

SOUTH DAKOTA BOARD OF REGENTS

Planning and Resource Development

AGENDA ITEM: 4 – I

DATE: October 7-8, 2015

SUBJECT: BOR Policy 1:31 - Exclusion of Members of the Public for Disruption of Institutional Activities or for Misconduct

The attached procedures round out the complement of policies that the institutions require in order to manage the review and resolution of incidents involving private individuals or organizations who have disrupted institutional activities or engaged in misconduct. Existing policies establish procedures for the orderly review of such incidents where students or employees may be responsible for disruption or other misconduct, but provisions for addressing third-party conduct are presently quite limited. Board Policy No. 6:13 allows for consideration of disruption or misconduct by third parties when reviewing applications for facilities use, but no policy currently defines policies or procedures for addressing such conduct in other contexts.

The attached draft Board Policy No. 1:31 will establish a framework to provide express delegation of institutional authority over third parties whose actions on campus or at institutional activities involve disruption or misconduct. Third parties have neither property nor liberty interests in using institutional grounds or participating in institutional activities; hence, in general, minimal procedural steps are required to determine whether individuals should be excluded from using facilities or participating in activities.

The summary procedures that have been created authorize and guide institutions in responding to reports of third party disruption or misconduct. They assure that institutions will provide notification of charges and an opportunity for hearing before a written exclusion order is issued. The written exclusion order would fulfill the precondition for enforcement under South Dakota’s trespass laws by providing “[a]ctual communication to the person who subsequently commits the trespass.” SDCL §22-35-6(1).

(Continued)

RECOMMENDED ACTION OF THE EXECUTIVE DIRECTOR

I move to approve Board Policy No. 1:31.

Special considerations may arise where the third party objects that the alleged disruption or misconduct was actually protected speech or expressive conduct. These defenses implicate protected constitutional interests of greater magnitude than liberty or property interests, and resolution of such disputes necessitate more formal procedures. Since Board Policy No. 6:13 already provides for the denial of access to facilities based upon prior disruption or misconduct, and since that policy was framed to protect constitutional interests in access to public property that is open to private expression, the obvious way to handle appeals under Board Policy No. 1:31 based upon claims that the activities involved protected speech or expressive conduct was to default to the procedures established under Board Policy No. 6:13.

In addition to establishing mechanisms aligned with South Dakota trespass laws to address problems that occur from time to time, this policy will provide an additional basis for addressing instances in which a third party has engaged in conduct that violates Board policy prohibitions against discriminatory conduct.

SOUTH DAKOTA BOARD OF REGENTS**Policy Manual**

SUBJECT: Exclusion of Members of the Public for Disruption of Institutional Activities or for Misconduct

NUMBER: 1:31

1. Institutions governed by the Board conduct a broad range of activities in furtherance of their teaching, research and service missions. Oftentimes these activities are conducted within facilities or on grounds acquired and maintained at public expense to support the institutional mission.

Members of the public do not have rights to participate in such activities, to attend or to observe them, or to use institutional facilities or grounds. From time to time, institutions may allow or invite members of the public to do so, subject to such reasonable and customary conditions as the institutions may specify.

The proper conduct of institutional activities depends upon the cooperation of participants and onlookers. Where students or employees engage in disruptive behavior, Board policies permit discipline that may restrict further participation in certain activities or access to certain facilities or that may result in expulsion or termination of employment.

Members of the public may also disrupt institutional activities. Accordingly, the present policy has been drawn to establish procedures to respond to disruptive behavior by visitors or others whose association with the university does not involve a status as student or employee.

2. Definitions:
 - A. "Disrupt," and its cognates, includes any actions that infringe institutional rules, interrupt institutionally sponsored or authorized instructional, research or service activities, or substantially interfere with the opportunity of other persons to participate in such activities or to use institutional grounds or facilities for their intended or authorized purposes.
 - B. "Facilities and grounds" includes buildings, structures, internal streets and sidewalks, parking facilities, athletic facilities, landscaping and grounds owned or occupied by the institution, but excludes municipal streets or sidewalks or public highways or rights of way that abut or traverse a campus.
 - C. "Institutional activities" includes activities organized and undertaken by an institution governed by the Board through its officers, employees, contractors or students, activities carried out by other institutions or entities, through their officers, employees, contractors or students, in cooperation with an institution, and activities carried out by individuals or

organizations that are duly authorized to make use of institutional facilities or grounds pursuant to Board Policy No. 6:13.

- D. “Member of the public” includes any individual, group or organization other than the institution, another institution within the system, or their current officers, agents, employees or students. Former institutional or system institution officers or employees, institutional alumni, persons who have attended classes but who are not currently enrolled in classes offered by the institution or within the system, persons providing contracted services, invitees and visitors and all others would be deemed to be members of the public for purposes of this policy.
 - E. “Misconduct” includes physical violence or the threat of physical violence against any member of the university community; unauthorized entry into, remaining in or use of institutional facilities or grounds, theft of or damage to institutional property, commission of unlawful acts in connection with institutional activities, in institutional facilities or on institutional property, violation of any Board or institutional policies, rules or procedures, failure to comply with lawful directions of institutional officers, including police or security officers.
3. Members of the public who disrupt institutional activities or engage in misconduct may be excluded from institutional activities, facilities and grounds.
- A. Exclusion is presumed to be of permanent duration unless a different duration is specifically stated at the time that the individual, group or organization is notified of its exclusion.
 - B. Any individual or organization that has been excluded may petition the institutional office responsible for implementation of this policy to have the exclusion modified or rescinded.
 - 1. A request will not be entertained during the first thirty-six months from the date that notice of exclusion was issued.
 - 2. The individual or organization seeking modification or rescission of the exclusion will have the burden of showing changed circumstances that will assure that disruption or misconduct will not recur.
4. The institutional chief executive officer will assign responsibility to implement the policy. The institutional officer (hereafter, “the institutional officer” or “the officer”) who has received this assignment will be authorized to issue a notice of exclusion.
- A. Any individual who has knowledge that a member of the public has disrupted an institutional activity or engaged in misconduct may report the matter to the institutional officer assigned to implement this policy.
 - B. Upon receipt of such a report, the institutional officer will make such inquiries as may be necessary to be satisfied that the report is credible, will contact the member of the public to discuss the report and will make such other investigations as may be appropriate to

determine whether there appears to be a reasonable, good faith basis for believing that the reported conduct occurred.

1. At the time that the institutional officer first contacts the member of the public, the officer will inform the member of the public that retaliation against anyone whom the member of the public believes responsible for the report will result, at minimum, in issuance of a notice of exclusion.
 2. Unless specifically required by Board Policy, the institutional officer need not disclose the identity of the individual or individuals who reported or who witnessed the disruption or misconduct.
- C. If the institutional officer concludes that there is a reasonable, good faith basis for believing that the reported conduct occurred, the officer may issue a notice of exclusion.
1. The notice of exclusion may be delivered in person to the individual member of the public or, in the case of an organization, to any individual who holds himself or herself out as an official of the member of the public, in which case it will become effective upon delivery.
 - a. Alternatively, the notice of exclusion may be deposited in the United States mail addressed to the last known address of the individual member of the public or, in the case of an organization, to any individual who holds himself or herself out as an official of the member of the public, and it will take effect three working days after.
 2. The notice of exclusion shall indicate that the individual or organization excluded may appeal the notice of exclusion by filing a written petition with the institutional chief executive officer within 10 working days of the effective date of notice.
 - a. The completed written appeal must be presented within five working days after the denial was communicated, transmitted, or deposited in the mails.
 - b. The appeal shall state specifically facts that, if proven, would demonstrate
 - i. that the denial was based upon an incorrect assessment of material fact,
 - ii. that it involved a misinterpretation, misapplication or violation of the requirements of Board or institutional policy or
 - iii. that the cited actions constituted speech or expressive conduct protected under the First Amendment when they occur on government property or at government activities that is open to the public for expressive purposes.
 1. Persons claiming that their speech or expressive conduct is protected under the First Amendment must also allege facts

that, if proven, would show:

- A. That the institution opened the facilities or the activities where the expression occurred for private speech or expressive conduct;
- B. That the person was within the class of private persons permitted to use the facility or to join in the activity for purposes of speech or expression; and
- C. That the content of the person's speech or expressive conduct addressed a subject that the institution allowed to be addressed at the time and place where the speech or conduct occurred.

Mere conclusions, general allegations and speculative statements cannot establish a factual ground for the claim that Board or institutional policy has been misinterpreted, misapplied or violated.

- c. Filing an appeal will not suspend the exclusion notice, and the exclusion notice will remain in effect during the appeal.
- D. Upon receipt of the written appeal, the institutional chief executive officer shall have fifteen working days to conduct such an investigation as may be warranted under the circumstances and to issue a written decision addressing the concerns raised by the private party and determining whether.
- 1. The institutional chief executive officer may delegate responsibility to conduct this review, provided that the individual charged with evaluating the appeal may not have been personally involved or interested in the underlying facts or initial institutional decision.
 - a. In the event that an appeal involves a claim that the individual's actions constituted protected speech or expressive conduct, the appeal will be deemed to be equivalent to a denial of permission to use institutional facilities pursuant to Board Policy No. 6:13(3)(E)(7), and the appeal will be resolved through the procedures established under Board Policy No. 6:13(3)(E).
 - 2. The decision of the institutional chief executive officer shall be final and shall stipulate its effective date.

SOURCE: BOR, August 2015