

SOUTH DAKOTA BOARD OF REGENTS

Academic and Student Affairs

AGENDA ITEM: 5 – R

DATE: October 7-8, 2015

SUBJECT: Revisions to Board Policy No. 3:4, the Student Conduct Code, to assure compliance with state and federal constitutional rights to due process and United States Department of Education hearing requirements for incidents of sexual violence.

On October 20, 2014, the United States Department of Education published its Final Rule implementing amendments to the Violence Against Women Act adopted in the Violence Against Women Reauthorization Act of 2013. *See*, Final Rule, 79 Fed. Reg. 62751 (October 20, 2014), <http://www.gpo.gov/fdsys/pkg/FR-2014-10-20/pdf/2014-24284.pdf>. The new regulations took effect on July 1, 2015.

As reported to the Board at its June 1-11, 2015, and August 12, 2015 meetings, system administrators have undertaken a comprehensive review of the Board’s Student Conduct Code. Procedural requirements for hearing student conduct charges numbered among the topics under review, particularly in light of Education Department’s Final Rule. Although the review of the full policy continues apace, the revision of sections of the policy that state procedural requirements for conduct hearings have been completed and are forwarded for Board review and action.

Discussion at both the June and August Board meetings emphasized an ongoing interest in assuring that the revised policy assured that students charged with sexual violence receive rights accorded to them under the due process requirements of state and federal constitution. Due process requirements under state and federal constitutions involving student discipline that could interrupt the student’s continued enrollment or attendance require, at minimum, “notice and an opportunity to be heard ... at a ‘meaningful time and in a meaningful manner.’” *Gul v. Ctr. for Family Med.*, 2009 S.D. 12, ¶ 1, 762 N.W.2d 629 (S.D. 2009); *Goss v. Lopez*, 419 U.S. 565, 579 (1975)(students facing suspension entitled to notice, since the right to be heard “has little reality or worth unless one is informed that the matter is pending and can choose for

(Continued)

RECOMMENDED ACTION OF THE EXECUTIVE DIRECTOR

I move to approve for the first reading proposed amendments to Board Policy No. 3:4.

himself whether to contest”)(quoting *Mullane v. Central Hanover Trust Co.*, 339 U. S. 306, 314 (1950); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)(due process requires an opportunity to be heard at a meaningful time and in a meaningful manner).

The constitutional standards for due process in the context of student disciplinary proceedings recognize that university conduct “regulations are not to be compared with the criminal statute. They are codes of general conduct which those qualified and experienced in the field have characterized not as punishment but as part of the educational process itself and as preferably to be expressed in general rather than in specific terms.” *Esteban v. Central Missouri State College*, 415 F.2d 1077, 1088 (8th Cir. 1969) (Blackmun, J.). Express statements confirming the educational purpose of the conduct code have been incorporated into the revision in order to make patent the understanding recognized by the courts. Such statements appear both in a new initial sections of Board Policy No. 3:4 and in the portions of the code, pp. 13-14 of 32, that specify the hearing procedures.

Constitutional due process requirements applicable to university disciplinary proceedings do not require a right to be represented by an attorney. *See, Tanyi v. Appalachian State University*, No. 5:14-CV-170RLV, 2015 WL 4478853, *4 (W.D.N.C. July 22, 2015)(the Due Process Clause does not necessarily require that students facing expulsion be represented by licensed attorneys). Nevertheless, some members of the Board expressed an interest in affording persons accused of sexual violence opportunities to be represented by attorneys. Board members also expressed an interest in language that would make patent the availability under the policy of testimonial privileges, including the right to decline to make incriminating statements, and that would provide clear directions involving burdens of proof.

The policy revisions attempt to respond to the concerns debated by the Board and take into account emerging trends in the case law that underscore the need for especial care to preserve constitutional standards for due process, which the guarantee of adequate notice of charges and evidence and a meaningful opportunity to be heard at a meaningful time.

The policy would allow active representation by attorneys in conduct hearings under Board Policy No. 3:4 in cases involving sexual violence, under Board Policy No. 1:17.1, acts of aggression or unconsented sexual acts as defined in the student conduct code, or where the respondent has also been charged by federal, state or local authorities with a felony violation of law arising from the same actions that allegedly violated the student conduct code. *See*, pp. 19-20 of 32. The object here is to recognize that significantly adverse, long term consequences could flow from an erroneous decision in matters involving sexual violence, aggressive conduct or misconduct so serious that it might also warrant felony-level criminal charges; hence, draft affords the Board an opportunity to determine whether to go beyond constitutional requirements in these limited circumstances.

The policy that permits respondents to be represented by counsel also implements regulatory requirements that complainants be afforded a right to representation, but, since Board Policies No. 1:18 and 3:4 require that the institution carry the burden of providing misconduct,

the revisions confirm that the role of such representation in the hearing would be limited to intervening to present objections based upon testimonial privileges on behalf of a complainant called to serve as a fact witness. *See*, pp. 20, 21 and 23 of 32.

The revisions include additional requirements for advance notice of charges and of the witnesses or documentary evidence that will be used to support such charges, including the requirements that requests for additional time to prepare to respond to charges not unreasonably be denied, and that new disclosures and additional time be allowed before an institution may supplement the evidence disclosed in the original notice. *See*, pp. 18-19 of 32. They make patent the allocation of burdens of production (presenting evidence) and persuasion (presenting enough evidence to show that it is more likely than not that the facts are as alleged), with the institution bearing these burdens of proof on charges of misconduct, and the respondent bearing them on any affirmative defenses. *See*, p. 20 of 32. The revisions include statements about evidence that track standards employed under the South Dakota Administrative Procedures Act, SDCL § 1-26-19(1), while reiterating the requirement that hearsay evidence be limited to statements previously disclosed. *See*, p. 21 of 32. Finally, the revisions make patent the understanding that when a student responds to a question by invoking constitutional or other testimonial privileges and declining to testify to a matters, the response may not be treated as evidence a; the institution must always present other evidence to support the allegations against students. *See*, p. 23 of 32

Another significant set of changes reinforces the requirement that hearing officers be specially trained employees or independent contractors. This avoids placing students into a position where they may be subject to suit because of their service on hearing panels in high-stakes conduct proceedings. *See, Doe v. Salisbury University*, No. JKB-15-517, 2015 WL 5005811, *1-*2 (D. Md. August 21, 2015)(student disciplined for sexual violence brought tort claims against complainant, institutional investigators and witnesses).

SOUTH DAKOTA BOARD OF REGENTS

Policy Manual

SUBJECT: Student Conduct Code

NUMBER: 3:4

1. Preface

The educational programs offered by South Dakota Public Universities prepare students for the responsibilities of citizenship, to assume positions of leadership in government, business and nonprofit organizations, to exercise the learned professions and to contribute to knowledge and understanding, at all levels of society, through contributions to education, to the humanities, the arts, the sciences, the social sciences and the professions. Success in all these endeavors depends upon acting in ways that strengthen the bonds of cooperation on which all concerted action depends. This, in turn, requires learning norms of conduct that increase cooperation and minimize conflict.

The Student Code supports these objectives in two ways. First, it defines norms of conduct that must be observed within the unique learning and living environments of public universities in order to maintain an orderly, secure learning and working environment within the institution and to encourage the development of habits that will prepare them for constructive participation and leadership in their future roles within society. Second, it establishes procedures for enforcing those norms of conduct in a fair, objective and orderly manner.

A Student Conduct Code (Student Code) serves different purposes from criminal or civil laws. The Student Code complements the formal educational programs of the university by encouraging the development of habits of good citizenship and by providing fair and impartial procedures to resolve disputed allegations of misconduct and to correct misconduct where it occurs. Criminal laws protect public interests by punishing individuals for conduct that deprives others of property, security or safety. Civil laws allow individuals to obtain compensation for injuries that they may have suffered through the negligent or intentional conduct of others. While criminal and civil sanctions serve primarily to protect the interests of third parties, society at large and victims, the Student Conduct sanctions operate as educational or corrective measures that reinforce for the student the institution's clear expectation that all students observe norms set forth in this Student Code if they wish to continue enrollment.

Because the Student Code has educational objectives, the due process procedures and student rights differ from those involved in criminal or civil court proceedings. The Student Code embodies the basic procedural elements of due process that

- protect the rights of persons to know the charges and evidence against them well enough in advance to prepare their defenses,
- to ask questions of their accusers,
- to remain silent when permitted under law to do so,
- to insist that evidence against them be based upon matters that are germane to the charges brought against them,
- to have the institution bear the burden of assembling sufficient evidence to make it more likely than not that they acted as had been alleged and
- to have decisions based solely upon the evidence fairly considered by an unbiased decision-maker.

In addition, students who have been suspended or expelled or who claim to have been deprived of a right specifically protected by constitution, statute, rule or policy, may appeal to the Board of Regents for a new hearing. These hearings will be conducted as the contested case provisions of the South Dakota Administrative Procedures Act.

2. Definitions

The following terms have the stated meanings in this Student Code:

- A. The term “institution” means Black Hills State University, Dakota State University, Northern State University, South Dakota School of Mines and Technology, South Dakota State University, and University of South Dakota and the Higher Education Centers.
- B. The term “system” means the system of post-secondary institutions under the control of the South Dakota Board of Regents.
- C. The term “student” includes all persons taking courses from the institution, both full-time and part-time, enrolled in undergraduate, graduate, professional or special topic courses.
- D. The phrase “faculty member” means any person hired by the institution to conduct classroom or other academic activities.
- E. The phrase “institutional official” includes any person employed by the institution, performing assigned administrative or professional responsibilities.
- F. The phrase “senior student affairs officer” means that institutional official exercising primary authority over institutional student affairs programs and operations.

- G. The phrase “member of the institutional community” includes any person who is a student, faculty member, institutional official, any person employed by the institution, volunteer or guest. A person’s status in a particular situation shall be determined by the senior student affairs officer.
- H. The phrase “institutional premises” includes all land, buildings, facilities, and other property in the possession of or owned, used, or controlled by the institution, including adjacent streets and sidewalks.
- I. The term “organization” means any number of persons who have been granted institutional registration or recognition.
- ~~J. The phrase “student conduct body” means any 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.~~
- K. The phrase “student conduct officer” means any institutional officer employee or independent contractor authorized on a case-by-case basis by the senior student affairs officer to conduct hearings under this policy and to impose sanctions upon students found to have violated the Student Code. Each student conduct officer shall receive annual training in the conduct of disciplinary proceedings, including proceedings involving allegations relating to dating violence, domestic violence, sexual assault and stalking, as defined in Board Policy No. 1:17.1, in a manner that protects the safety of victims and promotes accountability. ~~The senior student affairs officer may authorize a student conduct officer to serve as one of the members of a student conduct body, to determine the facts and to impose a sanction without the assistance of a student conduct body or to receive and consider the findings and recommendations of a student conduct body.~~ Nothing shall prevent the senior student affairs officer from authorizing the same student conduct officer to impose sanctions in all cases. Notwithstanding the use of the singular tense in this policies, the senior student affairs officer may assign a panel of duly trained student conduct officers to hear cases and designate a chair who shall be responsible for resolving such procedural and evidentiary questions as may arise.
- L. The term “respondent” means a student, group of students, or student organization against whom conduct charges have been brought.
- M. The term “complainant” means a member of the university community who has brought charges under this Student Code against any student, group of students, or student organization.
- N. The phrase “appellate board” means any person or persons authorized by the institutional chief executive officer to consider an appeal from a student conduct

body's officer's determination that a student has or has not violated the Student Code or from the sanctions imposed by the student conduct officer.

- O. The term "shall" is used in the imperative sense.
- P. The term "may" is used in the permissive sense.
- Q. The term "policy" includes the provisions of this policy as supplemented by consistent written regulations of the institution found in the Student Code, Residence Life Handbook, and Graduate or Undergraduate Catalogs or other official publications.
- R. The term "dishonesty" includes any action taken in order to deceive or to assist another to deceive the institution or any of its representatives. The motive for the action, *e.g.*, personal advantage, interference with another's prospective advantage or interference with institutional operations, shall not be considered. Dishonesty is established where it is shown that:
 - 1) An action, either directly or indirectly, shall affect the information or apparent facts upon which the institution relies in discharging its academic or administrative functions;
 - 2) The natural and reasonably expected consequences of relying upon such information includes the drawing of an inaccurate assessment of the true facts; and
 - 3) The actor knew or should have known that the action would probably mislead the institution.
- S. The term "obscenity" means that
 - 1) To the average person the dominant theme of the material taken as a whole appeals to prurient interest;
 - 2) The material is patently offensive under contemporary community standards relating to the description or representation of sado-masochistic abuse or sexual conduct; and
 - 3) The material is utterly without redeeming social value conduct or material lacks serious literary, artistic, political, or scientific value. (SDCL § 22-24-27).
- 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 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 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

3. **Proscribed Prohibited** Conduct

A. Jurisdiction of the Institution

- 1) The institution shall have authority over its students and recognized student organizations.
 - a. For purposes of the policy, the institution in which the majority of a student's credits are offered during an enrollment period shall have jurisdiction over the student for conduct purposes.

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.

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.

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b. Where students are also employees, they may be subject to concurrent authority. Conduct proceedings under **this Student Code** may be initiated irrespective of any action taken by the institutional employer, except that, if an individual has been subject to conduct hearings as an employee, and if those hearings afforded notice and an opportunity to be heard that are substantially equivalent to those provided herein, the facts found through that process, insofar as they are relevant to infractions of **this Student Code**, shall be given effect hereunder.

2) Conduct proceedings may be initiated in response to conduct that occurs on institutional premises or at events officially sponsored by the institution, conduct that arises out of membership in the institutional community or conduct elsewhere, otherwise **proscribable prohibited** under **this Student Code**, that adversely affects the institution, its affiliated organizations, or members of the institutional community or their pursuit of its objectives.

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, **and** disrupt the orderly progress of institutional activities **and, so, expose the actors to conduct sanctions**. Students who engage in such activities may be subject to conduct proceedings and 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.

1) Acts of dishonesty, including, but not limited to, the following:

a. Cheating, which is defined as, but not limited to, the following:

- i. use or giving of any unauthorized assistance in taking quizzes, tests, or examinations;
- ii. use of sources beyond those authorized by the instructor in writing papers, preparing reports, solving problems, or carrying out other assignments; or
- iii. acquisition, without permission, of tests or other academic material belonging to a member of the institutional faculty or staff.

- b. Plagiarism, which is defined as, but is not limited to, the following:
 - i. the use, by paraphrase or direct quotation, of the published or unpublished work of another person without full and clear acknowledgement consistent with accepted practices of the discipline;
 - ii. the unacknowledged use of materials prepared by another person or agency engaged in the selling of term papers or other academic materials.
 - c. Other forms of dishonesty relating to academic achievement, research results or academically related public service;
 - d. Furnishing information known or believed to be false to any institutional official, faculty member, or office;
 - e. Forgery, fabrication, alteration, misrepresentation, or misuse of any document, record, or instrument of identification, including misrepresentations of degrees awarded or honors received;
 - f. Tampering with the election of any institutionally-recognized student organization;
 - g. Claiming to represent or act in behalf of the institution when not authorized to so represent or so act.
- 2) Disruption or obstruction of teaching, research, administration, conduct proceedings, other institutional activities, including its public service functions on or off campus, appearances by speakers or presenters, whether invited by the institution, by recognized organizations or by authorized facility users, or other authorized non-institutional activities.
 - 3) Disruption of or interference with the activities of persons who are studying, sleeping, or otherwise engaging in activities that are consistent with the normal and expected uses of institutional facilities, or of student residential facilities, whether institutionally controlled or not.
 - 4) Acts of aggression including threats, intimidation, coercion, or other conduct that threatens or endangers the health or safety of any person.
 - a. “Aggression” means not only intentional infliction of harm, but also conduct that intentionally subjects another to unwelcome, offensive, physical contact or that puts another person in reasonable fear that

~~the actor intends immediately to subject person to intentional injury or unwelcome, offensive touching~~

~~Tampering with fire and life safety equipment including, without limitation, fire alarms, sprinkler systems, first aid equipment, and laboratory safety apparatus;~~

- b. ~~Tampering with fire and life safety equipment including, without limitation, fire alarms, sprinkler systems, first aid equipment, and laboratory safety apparatus;~~

~~Conduct that threatens or endangers a student's own health or safety may also violate this section;~~

- e. ~~“Aggression” means not only intentional infliction of harm, but also conduct that intentionally subjects another to unwelcome, offensive, physical contact or that puts another person in reasonable fear that the actor intends immediately to subject person to intentional injury or unwelcome, offensive touching.~~

- 5) Subjection of another person to any sexual act against that person's will or without consent, including any conduct that would constitute a sex offense, whether forcible or non-forcible, under SDCL §§ 22-22-1 through 22-22-7.2, 22-22-19.1 or 22-24.1.

- a. ~~Persons who are under the influence of alcohol, marijuana, or other illegal controlled substances at the time that they are subjected to the sexual act shall be presumed incapable of effective consent.~~

- 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 sexual assault, domestic violence and stalking, as defined under law.
- 7) Attempted or actual theft of services or property, including intellectual properties, of the institution or property of a member of the institutional community or other personal or public property;
- 8) Attempted or actual damage to property, including intellectual properties, of the institution or property of a member of the institutional community or other personal or public property;

- 9) Possession of stolen property on institutional property or at an institutionally sponsored activity, where the property is known to be stolen;
- 10) Participation in hazing. Hazing includes any activity intended to test another person's willingness or readiness to join a group (or to maintain full status in a group) by subjecting that person to humiliation, degradation, or other risks of emotional or physical harm; willing participation in a hazing exercise by the person being hazed does not excuse hazing;
- 11) Failure to comply with directions of institutional officials or law enforcement officers acting in performance of their duties or failure to identify oneself to these persons when requested to do so;
- 12) Failure to comply with emergency response measures as communicated by institutional officials, including measures adopted in response to, or in anticipation of, pandemic illness or other public health emergencies;
- 13) Unauthorized possession, duplication or use of keys, magnetic cards, electronic fobs or any device used to gain access to any institutional premises, unauthorized entry to or use of institutional premises or unauthorized possession, entry into or use of institutional equipment, data processing systems or information management or storage materials, facilities or systems;
- 14) Violation of published Board or institutional policies, rules, or regulations;
- 15) Violation of federal, state, or local law on institutional premises or at institutionally-sponsored or -supervised activities;
- 16) Making bomb threats;
- 17) The manufacture, sale, possession, use, or consumption of alcohol, marijuana, or controlled substances by students on any property controlled by the Board of Regents or used in connection with any institutionally sponsored activity; except that alcohol may be served at social activities held in other locations subject to the restrictions set out in this article and in guidelines for alcohol usage set out in Board Policy 4:27;
- 18) Unauthorized possession of containers with the original purpose of containing or holding alcohol, or drug paraphernalia as defined in SDCL § 22-42A-1;
- 19) Illegal or unauthorized possession of firearms, other items defined as dangerous weapons in SDCL § 22-1-2(10), fireworks, explosives, tasers, BB guns, or dangerous chemicals on institutional premises;

- 20) Participation in a campus demonstration which disrupts the normal operations of the institution and infringes on the rights of other members of the institutional community; leading or inciting others to disrupt schedules or normal activities within any campus building or area; intentional obstruction which unreasonably interferes with freedom of movement, either pedestrian or vehicular, on campus;
- 21) Obstruction of the free flow of pedestrian or vehicular traffic on institutional premises or at institutionally-sponsored or supervised functions;
- 22) Conduct classified under state law or local ordinance as disorderly, lewd, indecent, or a breach of peace;
- 23) Aiding, abetting, inviting, or procuring another person to breach the peace or to violate the Student Conduct Code;
- 24) Theft of computer time or other abuse of computer access, including, but not limited to:
 - a. Unauthorized entry into a file to use, copy, read, delete, or change the contents, or for any other purpose;
 - b. Unauthorized transfer of a file;
 - c. Unauthorized use of another individual's identification or account;
 - d. Use of computing facilities to interfere with the work of another student, faculty member, or institutional official;
 - e. Use of computing facilities to send obscene or abusive messages or to engage in unlawful activities, including those involving uses that infringe intellectual properties;
 - f. Use of computing facilities to interfere with normal operation of the institutional computing system;
 - g. Making, acquiring, or using unauthorized copies of computer software, or violating terms of applicable software license agreements;
 - h. Attempting to circumvent data protection schemes or tampering with security;
 - i. Violating institutional or Board internet policies.

- 25) Abuse of the Judicial System, including but not limited to:
- a. Failure to obey the summons of a student conduct **body officer** or institutional official;
 - b. Falsification, distortion, or misrepresentation of information before a student conduct **body officer**;
 - c. Disruption or interference with the orderly conduct of a judicial proceeding;
 - d. Initiation of a judicial proceeding knowingly without cause;
 - e. Attempting to discourage an individual's proper participation in, or use of, the judicial system, including retaliation against persons who brought charges or gave testimony;
 - f. Attempting to influence the impartiality of a member of a student conduct **body officer** prior to, or during the course of, the judicial proceeding;
 - g. Harassment (verbal or physical) or intimidation of a member of a student conduct **body officer** prior to, during, or after a judicial proceeding;
 - h. Failure to comply with the sanction(s) imposed under the Student Code;
 - i. Influencing or attempting to influence another person to commit an abuse of the judicial system.
- 26) Invasion of Privacy: No person may use a concealed camcorder, motion picture camera, or photographic camera of any type, to secretly videotape, film, photograph, or record by electronic means, any other person without clothing, or any other person under or through the clothing being worn by that other person, for the purpose of viewing the body of, or the undergarments worn by, that other person, without the consent or knowledge of that other person, and invade the privacy of that other person, under circumstances in which the other person has a reasonable expectation of privacy. Nor may a person use an audio recording device for use of unauthorized eavesdropping when another person or persons has a reasonable expectation of privacy.

C. Other Conduct

Conduct not expressly proscribed may also subject students, groups of students, or student organizations to conduct sanction where it has the purpose and effect of infringing interests protected by the rules set out in section 2(B) of this article, other provisions of Board or institutional policy, or comparable regulations duly established by other educational institutions or public or private authorities; or where it demonstrates that an individual disregards the need to conform to reasonable rules and regulations intended to protect the health and safety of others and to assure their orderly access to and beneficial use of institutional resources and facilities.

D. Student Organizations

Student organizations that, formally or informally through repeated practice, initiate, encourage, support, or tolerate conduct by members, associates, or invitees that violates the provisions of **this Student Code** shall be subject to conduct sanction.

- 1) The privileges of official recognition by South Dakota public institutions may be extended to student organizations, including those that maintain residences for their members, only if such organizations agree to adopt and to enforce policies that, at minimum:
 - a. Prohibit the possession, use, or dispensing of alcoholic beverages at organizational functions or in the organizational residence by persons under the age of 21 and the provision of alcoholic beverages to persons under the age of 21;
 - b. Prohibit the manufacture, possession, use, or dispensing of marijuana or illegal controlled substances at organizational functions or in the organizational residence;
 - c. Prohibit the expenditure of organizational funds on alcoholic beverages, marijuana, or illegal controlled substances;
 - d. Prohibit the informal collection from the members or residence of monies to be spent on alcoholic beverages, marijuana, or illegal controlled substances;
 - e. Require that whenever this section permits consumption of alcoholic beverages at organizational functions or in the organizational residence, the function must adhere to the Board guidelines for alcohol usage set out in Board Policy 4:27(E) at page 5 of 6;
 - f. Establish conduct policies and sanctions regarding violations by individual members or residents no less stringent than those set forth

under Board policies, except that limited use of alcoholic beverages is permissible as set out above, and except that, in lieu of suspension or expulsion, the organization shall suspend or revoke the privileges of membership, including residence privileges;

- g. Require that a report be filed with the senior student affairs officer each semester identifying all actions taken pursuant to the conduct policies required in this Student Code;
 - h. Institutions may impose additional or more restrictive conditions on official recognition.
- 2) Student organizations are subject to the Board's antidiscrimination policies set forth in Board Policy 1:18.

E. No provision of this Student Code shall be interpreted to deprive students of rights guaranteed them under state or federal law.

F. Violation of Law and Institutional Conduct Sanctions

1) Student Code serve different purposes from criminal or civil proceedings. In conduct proceedings, the ultimate question will always be whether a student has in fact violated an institutional norm and, if so, whether educational or corrective measures may suffice to communicate to the student the institution's clear expectation that all students observe norms set forth in this Student Code or whether a violation of institutional standards is so severe that the student will not be allowed to continue enrollment.

a. From time to time, a single course of conduct may give rise to criminal charges, civil damages claims and conduct proceedings under this Student Code. Law enforcement authorities have discretion only to arrest and to charge persons with violation of a criminal statute. The courts have exclusive power and responsibility to determine questions of criminal culpability or civil liability.

b. Institutions have the power to determine whether conduct has violated their internal conduct rules and the duty to enforce institutional standards of conduct.

i. When any institutional employee, other than a licensed counselor regularly employed on a full-time basis as a counselor to provide psychological counseling services to enrolled students, receives a report of student misconduct that may constitute a felony offense under state or federal law, that person shall report the known facts and circumstances to law enforcement officials who have jurisdiction over the matter and to the individual's

supervisor. If a report has not already been made to law enforcement by institutional employees when the senior student affairs officer receives a report, that official shall do so.

- ii. Where required under Board Policy No. 1:18(13)(E), institutions may take interim measures to assure that (a) persons reporting an incident or reporting that they have been victimized by criminal misconduct are protected from retaliation for having made a complaint or responded to inquiries initiated in response to a report, (b) necessary or appropriate interim measures are taken to guard against a recurrence of the conduct that gave rise to the report, (c) requests for such persons' academic, living, transportation, and working situation are reviewed case by case through an interactive process and granted if they are reasonably available and (d) informing such persons of their options for requesting protection or accommodation and how to request such assistance.
- iii. Conduct proceedings under this Student Code may be delayed to accommodate investigations by law enforcement authorities into alleged facts that suggest criminal conduct. Institutions shall cooperate with law enforcement authorities to the extent permitted under law, but they may neither treat the investigation by law enforcement authorities as a substitute for their own investigation into allegations of Student Code violations, nor delay their own investigations until the ultimate outcome of the criminal investigation.
- iv. Institutions shall briefly suspend their internal investigations into student misconduct if requested in writing by a federal, state or local law enforcement authority during initial investigatory phases of the law enforcement effort. The institution shall maintain regular contact with law enforcement to determine when it may resume its investigation, and the institution will resume its investigation as soon as notified by the law enforcement agency that it has completed the evidence gathering process, or sooner if the senior student affairs officer determines that the evidence gathering process will be lengthy or delayed.
- v. Student Code charges should be initiated when justified by the evidence available to the institution, irrespective of the status of criminal prosecution or civil litigation arising from the same alleged course of conduct.
- vi. When federal, state, or local authorities investigate or charge students with a violation of law, the institution shall neither

request nor agree to special consideration for students because of their student status.

vii. If the alleged offense is also the subject of a proceeding before the student conduct officer under the Student Code, the institution may advise off-campus authorities of the existence of the Student Code and of how such matters shall be handled internally within the institutional community.

viii. Individual students and faculty members, acting in their personal capacities, remain free to interact with governmental representatives as they deem appropriate.

2) Institutions shall attempt to accommodate conditions imposed by criminal courts for the rehabilitation of student violators. When evaluating the practicality of such accommodations, institutions shall consider the effects on the student and on other students. Among the factors to be considered will be any existing restrictions on the student that were established pursuant to Board Policy 1:18 to protect persons who brought complaints or who participated in related investigations, disciplinary or conduct proceedings, institutions shall cooperate with law enforcement or other agencies to accommodate.

~~Students charged with a violation of federal, state, or local laws may be subject to conduct sanction where the conduct would fall within the proscriptions set out in this code or institutional regulations. Where the student has been found guilty in a court of law or has declined to contest such charges, although not actually admitting guilt (e.g., “no contest” or “nolo contendere”), the alleged facts that formed the basis of the criminal charges shall be deemed established for purposes of conduct proceedings.~~

~~3) Conduct proceedings may be instituted against a student charged with violation of a law which is also a violation of this Student Code, for example, if both violations result from the same factual situation, without regard to the status of civil litigation in court or criminal arrest and prosecution. Proceedings under this Student Code may be carried out prior to, simultaneously with, or following civil or criminal proceedings off-campus.~~

~~4) When a student is charged by federal, state, or local authorities with a violation of law, the institution shall not request or agree to special consideration for that individual because of his or her status as a student. If the alleged offense is also the subject of a proceeding before a student~~

conduct body under the Student Code, however, the institution may advise off-campus authorities of the existence of the Student Code and of how such matters shall be handled internally within the institutional community. The institution shall cooperate fully with law enforcement or other agencies in the enforcement of criminal law on campus and in the conditions imposed by criminal courts for the rehabilitation of student violators. Individual students and faculty members, acting in their personal capacities, remain free to interact with governmental representatives as they deem appropriate.

Where the student has been found guilty in a court of law or has declined to contest such charges, although not actually admitting guilt (*e.g.*, “no contest” or “nolo contendere”), the alleged facts that formed the basis of the criminal charges shall be deemed established for purposes of conduct proceedings.

- 4) When the senior student affairs officer receives a report of student misconduct that may constitute a felony offense under state or federal law, that official shall report the known facts and circumstances to law enforcement officials who have jurisdiction over the matter.

4. Judicial Policies

A. Allegations and Hearings

- 1) Written allegations of misconduct may be filed against any student by any member of the institutional community. Allegations shall be directed to the student conduct officer responsible for the administration of the institutional judicial system. The complaint shall state the specific facts that form the basis for the allegation, as well as the identities of any other witnesses and the location of any physical evidence of the misconduct. Allegations Except for instances involving allegations of discrimination governed by Board Policies No. 1:17, 1:17.1 or 1:18, allegations must be signed by the complainant. Any allegation should be submitted as soon as possible after the event takes place or after the complainant discovers the identity of the alleged perpetrator.
- 2) Allegations arising under Board Policies No. 1:17, 1:17.1 or 1:18 shall be handled as provided in Board Policy 1:18.
- 3) In cases in which a faculty member raises allegations of acts of dishonesty related to student coursework, the written allegation shall contain specific details of the alleged violation and include a recommendation in regard to conduct sanctions.

- a. Conduct proceedings and related sanctions differ from proceedings and actions based on academic grounds in response to undisputed facts or facts determined after an opportunity for a hearing. Appeals involving grades or other academic actions are resolved under Board Policy No. 2:9.
- ~~2) In cases in which a faculty member raises allegations of academic misconduct, the written allegation shall contain specific details of the alleged violation and include a recommendation in regard to conduct sanctions.~~
- ~~3) Allegations arising under the human relations policy shall be handled as provided in Board Policy 1:18.~~
- 4) The student conduct officer shall make an initial determination whether the allegations were timely brought, taking into account the seriousness of the incident and the degree to which delay may have impaired access to evidence. The student conduct officer shall determine if the allegations have merit, including, as to off-campus conduct that occurred off campus or that involved the use electronic or social media, whether the incident sufficiently affects institutional interest to warrant further proceedings.
- 5) If the student conduct officer determines that the allegations have merit, the officer shall next determine whether they can be disposed of by mutual consent of the parties involved on a basis acceptable to the student conduct officer or by waiver of formal hearing where the student charged admits to the misconduct and accepts the proposed punishment.
- a. Informal disposition of allegations of discrimination governed by Board Policies No. 1:17, 1:17.1 or 1:18 shall be handled as provided in Board Policy 1:18.
- b. Informal disposition shall be final and there shall be no subsequent proceedings. If the allegations cannot be disposed of informally, the student conduct officer may later continue to serve in the same matter as the student conduct officer ~~body or a member thereof~~.
- 6) Within fifteen workdays of the filed complaint, the student conduct officer shall present all allegations to the student charged with misconduct. The allegations shall be in written form and shall identify with specificity each section of the conduct code under which allegations are brought, the factual allegations that support the allegations, and those the names of all persons whose testimony shall be used to establish the allegations, and copies of all documents to be used as evidence. A time shall be set for a hearing, not less than five ten nor more than fifteen twenty calendar days after the student has been notified. The minimum time limits may be waived by the party charged. Maximum time

limits for scheduling of hearings may be extended at the discretion of the student conduct officer, but a request by the party charged for additional time to prepare a response shall not unreasonably be denied.

a. If the institution acquires new evidence bearing on the original allegations or justifying additional allegations, it shall issue an amended notice and afford additional, reasonable time, consistent with the nature of the evidence or allegations, to permit the respondent to prepare responses.

7) Hearings shall be conducted by a ~~student conduct body or~~ student conduct officer according to the following guidelines:

a. Hearings shall be conducted in private.

b. The ~~chair of the student conduct body or the~~ student conduct officer shall have the power to exclude from the hearing any person whose conduct interferes with the hearing.

c. In hearings involving more than one ~~accused student, the student conduct body or student conduct officer~~ may permit the hearings concerning each student to be conducted separately or jointly. student respondent, any respondent may obtain a separate hearing if there is a serious risk that a joint hearing would compromise a specific right of one of the respondents, or prevent the student conduct officer from making a reliable judgment about contested facts.

d. The complainant and ~~the~~ respondent have the right to be assisted by ~~an advisor~~ advisors of their choice, at their own expense. Ordinarily, no more than one advisor judicial for each student shall be permitted. The advisor may be a faculty member, staff member, student, attorney, or family member. The complainant and the respondent are responsible for presenting their own cases, and, therefore, advisors are not permitted to speak or to participate directly in any hearing before a ~~body or~~ student conduct officer, except that the senior student affairs officer shall assume that responsibility under Board Policy 1:18 for the presentation of evidence in matters involving discrimination complaints against students or in matters involving Board Policy 1:17.1 or acts of aggression or unconsented sexual acts as defined in this Student Code.

i. Although attorneys are not generally allowed to actively represent students in connection with most Student Code proceedings, students are allowed to be represented by

attorneys in three situations. Students may be represented by an attorney of their choice at their own expense if the alleged misconduct involves sexual violence or hate-motivated violence prohibited under Board Policy 1:17.1, if the alleged misconduct involves acts of aggression or unconsented sexual acts as defined in this Student Code, or if the student has been charged by federal, state or local authorities with a felony level offense, arising from the same actions that are alleged to have violated the Student Code.

ii. In such cases, the attorneys may argue on behalf of the respondents and examine witnesses.

iii. The right of representation established under this section with respect to institutional hearings does not include a right to discovery comparable to the rights afforded under criminal or civil procedures or under contested case procedures.

iv. Complainants shall be entitled to representation by an attorney at any meeting or hearing where respondents have such rights; provided that, where a complainant participates in a proceeding only as a non-party fact witness, the attorney may not intervene for any purpose other than to assert a constitutional or testimonial privilege on behalf of the complainant.

v. The institution will advise both complainants and respondents of the rights established under this subsection 7(d) to be represented by attorneys.

e. The party alleging misconduct, be it the complainant or the senior student affairs officer, bears the burden of producing evidence to establish each factual element required to show that the respondent violated a specific provision of this Student Code. The party alleging misconduct also has the burden of persuading the student conduct officer that the evidence shows it to be more likely than not that each element alleged did in fact occur.

The respondent will have the corresponding burdens to produce evidence to establish each factual claim in any affirmative defense and to produce sufficient evidence to persuade the student conduct officer that it was more likely than not that each element in the defense did in fact occur.

- f. The complainant, the respondent, and, in matters involving discrimination complaints against students or in matters involving Board Policy 1:17.1 or acts of aggression or unconsented sexual acts as defined in this Student Code, the senior student affairs officer ~~the student conduct body~~ shall have the privilege of presenting witnesses previously disclosed to respondents as provided in § 4(A)(6), above, subject to the right of cross examination. Witnesses may only be present during the hearing while testifying.
- g. Pertinent records, exhibits, and written statements previously disclosed to respondents as provided in § 4(A)(6), above, may be accepted as evidence for consideration by a student conduct body or ~~conduct officer~~ at the discretion of ~~the chairperson or~~ the student conduct officer; provided that the evidence relates to a fact relevant to the alleged infraction, that it is based upon testimony from someone who has knowledge of the fact or from a source that reliably documents the fact, that it is a fact that makes a difference to outcome of the conduct hearing and that it is not unduly repetitious. Institutions shall always observe the constitutional privileges against self-incrimination, as well as testimonial privileges established under SDCL §§ 19-19-501 through 19-19-516. Technical rules of evidence used in criminal and civil court do not apply to proceedings under this Student Code. Subject to the prior disclosure requirements of this section, hearsay, i.e., statements by parties who do not testify the hearing and are not available for cross examination, may be admitted to prove facts asserted in such statements if they are of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs.
- g. All procedural questions are subject to the final decision of ~~the chairperson of the student conduct body or~~ the student conduct officer.
- h. At the hearing, the ~~student conduct body or~~ student conduct officer shall determine ~~(by majority vote if the student conduct body consists of more than one person)~~ whether the student has violated each section of the Student Code which the student is charged with violating.
- i. The ~~student conduct body's or~~ student conduct officer's determination shall be made on the basis of whether it is more likely than not that the accused student violated the Student Code.

- j. The fact that a student acted while under the influence of alcohol, marijuana or an illegal controlled substance shall not be considered a mitigating factor when determining appropriate sanctions.
- k. Intoxication may be considered an aggravating factor when determining appropriate sanctions, and it shall be so considered where the student has a history of prior violations of alcohol, marijuana, or controlled substance regulations.
- l. The student conduct ~~body~~ officer shall prepare written findings to support ~~its~~ his or her determination. These shall include:
 - i. Concise statements of each factual finding.
 - ii. Brief explanations of whether the factual findings justify a conclusion that the conduct violated the code;
 - a) These must address each factual element that must be satisfied to establish that conduct has violated the code.
 - iii. Recommendations concerning appropriate sanctions;
 - a) These must explain why the sanctions recommended are appropriate in view of the seriousness of the conduct and in consideration of the need to assure that the violation shall not recur.
 - b) The student conduct officer shall determine the effective date of any sanctions imposed.
- ~~m. If a student conduct body prepares recommended sanctions, these shall be forwarded, together with the other findings and conclusions, to the student conduct officer who may adopt or reject the recommended sanctions.~~
 - ~~i. If the findings, conclusions, or recommended sanctions are rejected, the student conduct officer shall impose appropriate sanctions, or take such other action as deemed necessary, and provide the student conduct body with a written explanation for this action.~~
 - ~~ii. The student conduct officer shall determine the effective date of any sanctions imposed.~~

- n. The approved written findings and conclusions and sanctions, if any, shall be provided to a complainant entitled to receive such information under section B, below, and to the respondent.
- o. There shall be a single verbatim record of all formal evidentiary hearings before a student conduct body officer. The record shall be the property of the institution.
 - i. The record and its contents shall be held in confidence and may be used solely for purposes of appeal. Any person who unnecessarily discloses the contents of the record to parties not involved in the appeal shall be subject to conduct sanction.
 - ii. In the event of an appeal, the respondent shall be given access to the record for purposes of preparing the appeal. Access shall be provided at such places and times as the senior student affairs officer may direct.
 - iii. Except as required by the Americans with Disabilities Act, the institution shall not be required to change the form in which the record is maintained.
- p. No student may be found to have violated the Student Code solely because the student invoked any constitutional or testimonial privilege and declined to testify or failed to appear before a student conduct body officer, unless the student has allegedly failed to obey the direction of a duly empowered student conduct body, student conduct officer or other institutional officer to appear. Nor may the fact that, in response to a question, a student has invoked any constitutional or testimonial privilege and declined to respond be treated as evidence, one way or the other, about the subject matter of the question. In all cases, the evidence in support of the allegations or defenses shall be presented by the party bearing the burdens of proof and considered.

B. Sanctions

In each case in which a student conduct body determines that a student has violated the institutional Student Code, the sanction(s) shall be determined and imposed by the student conduct officer. Where a violation of Board Policy is established, and where a sanction is mandated under Board Policy, that sanction shall be imposed. In cases in which persons other than or in addition to the student conduct officer have been authorized to serve as the student conduct body, the recommendation of all members of the student conduct body shall be considered by the student conduct

~~officer.~~ The judicial student conduct officer is not limited to sanctions recommended by members of the student conduct body. Following the hearing, ~~the student conduct body and~~ the student conduct officer shall provide the accused in writing of the findings of fact, conclusions and recommendations, if any, reached by ~~the student conduct body or~~ student conduct officer and of the sanction(s) imposed, if any.

- 1) Complainants shall be informed of any sanctions imposed in the following circumstances:
 - a. When the sanction involves remedial action that directly relates to the complainant (for example, an order requiring the student harasser not to have contact with the complainant);
 - b. Where the allegations against the accused would constitute a crime of violence as defined in section 1(T), above, and committed a violation of the institution's rules or policies with respect to that crime.
- 2) Institutions may disclose the final results of a conduct proceeding when, at their discretion, they conclude that disclosure will serve a legitimate educational interest and determine through a conduct proceeding conducted under its student conduct code that the alleged student perpetrator committed a crime of violence or a nonforcible sexual offense that is a violation of the university's rules or policies with respect to such crime or offense. For purposes of this subsection, "final results" means the name of the student perpetrator, the violation committed, and any sanction imposed by the university on that student. Names of other students involved in the violation, such as a victim or witness, will be released only with the written consent of that other student or students.
- 3) Institutions may inform the parents or legal guardians of students under twenty-one years of age that the students have violated institutional policies concerning the use or possession of alcohol or controlled substances as follows:
 - a. When the infraction occurs under circumstances that suggest that the student suffers from a serious substance abuse problem or shows little regard for his or her own health or safety or that of others; or
 - b. When the student is found to have committed a second violation.
- 4) The following sanctions may be imposed upon any student found to have violated the institutional Student Code:

- a. Warning – A conduct notice in writing to the student that the student is violating or has violated institutional regulations.
- b. Censure – A written censure for violation of specified regulations.
- c. Probation – Probation is for a designated period of time and includes the probability of more severe conduct sanctions if the student is found to be violating any institutional regulation(s) during the probationary period.
- d. Loss of Privileges – Denial of specified privileges for a designated period of time.
- e. Fines – Previously established and published fines may be imposed.
- f. Restitution – Compensation for loss, damage, or injury. This may take the form of appropriate service or monetary or material replacement.
- g. Discretionary Sanction – work assignments, service to the institution or other related discretionary assignments.
- h. Residence Suspension – Separation of the student from residence facilities for a definite period of time, after which the student is eligible to return. Conditions for readmission may be specified.
- i. Residence Expulsion – Permanent separation of the student from residence facilities.
- j. Suspension – Separation of the student from the institution for a definite period of time, after which the student is eligible to return. Conditions for readmission may be specified. A student who has been suspended from one Board institution may not be enrolled at another.
- k. Expulsion – Mandatory separation of the student from the institution for a period of no less than six years. A student who has been expelled from one Board institution may not be enrolled at another until the period of expulsion has expired.
- l. The privileges of continued participation in institutional activities, access to institutional facilities or residences may be conditioned upon participation in or completion of counseling, substance abuse, or comparable programs, at the student's expense.

- m. More than one of the sanctions listed above may be imposed for any single violation.
- n. Imposition of a sanction may be delayed, suspended, or held in abeyance on such conditions as the student conduct officer may prescribe.

5) The following sanctions are mandated for violation of Board policies:

- a. Conduct sanction for acts of aggression, sex offenses, or harassment shall be subject to the following conditions:
 - i. Conduct sanction on the first occasion may include expulsion, where appropriate, given the nature of the act of aggression, sex offense, or harassment;
 - ii. If there is a second occurrence of an infraction of the same nature at any time during the student's career in South Dakota public higher education, expulsion shall be mandatory.
- b. Persons who make bomb threats or who aid or abet their making shall be expelled. Additionally, they shall be required to pay restitution to the institution for all direct and indirect expenses incurred as a result of the threat or threats.
- c. Conduct sanctions for infractions of alcohol, marijuana, and controlled substances regulations:
 - i. Conduct sanction for the initial infraction shall be determined under local regulations which may provide for mandatory substance abuse assessment.
 - ii. If, at any time during their enrollment within the system, students commit a second offense under the alcohol, marijuana, and controlled substances policy, they shall be fined \$100.00 and placed on conduct probation.
 - iii. If, at any time during their enrollment within the system, students commit a third alcohol, marijuana or controlled substances offense, they shall either be suspended for one semester or, in compelling circumstances, be permitted to continue attendance subject to conduct probation while

participating in an approved substance abuse treatment program at their own expense.

- iv. The foregoing sanctions, together with such actions as may be imposed pursuant to local regulations for initial infractions, are minimum sanctions. The reference to them does not preclude the institution from imposing more severe sanctions at any level, including expulsion, where the facts and circumstances of the infraction warrant such action.
 - v. Where an infraction of Board alcohol, marijuana, or controlled substances policies appears also to constitute a criminal offense under South Dakota or federal law, the institution may refer the matter to law enforcement authorities. Where the facts suggest a felony offense, such referral shall be mandatory. Referral of a matter to law enforcement authorities shall not require suspension of conduct proceedings nor delay imposition of discipline.
- d. The following sanctions may be imposed upon groups or organizations:
- i. Those sanctions listed above in Section 3(B)(3)(a)-(g) and (l)-(n).
 - ii. Loss of all privileges, including institutional recognition, for a specified period of time.
 - iii. When an officially recognized student organization has violated any of the conditions of the recognition established under the alcohol, marijuana, and controlled substances policy, it shall be sanctioned as follows:
 - a) On the first offense the organization shall be required to forego the use of alcohol at any of its functions, to remove all alcohol from the residence or both for one calendar year from the date on which this conduct sanction is imposed. Additionally, the organization may lose the right to conduct social functions for a like period of time or, at the discretion of local officials, may incur additional sanctions including the loss of recognition.
 - b) A second offense within four years against any of the conditions of recognition or a violation of a sanction

imposed following a first infraction shall result in the suspension of the privilege to solicit and to accept new members for one calendar year from the time the sanction is imposed and may result in the loss of recognition.

- c) A third offense shall result in the loss of recognition.

C. Interim Suspension

In certain circumstances, the senior student affairs officer, or a designee, may impose an institutional or residence suspension prior to the hearing before a student conduct body officer.

- 1) Interim suspension may be imposed only for one or more of the following purposes:
 - a. To ensure the safety and well-being of members of the institutional community or preservation of institutional property or other property located on premises controlled by the institution;
 - b. To ensure a student's own physical or emotional safety and well-being; or
 - c. To ensure the normal operations of the institution where a student poses a definite threat of disruption of or interference with the normal operations of the institution.
- 2) During the interim suspension, students shall be denied access to residence facilities or to the campus (including classes) or all other institutional activities or privileges, in any combination or all together, for which the student might otherwise be eligible, as the senior student affairs officer or the student conduct officer may determine to be appropriate.
- 3) Except in circumstances presenting an immediate threat to the safety and well-being of members of the institutional community, including the affected student, or in circumstances presenting an immediate threat of serious damage to institutional property or other property located on premises controlled by the institution, interim suspension may not be imposed until the student is afforded a reasonable opportunity to meet informally with the senior student affairs officer, or a designee, to learn the basis for the action and to raise any objections or to request leniency. The student should be notified beforehand of the purpose of the meeting. A student who fails to respond to the notice shall be deemed to have waived the right to such a meeting.

- D. Conduct sanctions shall not be made part of the student's permanent academic record, but shall become part of the student's confidential record. Sanctions that would be considered in the course of administering progressive conduct sanctions under section 3(B)(2) above shall be disclosed to another institution within the system if a student transfers to that institution or is required to appear there to respond to conduct allegations. Upon graduation, the student's confidential record may be expunged of conduct actions other than residence expulsion, institutional suspension or institutional expulsion. Cases involving the imposition of sanctions other than residence expulsion, institutional suspension or institutional expulsion shall be expunged from the student's confidential record six years after final disposition of the case or such other time as the student conduct officer may prescribe at the time of the expulsion. Where restitution is required of a student, the institution reserves the right to disclose all material portions of the confidential file as may be necessary to obtain a judgment in a court of competent jurisdiction. Such files as relate to matters involving restitutionary sanctions shall be preserved at least until all necessary sums have been paid.
- E. Students enrolled in a Board institution shall be held accountable for their conduct while visiting other Board institutions. Students may be required, as a condition of continued enrollment, to report at their own expense to another campus to appear before a conduct hearing and to answer allegations based on their conduct while at that campus.
- 1) Any conduct sanction imposed in response to campus or Board regulations shall be given systemwide effect. A student suspended at one institution shall not be able to enroll in the meantime at another. A student who has been expelled from one Board institution may not be enrolled at another.
 - 2) When a student is brought forward on conduct allegations by an institution, sanction shall be determined under local standards. This punishment/sanction may, at the discretion of local authorities and pursuant to local procedural regulations, include sanctions more severe than the minimum sanctions set forth in systemwide policy; except that no discretionary recommendation for suspension or expulsion may be imposed without the concurrence of the senior student affairs officer from the student's home campus.
- F. Appeals
- 1) A decision reached ~~by the student conduct body~~ or a sanction imposed by the student conduct officer pursuant to § 3:4(3)(A)(7) may be appealed by accused students or complainants entitled to receive information concerning conduct sanctions under section (B) above, to an appellate board of the institution within five (5) week days, exclusive of holidays, after notice of

the decision is sent. Such appeals shall be in writing and shall be delivered to the student conduct officer or his or her designee.

- 2) Except as required to explain the basis of new evidence, an appeal shall be limited to review of the verbatim record of the initial hearing and supporting documents for one or more of the following purposes:
 - a. To determine whether the original hearing was conducted fairly in light of the allegations and evidence presented, and in conformity with prescribed procedures;
 - b. To determine whether the facts in the case were sufficient to establish that violation(s) of the Student Code occurred;
 - c. To determine whether the sanction(s) imposed were appropriate for the violation of the Student Code which the student was found to have committed.
- 3) An appeal may request consideration of new evidence, sufficient to alter a decision, or other relevant facts not brought out in the original hearing, where such evidence or facts were not known to the person appealing at the time of the original hearing.
- 4) If an appeal is upheld by the appellate board, the matter shall be remanded to the original ~~student conduct body and~~ student conduct officer for re-opening of the hearing to allow reconsideration of the original determination and/or sanction(s).
- 5) In cases involving appeals by students accused of violating the Student Code, review of the sanction by the appellate board may not result in more severe sanction(s) for the accused student. Instead, following an appeal, the senior student affairs officer may, upon review of the case, reduce, but not increase, the sanction(s) imposed by the student conduct officer.
- 6) Where complainants entitled to receive information concerning conduct sanctions under section (B) above appeal from the decision, the senior student affairs officer may, upon review of the case, reduce or increase the sanction(s) imposed by the student conduct officer or remand the case to the original ~~student conduct body and~~ student conduct officer.

4. Administrative Review

As provided in Board Policy No. 1:6(4), the Board or a President may review a finding or a sanction of an official or body exercising the powers delegated through this policy.

- A. Except on the affirmative vote of two-thirds of the members of the Board, a notice of review must be given to the complainant and respondent within ninety calendar days of a final decision by the official or body exercising delegated authority.

5. Interpretation and Revision

- A. Any question of interpretation regarding the Student Code shall be referred to the senior student affairs officer or his or her designee for final determination.
- B. The Student Code shall be reviewed every four years under the direction of the student conduct officer.
 - 1) If the review leads to a recommendation that Board policy be modified, that recommendation and its supporting rationale shall be provided to the institutional president and, if approved, forwarded to the Executive Director.

6. Institutions may adopt consistent local regulations to implement **this Student Code.**

7. Contested Case Review

After exhausting disciplinary procedures on campus, student may challenge some disciplinary actions as provided in chapter 1-26 of the South Dakota Codified laws.

- A. The review will be permitted where:
 - 1. A student has been expelled or suspended based upon alleged violations of Board Policy No. 3:4; or
 - 2. A disciplinary action allegedly deprived the student of a right or privilege protected by a specific term or provision of Board policy or state or federal constitution, law or regulation.
- B. Contested case proceedings will be conducted under protective orders entered pursuant to SDCL §§ 1-26-19 and 15-6-26(c), in order to implement rights guaranteed under the Family Educational Rights and Privacy Act of 1974.
- C. Students who have exhausted institutional procedures, including a request for discretionary administrative review, may challenge an institutional disciplinary action by mailing a written request for a review under chapter 1-26 with the Executive Director within thirty (30) days after the institution transmits notification of its final decision by sending a written electronic notice to the students' official institutional address and by depositing with the United States Postal Office written notice addressed to the students' last known mail address.

1. The notice will not be effective unless the student attaches all documentation provided to the students by the institution detailing the charges, supporting allegations, findings and conclusions that supported imposition of the discipline.
- D. The Executive Director will have fifteen (15) working days within which to attempt, at his discretion, a resolution through informal means.
 - E. If no resolution has been effected within the time allowed under paragraph VII (D), the Executive Director will refer the matter to a hearing examiner for reconsideration pursuant to chapter 1-26 of the codified laws and formulation of recommendations for the disposition of the matter by the Board.

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; August 2015.