outlined in the bipartisan S. 590, the Campus Accountability and Safety Act, introduced into the 114th Congress, Session I, by Senator Claire McCaskill of Missouri.^[2]

The Board recognizes that the proposal represents a significant change to longstanding public policy and therefore raises matters that affect many agencies of government and the public and private interests that they protect and serve. Even though this proposal aims to relieve equally longstanding deterrents to assisting victims of sexual violence, the proper consideration of the consequences, both expected and perhaps unexpected, requires more time than the press of legislative deadlines typically allows. Hence, I write now to draw attention to this proposal and to provide important background information to permit responsible executive, law enforcement and legislative leaders, as well as advocacy groups, to begin to weigh the concerns that prompt the proposal and to evaluate the consequences that might flow from enacting the proposed legislation. Although I am bound to other commitments during the coming month, I will intend to make time in November to contact you and to determine whether it may be useful or convenient to meet and to discuss these matters further.

For many decades, the Board of Regents policies made patent its expectation that the institutions not tolerate sexual violence.¹ As have other postsecondary institutions in recent years, the Board expanded the resources that it devotes to this objective. The present effort recognizes that policies and practices must be shaped to accommodate the fact that the psychological trauma of violence typically has both immediate and longer term repercussions for victims and that these may affect their trust of others and willingness to cooperate with authorities or, even, to accept assistance.

In this connection, and mindful of your support for efforts to enhance the capacity of state agencies to respond constructively to sexual violence, I write you today to request your thoughts about, and your support for, another measure that the Board wishes to address to enhance its ability to work with victims. It concerns the question whether an institution may provide

^[1] AIR FORCE INSTRUCTION 36-6001, <http://www.afpc.af.mil/shared/media/document/AFD-130510-040.pdf>. The Air Force Document, itself, implements Department of Defense Instruction 6495.02, <http://dtic.mil/whs/directives/corres/pdf/649502p.pdf>. DoDI 6495.02 applies to all military services, “Army, Air Force, Navy, Marines, Reserve Components, and their respective Military Academies.” DoDI 6495.02, p. 92.

^[2] <http://www.gpo.gov/fdsys/pkg/BILLS-114s590is/pdf/BILLS-114s590is.pdf>, Cosponsors through September 14, 2015, include, in alphabetical order: Sen Ayotte, Kelly [NH], Sen Blumenthal, Richard [CT], Sen Blunt, Roy [MO], Sen Boxer, Barbara [CA], Sen Brown, Sherrod [OH], Sen Capito, Shelley Moore [WV], Sen Coons, Christopher A. [DE], Sen Ernst, Joni [IA], Sen Feinstein, Dianne [CA], Sen Franken, Al [MN], Sen Gillibrand, Kirsten E. [NY], Sen Graham, Lindsey [SC], Sen Grassley, Chuck [IA], Sen Hatch, Orrin G. [UT], Sen Heller, Dean [NV], Sen Kirk, Mark Steven [IL], Sen Klobuchar, Amy [MN], Sen Menendez, Robert [NJ], Sen Merkley, Jeff [OR], Sen Murphy, Christopher S. [CT], Sen Peters, Gary C. [MI], Sen Reed, Jack [RI], Sen Rubio, Marco [FL], Sen Sanders, Bernard [VT], Sen Schatz, Brian [HI], Sen Schumer, Charles E. [NY], Sen Shaheen, Jeanne [NH], Sen Stabenow, Debbie [MI], Sen Sullivan, Dan [AK], Sen Tester, Jon [MT], Sen Vitter, David [LA], Sen Warner, Mark R. [VA], Sen Whitehouse, Sheldon [RI], Sen Wyden, Ron [OR].

¹ By sexual violence, the Board intends to refer to victim of sexual assault as defined in chapter 22-22, domestic violence as defined in chapter 25-10, or stalking as defined in chapter 22-19A.

assurances of confidentiality to persons who report that they have been victims of sexual violence.² Because many instances of sexual violence may involve felony offenses, SDCL § 22-11-12 precludes granting sexual violence victims such assurances unless the communications occur in a context covered by evidentiary privileges under SDCL ch 19-13.³

While it is certainly true that an incident involving sexual violence may result in misdemeanor level charges rather than felony charges, from the practical standpoint, the person who receives the report from the victim may not be able to know at the onset whether the facts would support a criminal action, let alone what charges or what level of charges might be brought. Hence, at the point of first contact, the institutional staff members could not know whether they could offer to safeguard a student's report in confidence or whether they would be obligated to make a report to law enforcement. Given the uncertainty, making a report in every instance is the only way to assure compliance with SDCL §22-11-12.

Unfortunately, SDCL § 22-11-12 thus prevents the Board from adopting confidential reporting practices that have been shown to provide effective victim assistance. Confidential reporting systems accommodate the fact persons experiencing the trauma of sexual violence may be reluctant to disclose that they have been victimized. One common strategy to encourage victims to step forward involves creating options to report incidents confidentially.⁴ The United States military and the military service academies formally adopted this practice in 2005.⁵

² Federal authorities consistently urge that institutions provide victims of sexual assault with an avenue to make confidential reports. "In recent years, some schools have directed nearly all their employees (including those who typically offer confidential services, like rape crisis and women's centers) to report all the details of an incident to school officials – which can mean that a survivor quickly loses control over what happens next. That practice, however well-intentioned, leaves survivors with fewer places to turn. This is, by far, the problem we heard most about in our listening sessions." *The First Report of the White House Task Force to Protect Students From Sexual Assault*, (April 2014), http://www.whitehouse.gov/sites/default/files/docs/report_0.pdf, p. 11; United States Education Department, Office of Civil Rights, *Questions and Answers on Title IX and Sexual Violence, April 29, 2014*, <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>, pp., 18-24; United States Education Department, Office of Civil Rights, released a Dear Colleague Letter on Sexual Violence, April 4, 2011, <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>, p. 5.

³ SDCL § 22-11-12 provides that, "Any person who, having knowledge, which is not privileged, of the commission of a felony, conceals the felony, or does not immediately disclose the felony, including the name of the perpetrator, if known, and all of the other relevant known facts, to the proper authorities, is guilty of misprision of a felony. Misprision of a felony is a Class 1 misdemeanor. There is no misprision of misdemeanors, petty offenses, or any violation of § 22-42-5.1." Sexual violence includes rape, domestic violence and stalking, and such crimes may well involve felony offenses. Rape and other violations of SDCL ch 22-22, except for certain acts between minors, constitute felony level offenses. Violations of protection orders may be felonies if the violated acted in ways that would violate criminal assault or stalking statutes. SDCL § 25-10-13. A second conviction for stalking within ten years of an earlier conviction is also a felony offense. SDCL § 22-19A-1.

⁴Concededly, victim reluctance does not appear to reflect an awareness of legal reporting requirements, but rather a reluctance to divulge such information to anyone other than peer confidants. Surveys completed by cadets and midshipmen indicate that reluctance to tell anyone about an incident or to expose oneself to gossip numbers among major factors deterring women from making any report at all about an incident. DoD, Academic Program Year 2013-2014 Report on Sexual Harassment and Violence at the Military Service Academies, February 2015, http://sapr.mil/public/docs/reports/MSA/APY_13-14_MSA_Report.pdf, p. 37 (63% of women victims as the United States Military Academy responded that they did not want to become the subjects of gossip and that they did not

While many law enforcement officials understandably view with skepticism any proposal to create another exception to the mandate of SDCL § 22-11-12, the experience of the service academies affords evidence that affording a confidential option to sexual violence victims, when combined with additional programming to reduce the incidence of sexual violence, may actually increase the number of actionable reports that become available to law enforcement.

The experience at the Air Force Academy provides degrees of assurance that granting confidentiality may actually improve the opportunities to identify and to sanction wrongdoers. The Air Force Academy experience is instructive because the sequence of events affords a real-life experiment of the intuition that creating circumstances that support confidential reports will contribute to increasing the overall number of reports available for disciplinary and law enforcement purposes.

The Air Force Academy created an ad hoc confidential system outside military mandatory reporting requirements. In one form or another, from early 1993 through May 2003, it had in place a practice of permitting such reports. The Air Force Office of Special Investigations (AFOSI) first learned of the practice in 1996 and objected to it. The confidentiality practice was suspended at the end of May 2003.⁶

Nonetheless, as part of a comprehensive approach to strategies for preventing and responding to sexual violence, the DoD adopted a modified version of the policy for use

report incidents because they did not want anyone to know of the incident), p. 56 (68% of women victims at the United States Naval Academy responded that they did not report incidents because they did not want anyone to know of the incident), p. 78 (66% of women victims at the United States Air Force Academy responded that they did not report incidents because they did not want anyone to know of the incident and that they did not want to become the subjects of gossip); Giannina Fehler-Cabral, et al., “Adolescent Sexual Assault Disclosure: The Impact of Peers, Families, and Schools,” 52 AMERICAN J. OF COMMUNITY PSYCHOLOGY 73, 81 (Sep 2013) (disclosure by a peer to other people without the survivor’s consent increased the difficulty survivors’ subsequent disclosures and entry into the formal system); Carrie A. Moylan, et al., “Sexual Assault Response Teams (SARTs): Mapping a research agenda that incorporates an organizational perspective on multidisciplinary service delivery,” 21 VIOLENCE AGAINST WOMEN 516, 528-29 (2015)(differing interests and priorities among community resources (health care, victims services and law enforcement), sometimes result in “victims reporting that they feel ‘revictimized’ by the people they have turned to for help,” a circumstance that may interfere with victim progress in overcoming the trauma).

⁵ Service Academy 2005 Sexual Harassment And Assault Survey, DMDC Report No. 2005-018, <http://sapr.mil/public/docs/research/DMDC-Academy-2005-Survey.pdf>, pp. 2 – 10 (citing Confidentiality Policy for Victims of Sexual Assaults (JTF-SAPR-009), dated March 16, 2005, <http://www.defense.gov/news/Mar2005/d20050318dsd.pdf>); See, also, Sexual Assault Evidence Collection and Preservation Under Restricted Reporting (JTF-SAPR-014), dated June 30, 2005, http://www.usfk.mil/usfk/Uploads/sites/sa/menu_files/Module_3/Mod3Memo15.pdf?AspxAutoDetectCookieSupport=1.

⁶ DoD, OIG Report No. IPO2004C003, “valuation of Sexual Assault, Reprisal, and Related Leadership Challenges at the United States Air Force Academy,” December 3, 2004, <http://www.dodig.mil/FOIA/ERR/IPO2004C003-report.pdf>, pp. 19-20. The Department of Defense Office of Investigator General strongly supported the objections of the AFOSI. The OIG minced few words, “The [Air Force Academy] program prevented criminal investigators from even learning about sexual assault crimes, thereby denying them the opportunity to exercise their independent authority to decide whether a criminal investigation was warranted. Sexual assault reporting to AFOSI was adversely affected in this way for approximately 10 years, despite continuing AFOSI objections.” *Id.*, at p. 20.

throughout the armed services in 2005.⁷ The Air Force Academy reinstated the approved version of the confidentiality policy, which remains in use today.⁸

The data set forth in Attachment I demonstrate that, at least in a postsecondary institution setting, it is possible to create an avenue to permit institutional personnel to submit confidential reports of sexual violence and still increase the number of reports that are open to full investigation for purposes of discipline and law enforcement. During the initial, unofficial phases of the Air Force Academy experience, from 1993 through 1995, though still quite low, reports of sexual violence increased significantly from the negligible numbers in the immediately preceding years. Numbers fell back during a time when the program was being questioned by AFOSI. But reports for the years following the DoD decision to implement comprehensive approaches to preventing and responding to sexual violence, 2006-2014, have shown gains in the number of incident reports that are immediately available for full investigation.

In addition to the increase in the number of reports immediately available for investigation by disciplinary and law enforcement authorities, experience at the military service has shown that a number of individuals who choose at first to submit confidential reports will subsequently decide to refer their reports to disciplinary and law enforcement authorities.⁹

The data provide clear, consistent support for the conclusion that, at least in a postsecondary institution setting, creating avenues for confidential incident reporting, should increase, not reduce, the overall number of actionable reports received by law enforcement. The caveat, of course, is that this expectation assumes that the confidential reporting system is one measure among many taken as part of a comprehensive approach to preventing sexual violence, supporting victims and holding assailants to account.

The draft legislation limits the exemption from SDCL § 22-11-12 to reports involving sexual violence. The Board of Regents is not proposing an exception to all reporting requirements. This proposal will not affect public policies that protect minors, elders or disabled adults, nor will this proposal create exceptions to SDCL § 22-11-12 for separate felony offenses committed in the course of a sexual assault.

The bill is limited to reports involving criminal activity that would be regulated by the Violence Against Women Rehabilitation Act of 2013 as those crimes are defined under South Dakota law, namely, sexual assault as defined in SDCL ch 22-22, domestic violence as defined

⁷ See, *supra*, note 4; Department of Defense Directive-Type Memorandum (DTM), (JTF-SAPR-008), Response Capability For Sexual Assault, December 17, 2004.

⁸ See, DoD, Academic Program Year 2013-2014 Report on Sexual Harassment and Violence at the Military Service Academies, February 2015, http://sapr.mil/public/docs/reports/MSA/APY_13-14_MSA_Report.pdf, p. 62.

⁹ Aggregated data from the three service academies for the years from Academic Year 2005-06 through 2013-14, shows considerable fluctuation involving from 7% to 27% of confidential reports being converted to reports available for disciplinary or law enforcement use. *Id.*, at pp. 106-07.

in SDCL ch 25-10, or stalking as defined in SDCL ch 22-19A.¹⁰ In addition to the limitations inherent in its focus on sexual assault, domestic violence or stalking, the draft legislation accommodates expectations that emergency warnings will be given where the circumstances of an incident suggest a significant emergency or a dangerous situation involving an immediate threat to the health or safety of students or employees on campus.

The exception created would not operate as a free-standing exception, but would only be available for postsecondary institutions and then only where such institutions have established policies to support confidential reporting of sexual assault, domestic violence or stalking and have assigned specially trained personnel, whose other duties do not create conflicts of interest, to serve as confidential victim advisors.

Please let me know what you think about the approach to creating a confidential reporting system that the Board of Regents has under consideration. Your views about these matters will be of critical importance to the decision whether to move this project forward.

Thank you in advance for your assistance.

¹⁰ Violence Against Women Reauthorization Act of 2013, PL 113-4, March 7, 2013, 127 STAT. 54, 89 ff. § 304 <http://www.gpo.gov/fdsys/pkg/PLAW-113publ4/pdf/PLAW-113publ4.pdf> (expanding notice, education and reporting requirements – and thereby, implicitly, programming and policy requirements addressing investigations, discipline, local victim assistance resources and availability through the institution of reasonable accommodations for victims, and, in proper cases, emergency warning requirements – for sex offense, domestic violence, dating violence, sexual assault, or stalking, including, at 127 STAT. 91, information “about how the institution will protect the confidentiality of victims, including how publicly-available recordkeeping will be accomplished without the inclusion of identifying information about the victim, to the extent permissible by law.”)

	Attachment I		
	United States Air Force Academy Sexual Assault Statistics¹¹		
	Total Reports¹²	Unrestricted Reports	Reports Remaining Restricted
FY 2013	45	18	27
FY 2012	52	21	31
FY 2011	33	16	17
FY 2010	20	4	16
FY 2009	8	0	8
FY 2008		17 ¹³	
FY 2007	19	10	9
FY 2006	14	8	6
FY 2005	N/A	N/A	N/A
FY 2004	N/A	N/A	N/A
FY 2003	N/A	N/A	N/A
FY 2002	N/A	N/A	N/A
FY 2001	N/A	N/A	N/A
FY 2000	1	1	N/A
FY 1999	2	2	N/A
FY 1998	4	4	N/A
FY 1997	4	4	N/A
FY 1996	3	3	N/A
FY 1995	9	9	N/A
FY 1994	7	7	N/A
FY 1993	8	8	N/A
FY 1992	1	1	N/A
FY 1991	0	0	N/A
FY 1990	0	0	N/A

¹¹ The data in this table for the period 2005 through 2014 derive from annual reports published by Department of Defense Sexual Assault Prevention and Response Office. These may be located at <http://www.sapr.mil/index.php/annual-reports>. Data reported for 1990 through 2000 were set out in DoD Office of Inspector General, "Evaluation of Sexual Assault, Reprisal, and Related Leadership Challenges at the United States Air Force Academy," Report Number IPO2004C003, December 3, 2004, <http://www.dodig.mil/FOIA/ERR/IPO2004C003-report.pdf>, p. 83 1990-2000 data. No comparable data were published for the period 2001-2005.

¹² Even at institutions with well-established programs to prevent and to respond to sexual assault – programs that include options to make confidential reports of assaults, nine times out of ten victims chose not to report sexual assaults. DoD, Academic Program Year 2013-2014 Report on Sexual Harassment and Violence at the Military Service Academies, February 2015, http://sapr.mil/public/docs/reports/MSA/APY_13-14_MSA_Report.pdf, p. 101 (comparing aggregated service academy survey responses reporting incidents and filed incident report statistics from academic years 2005-06 through 2013-14)(the combined restricted and unrestricted incident reports accounted for a variable percentage of survey incident responses, ranging from a low of 6% of the estimated total incidents to a high of 16% of the estimated total incidents)

¹³ FY2008 data were aggregated among all academies for purposes of reporting. Reports on investigation outcomes appear to document 17 reports involving Air Force Academy cadet victims. http://www.sapr.mil/public/docs/reports/apy2007-08_military_service_academy_report_final.pdf, pp. 44-45 of 47.

Draft bill:**STATE OF SOUTH DAKOTA****NINTIETH SESSION
LEGISLATIVE ASSEMBLY, 2015**

BILL NO.

Introduced by:

FOR AN ACT ENTITLED, An Act to exempt certain communications to designated confidential advisors serving postsecondary institutions from mandatory reporting under § 22-11-12.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. That a new section be added to chapter 22-11 to read as follows:

Notwithstanding the provisions of § 22-11-12 to the contrary, reports alleging that a postsecondary institution adult student, employee or visitor was the victim of sexual assault as defined in chapter 22-22, felony domestic violence as defined in chapter 25-10, or felony stalking as defined in chapter 22-19A, need not be forwarded to the institutional administration or to law enforcement and do not constitute notice to the institution for purposes of criminal or civil liability if the postsecondary institution has established a confidential victim reporting policy compliant with this Act and the report is made to a designated confidential victim advisor. This section does not preempt mandatory reporting of felony offenses other than sexual assault, felony domestic violence or felony stalking; mandatory reporting of for separate felony offenses committed in the course of a sexual assault, felony domestic violence or felony stalking; or mandatory reporting required under chapters 22-46 or 26-8A, pertaining, respectively, to offenses against minors or against elderly or disabled persons. For purposes of this Act, a postsecondary institution includes any institution authorized to operate from a physical location in South Dakota pursuant to chapter 13-48.

Section 2. That a new section be added to chapter 22-11 to read as follows:

For purposes of this Act, a postsecondary institution confidential victim reporting policy permits a victim to report allegations of sexual assault, domestic violence or stalking to specified personnel without triggering an institutional investigation or mandatory report to law enforcement. In recognition of the probability that the victim's first contact with postsecondary institution staff may be a person other than a designated confidential victim advisor, a confidential victim reporting policy compliant with this Act shall provide that, where the victim first contacts an employee other than a designated confidential victim advisor, the employee shall inform the victim that he or she

will be obligated to disclose the report to the institution and, possibly, to law enforcement. The employee shall also advise the victim of the option to make a full report to the confidential victim advisor. If the victim opts to make the report to the confidential victim advisor, the confidential victim advisor shall notify the employee with whom the victim first spoke that the victim exercised the right to make a confidential report and neither employee shall be obligated to report the initial contact to the institution or to law enforcement.

Section 3. That a new section be added to chapter 22-11 to read as follows:

For purposes of this Act, a confidential victim advisor is a specially trained employee of a postsecondary institution, who has been designated, on behalf of the institution, to receive confidential reports from victim of sexual assault, domestic violence or stalking; to provide the victim information on the institutional sexual assault response process, including both the victim's option to make a formal report to the institution or to law enforcement and the victim's option to make a confidential report; to advise the victim of both the victim's rights and the institution's responsibilities regarding orders of protection, no contact orders, restraining orders, or similar lawful orders issued by the institution or a criminal, civil, or tribal court; to inform the victim of the availability of healthcare, the option of a forensic medical examination and the collection of evidence, of counseling or additional victim advocacy resources and of forms of assistance that may be provided by the institution; and, upon request by the victim, to assist the victim in communicating with the institution, law enforcement or other agencies.

The name and contact information for the confidential advisor, as well as a victims' reporting options, the process of investigation and adjudication both by the institution and by law enforcement, and the range of confidential assistance available through the institution shall be listed on the website of the institution.

Section 4. That a new section be added to chapter 22-11 to read as follows:

Postsecondary institutions may designate one or more employees to serve as designated confidential victim advisors, and these individuals may have other responsibilities at the institution, provided that no part-time confidential victim advisor may be assigned to institutional student services programs, human resources programs or civil rights compliance programs or otherwise serve in a position that receives legally privileged communications. Each confidential victim advisor shall be trained to perform a victim-centered, trauma-informed (forensic) interview, which shall focus on the experience of the victim to elicit and preserve information about the traumatic event in

question for use in either a campus or criminal investigation or disciplinary proceeding in the event that the victim subsequently chooses to make a formal complaint.

Section 5. That a new section be added to chapter 22-11 to read as follows

Subject to Section 6 of this Act, personally identifiable information received in confidence by the confidential victim advisor may only be disclosed under the following circumstances:

1. To institution and law enforcement when disclosure is authorized by the victim in writing;
2. To institution and law enforcement to the extent that such disclosure is necessary to prevent or lessen a serious and imminent threat to the health or safety of the victim or another specifically identified person;
3. To institution, health care or other personnel when disclosure is required for the supervision and/or coordination of direct victim treatment or services;
4. To a criminal or civil court of competent jurisdiction pursuant to judicial order; or
5. To officials or entities as specifically required by a Federal or State statute.

Section 6. That a new section be added to chapter 22-11 to read as follows

Each postsecondary institution shall require that, where a sexual assault occurred under circumstances that may present a significant emergency or a dangerous situation involving an immediate threat to the health or safety of students or employees occurring on the campus, the confidential victim advisor shall immediately disclose to the institutional administration sufficient information about the circumstances of the offense, without disclosing the identity of the victim, to permit the institution to issue an emergency notification that will enable students and employees to take timely precautions. In all other instances, each institution shall require that, within twenty-four hours of a report of sexual assault, the confidential victim advisor inform the institutional administration that a confidential report has been made, and, without disclosing information that might identify the victim, disclose sufficient details to allow the institution to determine whether the nature and location of the activity would require the incident to be recorded as a crime for purposes of Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. § 1092(f), if reported to law enforcement, and whether it presents a serious or continuing threat to students and employees, in order to permit the administration to determine whether action is

necessary to prevent or lessen a serious and imminent threat to the health or safety of the victim or another person and, otherwise, to review the effectiveness of prevention efforts.

Section 7. That § 1-27-1.5 be amended to read as follows:

1-27-1.5. The following records are not subject to §§ 1-27-1, 1-27-1.1, and 1-27-1.3:

- (1) Personal information in records regarding any student, prospective student, or former student of any educational institution if such records are maintained by and in the possession of a public entity, other than routine directory information specified and made public consistent with 20 U. S.C. 1232g, as such section existed on January 1, 2009;
- (2) Medical records, including all records of drug or alcohol testing, treatment, or counseling, other than records of births and deaths. This law in no way abrogates or changes existing state and federal law pertaining to birth and death records;
- (3) Trade secrets, the specific details of bona fide research, applied research, or scholarly or creative artistic projects being conducted at a school, postsecondary institution or laboratory funded in whole or in part by the state, and other proprietary or commercial information which if released would infringe intellectual property rights, give advantage to business competitors, or serve no material public purpose;
- (4) Records which consist of attorney work product or which are subject to any privilege recognized in chapter 19-13;
- (5) Records developed or received by law enforcement agencies and other public bodies charged with duties of investigation or examination of persons, institutions, or businesses, if the records constitute a part of the examination, investigation, intelligence information, citizen complaints or inquiries, informant identification, or strategic or tactical information used in law enforcement training. However, this subdivision does not apply to records so developed or received relating to the presence

of and amount or concentration of alcohol or drugs in any body fluid of any person, and this subdivision does not apply to a 911 recording or a transcript of a 911 recording, if the agency or a court determines that the public interest in disclosure outweighs the interest in nondisclosure. This law in no way abrogates or changes §§ 23-5-7 and 23-5-11 or testimonial privileges applying to the use of information from confidential informants;

- (6) Appraisals or appraisal information and negotiation records concerning the purchase or sale, by a public body, of any interest in real or personal property;
- (7) Personnel information other than salaries and routine directory information. However, this subdivision does not apply to the public inspection or copying of any current or prior contract with any public employee and any related document that specifies the consideration to be paid to the employee;
- (8) Information solely pertaining to protection of the security of public or private property and persons on or within public or private property, such as specific, unique vulnerability assessments or specific, unique response plans, either of which is intended to prevent or mitigate criminal acts, emergency management or response, or public safety, the public disclosure of which would create a substantial likelihood of endangering public safety or property; computer or communications network schema, passwords, and user identification names; guard schedules; lock combinations; or any blueprints, building plans, or infrastructure records regarding any building or facility that expose or create vulnerability through disclosure of the location, configuration, or security of critical systems;
- (9) The security standards, procedures, policies, plans, specifications, diagrams, access lists, and other security-related records of the Gaming Commission and those persons or entities with which the commission has entered into contractual relationships. Nothing in this subdivision allows the commission to withhold from the public any

information relating to amounts paid persons or entities with which the commission has entered into contractual relationships, amounts of prizes paid, the name of the prize winner, and the municipality, or county where the prize winner resides;

- (10) Personally identified private citizen account payment information, credit information on others supplied in confidence, and customer lists;
- (11) Records or portions of records kept by a publicly funded library which, when examined with or without other records, reveal the identity of any library patron using the library's materials or services;
- (12) Correspondence, memoranda, calendars or logs of appointments, working papers, and records of telephone calls of public officials or employees;
- (13) Records or portions of records kept by public bodies which would reveal the location, character, or ownership of any known archaeological, historical, or paleontological site in South Dakota if necessary to protect the site from a reasonably held fear of theft, vandalism, or trespass. This subdivision does not apply to the release of information for the purpose of scholarly research, examination by other public bodies for the protection of the resource or by recognized tribes, or the federal Native American Graves Protection and Repatriation Act;
- (14) Records or portions of records kept by public bodies which maintain collections of archeological, historical, or paleontological significance which nongovernmental donors have requested to remain closed or which reveal the names and addresses of donors of such articles of archaeological, historical, or paleontological significance unless the donor approves disclosure, except as the records or portions thereof may be needed to carry out the purposes of the federal Native American Graves Protection and Repatriation Act and the Archeological Resources Protection Act;

- (15) Employment applications and related materials, except for applications and related materials submitted by individuals hired into executive or policymaking positions of any public body;
- (16) Social security numbers; credit card, charge card, or debit card numbers and expiration dates; passport numbers, driver license numbers; or other personally identifying numbers or codes; and financial account numbers supplied to state and local governments by citizens or held by state and local governments regarding employees or contractors;
- (17) Any emergency or disaster response plans or protocols, safety or security audits or reviews, or lists of emergency or disaster response personnel or material; any location or listing of weapons or ammunition; nuclear, chemical, or biological agents; or other military or law enforcement equipment or personnel;
- (18) Any test questions, scoring keys, results, or other examination data for any examination to obtain licensure, employment, promotion or reclassification, or academic credit;
- (19) Personal correspondence, memoranda, notes, calendars or appointment logs, or other personal records or documents of any public official or employee;
- (20) Any document declared closed or confidential by court order, contract, or stipulation of the parties to any civil or criminal action or proceeding;
- (21) Any list of names or other personally identifying data of occupants of camping or lodging facilities from the Department of Game, Fish and Parks;
- (22) Records which, if disclosed, would constitute an unreasonable release of personal information;
- (23) Records which, if released, could endanger the life or safety of any person;

- (24) Internal agency record or information received by agencies that are not required to be filed with such agencies, if the records do not constitute final statistical or factual tabulations, final instructions to staff that affect the public, or final agency policy or determinations, or any completed state or federal audit and if the information is not otherwise public under other state law, including chapter 15-15A and § 1-26-21;
- (25) Records of individual children regarding commitment to the Department of Corrections pursuant to chapters 26-8B and 26-8C;
- (26) Records regarding inmate disciplinary matters pursuant to § 1-15-20; and
- (27) Any other record made closed or confidential by state or federal statute or rule or as necessary to participate in federal programs and benefits.; and
- 28) Records containing information received in confidence by a confidential victim advisor pursuant to this Act.