SOUTH DAKOTA BOARD OF REGENTS

Academic and Student Affairs

REVISED
AGENDA ITEM: 5 – E (1)
DATE: December 4-6, 2018

SUBJECT

CONTROLLING STATUTE, RULE, OR POLICY
U.S. Constitution Amendment I
SD Constitution Art. VI § 5 – Freedom of speech
SDCL § 3-6C-19 – Freedom of Speech of Officers and Employees
BOR Policy 3:3 – Freedom of Speech
BOR Policy 3:4 – Student Code of Conduct
BOR Policy 6:13 – Facilities Use By Private Parties

BACKGROUND / DISCUSSION
During the June 2018 Board meeting, a Free Speech Roundtable was scheduled with a number of invitees who provided both written and oral comments on a variety of system and institutional policies affecting free speech. Board of Regents staff worked with institutional representatives to make necessary revisions to BOR policies to address issues/concerns that were raised by various constituent groups and brought the first reading of the proposed policy changes to the Board at its October 2018 meeting.

Public comments on the proposed policy changes were once again solicited. Attachment VIII contains the comments submitted to the Board Office since the October meeting, which totaled 7 responses from a mix of internal and external constituencies. The commentary speaks for itself, but it represents a mix of viewpoints with differing perspectives on the various issues.

The attached policies have been reformatted to the new policy template; however, in an attempt to avoid unnecessary confusion, only the substantive policy revisions are tracked and not the re-numbering/formatting changes.

(Continued)

DRAFT MOTION 20181204_5-E(1):
I move to approve the second and final reading of the proposed revisions to BOR Policies 1:17, 3:3, 3:4, 3:18, 4:21, 6:13, and 7:1.
IMPACT AND RECOMMENDATIONS
Changes have been made to seven BOR policies to provide greater clarity for institutional leadership as they manage freedom of speech issues on their campuses. The proposed changes have been made following engagement with Board leadership, campus general counsels, presidential feedback and comments from students, faculty and external constituencies.

Staff recommends approval, subject to any additional clarifications or changes deemed appropriate by the Board.

ATTACHMENTS
Attachment I – BOR Policy 1:17 Harassment Including Sexual Harassment
Attachment II – BOR Policy 3:3 Freedom of Speech
Attachment III – BOR Policy 3:4 Student Code of Conduct
Attachment IV – BOR Policy 3:18 Recognition and Funding of Student Organizations
Attachment V – BOR Policy 4:21 Political Activity
Attachment VI – BOR Policy 6:13 Facilities Use by Private Parties
Attachment VII – BOR Policy 7:1 Acceptable Use of ITS
Attachment VIII – Public Comments to Proposed Policy Changes
SUBJECT: Harassment including Sexual Harassment

NUMBER: 1-17

A. PURPOSE

To establish policy prohibiting harassment, including sexual harassment, and to provide the framework for investigation(s) and reporting in the event of allegation(s) and/or violation(s) thereof.

B. DEFINITIONS

None

C. POLICY

1. Educational institutions play a special role in preparing students to lead the complex social organizations through which businesses and professions operate and through which free people govern themselves. Students must be taught, and they must be shown through the example given by institutional employees, that stable, effective and prosperous social organizations observe norms of conduct under which all participants are expected to treat one another civilly and to carry out their respective tasks in a constructive and informed manner. Complex social organizations derive their strength from the cooperation of those who participate in them. By virtue of their special role in preparing future generations of leaders, educational institutions have a particular concern with conduct that subjects members of the institutional community to harassment, as herein defined, on the basis of sex, race, color, creed, religion, national origin, ancestry, citizenship, gender, gender identity, transgender, sexual orientation, age, disability, genetic information or veteran status, on any other status that may become protected under law against discrimination or on any other grounds. Such conduct destroys the bonds of cooperation and common purpose on which society rests by demeaning some members of the community, and, it cannot be tolerated in an institution whose very purpose is to shape the skills and conscience of the rising generations. For this reason, the Board strictly proscribes harassing conduct, and those members of the institutional community who have indulged in it shall be subject to discipline pursuant to Board Policy 1:18 or BOR Policy 3:4.

2. Harassment on any grounds, directed against individuals, is proscribed.

   2.1. Sexual harassment in either of its recognized forms is proscribed:

      2.1.1. Sexual harassment may be established by showing that an individual has been subjected to unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature where:
2.1.1. Submission to such conduct is made either explicitly or implicitly a term or a condition of an individual's participation in, or use of, an institutionally sponsored or approved activity, employment or resource; or

2.1.1.2. Submission to or rejection of such conduct by an individual is used as the basis for educational, employment or similar decisions affecting an individual's ability to participate in or use an institutionally sponsored or approved activity, employment or resource.

2.1.2. Sexual harassment may also be established by showing participation in the creation of an intimidating, hostile or demeaning environment established under § 1.2 below.

2.2. Harassment on the basis of sex, race, color, creed, religion, national origin, ancestry, citizenship, gender, gender identity, transgender, sexual orientation, age, disability, genetic information, veteran status or harassment on any other status that may become protected under law against discrimination or on any grounds, directed against individuals, may be established by showing:

2.2.1. Conduct toward another person that has the purpose or the effect of creating is severe or pervasive enough to create an objectively and subjectively intimidating, hostile or demeaning environment that substantially interferes with the individual’s ability to participate in or to realize the intended benefits of an institutional activity, employment or resource.

2.2.1.1. Sexual assault, as described in Board Policy No. 1:17.1, or animus-based assault that would constitute a hate crime under state or federal law, or involving conduct towards any individual otherwise protected from harassment under this policy that would constitute a hate crime if directed towards a person protected under state of federal hate crime law, will satisfy the requirement that the assailant’s conduct creates an objectively and subjectively intimidating, hostile or demeaning environment that substantially interferes with his or her ability to participate in or to realize the intended benefits of an institutional activity, employment or resource.

2.2.1.2. In most other cases, harassment consists of more than casual or isolated incidents.

2.2.1.2.1. Consideration should be given to the context, nature, scope, frequency, duration and location of the incidents, whether they are physically threatening or humiliating as opposed to merely offensive utterances, as well as to the identity, number and relationships of the persons involved.

2.2.1.2.2. Harassment shall be found where, in aggregate, the incidents are sufficiently pervasive or persistent or severe that a reasonable person with the same characteristics of the victim of the harassing conduct would be adversely affected to a degree that interferes with his or her ability to participate in or to realize the intended benefits of an institutional activity, employment or resource.
2.2.1.2.3. The reasonable person standard includes consideration of the perspective of persons of the alleged victim's race, gender or other circumstances that relate to the purpose for which he or she has become the object of allegedly harassing conduct.

2.2.1.2.4. If the victim does not subjectively perceive the environment to be hostile, the conduct has not actually altered the conditions of participation and there will be no violation of this policy.

2.2.1.2.5. It is not necessary to show psychological harm to the victim to establish that the conduct would interfere with the person's ability to participate in or to realize the intended benefits of an institutional activity, employment or resource.

2.2.1.3. Other conduct that is extreme and outrageous exceeding all bounds usually tolerated by polite society and that has the purpose or the substantial likelihood of interfering with another person's ability to participate in or to realize the intended benefits of an institutional activity, employment or resource. RESERVED

2.2.1.4. Reasonable directions and admonitions by duly authorized institutional agents as to time, place and manner in which employees or volunteers perform assigned responsibilities, students carry out educational assignments or program participants engage in sponsored activities do not constitute prima facie evidence of harassment.

3. The chief executive officer of each institution is responsible for the enforcement of this policy and may delegate the necessary authority to the appropriate campus administrator

3.1. Enforcement policies shall provide, at the minimum, for the following:

3.1.1. Posting of notices to alert students, employees and others of the institution's policies concerning harassment, including its assurance that persons who bring complaints of discrimination and persons who participate in the investigation and disposition of such complaints will not be subject to harassment, interference, intimidation, or retaliation;

3.1.2. Posting of notices informing students, employees and others of the steps that they must take in order to communicate complaints or concerns to the institution pursuant to Board policy 1:18, including a clear and accurate identification of the person or persons currently serving as the institution's Title IX/EEO coordinator or deputy coordinators; and

3.1.3. Sponsoring educational programs for members of the campus community to assure that they are informed of their rights and obligations under this policy and to assist them in understanding the various forms that harassment may take, the effects it has on its victims and the ways in which it interferes with the proper operation of social organizations and society at large.

3.2. In addition to the procedures compliant with Board Policy No. 1:18, each institution will establish a procedure to encourage persons who have been subjected to unwelcome conduct of a sexual nature, whether or not rising to a level that constitutes harassment as
defined in this policy, to contact the Title IX/EEO coordinator designated pursuant to Board Policy No 1:18(7).

3.2.1. Upon receipt of such a report, the Title IX/EEO coordinator will meet with the individual to discuss the incident, to reiterate the institution’s commitment to preventing harassment and the protections afforded under Board policy, and to assess whether the conduct that prompted the report might involve prohibited harassment.

3.2.2. If the Title IX/EEO coordinator concludes that the conduct may involve prohibited harassment, the coordinator will initiate proceedings under that chapter.

3.2.3. If the Title IX/EEO coordinator concludes that the conduct, though unwelcome, did not involve prohibited harassment, the coordinator will inform the person of the resources that the institution may be able to provide to assist the person to resolve concerns with the individual whose conduct prompted the report or otherwise to assist the person to become familiar with strategies that may assist in avoiding or responding to such conduct.

3.2.3.1. If the reported conduct, while not yet harassment, was targeted at a specific person or persons, was abusive, and served no bona fide academic purpose, the Title IX/EEO coordinator will contact the individual whose conduct prompted the report to discuss the conduct and its relation to federal and state law and to Board and institutional policies.

3.2.3.1.1. Before initiating the contact, the Title IX/EEO coordinator will inform the person who made the report that the contact will be made and will explain that the institution will stress the prohibition against retaliation and will avoid making an express disclosure of confidential information.

3.2.3.2. If the reported conduct was not targeted at a specific person or persons, the Title IX/EEO coordinator will discuss with the person who made the report, options to contact the individual whose conduct prompted the report, with or without the assistance of person who made the report, to discuss the implications of the conduct. The institutional, where appropriate, Title IX/EEO coordinator will also contact the institutional official responsible for the individual whose conduct prompted the report.

3.2.3.2.1. The Title IX/EEO coordinator will determine whether the circumstances require that the institution contact the individual whose conduct prompted the report or whether other action may be necessary to assure that the individual understands the obligation to avoid harassment and how certain forms of conduct may interfere with the ability of others to participate fully in institutional employments and programs.
FORMS / APPENDICES:
None

SOURCE:
BOR April 1987; BOR January 1995; BOR August 2009; BOR December 2013; BOR December 2018
SUBJECT: Commitment to Freedom of Speech

NUMBER: 3:31:32

A. PURPOSE

To express the Board’s commitment to the principles of expression protected by the First Amendment to the U.S. Constitution

B. DEFINITIONS

None

C. POLICY

The Board and its institutions shall ensure the rights have a long history of commitment to the principles of free speech and expression and shall encourage the timely and rational discussion of topics whereby the ethical and intellectual development of the student body and general welfare of the public may be promoted.

Freedom of expression includes the right to discuss and present scholarly opinions and conclusions on all matters both in and outside the classroom without Board or institutional discipline or restraint. This freedom includes the right to speak and write as a member of the institutional communities governed by the Board or as a private citizen on matters of public concern. The Board and its institutions are committed to these principles and provide all members of their community the latitude to explore ideas and to speak, write, listen, challenge, and learn. Except insofar as limitations on that freedom are necessary to the functioning of the institution, the Board fully respects and supports the freedom of all members of the institutions’ community to discuss any problem or issue that presents itself.

The ideas of different members of the institutions’ community will often and quite naturally conflict, and some individual’s ideas will even conflict with the institutions’ values and principles. But it is not the proper role of the Board or the institutions to attempt to shield individuals from viewpoints they find unwelcome, disagreeable, or even deeply offensive. To be clear, the Board greatly values and is responsible for upholding a culture of civility at its institutions. All members of the institutions’ community share in the responsibility for maintaining a climate of mutual respect. Such a climate is essential to First Amendment principles of academic freedom and freedom in learning, as both principles rely on the discursive order and restraint from disruption that civility demands of each of us. Yet, while
the manner in which ideas are conveyed may be uncivil and disrespectful, ideas, themselves, are not. In other words, concerns about civility and mutual respect can never be used as a justification for closing off discussion of ideas, however offensive or disagreeable those ideas may be to some members of our institutions’ community.

The freedom to debate and discuss the merits of competing ideas does not, of course, mean that individuals may say whatever, whenever, and wherever they wish. The institutions may restrict expression that violates the law, that falsely defames a specific individual, that constitutes a genuine threat or harassment, that unjustifiably invades privacy or confidentiality interests, or that is otherwise directly incompatible with the functioning of the institution, including any limited public or nonpublic forum it creates. In addition, the institution may reasonably regulate the time, place, and manner of expression to ensure that it does not disrupt the ordinary activities of the institution. But these are narrow exceptions to the general principle of freedom of expression, and it is vitally important that these exceptions never be used in a manner that is inconsistent with the Board’s commitment to a free and open discussion of ideas.

It is the Board’s fundamental commitment to the principle that viewpoints may not be suppressed because the ideas put forth are thought by some or even by most members of the institutions’ community to be offensive, unwise, immoral, or wrong-headed. Controversial speech and robust debate are expected and valued at the institutions. The right to engage in such expression is one of the rights protected by the United States Constitution. Indeed, encouraging professional diversity in faculty and fostering the ability of members of the institutions’ community to engage in such debate and deliberation in an effective and responsible manner is an essential part of the institutions’ educational missions.

As a corollary to the Board’s commitment to protect free expression, and as suggested by the above discourse on civility, members of the institutions’ community must also act in conformity with the responsibilities of free expression. Although members of the institutions’ community are free to criticize and contest the views expressed on campus, and to criticize and contest speakers who are invited to express their views on campus, they may not obstruct or otherwise interfere with the conduct of the institutions or the freedom of others to express views they reject or even loathe. To this end, the Board and the institutions have a responsibility not only to promote a lively and fearless freedom of debate and deliberation, but also to protect that freedom when others attempt to restrict it.

Accordingly, the Board will adopt and interpret policies consistent with this commitment and institutions will ensure their policies and procedures uphold the commitment contained herein and within the policies adopted by the Board setting forth reasonable time, place, and manner restrictions.

This policy shall not be interpreted in any manner to mandate new funding by institutions to ensure its enforcement.
FORMS / APPENDICES:
None

SOURCE:
(RR, 12:02, 1977); BOR March 1993; BOR December 2018.
SOUTH DAKOTA BOARD OF REGENTS

Policy Manual

SUBJECT: Student Code of Conduct

NUMBER: 3:4

A. PURPOSE

To establish the expectations of student conduct, the process for determining when there is a violation of the conduct code, and the appeals process available when a violation is found.

B. DEFINITIONS

1. Advisor: A person of the student’s choosing who has agreed to advise a student throughout the student conduct process. The advisor may be a faculty member, staff member, student, attorney, family member, or anyone else. The advisor is limited to advising the student directly, and is not permitted to speak to anyone else, or participate directly, in any hearing. Students should choose an advisor who is available to attend any scheduled meetings or hearings because advisor availability is not considered in scheduling meetings or hearings.

2. Appellate Board: Any person or persons authorized by the institutional president to consider an appeal from the chair’s determination that a respondent has or has not violated the Student Code or from the conduct sanctions imposed by the Student Conduct Officer.


4. Chair: The Student Conduct Officer or the senior student affairs officer who:
   4.1. Is a member of the Student Conduct Panel;
   4.2. Is responsible for the proper operation of the hearing; and
   4.3. Has sole discretion to determine whether a Respondent has violated the Student Code, and if so, to impose appropriate sanctions.

5. Complainant: An individual who was allegedly injured by an alleged violation of the Student Code by a respondent.

6. Day: Monday through Friday, except for holidays and other times when the Institution’s administrative offices are closed.

7. Faculty Member: Any person hired by the institution to conduct classroom or other academic activities.


10. **Institution**: 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.

11. **Institutional Official**: Any person employed by the institution, performing assigned administrative or professional responsibilities.

12. **Institutional Premises**: All land, buildings, facilities, and other property in the possession of, or owned, used, or controlled by, the Institution, including adjacent streets and sidewalks.

13. **Member of the Institutional Community**: Any person who is a student, faculty member, institutional official, any person employed by the institution, a volunteer, or guest. A person’s status in a particular situation shall be determined by the senior student affairs officer.

14. **Notice**: Notice required by this Student Code shall be provided in writing via email to the student’s official institutional email account. Notice is deemed received the Day after it is sent by email.

15. **Organization**: Any student group that has been granted institutional registration or recognition.

16. **Policy**: The written regulations of the institution as found in, but not limited to, this Student Code, the Residence Life Handbook, the Graduate and Undergraduate Catalogs, and other official publications.

17. **Reasonable Person**: A reasonable person under similar circumstances and with similar identities as the complainant.

18. **Respondent**: A student or organization that is alleged to have violated the Student Code.

19. **Senior Student Affairs Officer**: That institutional official exercising primary authority over institutional student affairs programs and operations, or designee.

20. **Student**: All persons taking courses from the institution, both full-time and part-time, enrolled in undergraduate, graduate, professional or special topic courses, whether credit-bearing or not.


22. **Student Conduct Panel**: The panel that hears formal hearings.

   22.1. This panel can take the following forms:

      22.1.1. Option 1 – only the Student Conduct Officer;

      22.1.2. Option 2 – the Student Conduct Officer and 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 conduct sanctions;

   22.2. For matters involving allegations of academic misconduct, the student conduct panel must include at least one faculty member or academic administrator appointed by the Provost in the form described in Option 2 above.
23. **Student Conduct Officer**: Any institutional official authorized by the Senior Student Affairs Officer to:

23.1. Informally resolve an allegation by determining the facts and, if a violation is found, imposing a conduct sanction without the assistance of a Student Conduct Panel;

OR

23.2. Serve as chair of the Student Conduct Panel;

23.3. Receive and consider the findings and recommendations of a Student Conduct Panel; and

23.4. Determine whether a respondent has violated the Student Code, and if so, to impose appropriate sanctions.

C. **POLICY**

1. **Introduction**

The Board of Regents and its institutions are committed to creating and maintaining a productive living-and-learning community that fosters the intellectual, personal, cultural, and ethical development of its students. Self-discipline and respect for the rights and privileges of others are essential to the educational process and to good citizenship.

1.1. **Purpose of the Student Code of Conduct**

The purpose of the Student Code is to educate students about their civic and social responsibilities as members of the institutional community. The primary focus of the student conduct process is on educational and corrective outcomes; however, conduct sanctions such as suspension or expulsion from an Institution may be necessary to uphold community standards and to protect the campus community. Extensive, organized, serious, or repeated violations of this Student Code are taken into account when determining conduct sanctions.

1.2. **Standards of Behavior**

Attendance at an institution is optional and voluntary. When students enroll at an institution, they voluntarily accept obligations of performance and behavior that are consistent with the institution’s lawful mission, processes, and functions. In general, these obligations are considered much higher than the obligations imposed by civil and criminal law for all citizens.

By enrolling at an institution, students voluntarily accept responsibility for compliance with all Board of Regents and Institutional Policies, including but not limited to this Student Code.

1.3. **Authority of an Institution over its Students and Organizations**

1.3.1. Student conduct proceedings may be initiated in response to conduct prohibited by the Student Code:

1.3.1.1. That occurs on institutional premises
1.3.1.2. That occurs at events official sponsored by an institution
1.3.1.3. That arises out of membership in the Institutional community; or
1.3.1.4. That occurs elsewhere and that adversely affects an Institution, any Organizations, members or the Institutional community, or the pursuit of their lawful objectives.

1.3.2. Notwithstanding this Student Code, an institution reserves the right to take necessary and appropriate action to protect the safety and well-being of the campus community. The institution also reserves the right to extend any deadline contained in this Student Code for good cause with written notice to the parties of the delay and the reason for the delay.

1.3.3. For purposes of the Student Code, the default authority over the student for student conduct purposes will be determined as follows:

1.3.3.1. For alleged misconduct that occurs on institutional premises, the institution where the alleged misconduct occurred;

1.3.3.2. For alleged misconduct that occurs at events officially sponsored by an institution, the institution that sponsored the event;

1.3.3.3. For alleged misconduct that occurs elsewhere and that adversely affects an institution, the institution adversely affected;

1.3.3.4. For alleged instances of Academic Misconduct, the institution that offered the course.

1.3.4. For instances where multiple Institutions have a reasonable claim to authority over the student for student conduct purposes, the Senior Student Affairs Officer at the institutions with a reasonable claim to authority shall determine the appropriate institution to proceed with the Student conduct process. The decision should consider the location of the alleged incident, complainant, respondent, witnesses, and the practicality of conducting the student conduct process at the different Institutions having a reasonable claim to authority. If the Senior Student Affairs Officers cannot agree, the System Director of Student Affairs will make a final decision.

1.3.5. Where students are also employees, they may be subject to concurrent authority. Student conduct proceedings under this Student Code may be initiated irrespective of any action taken by an institutional employer. However, when the student employee has been subject to conduct proceedings as an employee, the findings that resulted from such proceedings will be considered in the student conduct process as long as the standard used in such proceedings was preponderance of the evidence or higher.

1.4. Alcohol Amnesty

This section aims to remove the barriers that may prevent any student from seeking emergency medical attention by providing an opportunity for the institution to intervene in a caring and non-punitive manner. The goal is to reduce the potential risk
of alcohol-related injuries or deaths, and increase the likelihood that students will seek medical attention in crisis situations.

1.4.1. A student who seeks emergency medical attention (or who has emergency medical attention sought on his/her behalf) for alcohol-related consumption, will not be sanctioned for violating alcohol consumption prohibitions found in the Student Code related to that incident, as long as the student completes the following requirements:

- Participates in an initial meeting with the Senior Student Affairs Officer; and
- Completes all recommendations from the Senior Student Affairs Officer; and
- Submits proof of completion of all recommendations, within the time frame designated by the Senior Student Affairs Officer at the initial meeting.

1.4.2. A bystander student who has engaged in alcohol consumption and who seeks emergency medical attention for someone else or tries to actively engage in assistance for someone else for that person’s alcohol-related consumption, will not be sanctioned for violating alcohol consumption prohibitions found in the Student Code related to his/her own consumption but will be invited to meet with the Senior Student Affairs Officer.

1.4.3. The institution will not pursue any disciplinary action related to any alcohol or drug consumption against any student who has been sexually assaulted or sexually harassed, for his/her use of alcohol or drugs at the time of the sexual assault or sexual harassment.

1.4.4. Subsections C.1.4.1 and C.1.4.2 of this section will only apply to a student who seeks emergency medical attention before police or institutional employees or agents take any official action or intervention related to the alcohol consumption.

1.4.5. Alcohol amnesty does not preclude disciplinary action regarding other violations of the Student Code.

1.4.6. Alcohol amnesty only applies to the institution’s student conduct process. It does not apply to any criminal, civil or other legal consequence for violations under federal, state or local law.

1.4.7. Alcohol amnesty is not designed to protect or shield those students who repeatedly violate the Student Code. The Senior Student Affairs Officer may assess each situation on a case-by-case basis, denying the safeguards of alcohol amnesty if serious or repeated incidents prompt a higher degree of concern or response, which may include disciplinary action under this Student Code.

1.5. Relationship Between the Student Conduct Process and the Criminal Law Process

1.5.1. The student conduct process is independent of any criminal or civil process. Therefore, a student alleged to have engaged in conduct that would be a violation of this Student Code (whether such conduct could also be a violation
of criminal or civil law) may face student disciplinary action regardless of any criminal or civil process or their outcomes.

1.5.2. When the alleged misconduct includes allegations of Human Rights Violations, the disciplinary process will not be delayed except when law enforcement requests a delay to conduct the fact-finding portion of its investigation.

1.5.3. Determinations made or conduct sanctions imposed under this Student Code shall not be subject to change because criminal charges arising out of the same facts giving rise to violation of this Student Code were dismissed, reduced, or resolved in favor of, or against, the criminal law defendant.

1.5.4. When a student is charged by federal, state, or local authorities with a violation of law, the Institution will not request or agree to special consideration for that student because of his or her status as a student.

1.5.5. If the alleged violation of law also gives rise to student disciplinary action under this Student Code, the institution may advise off-campus authorities of the existence of the Student Code and of how such matters are typically handled under the Student Code.

1.5.6. The institution will attempt to cooperate with law enforcement and other agencies in the enforcement of criminal law and in the conditions imposed by criminal courts for the rehabilitation of Student violators provided that the conditions do not conflict with any conduct sanctions imposed as a result of the student conduct process, this Student Code, or Institutional Policies.

1.5.7. 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 any student conduct process.

1.5.8. Individual students and other members of the institutional community, acting in their personal capacities, remain free to interact with governmental representatives as they deem appropriate.

1.5.9. When an employee of the institution knows that a felony was committed and that knowledge is not privileged, such employee shall report the known facts and circumstances to law enforcement officials who have jurisdiction over the matter.

1.6. Interpretation and Revision

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

1.6.2. Institutions must ensure that institutional interests do not interfere with the impartiality of the student conduct process.

1.6.3. Any question of interpretation regarding the Student Code shall be referred to the Senior Student Affairs Officer for final determination.
1.6.4. The Student Code should be reviewed periodically under the direction of the Senior Student Affairs Officers.

1.6.4.1. If the review leads to a recommendation that Board Policy be modified, that recommendation and its supporting rationale shall be provided to the institutional presidents and, if approved, forwarded to the Executive Director.

1.7. Institutions may choose to adopt institutional policies that are consistent with this Student Code.

2. Prohibited Conduct

The following list describes actions that detract from the effectiveness of an institution’s productive living-and-learning community. Any student found to have engaged, attempted to engage, or allowed or assisted another in engaging, in the following prohibited conduct is subject to the student conduct process and conduct sanctions outlined in this Student Code. In instances where prohibited conduct contained in this policy is defined differently in another Board Policy or Institutional Policy, the definition contained in this policy shall be used to address prohibited conduct by a student.

2.1. Acts of Academic Misconduct or Dishonesty

Honesty and integrity are core values at all institutions. Faculty members and students are jointly responsible for maintaining academic standards and integrity in institutional courses. In addition to any conduct sanctions imposed under this Student Code, academic consequences for academic misconduct may be imposed by the faculty member, including issuing a failing grade in the course. Any grade issued by the faculty member, whether as a result of academic misconduct or not, constitutes an academic evaluation and is not a conduct sanction imposed under this Student Code. All faculty members should report incidents of Academic Misconduct to the Student Conduct Officer.

2.1.1. Engaging in acts of Academic Misconduct, which means Cheating or Plagiarism.

2.1.1.1. Cheating includes, but is not limited to, the following:

- Using any unauthorized assistance in, or having unauthorized materials while, taking quizzes, tests, examinations or other assignments, including copying from another’s quiz, test, examination, or other assignment or allowing another to copy from one’s own quiz, test, examination, or other assignment;

- Using sources beyond those authorized by the instructor in writing papers, preparing reports, solving problems, or carrying out other assignments;

- Acquiring, without permission, tests or other academic material belonging to the instructor or another member of the institutional faculty or staff;
• Engaging in any behavior prohibited by the instructor in the course syllabus or in class discussion;
• Falsifying or misrepresenting data or results from a laboratory or experiment; or
• Engaging in other behavior that a reasonable person would consider to be cheating.

2.1.1.2. Plagiarism includes, but is not limited to, the following:

• Using, by paraphrase or direct quotation, the published or unpublished work of another person without full and clear acknowledgment;
• Using materials prepared by another person or agency engaged in the selling of term papers or other academic materials without prior authorization by the instructor; or
• Engaging in other behavior that a reasonable person would consider plagiarism.

2.1.2. Engaging in other conduct that a reasonable person would consider dishonesty relating to academic achievement, research results or academically related public service.

2.1.3. Furnishing false information or false representations to any institutional official, instructor, or office. Submission of false information or withholding information at the time of admission or readmission may make an individual ineligible for admission to, or continuation at, an Institution.

2.1.4. Forging, fabricating, altering, misrepresenting, or misusing any document, record, or identification, including misrepresentations of degrees awarded or honors received.

2.1.5. Tampering with the election of any organization.

2.1.6. Claiming to represent, or act on behalf of, the institution when not authorized to do so.

2.2. Disruption, Obstruction, or Interference with Institutional Activities

2.2.1. Disrupting or obstructing institutional activities.

2.2.2. Classroom disruption, which is behavior that a reasonable person would view as significantly or repeatedly interfering with the instructor’s ability to teach the class or the ability of other students to benefit from the instructional program.

2.2.3. Failure to comply with directions of institutional, law enforcement, fire department, public safety contractors, or other government officials acting in performance of their duties and/or failure to identify oneself to these persons when requested to do so.

2.2.4. Obstruction of the free flow of pedestrian or vehicular traffic.

2.2.5. Abuse of the student conduct process, which includes, but is not limited to, any of the following:
• Falsifying, distorting, or misrepresenting information provided;
• Making false allegations;
• Attempting to discourage an individual’s proper participation in, or use of, the Student conduct process;
• Harassment (verbal or physical) or intimidation of any person participating in the Student conduct process;
• Failure to comply with any conduct sanctions imposed pursuant to this Student Code.

2.3. Misuse of Institutional Resources or Property, or Personal Property of Others

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

2.3.2. Unauthorized taking of, damage to, or possession of property belonging to the Institution, another member of the institutional community, or another person.

2.3.3. Unauthorized possession, duplication, or use of keys, access cards, or access codes to any institutional premises.

2.3.4. Unauthorized entry into, or use of, institutional premises.

2.3.5. Unauthorized possession, entry into, or use of institutional equipment, software systems, or information.

2.3.6. Possession of firearms, stun guns, tasers, BB guns, switchblade knives, fixed-blade knives with a blade length of five (5) inches or greater, or any item that is designed or used to injure or harm another person, fireworks, explosives, or dangerous chemicals on institutional premises or at institutional events, except as explicitly permitted by a Board Policy or an Institutional Policy;

2.3.7. Unauthorized use or abuse of technology, including, but not limited to:
• Unauthorized entry into a file or program to use, copy, read, delete, or change the contents, or for any other purpose;
• Unauthorized transfer of a file;
• Unauthorized use of another individual’s identification or account;
• Use of technology to interfere with the work of another student, faculty member, or institutional official;
• Use of an Institution’s technology to send engaging in Harassment or abusive messages.
• Use of technology to engage in unlawful activities, including those involving uses that infringe intellectual property rights;
• Use of technology to interfere with normal operation of an institution’s technology or other system;
• Making, acquiring, or using unauthorized copies of computer files, violating terms of applicable software license agreements, or using the Institution’s technology network or system to download files in violation of copyright laws;

• Attempting to circumvent data protection schemes or tampering with security;

• Violating institutional or board computer use or internet policies.

2.4. Threat of Harm or Actual Harm to a Person’s Physical or Mental Health or Safety

2.4.1. Violence, which includes, but is not limited to, using or threatening to use physical force on or towards another person without that person’s permission, except in reasonable self-defense. The use of physical force includes both using one’s own body parts as well as using other items.

2.4.2. Brandishing, pointing, or using a knife, gun, or other weapon towards another person, except in reasonable self-defense.

2.4.3. Restraining or transporting another person without that person’s permission.

2.4.4. Making bomb threats.

2.4.5. Harassment, which includes, but is not limited to: Conduct towards another person that has the purpose or effect of creating an objectively and subjectively intimidating, hostile, or demeaning environment that substantially interferes with the individual’s ability to participate in or to realize the intended benefits of an Institutional activity or resource; and

• Other conduct that is extreme and outrageous exceeding all bounds usually tolerated by polite society and that has the purpose or the substantial likelihood of interfering with another person’s ability to participate in or to realize the intended benefits of an Institutional activity or resource.

2.4.6. Sexual Harassment, which is subjecting another person to unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature where:

• Submission to such conduct is made either explicitly or implicitly a term or a condition of an individual’s participation in, or use of, an Institutionally-sponsored or approved activity or resource; or

• Submission to or rejection of such conduct by an individual is used as the basis for educational or similar decisions affecting an individual’s ability to participate in or use an institutionally-sponsored or approved activity or resource.

2.4.7. Stalking, which is engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for the person’s safety or the safety of others, or suffer substantial emotional distress.
2.4.7.1. “Course of conduct” means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person’s property.

2.4.7.2. “Substantial emotional distress” means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

2.4.8. Hazing, which includes, but is not limited to, an act that, as an explicit or implicit condition for initiation to, admission into, affiliation with, or as a condition for continued membership in a group or an organization:

- Is likely to, or would be perceived by a reasonable person as likely to, endanger the physical health of an individual or cause psychological discomfort or distress through treatment that a reasonable person would consider to be humiliating, intimidating, or demeaning;
- Destroys or removes public or private property;
- Involves the consumption of alcohol or other substances to excess; or
- Violates any Board Policy or Institutional Policy.

2.4.8.1. The express or implied permission of the individual being hazed does not make the behavior acceptable. It is also a violation of this provision to solicit, aid, or attempt to aid another person in planning or committing Hazing.

2.4.9. Sexual Misconduct, which is any contact of a sexual nature with another person without that person’s consent. Contact of a sexual nature includes, but is not limited to:

- Touching the intimate parts of another person;
- Touching another person with one’s own intimate parts;
- Forcing another person to touch one’s own intimate parts; and
- Exposing one’s own intimate parts to another person;

2.4.9.1. Intimate parts include, but is not limited to, genitalia, groin, breast, buttocks, mouth, or clothing covering the same.

2.4.9.2. Consent is defined as informed, freely given, and mutually understood. Consent requires an affirmative act or statement by each participant. If coercion, intimidation, threats and/or physical force are used, there is no consent. If a person is mentally or physically incapacitated or impaired so that the person cannot understand the fact, nature or extent of the sexual situation, there is no consent; this includes conditions due to alcohol or drug consumption or being asleep or unconscious. If a person is fifteen (15) years old or younger, there is no consent. Whether one has taken advantage of a position of influence over another may be a factor in
determining consent. Consent to any one form of sexual activity does not imply consent to any other form of sexual activity. Consent to one sexual encounter does not imply consent to another sexual encounter. Consent may be revoked at any time.

2.4.9.3. Voyeurism includes, but is not limited to, any use of electronic or other devices to make an audio, video, or photographic record of another person without that person’s prior knowledge and without that person’s prior authorization when such a recording is likely to cause that person or a Reasonable Person injury or distress, or involves that person’s intimate parts or sexual conduct involving that person.

2.4.9.4. Invasion of Privacy occurs when:

- An individual views another person, without that person’s prior knowledge and permission, under circumstances in which the other person has a reasonable expectation of privacy; or

- An individual uses an audio recording device to record another person, without that person’s prior knowledge and permission, under circumstances in which the other person has a reasonable expectation of privacy.

2.5. Discrimination and Retaliation

2.5.1. Discrimination is excluding from, or treating another person differently than others in, institutional activities on the basis of sex, race, color, creed, religion, national origin, ancestry, gender, gender identity, transgender, sexual orientation, age, disability, genetic information, or veteran status. However, social fraternities and sororities that are exempt from taxation under federal law may maintain single-sex membership practices without violating antidiscrimination policies, as recognized by 20 U.S.C. 1681(a)(6), and the enforcement of such single-sex membership practices by students does not violate this provision.

2.5.2. Retaliation is conduct that would make a reasonable person feel intimidated, or that interferes with, threatens, coerces, or otherwise discriminates against any individual because that individual reports or files a complaint alleging a violation of law, Board Policy, or Institutional Policy, or participates in any process in which the individual has a right to participate.

2.6. Housing and Living Groups

Violations of any rules imposed by institutional housing or living groups are also violations of this Student Code.

2.7. Use and Misuse of Substances

2.7.1. The unauthorized manufacture, sale, possession, use, or consumption of alcohol, marijuana, or controlled substances by students.

2.7.2. However, possession, use, or distribution of alcohol, marijuana, or controlled substances is permitted on premises controlled by the Board of Regents when:
2.7.2.1. Needed in conjunction with approved research activities;

2.7.2.2. Alcohol is possessed, used, or distributed in a lawful manner inside a designated residence hall facility occupied exclusively by upper-division and/or non-traditional students who are at least twenty-one (21) years of age;

2.7.2.3. Alcohol is possessed, used, or distributed in a lawful manner on premises controlled by the Board of Regents that have been designated by the Institution’s president as places where such possession, use, and distribution may be permitted, subject to such conditions as the Institution’s president may also prescribe, provided that a notice of such designation and conditions have been filed previously with the executive director of the Board of Regents; or

2.7.2.4. The possession, use, or distribution of the controlled substance is prescribed by a licensed health care professional authorized to prescribe such substances.

2.7.2.5. Alcohol is possessed, used, or distributed in a manner that is expressly approved by a Board Policy.

2.7.3. The unauthorized possession of any drug paraphernalia.

2.8. Violation of Policy or Laws

2.8.1. Violation of published Board of Regents or Institutional Policies, rules, or regulations.

2.8.2. Violation of federal, state, or local law.

2.9. RESERVED Other Conduct

Conduct not expressly prohibited may also subject students or organizations to conduct sanctions where such conduct has the purpose and effect of infringing interests protected by this Student Code or other provisions of Board Policy or institutional policy.

2.10. Conduct by Organizations

2.10.1. 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 sanctions.

2.10.2. The privileges of official recognition by an institution may be extended to organizations, including those that maintain residences for their members, only if such organizations agree to adopt and to enforce policies that, at minimum:

2.10.2.1. Prohibit the manufacture, possession, use, dispensing, or provisions of alcoholic beverages at organizational functions or in the organizational residence by persons under the age of 21 (or the legal age of use and possession in the applicable jurisdiction);
2.10.2.2. Prohibit the manufacture, possession, use, or dispensing of marijuana or unauthorized controlled substances at organizational functions or in the organizational residence;

2.10.2.3. Prohibit the expenditure of organizational funds on alcoholic beverages, marijuana, or controlled substances;

2.10.2.4. Prohibit the informal collection of monies from members, associates, or invitees to be spent on alcoholic beverages, marijuana, or controlled substances;

2.10.2.5. Prohibit the possession, use, or distribution of alcohol, marijuana, or controlled substances on premises controlled by the Board of Regents, except as explicitly permitted by Section C.2.6.2 of this Student Code;

2.10.2.6. Establish conduct policies and sanctions regarding violations by individual members no less stringent than those set forth under Board Policies, except that limited use of alcoholic beverages is permissible as set out above; and

2.10.2.7. Require that a report be filed with the Senior Student Affairs Officer each semester identifying all actions taken pursuant to the student conduct policies required in this Student Code;

2.11. Institutions may impose additional or more restrictive conditions on official recognition.

2.12. Organizations are also subject to the Board of Regents’ antidiscrimination policies set forth in Board Policy 1:18. However, social fraternities and sororities that are exempt from taxation under federal law may maintain single-sex membership practices without violating antidiscrimination policies, as recognized by 20 U.S.C. 1681(a)(6).

3. Student Conduct Process

3.1. Allegations

3.1.1. Allegations of misconduct may be reported against any student by anyone. Allegations shall be directed to the Student Conduct Officer in the Office of the Dean of Students. The reporting party will disclose the facts that form the basis for the allegation, the identities of any other witnesses, and any other relevant information regarding the alleged misconduct.

3.1.1.1. Allegations of Academic Misconduct will be reported to the Student Conduct Officer but are initially addressed through Board Policy 2:33.


3.1.1.2.1. The investigator assigned must not have any actual or reasonably perceived conflicts of interest and biases for or against any party involved in the initial complaint. If the institution determines that an actual or reasonably perceived conflict of interest does exist, another individual must lead the investigation on behalf of the institution.
3.1.2.2. The investigator assigned must be trained to analyze and document the available evidence to support reliable decisions, objectively evaluate the credibility of parties and witnesses, synthesize all available evidence, including both evidence that tends to suggest a violation and evidence that tends to suggest no violation, and take into account the unique and complex circumstances of each case.

3.1.2.3. The investigator assigned should avoid using any investigative techniques or approaches that apply sex stereotypes or generalizations.

3.1.2.4. Each party should be provided written notice in advance of any interview or hearing with sufficient time to prepare for meaningful participation.

3.1.2.5. The investigation should result in a written report summarizing the relevant evidence that tends to suggest a violation and evidence that tends to suggest no violation.

3.1.2.6. The investigator assigned must make findings of fact and conclusions as to whether the facts support a Human Rights violation.

3.1.2. The Student Conduct Officer shall make an initial determination whether the allegations, if true, would violate the Student Code. If the Student Conduct Officer determines that the allegations, if true, would violate the Student Code, the Student Conduct Officer shall conduct a pre-investigation inquiry to determine whether the allegations are credible. This process may include speaking with witnesses and reviewing any documentation.

3.1.2.1. The Student Conduct Officer must not have any actual or reasonably perceived conflicts of interest and biases for or against any party involved in the initial complaint. If the institution determines that an actual or reasonably perceived conflict of interest does exist, another individual must lead the investigation on behalf of the institution.

3.1.2.2. As to off-campus conduct, the Student Conduct Officer shall determine whether the incident adversely affects the institution, any organizations, members of the institutional community, or the pursuit of their lawful objectives.

3.1.2.3. Allegations of Academic Misconduct that are not informally resolved pursuant to Board Policy 2:33 will enter the student conduct process here.

3.1.2.4. Allegations of Human Rights Violations that are not informally resolved pursuant to Board Policy 1:18 will enter the student conduct process here.

3.1.3. If the Student Conduct Officer determines that either (i) the allegations, if true, would not violate the Student Code or (ii) that the allegations are not credible, then the Student Conduct Officer should inform the complainant of this determination and inform the complainant that the allegations may be re-submitted should additional information become available.
3.1.4. If the Student Conduct Officer determines that the allegations, if true, would violate the Student Code and determines that the allegations are credible and will be investigated, the Student Conduct Officer shall provide written notice to the respondent within fifteen (15) days of receiving the report of alleged misconduct or notification from the Faculty Member of the need to address alleged Academic Misconduct through the Student Code.

3.1.5. The written notice to the respondent must include the following:

- The alleged behavior that would be a violation of the Student Code;
- The date and location of the alleged behavior;
- The section(s) of the Student Code alleged to have been violated;
- The name of the complainant;
- A time to meet with the Student Conduct Officer to provide the respondent with the opportunity to give his/her account of the incident leading to the allegation of misconduct;
- Information about the right to have an advisor present throughout the student conduct process;
- Information about both the informal and formal resolution processes;
- A time for a hearing to occur no earlier than ten (10), and no later than twenty (20), days after this written notice is deemed received to address any alleged violations that are not informally resolved;
  - The minimum time limit may be waived by the respondent.
  - The maximum time limit may be extended at the discretion of the Student Conduct Officer.

3.1.6. At the time that the written notice to the respondent is sent, a written notice shall also be sent to the complainant containing information about the right to have an advisor present throughout the student conduct process, information about both the informal and formal resolution processes, and the time for the hearing to address any alleged violations that are not informally resolved.

3.1.7. The Student Conduct Officer will conduct an investigation of the allegations, which may include speaking with witnesses and reviewing any documentation. Only in instances where the Student Conduct Officer determines that there is sufficient evidence to establish that the respondent violated the Student Code by a preponderance of the evidence will the allegations proceed to informal or formal resolution.

3.1.7.1. For matters involving Human Rights Violations where an investigation was conducted pursuant to Board Policy 1:18, no additional investigation is required.

3.1.7.2. If the Student Conduct Officer determines that there is insufficient evidence to establish that the respondent violated the Student Code by a
preponderance of the evidence, the Student Conduct Officer will inform both parties of this fact and will cancel the hearing. This notification should also inform that parties that the investigation may be re-opened should additional information become available.

3.2. Interim Measures

In certain circumstances, the Senior Student Affairs Officer, or a designee, may impose interim measures that go into effect immediately, prior to a hearing before a Student Conduct Panel, and remain in effect until no longer needed.

3.2.1. Interim measures are intended to protect the interests of both the complainant and the respondent prior to a hearing. Interim measures may include, but are not limited to, no-contact directives, residence modifications, academic modifications and support, institutional work schedule modifications, interim residence suspension, or interim suspension. Interim measures that restrict the ability of either party to discuss the investigation should be avoided, as they may inhibit the ability of either party to obtain and present evidence or otherwise to defend their interests. Written notice of interim measures shall be provided to the party to whom the interim measures are directed.

3.2.1.1. In circumstances involving allegations of dating violence, domestic violence, sexual assault, or stalking, interim measures must be provided upon the request of a complainant if such measures are reasonably available.

3.2.1.2. In fairly assessing the need for a party to receive interim measures, the Senior Student Affairs Officer, or a designee, may not rely on fixed rules or operating assumptions that favor one party over another, nor make such measures available only to one party.

3.2.1.3. Interim measures should be individualized and appropriate based on the information gathered by the institution, making every effort to avoid depriving any student of his/her education.

3.2.1.4. The interim measures needed by each student may change over time, and the Senior Student Affairs Officer, or a designee, should communicate with each student throughout the student conduct process to ensure that any interim measures are necessary and effective based on each student’s evolving needs.

3.2.2. Interim suspension may be imposed only for one or more of the following purposes:

3.2.2.1. 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;

3.2.2.2. To ensure a student’s own physical or emotional safety and well-being; or

3.2.2.3. To ensure the normal operations of the institution where a student poses an ongoing threat of disruption or, or interference with, the normal operations of the institution.
3.2.3. During the interim suspension, the student may be denied access to residence facilities, the campus (including classes), and all other institutional activities or privileges.

3.2.4. A student placed on interim suspension shall be given written notice of interim measures, which shall include:
   3.2.4.1. The reasons for the interim suspension;
   3.2.4.2. The parameters of the interim suspension; and
   3.2.4.3. Information concerning the right to appeal the interim suspension.

3.2.5. Interim Suspension Appeal Process
   3.2.5.1. The student must submit a written request for a meeting to the Senior Student Affairs Officer.
   3.2.5.2. The Senior Student Affairs Officer will schedule a meeting with the student as soon as practical and no later than three (3) days after receiving the written request. At this meeting, the student is provided the opportunity to raise any objections to the interim suspension or to request alternative interim measures.
   3.2.5.3. The Senior Student Affairs Officer has sole discretion regarding interim measures.

3.3. Informal Resolution
   3.3.1. The Student Conduct Officer may speak separately and individually with the complainant and the respondent to determine whether the alleged misconduct can be resolved through informal resolution.
      3.3.1.1. In matters involving allegations of Human Rights violations, informal resolution may not take the form of having the complainant and the respondent be in the same room at the same time, unless both parties agree in writing.
      3.3.1.2. In matters involving allegations of Human Rights violations, the Student Conduct Officer should consider whether the informal resolution is equitable and will end the misconduct, prevent its recurrence, and address its effects.
   3.3.2. Informal resolution may be reached where:
      3.3.2.1. The parties involved mutually agree to a full resolution of the alleged misconduct that is acceptable to the Student Conduct Officer.
         3.3.2.1.1. This must be documented in writing and signed by the complainant, respondent, and Student Conduct Officer.
      3.3.2.2. The respondent waives a formal hearing by admitting to the misconduct and accepting the proposed conduct sanctions.
         3.3.2.2.1. This must be documented in writing and signed by the respondent and the Student Conduct Officer.
3.3.2.2. This type of informal resolution is not available in matters involving allegations of Human Rights violations.

3.3.3. Partial informal resolution may be reached where the respondent admits to the misconduct but does not accept the proposed conduct sanctions. When this occurs, the process moves to formal resolution with the hearing being limited to the question of appropriate conduct sanctions.

3.3.3.1. This must be documented in writing and signed by the respondent and the Student Conduct Officer.

3.3.3.2. In matters involving allegations of Human Rights violations, the complainant must also agree in writing to this partial informal resolution.

3.3.4. Informal resolution shall be final and the parties who agreed in writing to informal resolution waive any right to appeal otherwise available under Board Policy 3:4.

3.3.5. The Student Conduct Officer’s involvement in attempting to informally resolve the allegation of misconduct does not impact the Student Conduct Officer’s ability to later serve as the Student Conduct Panel or a member thereof in the formal resolution process.

3.3.6. Informal resolution may be reached at any time before the Chair issues any findings, conclusions, and, when a violation is found, conduct sanctions it determines to be appropriate through the Formal Resolution process.

3.3.6.1. If an informal resolution is reached, the Student Conduct Officer shall prepare written findings and conclusions, and any sanctions resulting from a violation during the informal resolution process. If the complaint included more than one allegation of misconduct, each allegation must have a separate decision.

3.4. Formal Resolution

3.4.1. If the alleged misconduct is not fully resolved through informal resolution, any unresolved matter proceeds to a hearing.

3.4.2. The composition of the Student Conduct Panel shall be determined as follows:

3.4.2.1. For matters where the Student Conduct Officer serves as Chair of the Student Conduct Panel, the Student Conduct Officer shall have sole discretion regarding whether the Student Conduct Panel includes:

3.4.2.1.1. Option 1 – only the Student Conduct Officer; or

3.4.2.1.2. Option 2 – the Student Conduct Officer and 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 conduct sanctions,

3.4.2.2. For matters involving allegations of Academic Misconduct, the Student Conduct Panel must include at least one faculty member or academic
administrator appointed by the Provost in the form described in Option 2 above.

3.4.2.3. Both the Complainant and the respondent will be provided notice of the identity of the member(s) of the Student Conduct Panel. Both parties may request in writing (and must include supporting information) that (i) the Student Conduct Panel include additional members (Option 2), and/or (ii) a Student Conduct Panel member be replaced due to an actual or reasonably perceived conflict of interest. Such requests must be submitted, in writing to the Senior Student Affairs Officer no later than twenty-four (24) hours after the notice is provided to the party. The Senior Student Affairs Officer shall make a final decision as to these requests and will provide notice to both parties of the decision.

3.4.3. Hearings shall be conducted by a Student Conduct Panel according to the following guidelines:

3.4.3.1. Hearings shall be conducted in private. Witnesses other than the complainant and the respondent may only be present during the hearing while presenting their information.

3.4.3.2. The Chair shall have sole discretion and final decision-making authority over the following:

- Whether an individual’s conduct interferes with the hearing and requires that individual’s removal;
- Whether written information, materials, documents, and statements submitted are relevant and will be accepted for consideration by the Student Conduct Panel;
- All questions about the interpretation of the student conduct process; and
- Whether to have separate or joint hearings when a hearing would involve more than one respondent;

3.4.4. Neither the complainant nor the respondent are required to attend or participate in the hearing, and such decision will have no bearing on the question of whether the respondent violated the Student Code.

3.4.5. The respondent has no obligation to provide any information, materials, documents, or witnesses, or answer any questions and is presumed to not have violated the Student Code. The burden is on the Institution to gather sufficient evidence to reach a fair, impartial determination as to whether the alleged violation of the Student Code occurred.

3.4.6. If the complainant or respondent wants the Student Conduct Panel to review any materials or documents or wants to present any witnesses at the hearing, such materials and documents and/or witness lists must be submitted to the Chair by the following deadlines in order to be considered:
• In matters alleging Human Rights violations, all materials and documents and/or witness lists must be submitted at least seventy-two (72) hours before the hearing. Additionally, a copy of the final report prepared by the Title IX/EEO Coordinator will be provided to the complainant, respondent, and the Student Conduct Panel members.

• For all other matters, all materials and documents and/or witness lists must be submitted at least twenty-four (24) hours before the hearing.

The Chair will promptly provide the other party and the Student Conduct Panel members a copy of any materials, documents, and witness lists submitted.

3.4.7. The complainant and the respondent have the right to be assisted by an advisor of their choice, at their own expense. Ordinarily, no more than two advisors for each student shall be permitted. The advisor is limited to advising the student directly, and is not permitted to speak to anyone else, or participate directly, in any hearing.

3.4.8. The Student Conduct Officer shall record the audio of the hearing.

3.4.9. Generally, the hearing will be conducted in the following order:

3.4.9.1. The Chair will ask each individual present at the hearing to identify him/herself by providing his/her name and role at the hearing (e.g., complainant, respondent, member of the Student Conduct Panel, etc.).

3.4.9.2. The Chair will remind the respondent:

• Of the materials that the Student Conduct Panel received prior to the hearing;
• Of the right to have an advisor present;
• Of the right to refuse to speak as a witness against him/herself;
• That the refusal to speak as a witness against him/herself will have no bearing on the question of whether the respondent violated the Student Code;
• Of the alleged behavior that would be a violation of the Student Code; and
• Of the section(s) of the Student Code alleged to have been violated.

3.4.9.3. The Chair will provide the complainant with the opportunity to engage in the hearing. If the complainant agrees to engage, then:

3.4.9.3.1. The Chair will provide the complainant the opportunity to provide any additional relevant factual details that were not previously provided. The complainant may choose to do so or may decline and maintain the right to not provide information, materials, documents, or answer questions. The complainant may decline but still present witnesses.
3.4.9.3.2. The Chair will ask the complainant to present any witnesses, who will be brought to the hearing one at a time, and ask questions of the witness.

3.4.9.3.3. The Student Conduct Panel will then ask questions of the witness.

3.4.9.3.4. The Chair will ask the respondent for any questions for the witness. The Respondent will provide the Chair any questions in writing.

3.4.9.3.5. The Chair will ask the witness any questions provided by the respondent that the Chair determines to be relevant.

3.4.9.3.6. The Chair will ask the complainant to present the next witness. The process described above shall repeat for each witness until the complainant has presented all of its witnesses.

3.4.9.4. The Chair will provide the respondent the opportunity to engage in the hearing. If the respondent agrees to engage, then:

3.4.9.4.1. The Chair will provide the respondent the opportunity to provide any additional relevant factual details that were not previously provided. The respondent may choose to do so or may decline and maintain the right to not provide information, materials, documents, or answer questions. The respondent may decline but still present witnesses.

3.4.9.4.2. The Chair will ask the respondent to present any witnesses, who will be brought to the hearing one at a time, and ask questions of the witness.

3.4.9.4.3. The Student Conduct Panel will then ask questions of the witness.

3.4.9.4.4. The Chair will ask the complainant for any questions for the witness. The complainant will provide the Chair any questions in writing.

3.4.9.4.5. The Chair will ask the witness any questions provided by the complainant that the Chair determines to be relevant.

3.4.9.4.6. The Chair will ask the respondent to present the next witness. The process described above shall repeat for each witness until the respondent has presented all of its witnesses.

3.4.9.5. The Student Conduct Panel may ask the complainant and/or the Respondent whether s/he agrees to answer questions. The Student Conduct Panel may then ask questions of either or both parties who agree to answer questions.

3.4.9.6. The Student Conduct Panel will meet in a closed session to discuss and make its recommendation, which closed session shall not be audio recorded.

3.4.10. The Student Conduct Panel shall review all information and materials presented to it and shall decide by majority vote whether the respondent violated the Student Code by a preponderance of the evidence (i.e., more likely than not).
Decision-making techniques or approaches that apply sex stereotypes or generalizations should be avoided so that the hearing process proceeds objectively and impartially.

3.4.11. The Student Conduct Panel shall prepare written findings to support its determination. If multiple allegations of misconduct exist, a decision should be reached separately for each allegation. These written findings shall include:

- Concise statements of each factual finding;
- Brief explanations of whether and why the factual findings support a conclusion that the conduct either violated or did not violate the Student Code;
  - These must address each factual element that must be satisfied to establish that conduct has violated the Student Code.
- Any initial, interim, or final decisions by the institution; and
- If a violation is found, recommendations of appropriate conduct sanctions and supporting rationale for the conduct sanctions.

3.4.12. The Student Conduct Panel shall forward its written findings to the Chair. The Chair has sole discretion to adopt or reject any portion of the written findings.

3.4.12.1. If any portion of the written findings are rejected, the Chair shall issue new written findings it determines to be appropriate for such portion(s), and will provide the Student Conduct Panel with an explanation for its decision.

3.4.12.2. The Chair shall determine the effective date of any conduct sanctions imposed, which effective date should be on or after the exhaustion of the appeal as a matter of right. However, interim measures may remain in place, or be instituted, until the effective date of any conduct sanctions.

3.4.13. The Chair’s written findings and information about appeal rights, shall be provided to the respondent. When FERPA allows, the complainant will receive the permitted information simultaneously. See Section C.3.5.1 below for more information.

3.4.13.1. In matters involving allegations of Academic Misconduct, the Chair’s written findings shall also be provided to the faculty member.

3.4.13.2. In matters involving allegations of Human Rights violations, the complainant must also be provided information about appeal rights.

3.4.14. The audio record of the hearing shall be the property of the institution and shall be maintained by the Student Conduct Officer. No other person may record the hearing.

3.4.14.1. The audio record and its contents shall be confidential and may only be used for purposes of any appeals. Any person who discloses the contents of the audio record to parties not involved in the appeal shall be subject to conduct sanction.
3.4.14.2. In the event of an appeal, the respondent shall be given access to the audio record for purposes of preparing an appeal. When the alleged misconduct involves allegations of Human Rights violations, the complainant shall be given access to the audio record for purposes of preparing an appeal. Access shall be provided at such places and times as the Senior Student Affairs Officer may direct.

3.4.14.3. Except as required by law, the institution shall not be required to change the form in which the record is maintained.

3.5. Sanctions

3.5.1. Individual Conduct Sanctions

3.5.1.1. In each case in which the Chair determines that a respondent has violated the Student Code, the Chair shall determine and impose appropriate conduct sanction(s). Where a violation of Board Policy is established, and where a conduct sanction is mandated under Board Policy, that conduct sanction shall be imposed.

3.5.1.1.1. Conduct sanction decisions must be made for the purpose of deciding how best to enforce the Student Code and should reflect a proportionate response to the violation.

3.5.1.1.2. In matters involving Human Rights Violations, the Chair should consider whether the sanctions are equitable and will end the misconduct, prevent its recurrence, and address its effects.

3.5.1.1.3. In matters involving Human Rights violations, the Chair should consider the impact of separating the respondent from his/her education before imposing a conduct sanction of suspension or expulsion.

3.5.1.2. In matters involving allegations of Academic Misconduct that are informally resolved pursuant to Board Policy 2:33, the Student Conduct Officer will receive the information from the faculty member and shall determine and impose appropriate conduct sanction(s).

3.5.1.3. Complainants shall be informed in writing and at the same time as the respondent of any outcome and conduct sanctions imposed in the following circumstances:

3.5.1.3.1. When the conduct sanction involves remedial action that directly relates to the complainant (e.g., a directive requiring the respondent to not have contact with the complainant)

3.5.1.3.2. Where the allegations against the respondent would also constitute a crime of violence or non-forcible sex offense as defined by FERPA; or

3.5.1.3.3. Where the allegations against the respondent would also constitute Human Rights violations. In this circumstance, the rationale for the result must also be included.
3.5.1.3.4. Where the institution finds that a hostile environment exists, the Institution shall also inform the complainant of other steps the institution has taken to eliminate the hostile environment.

3.5.1.4. FERPA allows institutions to disclose the final results of a conduct proceeding when the Chair determines that the respondent violated the Student Code and that violation falls within the definition of a crime of violence or a non-forcible sex offense as defined by FERPA. For purposes of this subsection, “final results” means the name of the respondent, the violation committed, and any conduct sanction(s) imposed by the institution.

3.5.1.5. FERPA allows institutions to inform the parents or legal guardians of a respondent younger than twenty-one (21) years of age that the respondent has violated Institutional Policies concerning the use or possession of alcohol or controlled substances.

3.5.1.6. The following conduct sanctions may be imposed upon any respondent found to have violated the Student Code. More than one of the conduct sanctions listed below may be imposed for any single violation. Imposition of a conduct sanction may be delayed or suspended on such conditions as the Student Conduct Officer may prescribe.

- Warning – A statement to the respondent that the respondent has violated the Student Code of Conduct.
- Probation – Probation is for a designated period of time and includes the probability of more severe conduct sanctions if the respondent is later found to have engaged in any additional violation(s) the Student Code during the probationary period.
- Loss of Privileges – Denial of specified privileges for a designated period of time. The privileges of continued participation in Institutional activities, access to Institutional facilities or residences may be conditioned upon participation in or completion of educational programming at the student’s expense.
- Fines – Monetary payments.
- Restitution – Compensation for loss, damage, or injury. This may take the form of appropriate service, money, or material replacement.
- Educational Sanction – work assignments, essays, service to the Institution, community service, workshops, or other related educational activities.
- Residence Suspension – Separation of the respondent from the Institution’s residence facilities for a definite period of time, after which the respondent is eligible to return. Conditions for return to the residence facilities may be specified.
• Residence Expulsion – Permanent separation of the respondent from the institution’s residence facilities. A sanction of residence expulsion will take the form of residence suspension pending completion of the appeals process.

• Suspension – Separation of the respondent from the institution for a definite period of time, after which the respondent is eligible to return. Conditions for return may be specified. A respondent who has been suspended from one Institution may not enroll at another institution until the period of suspension has ended.

• Expulsion – Permanent separation of the respondent from the Institution. A respondent who has been expelled from one institution may not enroll at another institution. A sanction of expulsion will take the form of suspension pending completion of the appeals process.

• Withholding Degree – the institution may withhold awarding a degree otherwise earned until the completion of the student conduct process or the completion of all conduct sanctions imposed.

• Revoking Admission and/or Degree – the institution may revoke admission to, or a degree awarded from, the institution for violation of Institutional standards for obtaining admission or the degree, or for other serious violations of the Student Code committed by the respondent prior to graduation.

3.5.1.7. Conduct sanctions shall not be made part of the respondent’s permanent academic record, but shall become part of the respondent’s conduct record. The respondent’s conduct record containing conduct sanctions other than suspension, expulsion, revoking admission and/or a degree, or withholding a degree, will be expunged seven (7) years after the date of the original finding of a violation of the Student Code. The respondent’s conduct record containing any of the four conduct sanctions above shall be maintained permanently. Where restitution is required of a respondent, the institution reserves the right to disclose all portions of the conduct file as may be necessary to obtain a judgment in a court of competent jurisdiction. Such files shall be preserved at least until all necessary compensation has been obtained.

3.5.1.8. Students enrolled in one institution shall be held accountable for their conduct while visiting all other institutions. Students may be required, as a condition of continued enrollment, to appear at the institution where the alleged misconduct took place, at their own expense, for a conduct hearing and to answer allegations based on their conduct while at that institution.

3.5.1.8.1. Any conduct sanction imposed by one institution shall be effective at all other institutions. A respondent suspended at one institution shall not be able to enroll at another institution until the period of suspension has ended. A respondent who has been expelled from one Institution may not enroll at another institution.
3.5.1.8.2. When a respondent is brought forward on allegations of misconduct by another institution, any conduct sanction issued after a finding of a violation shall be determined by the institution that brought forward the allegations of misconduct. Suspension or expulsion may only be imposed after first consulting with the Senior Student Affairs Officer from the institution where the respondent is enrolled.

3.5.2. Organizational Conduct Sanctions

3.5.2.1. The following conduct sanctions may be imposed upon organizations:

- Those conduct sanctions listed above in Section C.5.5.1.

3.6. Appeals

3.6.1. Appeal as a Matter of Right

3.6.1.1. The respondent may appeal a decision reached by the Chair. In matters involving allegations of Human Rights violations, the complainant may also appeal a decision reached by the Chair. The appeal must be in writing and must be submitted to the Senior Student Affairs Officer no later than five (5) days after notice of the Chair’s decision is deemed received.

3.6.1.2. The written appeal must cite at least one (1) of the following reasons for review and must include supporting arguments and documentation as to why an appeal should be granted on those grounds.

3.6.1.2.1. The original hearing was conducted unfairly to the point that it substantially and materially affected the outcome;

3.6.1.2.2. Using the facts found by the Chair, the conclusion regarding whether there was a violation(s) of the Student Code was incorrect;

3.6.1.2.3. The conduct sanction(s) imposed were not appropriate for the violation of the student Code that the respondent was found to have committed; and/or

3.6.1.2.4. New information that was unavailable at the time of the hearing has been discovered and could substantially and materially affect the outcome.

3.6.1.3. An appeal shall be limited to a review of:

- The verbatim record of the initial hearing;
- Supporting documents submitted as part of the initial hearing; and
- Supporting documents submitted in support of the appeal reason(s)

3.6.1.4. The Senior Student Affairs Officer will provide the other party a copy of the appeal and a reasonable amount of time to submit any materials to be considered.

3.6.1.5. The Senior Student Affairs Officer will provide the Appellate Board with the materials submitted. The Appellate Board will review the materials submitted and provide a written recommendation to the Senior Student Affairs Officer.
Affairs Officer as soon as practicable. The Senior Student Affairs Officer has sole discretion to adopt or reject the recommendation.

3.6.1.5.1. In instances where the respondent appeals a decision reached by the Chair, sanctions or conditions may not be increased, introduced for the first time, or extended.

3.6.1.5.2. If the recommendation is rejected, the Senior Student Affairs Officer will provide the Appellate Board with a written explanation for his/her decision.

3.6.1.5.3. The Senior Student Affairs Officer shall determine the effective date of any conduct sanctions imposed. The effective date of any conduct sanctions shall not be delayed pending any further appeals.

3.6.1.6. The Senior Student Affair Officer’s written decision shall be provided to the parties, along with the Appellate Board’s recommendation and, if rejected, the Senior Student Affairs Officer’s written explanation.

3.6.1.6.1. The Senior Student Affairs Officer may return the matter to the hearing panel for reconsideration or to the Title IX/EEO Coordinator for additional investigation, in light of the written decision.

3.6.2. Appeal to the President of the Institution

3.6.2.1. The respondent may appeal a decision reached by the Senior Student Affairs Officer. In matters involving allegations of Human Rights violations, the complainant may also appeal a decision reached by the Senior Student Affairs Officer.

3.6.2.2. The appeal must be in writing and must be submitted to the President’s Office no later than five (5) days after notice of the Senior Student Affairs Officer’s decision is deemed received.

3.6.2.3. The written appeal must cite at least one (1) of the following reasons for review and must include supporting arguments and documentation as to why an appeal should be granted on those grounds.

3.6.2.3.1. The original hearing was conducted unfairly to the point that it substantially and materially affected the outcome;

3.6.2.3.2. Using the facts found by the Chair, the conclusion regarding whether there was a violation(s) of the Student Code was incorrect;

3.6.2.3.3. The conduct sanction(s) imposed were not appropriate for the violation of the student Code that the respondent was found to have committed; and/or

3.6.2.3.4. New information that was unavailable at the time of the hearing has been discovered and could substantially and materially affect the outcome.
3.6.2.4. The President has sole and complete discretion as to whether to agree to review an appeal, including what materials to consider. However, the President will not consider any reasons for review that were not previously raised in the appeal to the Appellate Board.

3.6.2.5. If the President agrees to review an appeal, the President will provide the other party/parties a copy of the appeal and a reasonable amount of time to submit any materials to be considered.

3.6.2.6. The President will provide a written decision to the parties, and to the Senior Student Affairs Officer. The decision may be a substantive one, or may merely indicate that the President has declined to review the appeal.

3.6.2.6.1. The President may return the matter to the Senior Student Affairs Officer or hearing panel for reconsideration, or to the Title IX/EEO Coordinator for additional investigation, in light of the written decision.

3.6.3. Appeal to the Board of Regents

3.6.3.1. After exercising and exhausting all appeals available at the institutional level, the respondent may appeal a decision reached by the President. In matters involving allegations of Human Rights violations, the complainant may also appeal a decision reached by the President after exercising and exhausting all appeals available at the Institutional level.

3.6.3.2. The appeal must be in writing and must be submitted to the Executive Director of the Board of Regents no later than thirty (30) days after notice of the President’s decision is deemed received. The appeal must include the following:

- Supporting arguments and documentation;
- All documentation provided by the institution, including, at a minimum, the President’s decision, the Senior Student Affairs Officer’s decision, and the Chair’s decision.

3.6.3.3. Written appeals that fail to include supporting arguments and documents, and the documentation provided by the institution will be rejected.

3.6.3.4. An appeal submitted to the Executive Director that is not covered by subsection e) below may be considered by the Executive Director. In these instances, the Executive Director has sole and complete discretion as to whether to agree to review an appeal, including what materials to consider.

3.6.3.4.1. If the Executive Director agrees to review an appeal, the Executive Director will provide the other party a copy of the appeal and a reasonable amount of time to submit any materials to be considered.

3.6.3.4.2. The Executive Director will provide a written decision to the parties, and to the President.

3.6.3.4.3. The Executive Director may return the matter to the President, Senior Student Affairs Officer, or hearing panel for reconsideration.
or to the Title IX/EEO Coordinator for additional investigation, in light of the written decision.

3.6.3.5. An appeal submitted to the Executive Director must be considered by the Board of Regents where a student has been expelled or suspended based upon alleged violations of Board Policy 3:4; or 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.

3.6.3.5.1. The Executive Director will have fifteen (15) working days within which to attempt, at his or her discretion, a resolution through informal means.

3.6.3.5.2. If no informal resolution has been effected within the fifteen (15) working days, the Executive Director will refer the matter to a hearing examiner for reconsideration pursuant to SDCL § 1-26 using the contested case proceedings. At the conclusion of the contested case proceedings, the hearing examiner will provide a recommendation to the Executive Director for the disposition of the matter by the Board.

3.6.3.5.2.1. Contested case proceedings may be conducted under protective orders entered pursuant to SDCL §§ 1-26-19 and 15-6-26(c).

3.6.3.5.2.2. The Board may return the matter to the President, Senior Student Affairs Officer, or hearing panel for reconsideration or to the Title IX/EEO Coordinator for additional investigation, in light of the written decision.

FORMS / APPENDICES:
None

SOURCE:
SUBJECT: Recognition and Funding of Student Organizations

NUMBER: 3:18

A. PURPOSE

To establish policy regarding the recognition of student organizations on campus and the provision of funding thereto.

B. DEFINITIONS

None

C. POLICY

1. Recognition of Student Organizations

1.1. Each institution will develop and publish criteria for recognition of student organizations. These recognition criteria will require student organizations to operate under a formal set of articles that define the powers of the organization and describe how those powers may be exercised, just as articles of incorporation or constitutions define the powers of commercial, nonprofit or governmental entities and describe how these powers may be exercised. Each institution will establish rules for budgeting, custody, expenditure and audit of organization funds, and the recognition criteria will require that recognized student organizations abide by such rules.

Such criteria will require student organizations to operate in a nondiscriminatory manner as provided in Board Policy No. 1:18. In compliance with Board Policy No. 1:18(5) institutions will recognize two limited exceptions to the general requirement that organizations not restrict membership or participation on the basis of race, color, creed, religion, national origin, ancestry, citizenship, gender, transgender, sexual orientation, age, disability, genetic information, military service membership or veteran’s status. Consistently with rights guaranteed under state and federal constitutions, Board Policy No. 1:18(5) accommodates the distinctive characteristics of intimate associations or expressive associations.

1.1.1. Intimate associations involve distinctively personal aspects of life. Factors that suggest that an organization should be treated as intimate association include: (a) the relative smallness of the organization; (b) a high degree of selectivity in choosing and maintaining members of the organization; (c) the personal nature of the organization's purpose; and (d) the exclusion of nonmembers from the central activities of the organization.
1.1.1. A student organization that operates a residential facility for its membership would illustrate the kind of organization that might be classified as an intimate association, at least insofar as relates to limiting membership on the basis of gender.

1.1.2. Expressive associations are created for specific expressive purposes, and they would be significantly inhibited in advocating their desired viewpoints if they could not restrict their membership based on race, color, creed, religion, national origin, ancestry, citizenship, gender, transgender, sexual orientation, age, disability, genetic information or military service membership or veteran’s status.

1.1.2.1. A student organization dedicated to the practice of a particular religious faith would illustrate the kind of organization that might be classified as an expressive association, at least insofar as relates to limiting membership on the basis of adherence to the tenants of that faith.

1.1.3. Exceptions from the nondiscrimination policy will be made only to the extent necessary to accommodate the particular circumstance that warrants an exception; the overarching purpose of supporting student organization activities is to prepare students to act as citizens and leaders of a republican form of government, which by its nature permits discrimination against none.

1.1.3.1. By way of illustration, but not limitation, a student organization operating a residential facility for its membership may be allowed to limit membership on the basis of gender, but not on the basis of religion; a student organization dedicated to the practice of a particular religious faith may be allowed to limit membership on the basis of religion, but, absent any contrary doctrine of faith, not on the basis of gender.

1.1.4. Each institution will establish a process that student groups may follow to secure recognition as student organizations. The chief executive officer of the institution will designate an administrator who will be responsible for determining whether a group of students satisfies the criteria for recognition as a student organization. Institutions with student government organizations may request that such organizations review applications for recognition as student organizations and make recommendations to the designated administrator whether a particular group of students satisfies the institutional criteria for recognition.

2. Funding of Student Organizations

In order to reduce the economic barriers to forming and operating student organizations or to accessing means of communication, institutions may grant subsidies, pursuant to this section, from funds apportioned from the general activity fee.

Only recognized student organizations may receive disbursements from the find to finance the organizations’ general operational expenses and to subsidize cultural, social, recreational and informational activities and events sponsored by the organizations.

Student activity fee proceeds Funding shall be allocated consistently with the institution’s interests as outlined in herein Section 1 above; provided that
2.1. No student organization will be eligible for student-fee subsidies of its operating expenses:

2.1.1. If the funding is prohibited by Article 6, § 3 of the SD Constitution because its it will be used for predominant activities involve sectarian ceremonies or exercises;

2.1.1.2. If the funding is prohibited by SDCL § 12-27-20 because it will be used for the promotion or opposition of particular candidates for public office or ballot issues in general elections, or financing off-campus lobbying or political activities of non-students; or

2.1.3. If the organization operates a residential facility for its membership or otherwise generates income from commercial activities for the personal use and benefit of members or on behalf of for-profit entities; or

2.1.4. If the organization generates income for the personal use and benefit of the sponsoring organization members or on behalf of for-profit entities. This section does not prohibit a student governance body, recognized by the institution, whose leadership is popularly elected by the students, from using student feesfunding to communicate its position on behalf of all students, either through lobbying efforts before legislative bodies.

2.2. The institution may distribute student activity fee proceeds to support on campus cultural, social, recreational and information activities and events that are open to all members of the campus community and that are sponsored by a recognized student organization, even if the organization would not be eligible for fees to support general operational expenses, but only if the activity or event does not have the primary effect or supporting sectarian ceremonies or exercises, promoting candidates or ballot issues in general elections, financing off-campus lobbying or political activities by non-students or generating income for the personal use and benefit of the sponsoring organization members or on behalf of for-profit entities.

3. Procedures for Requesting Funding and Allocating Funds

3.1. Each institution will develop and publish instructions outlining the procedure that recognized student organizations may use to request funding from the general activity fee levied pursuant to Board Policy No. 5:5:4(1)(B).

3.2. The chief executive officer of the institution will designate an administrator who will be responsible for determining how funds will be allocated. Institutions with student government organizations may request that such organizations review applications for funding and make recommendations to the designated administrator.

3.3. Each institution will develop standards to guide the review of funding requests submitted by recognized student organizations. Subject to the limitations stated herein in § 2 of this policy, these standards will require that decisions be made on grounds unrelated to the exercise by students through the organization of their rights to free expression, to the free exercise of religion, to the freedom of association or to the freedom to petition government. Such rights-neutral mechanisms may include, without limitation, random selection from among student proposals or prioritization based upon...
frequency of funding or other objective factors unrelated to the exercise of protected rights.

FORMS / APPENDICES:
None

SOURCE:
BOR October 1994; BOR October 1996; BOR December 2000; BOR April 2013; BOR December 2018
SOUTH DAKOTA BOARD OF REGENTS

Policy Manual

SUBJECT: Political Activity

NUMBER: 4:21

A. PURPOSE

To describe the parameters applicable to employees of the Board of Regents engaging in political activity.

B. DEFINITIONS

None

C. POLICY

1. Employees of the Board of Regents shall not be obligated, by reason of their employment, to contribute to any political funds or collections or render political service. Employees refusing to contribute such funds or to render political service may not be removed or otherwise disciplined or prejudiced for such refusal.

2. Employees of the Board of Regents shall not use their official authority or influence to coerce the political action of a person or group.

3. Employees of the Board of Regents may:

   3.1. Take an active part in political management, political campaigns, or non-political activities except during non-regularly scheduled working hours, and without the use of Board information and communication technology systems, Board services or Board property that is not available to the public and paid for at the rate offered to the public. However, using Board information and communication technology systems, Board services or Board property for such activities is prohibited unless it is available to the public and paid for at the rate offered to the public; and

   3.2. Seek and hold compatible elective political office. Employees, both during any election campaign and during the term of any part-time office, other than that of state representative or senator, to which the employee may be elected, are required to make specific arrangements with the president, superintendent and his/her designee to assure that the employee's regular duties are performed. Employees elected to a full-time public office are entitled to leave without pay consistent with 4:15 of the Board of Regents Policy Manual. Under current South Dakota Supreme Court interpretation of section 12, article III, of the South Dakota Constitution, employees elected to the South Dakota Legislature must resign from state employment no later than the beginning of their term in office.
4. This policy shall not prohibit activity of nonpartisan type not specifically identified with a national or state political party. Questions relating to constitutional amendments, referendums, approval of state laws, and other issues of similar character are deemed not specifically identified with a national or state political party.

5. Employees of the Board of Regents enjoy all rights of free expression accorded them under state and federal law. Nevertheless, employees, especially faculty and professional staff members, should remember that the public may judge their institution or the Board by their public statements. Accordingly, unless they have been authorized to make an official statement on behalf of their institution or the Board, employees should make every effort to indicate that they are not speaking or writing as institutional or Board representatives. At a minimum, employees who identify their institutional affiliation should advise the public that the views that they express represent their own private or professional opinions, not those of their institution or of the Board, and that these opinions are given in their individual capacities or as private consultants.

Faculty members should, additionally, observe those standards set forth in the Board’s policies on academic freedom, Policy No. 1:11, and the agreement with the Council of Higher Education.

FORMS / APPENDICES:
None

SOURCE:
BOR Aug. 1979, p. 1126; SDCL §§ 3-6-26 through 3-6-27, 3-6A-14(6), 3-6A-15, 13-49-14 through 13-49-14.1; Revised BOR March 1992; BOR October 2010; BOR December 2018
SOUTH DAKOTA BOARD OF REGENTS

Policy Manual

SUBJECT: Facilities Use by Private Parties

NUMBER: 6:13

A. PURPOSE

To establish policy and procedures pertaining to the use of institutional facilities by private parties.

B. DEFINITIONS

1. Affiliated Entity: organizations, such as institutional foundations, whose legal purpose includes support of the institution and its activities, organizations that have been authorized by the institution to use it name and marks, and student organizations recognized by the institutions, as well as the State of South Dakota and its political subdivisions, and their instrumentalities.

2. Commercial Purposes: activities that involve the exchange or goods or services for valuable consideration and speech that relates solely to the economic interests of the speaker and audience and proposes a commercial transaction.

3. Disrupt: 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 use institutional grounds or facilities for their intended or authorized purposes.

4. Events: speeches, presentations, social gatherings, religious ceremonies, entertainments, youth camps or other activities that pose no substantial risk of injury to persons and property and that are generally consistent with the kinds of activity sponsored by the institution itself.

5. Facilities and Grounds: 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.

6. Private Party: any individual or group other than the institution is affiliated entities, or their officers, agents, faculty, or staff when acting on their behalf.

7. Working Days: those days when the office of the institution are open for business.

C. POLICY

1. Institutional Facilities
Institutional facilities and grounds embody investments by students and taxpayers to advance the educational, research, and service missions of the institution. They are not open to the public for assembly, speech, or other activities as are the public streets, sidewalks, parks, or seats of government. Institutional facilities and grounds are selected, designed, and operated to balance aesthetic and utilitarian considerations, to provide settings conducive to learning and research, and to provide venues to expose students to high and popular cultural activities. These purposes define the priorities for their use by private parties.

1.1. Casual visitors may enter institutional facilities and grounds to conduct business with the institution, to attend institution sponsored events, exhibits or programs that are open to the public, to deliver goods ordered by residents or to traverse the grounds without stopping, or for purposes incidental to personal family or social matters involving students or institutional staff.

1.2. Private parties may request permission to use facilities or grounds for private meetings or events. Such requests may be granted to the extent that institutional program schedules permit if the requested use is lawful and otherwise consistent with this policy, poses no risk of harm to persons or property, and will not disrupt the intended use of the facilities or grounds by the institution, its students, staff, or other visitors.

1.3. Permission to use facilities or grounds for private meetings or events shall be contingent upon agreement to avoid disruption of institutional uses of the facilities or grounds, interference with students or employees, or damage, fouling or littering facilities, grounds or other property. Private users shall be responsible for the cleanliness and order of any facilities or grounds that they use.

1.4. Institutional facilities and grounds are tax exempt public facilities and, as such, are not generally available for use by private parties for commercial purposes. Institutions may contract with private parties to provide goods and services on its behalf, to provide access to dedicated advertising venues or to engage in limited mission-related testing, research or economic development activities. As part of their service to the state and their host communities, institutions may designate specific venues where third parties may schedule occasional activities that may have incidental commercial purposes.

1.5. Some institutional facilities and grounds may be restricted, and private parties may only venture there if specifically invited by a person with authority to invite them. Buildings or facilities that are ordinarily open during regular business hours shall be deemed to be restricted areas if they have been locked.

2. Private Parties

Private Parties must request prior authorization to use a facility or a portion of the institutional grounds. Each institution shall develop and shall make public practices and rules to implement this policy. In particular,

2.1. Each Institution shall appoint a person or persons to receive and to administer private party requests for permission to use institutional facilities or grounds for meetings or events.
2.2. Each institution shall designate those facilities, or portions thereof, or portions of the grounds that may be used by private parties for meetings or events, and shall specify whether, when and how private parties may use application in conjunction with their meetings or events. Each institution shall differentiate between meeting rooms and classrooms that are appropriate for meetings involving up to one hundred persons and lecture halls, auditoria, outdoor areas and other places that are appropriate for larger events and gatherings. If an institution elects to permit limited activities for commercial purposes, it shall identify which facilities are available for such purposes and shall indicate what kinds of commercial purposes may be pursued in the facilities.

2.3. Each institution shall designate those days, including finals week and the week preceding it, when facilities and grounds will not be available for private meetings or events.

2.4. Each institution shall establish and publicize local rules to implement this policy. These rules shall provide, at minimum, that

2.4.1. Private parties may request permission to use institutional facilities or grounds for meeting or events that will not interfere with the use of the facilities by the institution or institutionally affiliated organizations.

2.4.2. Private parties seeking permission to use institutional facilities or grounds shall complete and submit written applications on forms developed by the institution.

2.4.3. Private parties requesting permission to use facilities or grounds for events shall submit completed forms and all necessary attachments no less than three (3) working days prior to the date on which they wish to use the facilities or grounds.

2.4.4. Private parties may not reserve facilities or grounds for regularly scheduled meetings, thereby precluding institutional uses of the facility.

2.4.5. Private parties who have been granted permission to use institutional facilities shall agree to abide by all institutional regulations and shall not publicize their meetings or events in ways that suggest co-sponsorship by the institution.

2.4.6. Private parties shall agree to restore facilities and grounds to the state of cleanliness and repair in which they found them or to pay for custodial or repair services at standard university rates and for extraordinary restoration or replacement expenses at cost.

2.4.7. Private parties shall agree to avoid actions that disrupt pedestrian or vehicular traffic on campus grounds, interfere with the instructional, research, service or administrative activities of the institution or disrupt meetings or events sponsored by the institution or other private parties.

2.4.8. Private parties seeking permission to use facilities for commercial purposes or to sponsor events with planned attendance of five hundred people or more shall provide security and shall purchase event insurance in the amount of one million dollars, naming the State of South Dakota, the Board, the institution and their officers, agents and employees as named insureds.
2.4.9. Private parties may be charged fees at published rates to cover the costs institutions incur to provide private parties access to the selected facilities or grounds and to maintain and to repair of such facilities; however, any such fee(s) must be based on definite and objective criteria that are not content-based.

2.4.10. Private parties may be allowed to purchase at published rates institutional services to prepare the facilities for private use, to monitor use of the facilities during meetings or events and to restore the facilities to the prior state.

2.4.11. Private parties wishing to serve, or to offer for sale, food or beverages shall make any necessary arrangements with the institutional food service provider, if applicable.

2.5. Each institution shall establish procedures to implement its local rules. These procedures shall provide, at minimum, that

2.5.1. Copies of the Board and institutional rules, information about institutional facilities and grounds available for use by private parties, schedules of fees and all forms needed to apply for permission shall be published, together with contact information to enable readers to obtain clarification of the meaning or application of rules or assistance in completing applications

2.5.2. Private parties seeing permission to use institutional facilities or grounds shall complete and submit written applications on forms prepared by the institution, together with all necessary documentation.

2.5.3. Private parties seeking permission to use facilities or grounds for events shall submit the required written documentation no less than three (3) working days prior to the date on which they wish to use the facilities or grounds.

2.5.4.2.5.2. The institution shall act upon applications no later than the third (3rd) working day after receipt of a completed application.

2.5.5.2.5.3. Except as provided in § III (E) (7), below, the institution shall grant applications for meetings or events if,

2.5.5.1.2.5.3.1. The applications, and all required attachments, have been completed; and

2.5.5.2.5.3.2. The meetings or events have lawful purposes and would otherwise be consistent with this policy and the institutional rules that implement it will comply with the requirements and limitations contained in this policy and the institutional policy(ies) or rule(s) that implement it;

2.5.5.3. The meetings or events pose no risk of harm to persons or property;

2.5.5.4. The meetings or events will not disrupt the intended use of the facilities or grounds by the institution, its students, staff or other visitors;

2.5.5.5. The meetings or events will take place at times during the academic calendar when private parties are permitted to schedule such uses of facilities or grounds;
2.5.5.6. The private parties agree to abide by requirements of this policy and the institutional rules that implement it; and

2.5.5.7. The meetings or events will not conflict with previously scheduled institutional or private activities.

2.5.6. If the institution denies an application for a meeting or event, it shall provide the private party with a written explanation for the denial.

2.5.6.1. The denial shall be effective upon the earlier of, actual communication to the applicant, transmission of an electronic message containing the written denial to the applicant or deposit of the written denial in the United States mail.

2.5.7.2. The institution may deny applications for meetings or events only if,

2.5.7.1. The private party has failed to comply with the requirements of § III (E) (5), above, or the meeting or event or the requested schedule otherwise does not meet the standards stated in that section.

2.5.7.2.1. If permission is denied due to a conflict with the academic calendar or with previously scheduled activities, the institution shall propose an alternative facility or place if available for the same time, or an alternative time, if available, for the same place.

2.5.7.3. The private party has on prior occasions made material misrepresentations regarding the nature or scope of a meeting or event previously permitted or has violated the terms of prior use agreements.

2.5.7.3.1. Any of the following grounds are present:

2.5.7.3.1.1. The application for permit contains a material falsehood or misrepresentation;

2.5.7.3.2. The applicant is legally incompetent to contract or to sue and be sued; or

2.5.7.3.3. The applicant has on prior occasions damaged institutional property and has not paid in full for such damage, or has other outstanding and unpaid debts to the institution.

2.5.7.4. Private persons whose prior conduct would justify denial of permission to use facilities or grounds may not avoid denial by creating new organizations, by associating themselves with other private organizations or by otherwise associating themselves with others for the purposes of avoiding denial of permission under this section.

2.5.6. A written denial shall advise private parties of their right to appeal the denial by filing a signed, written appeal with the official designated by the institutional chief executive officer to receive such appeals. Any denial issued pursuant to this policy shall be deemed effective upon the earlier of, actual communication
to the applicant, transmission of an electronic message containing the written denial to the applicant, or deposit of the written denial in the United States mail.

2.5.7.5.2.5.6.1. The appeal must be presented on the approved form.

2.5.7.6.2.5.6.2. The person receiving the appeal shall not be the same official who issued the original denial.

2.5.7.7.2.5.6.3. The completed written appeal must be presented within five working days after the denial was communicated, transmitted, or deposited in the mail issued.

2.5.7.8.2.5.6.4. The appeal shall state specifically facts that, if proven, would demonstrate

2.5.7.8.1.2.5.6.4.1. That the denial was based upon an incorrect assessment of material fact or

2.5.7.8.2.5.6.4.2. That it involved a misinterpretation, misapplication or violation of the requirements of Board or institutional policy.

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.

2.5.7.9.2.5.6.5. The institution will respond to such appeals via email within two working days after their receipt by the institution. Should the institution deny the appeal, it shall provide in its response the procedure for appealing the decision to the institutional chief executive officer.

2.5.7.9.1. The institution may determine that it shall address the concerns raised by the private party and shall determine whether denial was grounded in fact and proper under § III (E)(7).

2.5.7.9.2. The institutional response shall be effective upon the earlier of, actual communication to the applicant, transmission of an electronic message containing the written denial to the applicant or deposit of the written denial in the United States mail.

2.5.7.10.2.5.6.6. If the private person remains dissatisfied, the private person may appeal to the institutional chief executive officer by filing a written appeal on the same approved form within five working days after the institution issued its response. The appeal to the institutional chief executive office shall state specifically the grounds for believing that the grounds for denial misinterpreted, misapplied or violated the requirements of Board or institutional policy.

2.5.7.11.2.5.6.7. The institutional chief executive officer shall have fifteen ten working days after receipt of such an appeal 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 denial was proper under §III (E) (7),
appeal is denied, informing the private party of the discretionary appeal to the Executive Director of the Board of Regents.

2.5.7.11.1. The decision of the institutional chief executive officer shall be effective upon the earlier of, actual communication to the applicant transmission of an electronic message containing the written denial to the application or deposit of the written denial in the United States mail.

2.5.7.12.2.5.6.8. After exhausting institutional appeals, the private party may appeal the determination of the institutional chief executive officer by submitting a written appeal to the Executive Director of the Board of Regents within ten (10) working days from the effective date in the institutional chief executive officer decision. Such an appeal shall include the application, the denial, the appeals and decisions exchanged at the institutional level, and the required appeal form.

2.5.7.13.2.5.6.9. The Executive Director of the Board of Regents shall have fifteen ten (10) working days after receipt of such an appeal to review the appeal and its documentation and to determine whether to attempt to mediate a resolution. Within tenfive (5) working days thereafter, the Executive Director shall either issue a preliminary recommendation or refer the matter to a hearing examiner to determine whether the matter presents contested issues of material fact warranting a hearing or whether denial was proper under § III (E) (7) as a matter of law.

2.5.7.13.1.2.5.6.9.1. If the Executive Director issues a preliminary recommendation that would deny the private party relief, the private party shall be allowed ten (10) working days from the transmission or deposit in the mails of the Executive Director’s written response to provide reasons why that response should not become final. The recommendation of the Executive Director and any responses by the private party will be forwarded to the Board at the next regularly scheduled meeting.

2.5.7.13.2.2.5.6.9.2. If the Executive Director appoints a hearing examiner using the contested case proceedings pursuant to SDCL ch. 1-26, the hearing examiner shall contact the institution and the private party within ten (10) working days from the date of appointment to schedule any necessary exchanges of authorities, hearings or evidentiary hearings.

2.5.7.13.3. All parties to the dispute have the right to obtain witnesses and present evidence. The institution will cooperate with the hearing examiner in securing witnesses and in making available specifically identified and relevant documentary and other evidence requested by the private party, to the extent not limited by contract or law. The parties to the grievance will have the right to cross examine witnesses. Where a witness cannot or will not appear, but the hearing examiner determines that the interest of justice requires admission of their statement, then
the hearing examiner will arrange for a deposition. The hearing examiner may grant continuances when requested by either party to enable either party to investigate evidence, or for any other reason deemed appropriate. The hearing examiner will keep a record of the proceedings.

2.5.7.13.3.1. The hearing will not be conducted under strict rules of legal evidence and is not a contested case. Every possible effort will be made to obtain the most reliable evidence.

2.5.7.13.3.2. 2.5.6.9.2.1. The hearing examiner will make a recommendation to the Board which will take the form of findings, conclusions and an order of disposition and will be issued within fifteen working days of the hearing or of the expiration of any briefing schedule established by the hearing examiner. A copy of the recommendation will be provided to the institution and to the private party. The recommendation must be based solely on the record, pertinent institutional and Board policies, this agreement and the law of the land.

2.5.7.13.4. 2.5.6.9.3. The Board will make a final decision based upon the recommendation of the hearing examiner or the Executive Director where a matter is to be resolved as a matter of law. In addition, it may review the record pertinent to the issues and may hear testimony from individuals as it deems appropriate. Such decision will be made at the next regularly scheduled Board meeting following receipt of the recommendation, provided the recommendation is received not less than ten working days prior to the Board meeting. If not received in time, the recommendation will be acted upon at the subsequent meeting. If the Board rejects or modifies the recommendation of the hearing examiner or the Executive Director, the Board will provide the institution and the private party with the reasons for rejecting or modifying the recommendation. Appeals from the decision of the Board will be governed by SDCL ch 1-26.

2.5.7.14.2. 5.6.10. Appeals from the decision of the Board will be governed by SDCL ch 1-26.

FORMS / APPENDICES:
None

SOURCE:
BOR August 2007; BOR April 2009; BOR December 2018
A. PURPOSE

The Board acquires, maintains and operates information technology systems to support administrative, research, instructional and service functions of the universities and special schools. This policy serves To assure the optimum functioning of these information technology systems that support the administrative, research, instructional and service functions of the universities and special schools and to protect them from abuse and from unlawful or other misuse. By using the electronic information and communications systems, users agree to abide by all relevant policies and procedures, as well as all current federal, state, and local laws.

B. DEFINITIONS

1. Information Technology Systems: Technology that includes any and all electronic means used to create, store, access, transmit, and use data, information or communications in the conduct of administrative, instructional, research or service activities.

C. POLICY

1. Information Technology Devices and Systems Subject to this Policy

   Information technology Systems include any and all electronic means used to create, store, access, transmit, and use data, information or communications in the conduct of administrative, instructional, research or service activities. These systems include, devices now in existence, or to be invented, that serve such purposes.

   1.1. Devices provided or supported by a regental university including desktops, laptops, iPads, cell phones, or any other electronic device used to access technology systems are subject to this policy.

   1.2. Privately owned information technology devices will be subject to all policies governing system use, including those involving administrative access to system components, while actively connected to the system.

      1.2.1. Persons wishing to use privately owned information technology devices to access Board information technology services may be required to demonstrate to the satisfaction of the Chief Information Officer that their devices and software conform to the specifications of the information technology systems.
1.3. **By using the electronic information and communications systems, users agree to abide by all relevant policies and procedures, as well as all current federal, state, and local laws.**

2. **Selection and Operation of Information Technology Systems**

Information technology systems can only achieve their intended purposes if they operate in an integrated fashion. Therefore, the selection, purchasing, allocation, installation, maintenance, replacement and governance of electronic information and communications systems necessarily involve the governmental policy-making responsibilities of the Board.

2.1. In its sole discretion, the Board shall select, purchase, allocate, install, maintain, replace and regulate the hardware, software or support services that comprise its information technology systems.

2.2. The Board will make reasonable effort to support specialized information systems needed for research.

2.3. The Board will determine the extent of the authority granted to each user to access its information technology systems.

2.4. The Board will regulate uses that affect system performance or availability of system resources.

3. **Administrative Monitoring, Access and Disclosure of Information Technology Systems Data or Contents**

3.1. The Board safeguards the privacy and confidentiality of information and communications systems in accordance with relevant laws, regulations, and policies. While the Board permits limited personal use of the communications components within its information technology systems, persons availing themselves of this privilege do not acquire a right of ownership or privacy in communications transmitted or stored on university information technology resources.

3.2. The Board Routinely monitors aggregate information technology system usage to assure proper system operation, but it does not routinely monitor use of information technology systems. Nevertheless, the Board will access components of information technology systems to:

- Conduct routine operation, troubleshooting, audit, maintenance or security activities;
- Investigate activities that disturb optimum information technology system operations;
- Recover documents or files needed for instructional, research, service or business activities;
- Respond to health or safety emergencies;
- Investigate violations of law, policy or rule;
- Respond to inquiries properly initiated under law.

3.2.1. Routine maintenance may include remote access to components of information
technology systems to install anti-virus programs, software updates or for other purposes designed to assure the integrity and optimal functioning of the information technology systems.

3.2.2. In the event that administrative monitoring of system operation or investigating apparent policy violation necessitates the inspection of a privately owned information technology device, the owner will be deemed to have consented to its inspection at all times when the device is actively connected to the information technology systems.

3.3. Individual users with access to communications components within the Board’s information technology systems may access or disclose the content of communications in which they are intended correspondents; provided that the disclosure does not involve an unacceptable use under this policy or otherwise involve a violation of law, regulation or policy.

3.4. Reasonable administrative access to information technology and communication systems for purposes other than routine operation, troubleshooting, audit, maintenance or security activities, will be authorized by the Board’s Chief Information Officer (or such subordinates as that officer may designate), for good cause shown. The following circumstances illustrate, but do not limit, situations where access may be provided, with or without notice in accordance with law:

3.4.1. When requested by the Board of Regents General Counsel, or an attorney designated by the General Counsel for such purposes, in order to respond to a court order, subpoena, search warrant or other such duly issued mandate;

3.4.2. When requested for necessary business purposes by an appropriate system or institutional official, including, but not limited to, the Board of Regents General Counsel, or an attorney designated by the General Counsel to represent the institution, Chief Human Resources Officer, or the Vice President with administrative responsibility and supervision over the administrative unit, functions and staff that use the components of information technology systems for which access is sought;

3.4.3. When requested in furtherance of the legal, regulatory, or other applicable duties of the institution or the system;

3.4.4. When requested in the course of investigating potential violations of policy, rule or law; or

3.4.5. When requested in the course of responding to a health or safety matter.

4. Acceptable Use of Information Technology Systems

Use of the Board’s information technology systems is a privilege and requires that individual users act responsibly. Individual users must respect the rights of other users, respect the integrity of the systems, and observe all relevant laws, regulations, and contractual obligations. Since electronic information is volatile and easily reproduced, users must exercise care in acknowledging and respecting the work of others through strict adherence to software licensing agreements, copyright, patent, trademark and trade secret laws. When accessing remote resources from Board or institutional facilities, users are responsible for following the
policies of the Board.

4.1. Authorization to access the information technology systems is granted only to support the administrative, research, instructional and service functions of the universities and special schools.

4.2. Authorized users may use the systems for incidental personal purposes provided that such use does not:

4.2.1. Directly or indirectly interfere with the Board’s operation of such systems;
4.2.2. Interfere with the user’s employment or other obligations to the Board,
4.2.3. Burden the Board with noticeable incremental costs, or
4.2.4. Violate law or Board policy.

5. **Unacceptable Use of Information Technology Systems**

Notwithstanding any other provision of policy, certain uses of information technology systems are unacceptable, and persons who engage in such uses may be denied to access to information technology systems peremptorily and referred for disciplinary action.

5.1. Unacceptable use includes, but is not limited to, the following attempted or completed actions:

5.1.1. Infringing intellectual properties, including copyrights, patents, and trademarks;
5.1.2. Disclosing trade secrets or other information resident in the systems that is private, confidential or privileged;
5.1.3. Violating intellectual property licensing agreements;
5.1.4. Interfering with the normal operation of electronic communication resources, including, without limitation:

- Modifying, damaging or removing, without proper authorization, electronic information or communications system components or private electronic information or communications resources belonging to other users;

- Encroaching upon others’ access and use of the electronic information and communications system, as exemplified, without limitation, by sending excessive numbers of messages, printing excessive copies, running grossly inefficient programs when efficient alternatives are available, attempting to crash or tie up electronic communications resources;

- Intercepting, monitoring or otherwise conducting surveillance of communications, whether live or stored, of others;

- Developing or using programs such as, but not limited to, viruses, backdoors, logic bombs, Trojan horses, bacteria, and worms that disrupt other users, access private or restricted portions of the system, identify security vulnerabilities, decrypt secure data, or damage the software or hardware components of an electronic communications resource; provided that supervised academic research into such mechanism may be conducted upon the review and approval of the chief institutional academic affairs officer and
the Board’s Chief Information Officer (or such subordinates as that officer may designate), as to matters involving the compatibility of such research with the proper functioning of the information and communications systems;

• Installing or attaching any equipment to the electronic information and communications system without the prior approval of the Board’s Chief Information Officer (or such subordinates as that officer may designate);

5.1.5. Accessing electronic information or communications systems without proper authorization, intentionally enabling others to do so, or exceeding authorization;

5.1.5.1. Any superior who directs a subordinate to access electronic information systems under circumstances that exceed the authorized access of the institution or organizational unit will be deemed to have indirectly exceeded authorized access and will be subject to discipline.

5.1.5.2. Subordinates who decline to exceed authorized access to electronic information systems or who report efforts to induce them to do so will not, for those reasons, be subject to adverse employment action.

5.1.6. Disclosing, without authorization, the password of a password-protected account;

5.1.7. Using the system in an unlawful or tortious manner, in ways involving obscene materials or in violation of Board policies, including, without limitation:

5.1.7.1. Using electronic information or communications systems for criminal purposes, including, without limitation, SDCL §§ 22-19A-1 (stalking); 22-22-24.2 (possession, manufacture or distribution of child pornography); 43-43B-1 (unlawful uses of computer systems); Omnibus Crime Control and Safe Streets Act of 1968 (unlawful interception of communications); Computer Fraud and Abuse Act (unlawful access to computer systems); Protection of Children Against Sexual Exploitation Act of 1977 (trafficking in child pornography);

5.1.7.2. Distributing fraudulent, libelous, slanderous, harassing, threatening, or other tortious communications;

5.1.7.3. Creating, downloading, exchanging or possessing obscene material as defined by SDCL § 22-24-27, unless previously authorized for bona fide instructional or research purposes;

5.1.7.4. Harassing individuals in violation of Board policies proscribing harassment;

5.1.8. Using the identity of another user without the explicit approval of that user, or masking the identity of an account or machine or person:

5.1.9. Creating the false impression that the user has authority to represent, give opinions, tender endorsements or otherwise make statements on behalf of the Board or the institution:

5.1.10. Using the information and communications system for partisan political purposes, in violation of SDBOR Policy 4:21, or where the message could be reasonably construed as expressing the position of the institution itself other than the expression of private political views by participants in otherwise permitted
communications, so long as the user specifically disclaims any support, endorsement, or opposition by the Board for the views so expressed;

5.1.11. Using the information and communications system for the purpose of sectarian purposes, to provide sectarian instruction or to benefitting any sectarian or religious society or institution in violation of Article 6, § 3 of the SD Constitution, other than the use of religion-based rationale or expression by participants in otherwise permitted communications, so long as the user specifically disclaims any support, endorsement, or opposition by the Board for the views so expressed;

5.1.12. Using the information and communications system for advertising, solicitations or promotions or other private commercial purposes, including personal purposes, except as permitted under Board policy or with the appropriate approval;

5.1.13. Using institutionally created mailing lists without specific prior authorization which may be granted solely for purposes of communicating institutional messages to recipients

6. **Temporary Suspension of Privileges and Disciplinary Measures**

Authorized users will be subject to discipline for violation of this policy.

6.1. When alleged violations of this policy come to the attention of the Board’s Chief Information Officer (or such subordinates as that officer may designate), the Chief Information Officer shall investigate the allegations and may temporarily suspend access privileges if necessary or appropriate to maintain the integrity of the system or to comply with the system’s legal obligations.

6.1.1. Temporary suspension of access privileges is not a disciplinary action, but it will be deemed to be a grievable matter.

6.2. Users, when requested, will cooperate with institutions in the investigation of suspected violations of this policy. Failure to cooperate may result in suspension of access to the systems or to discipline.

6.3. If the investigation establishes reasonable grounds to believe that a user has violated this policy, the Board’s Chief Information Officer (or such subordinates as that officer may designate) shall initiate disciplinary proceedings.

6.3.1. The procedural and appeal rights of users will be based upon rights provided to similarly situated employees or students.

6.3.2. To the extent that any employee or student disciplinary code or procedure is inconsistent with the requirements of this policy, this policy shall control.

6.4. Where the facts that would trigger disciplinary action under this policy may also constitute a criminal infraction under any state or federal law it may be reported to responsible authorities, whether or not disciplinary action is initiated.
FORMS / APPENDICES:
None

SOURCE:
BOR, October 2008; October 2013; BOR December 2018.
FYI – COHE written responses.

Regarding free speech policy...

While broadly interpreted, the rule changes "look like" they are supporting free speech, two subtle changes appear to INCREASE restrictions on faculty. [Link](https://www.sdbor.edu/the-board/agendaitems/2014AgendaItems/2018%20Agenda%20Items/October/5_B1_BOR1018.pdf)

On page 7, the new policy removes the statement, for no apparent reason, "without Board or institutional discipline or restraint, on scholarly matters". This seems to imply the threat of punitive action by BOR or individual institutions on employees.

Additionally, on page 46, the statement is added "without the use of Board information and communication technology systems", which 1. Implies that the board will now be monitoring all communications, and 2. combined with the removal of penalty protections (see p7 above), gives them broad latitude to censor any faculty freedom of speech.

Whether these changes would stand up to court review is unsure, but combined with depressed faculty wages, and lack of cost of living increases, combine to make South Dakota an inhospitable environment for faculty recruitment.

Mark Geary
COHE President
MEMORANDUM

To: Paul B. Beran, CEO & Executive Director, South Dakota Board of Regents
From: Azhar Majeed, Vice President of Policy Reform, Foundation for Individual Rights in Education (FIRE)
Date: September 30, 2018
Re: Speech Policy Revisions by the South Dakota Board of Regents

Introduction

This memorandum will cover the Foundation for Individual Rights in Education’s (FIRE’s) analysis of the South Dakota Board of Regents’ most recent policy revisions regarding free speech rights on campus. We hope FIRE’s commentary will be helpful during the Regents’ October 2-4 meeting, and we look forward to continuing the dialogue as the Regents and their member institutions work on revising their speech-related policies.

This memorandum will cover each of the current policy revision drafts, one by one.

I. Harassment including Sexual Harassment (Policy 1:17)

This policy comes close to meeting the Supreme Court’s governing standard for student-on-student (or peer) hostile environment harassment in the educational setting. Since it falls slightly short of that legal standard, however, FIRE recommends a slight further revision.

Under the standard set forth by the Supreme Court, alleged peer harassment must be conduct that is ‘so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims’ educational experience, that the victim-students are effectively denied equal access to an institution’s resources and opportunities.’ Davis v. Monroe County Board of Education, 526 U.S. 629, 651 (1999). As the Court’s only decision to date regarding the substantive standard for peer harassment in education, Davis is controlling on this issue. Moreover, the Davis standard properly balances schools’ dual obligations to both address harassing conduct and respect free speech rights.

The revised draft of this policy defines actionable harassment, in relevant part, as “[c]onduct toward another person that is severe or pervasive enough to create an objectively and subjectively intimidating, hostile or demeaning environment. . . .” As the
"Davis" standard requires that the conduct in question be both severe and pervasive, as well as objectively offensive, it prevents constitutionally protected expression from being erroneously labeled as hostile environment harassment. The Regents are advised to adopt this stringent, speech-protective standard in place of the “severe or pervasive” formulation that the draft currently employs in section 2.B.1.

Additionally, FIRE would be pleased to offer our recommendations with respect to section 2.B.2, which is currently marked as “reserved.”

II. Student Code of Conduct (Policy 3:4)

Under the “Prohibited Conduct” section (section 3), the Student Code of Conduct would benefit from the currently suggested change in subsection C.7, which would remove the ban on “abusive messages.” Likewise, the proposed elimination of subsection D.5.b is another positive change that would remove a vague regulation of speech protected by the First Amendment.

However, with respect to subsection D.5.a, FIRE recommends the same further revision as we do with respect to Policy 1:17 on Harassment including Sexual Harassment. For the reasons discussed in the previous section of this memorandum, FIRE recommends that, rather than utilize a “severe or pervasive” standard for harassment, the Regents consider incorporating the full legal standard from the Supreme Court’s decision in Davis v. Monroe County Board of Education, i.e., conduct that is sufficiently severe, pervasive, and objectively offensive.

Lastly, with respect to subsection I—which is currently marked as “reserved”—we would be pleased to offer our recommendations for any policy language that is set forth in the future.

III. Political Activity (Policy 4:21)

This policy includes a few vague provisions that may restrict or chill faculty members’ political speech.

First, subsection 3.A states that employees of the Board of Regents may “[t]ake an active part in political management, political campaigns, or non-political activities,” but in doing so may not use “Board information and communication technology systems, Board services or Board property.” It is unclear what the extent of this regulation would be, but if it would mean, in application, that faculty members are not allowed to use their university email addresses—or even university network resources, when using their personal email accounts—to engage in political commentary, forward political messages to their colleagues, and the like, then subsection 3.A would be an abridgement of their First Amendment right to political speech. Likewise, it is unclear what “non-political activities” may fall within the scope of this provision. If the intention is to limit any and all non-political expression when using university networks or resources, that too is an untenable restriction of faculty members’ free speech rights.
FIRE recommends that, in place of this provision, the Regents broadly allow employees, including professors, to engage in a wide swath of political speech and activity—and that it only limit such expression when it constitutes campaign activity for a particular political candidate. By utilizing this narrower regulation, the Regents could still prevent the use of university resources and property in service of a particular candidate, without needlessly restricting core First Amendment rights.

Second, subsection 5 states that “employees should make every effort to indicate that they are not speaking or writing as institutional or Board representatives.” Employees, including faculty members, should be strongly presumed to speak on behalf of themselves as individuals—a presumption that is ordinarily overcome only when they expressly hold themselves out as speaking on behalf of the institution and representing its views. The current iteration of subsection 5 turns this presumption on its head, requiring employees to make an affirmative declaration that they do not speak for their institution. Accordingly, FIRE recommends that the Regents modify this provision to make clear that employees are strongly presumed to speak for themselves as individuals—and to make clear that they will only be considered to impermissibly speak for the school when they explicitly hold their position out as such.

IV. Facilities Use by Private Parties (Policy 6:13)

Much of this policy falls outside the scope of FIRE’s mission, which is to defend the individual rights of students and faculty members on college campuses, as opposed to non-university-affiliated individuals and groups. However, the procedures and principles set forth in this policy appear to be sound, reasonable accommodations of the right of non-university-affiliated individuals and groups to use campus grounds and facilities for expressive activity.

With respect to subsection 3.D.9 and its imposition of fees on private parties, FIRE would be pleased to offer our recommendations. In particular, while we note that this provision mandates such fees to be “based on definitive and objective criteria that are not content-based,” we also note that the criteria are not specified therein. We would be pleased to review any criteria that are decided upon at the institutional level and to offer our analysis and recommendations as to how the criteria can be best set forth to avoid content- or viewpoint-based regulation of expressive activity and related problems of selective enforcement.

V. Acceptable Use of Information Technology Systems (Policy 7:1)

This policy does not present any significant First Amendment concerns and appears to be narrowly drawn to address the Regents’ interests in maintenance of properly functioning information technology systems.
Under the “Unacceptable Use” section, subsection 7.d, the policy prohibits harassing individuals with reference to “Board policies proscribing harassment.” On this subject, FIRE would simply refer back to the discussion from earlier in this memorandum regarding Policy 1:17 (“Harassment including Sexual Harassment”), which provides our recommendations for how the Regents can more narrowly define harassment to avoid infringements upon protected speech. Likewise, subsection 10 bans use of the information and communications system “for partisan political purposes,” with reference to Policy 4:21 (“Political Activity”). On this point as well, FIRE would refer back to our recommendations regarding that particular policy.

Lastly, subsection 11 prohibits use of the information and communications system “for the purpose of benefitting any sectarian or religious society or institution.” To the extent this regulation would be enforced to prevent incidental messages asking for donations to a religious institution or participation in a religious institution’s community event, it would be needlessly restrictive. FIRE suggests that the Regents would still be able to achieve their objective with a narrower provision that limits large quantities of messages (as defined by the policy) that are aimed at “benefitting any sectarian or religious society or institution.”

VI. Commitment to Freedom of Expression (Policy 1:32)

FIRE would be pleased to see the Regents adopt the “Commitment to Freedom of Expression” in its current, proposed form. This policy statement is an excellent adaptation of the “Report of the Committee on Freedom of Expression” at the University of Chicago (better known as the “Chicago Statement”). Accordingly, FIRE would be glad to see this endorsement of free speech principles become codified by the Regents, and to include the member institutions governed by the Regents on our list of university administrations and faculty bodies that have adopted their own version of the Chicago Statement.

VII. Recognition and Funding of Student Organizations (Policy 3:18)

FIRE views this policy as a sound and reasonable set for procedures for recognizing and funding student groups. In particular, the discussion of expressive association in section 2 is helpful in ensuring that student groups that seek to restrict membership or leadership on a limited basis, pursuant to their shared views and beliefs, will not face backlash on the grounds that they run afoul of institutional non-discrimination requirements.

Conclusion

Once again, FIRE hopes that our analysis will help to guide part of the discussion during the Regents’ October 2-4 meeting and beyond. We would be pleased to assist the Regents in any other way with its policy deliberations.
Student Organizations

When students foray into public discourse through their student organization activity, they can and ought to be exposed to opposing viewpoints. We see that SDBOR Policy encourages this free exchange of ideas, even in circumstances that might cause discomfort or even offense and we embrace this broad acceptance of First Amendment freedoms. The question left unanswered by the policy as written is whether student organizations will be required to allow these opposing viewpoints to drown out the organization's expressive purpose.

Many student organizations are created for the specific purpose of advocating or expressing particular ideas. For example, PAVE-USD was created to spread awareness about sexual violence and to provide resources for victims and to empower students to stand up against sexual violence. The organization comports with the University's anti-discrimination policy and would not, of course, attempt to interfere with students' ability to express opposing viewpoints. Yet, as an organization which is created for the specific purpose of creating an atmosphere conducive to empowering sexual assault victims, its expressive mission would be completely undermined by a speech policy that required it to give its name, support and platform to a student that, for example, argued that most sexual assault claimants were making false claims. Such a claim is not illegal, defamatory of a specific individual, is not a genuine threat or harassment and does not violate privacy interests. It would also not appear to be incompatible with the functioning of the institution. Thus it would seem to be protected by SDBOR Policy 1:32. Yet it would require PAVE to allow its expression to be diluted or even drowned in the interest of the other party's free speech rights.

PAVE's right to expressive freedom could be impaired by a policy that precludes it from maintaining control of its expressive purpose. In Hurley v Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995), the United States Supreme Court faced a case in which lower courts found a parade organizer (the South Boston Allied War Veterans' Council) in violation of a public accommodations law when it prohibited a gay, lesbian and bi-sexual group from participating in its St. Patrick's Day parade. The parade organizer argued that the message promoted by the group was contrary to the parade's expressive purpose. In disapproving the lower court's holding that the parade was a public accommodation requiring admission of all speakers, the Court noted,

under this approach any contingent of protected individuals with a message would have the right to participate in petitioners' speech, so that the communication produced by the private organizers would be shaped by all those protected by the law who wished to join in with some expressive demonstration of their own. But this use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.

The Court reasoned that when an organization chooses what to say it also may decide what not to say; a choice that is "one important manifestation of free speech." *Id.* It is a rare
circumstance in which the state may compel affirmance of a belief when the speaker disagrees. *Id.*

The broad language of the policy seems to permit and perhaps even encourage instances in which a speaker or a student organization is forced to provide a platform for statements that specifically undermine the speaker’s expressive intent. While we endorse the ability of all members of the community to raise issues of importance and express their viewpoints, however much they maybe in derogation of popular belief, we are concerned that there seems to be no protection, or even acknowledgment of, a student organization’s right to control the content of its own speech by refusing to provide a platform to those who would undermine their message.

We appreciate the thoughtfulness with which the drafters crafted this policy and applaud the broad embrace of free speech principles. We believe that with further definition or clarification, all interests, including the pedagogical and expressive can be protected.
10/5/2018

To Whom It May Concern:

We are writing with a comment on SDBOR Policy 1:32.

1. To what extent does the policy, as written, entitle a faculty member to limit the scope, tone and vocabulary of classroom discourse?

Classroom speech

The University is the place where the marketplace of ideas bustles most vigorously. Certainly university students and faculty ought to be confronted with ideas that they find disagreeable, unwelcome or even offensive as they learn to navigate a free society. While professors ought not impede on students’ thoughtful consideration or discussion of academic content, practical and pedagogical considerations at times require restriction on some student speech. SDBOR Policy 1:32 permits the limitation on expressive freedom only to the extent that the limitations are “necessary to the functioning of the institution,” without defining the phrase or showing consideration for different aspects of university functioning. This creates the possibility that classroom instruction could be significantly hampered by the faculty member’s inability or chilled willingness to create and enforce policies that delimit the scope, tone and vocabulary of the classroom.

For example, in the Constitutional Law classroom, the professor has forbidden students from arguing about the cases by use of political talking points. Hence, students are not permitted to argue that “guns don’t kill people, people kill people” in discussing the District of Columbia v Heller case. With controversial cases such as Roe v Wade and NFIB v Sebelius, the imposition of such political claims directly interferes with students’ ability and willingness to analyze the constitutional issues and instead tends to polarize the classroom and devolve the discussion to partisan bickering. Certainly such political speech is fully protected and part of the public discourse on these controversial issues; yet it is also disruptive to the pedagogical aims of the classroom. Similarly, a student studying Human Trafficking may deeply believe that prostitution ought to be fully legalized as an empowered economic choice, but at some point those assertions must be quieted in order for the class to learn the criminological, sociological and psychological theories underlying the academic study of the phenomena.

We suggest that the policy define the phrase “necessary to the functioning of the institution” such that instructors will not be chilled in their ability to properly limit classroom discourse to those issues pertinent to the significant learning outcomes of the course.

Thank you for your consideration,

Bridget Diamond-Welch, Ph.D.
Julia M. Helms, Ph.D.
Cassandra McKeown SD

Molly Rozum

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COMMENT FOR SUBMISSION TO THE SOUTH DAKOTA BOARD OF REGENTS REGARDING THE PROPOSED AMENDMENTS TO THE POLICIES REGARDING FREE EXPRESSION

Blake Meadows, Legal Counsel
Center for Academic Freedom

Alliance Defending Freedom

November 8, 2018
Dear President Schieffer and Members of the Board of Regents:

Alliance Defending Freedom (“ADF”) is grateful to have been a part of the process as the South Dakota Board of Regents has evaluated and revised its policies in an attempt to conform to the demands of the First Amendment. ADF’s Center for Academic Freedom is committed to protecting freedom of speech and association for students and faculty because of the importance of a free and robust marketplace of ideas on campus. ADF’s last letter highlighted a number of common constitutional pitfalls on college and university campuses, as well as specific examples of unconstitutional policies at colleges and universities in South Dakota. We would encourage the Board of Regents to keep those principles and examples in mind as these policies are finalized.

While the Board of Regents has proposed generally positive changes, and ADF commends the Board of Regents on its work in many regards, there are two particular areas that are still of constitutional concern. First is the Board of Regent’s policy prohibiting funding for religious student organizations. Second is the lack of an effective check on the various subsidiary Colleges and Universities.

Looking first at the funding policy, BOR Policy 3:18(3)(A)(1). The policy prohibits funding that “will be used for sectarian ceremonies or exercises.” Policies that single out and prohibit distributing funding to religious student organizations are unconstitutional because they discriminate against religious viewpoints. The Board of Regents cannot justify this policy by relying upon a similar provision in the South Dakota State Constitution. First, the provision in the South Dakota Constitution does not apply to university funds expended by student organizations on religious activities because that is considered private, not government, expression. Second, even if the South Dakota Constitution prohibited the funding of private religious speech, the Supreme Court recently ruled that a state constitution does not shield the government from its requirement of viewpoint neutrality in allocation of funding.

Regarding the specific policies on campuses throughout South Dakota, ADF’s previous letter to the Board of Regents noted numerous constitutional problems at almost every public university in the state, including South Dakota State University, University of South Dakota, Black Hills State University, Dakota State University, Northern State University, and the South Dakota School of Mines and Technology. ADF also addressed many of these policies in oral testimony. Because ADF’s previous letter and testimony is already in the possession of the Board of Regents, it is unnecessary to repeat the violations here. What is concerning is that these campus policies remain in effect and unaddressed by the Board of Regents in its proposed policy changes.

The Board of Regents has a unique responsibility to not only conform its own policies to constitutional mandates, but also to ensure that the institutions it oversees have constitutional policies as well. ADF would urge this body to take a more proactive role in addressing unconstitutional policies on the campuses of South Dakota’s public universities.

In the last decade, ADF has assisted hundreds of students and student groups of varying religious and political beliefs facing violations of their First Amendment rights on campus. The

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Center for Academic Freedom has achieved an overwhelming success rate in challenging unconstitutional policies. ADF prefers that problems of this nature be dealt with in the Boardroom, by you, rather than in the Courtroom, by a judge. This Board of Regents has the unique responsibility and ability to make sure that the policies of the South Dakota public university system respect the First Amendment rights of its students and faculty. We commend the Board of Regents for its attention to this vital matter and urge the Board of Regents to take a hard look at the policies of the various colleges and universities within the state.

Best regards,

Blake Meadows
Blake W. Meadows, Legal Counsel
Center for Academic Freedom
Alliance Defending Freedom

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For more information on cases represented by the ADF Center for Academic Freedom, visit http://www.centerforacademicfreedom.org/cases/
To: South Dakota Board of Regents
c/o Katie Hubbart, Board of Regents Academic Affairs Specialist

From: Josh Sorbe
Student Body President
University of South Dakota

Madison Green
Student Body Vice President
University of South Dakota

Date: November 12, 2018

Re: Written Testimony on behalf of USD Students – Draft Free Speech Policy Revisions

South Dakota Board of Regents,

First off, thank you for your consideration of public testimony to the draft free speech policies. More specifically, thank you for your consideration of student testimony to policies that inadvertently affect the daily lives of our system’s 35,737 students. The students of the South Dakota Student Federation have discussed these policies and their implications at length with each other and our respective student senates. The typical student may not be cognizant of these policies’ impact, but they certainly do impact the education we receive. It is therefore incumbent upon student leaders submitting testimony to ensure the best interests of students is preserved.

We are testifying on behalf of the student population at the University of South Dakota, our state’s flagship university. We are the only Regental institution rooted in the liberal arts, the educational bedrock of critical thinking and conflict resolution. Free speech is of great importance to our educational philosophy. However, there are two revisions that we request further clarification on and reconsideration:

1. **BOR Policy 1:17 § 2(B)1:** Our student population does not tolerate harassment in any form. Given the #MeToo movement, a high-profile sexual assault case at our university last year, and numerous student survivor advocacy organizations that have eclipsed 200 members respectively, students have loudly declared their disdain for and intolerance of harassment. Simply put, adopting the “severe or pervasive” standard is counterintuitive to the safety and best interests of our students. If an action creates (or the effects of it create) an environment that is “intimidating, hostile or demeaning”, the promise of equal opportunity has already been violated and a barrier to educational attainment has been created. It is our job to remedy these violations and remove these barriers. The additional standard for harassment to be “severe or pervasive” is unnecessary and would further stifle legitimate reporting – a problem we already see. Adopting the severe-or-pervasive clause shifts the standard of proof overwhelmingly to the victim, inherently requiring a justification that their experience was demeaning enough to be considered “severe or pervasive” – an arbitrary, unspecified standard different to every individual. We recognize and embrace the right to due process and presumption of innocence, but we **encourage the Regents to omit this change in favor of the current standard as a fairer balance for accusers and the accused.**
2. **BOR Policy 3:18 § 3(A):** We would like to request further clarification on this revision. After discussion at South Dakota Student Federation, with campus officials, and with students, the purpose of this revision has been construed in various ways. What effect does the deletion of 3:18 § 3(B) have on funding activities and events of non-eligible organizations? What effect does the removal of referrals to “operational expenses” have on allocations? A memo from the BOR legal staff to the South Dakota Student Federation explaining intentions of this policy and its implications would be greatly appreciated, as student senates are the pocketbooks for student organizations and are the ones administering this policy.

We thank you for the opportunity to testify, and are open for further questions or inquiries via phone at (605) 690-6401 and email at josh.sorbe@coyotes.usd.edu.

Best,

Josh Sorbe
Student Body President
University of South Dakota

Madison Green
Student Body Vice President
University of South Dakota
To: South Dakota Board of Regents

From:
Matthew Yetter    Ryan Sailors
Executive Director    Chair
South Dakota Student Federation  South Dakota Student Federation

Date: November 10, 2018

Re: Written Testimony on behalf of Regental Students – Draft Free Speech Policy Revisions

South Dakota Board of Regents,

Thank you for allowing student testimony regarding the Draft Free Speech Policy Revisions. As the primary advocates of the 35,000+ students enrolled at South Dakota’s Public University we welcome the opportunity to help guide the board’s decision-making process.

The South Dakota Student Federation is the united voice of the six student governments of the Regental System and seeks to create a collective voice for the 35,000+ students enrolled at South Dakota’s Public University. Two executive officers from each of the Student Governments of the State's public university sit on the Board of directors when those twelve members come to consensus it is the responsibility of the Executive Director and the Chair to promulgate their views to the relevant authority

Internally as a federation we have held many length discussion on these proposed policy revisions and hope to continue working with the Board and its’ staff to create policy in the best interest of the students of South Dakota’s public universities.

We would like the Board to take the following under consideration:

- **South Dakota’s public universities do not have a free speech problem.**
  - From April to May of 2018, we administered the first ever system-wide survey of students’ views on free speech. Of responding students, nearly 80% indicated that they had no concerns about (then) current BOR free speech policies. When asked about examples or personal experiences with free speech, no responses contained any mentions or anecdotal evidence of instances where free speech had been suppressed. Instead, responses indicated that free speech is alive and well in our public university system. In the absence of any evidence to the contrary, we can unequivocally state that no student voices are being silenced, especially among partisan lines. Further, this suggests that voices from across the political spectrum are being heard and welcomed on the campuses of our state’s public universities.

South Dakota Student Federation
Student.Federation@sdbor.edu
https://www.sdbor.edu/student-information/Pages/Student-Federation.aspx


- **More research should be done as to the impact of “severe or pervasive.”**
  
  - Any act of Sexual harassment is iniquitous and should not be tolerated, and no perfect standard exists. Nonetheless, some Student Federation members hold concerns over the “severe or pervasive” standard and would prefer that the current standard remain. As a Federation we are unclear how switching this standard will benefit students. Does replacing “purpose or the effect of” with “severe or pervasive” create a higher standard? If so, we fear that this may impact the (already limited) willingness of students to come forward. Additionally, what falls under “severe or pervasive” is well litigated, can the Board make assurances that behavior such as outlined in Weiss v. Coca-Cola Bottling Company of Chicago will meet the Regental standard for “severe or pervasive”?

  "For Weiss' claim of sexual harassment to be actionable, the harassment "must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67, 106 S.Ct. 2399, 2405, 91 L.Ed.2d 49 (1986), quoting Henson v. Dundee, 682 F.2d 897, 902 (11th Cir.1982). ... Weiss alleged that Lawrence asked her for dates, called her a "dumb blond," put his hand on her shoulder several times, placed "I love you" signs in her work area and attempted to kiss her in a bar. Lawrence also may have twice attempted to kiss her in the office, though Weiss' deposition testimony is contradictory on this point. In any case, these incidents were also relatively isolated and no more serious than those in Scott. Taking all of Weiss' allegations as true, her claim does not meet the standard for actionable sexual harassment."1

Should anyone have any questions, please contact us at Student.Federation@sdbor.edu

Sincerely,

Matthew Yetter
Executive Director
South Dakota Student Federation
(215)-817-9015

Ryan Sailors
Chair
South Dakota Student Federation
(605)-877-6285

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1 Weiss v. Coca-Cola Bottling Company of Chicago. 990 F. 2d 333
Mr. Kevin Schieffer, President
Mr. John W. Bastian, Vice President
Mr. Jim Morgan, Secretary
Mr. Jim Thares, Member
Mr. Randy Schaefer, Member
Ms. Pam Roberts, Member
Ms. Joan Wink, Member
Mr. David Mickelson, Member
Mr. Lucas Lund, Member
South Dakota Board of Regents
306 East Capitol Avenue, Suite 200
Pierre, South Dakota 57501-2545

By email to: Nathan.Lukkes@sdbor.edu

Re: Comment Letter on the Board’s Free Speech Policies Affecting All South Dakota Public Institutions of Higher Education

Dear Regents:

The Christian Legal Society (“CLS”) has student chapters at law schools nationwide that have repeatedly been discriminatorily denied funding otherwise available to other student organizations because they engage in religious speech at their meetings. Other religious student groups have encountered the same problem. As this comment letter will detail, denial of access to funding otherwise available to other student organizations is viewpoint discrimination prohibited by the First Amendment of the United States Constitution. As the United States Supreme Court and the United States Eighth Circuit Court of Appeals have both repeatedly held, such viewpoint discrimination is not justified by an appeal to either the federal or state Establishment Clauses.

CLS submits this comment letter in order to help the Board understand why the current language, as well as the proposed language, of ¶ 3.A.1 of Board Policy 3:18, “Recognition and Funding of Student Organizations,” is unconstitutional because it denies eligibility for student activity fee funding if the funding will be used for “sectarian ceremonies or exercises.” The proposed language of ¶ 6.11 of Board Policy 7:1, “Acceptable Use of Information Technology Systems,” is similarly unconstitutional because it deems it an “unacceptable use” of the information technology system to use “the information and communications system for the purpose of benefitting any sectarian or religious society or institution in violation of Article 6, § 3 of the SD Constitution.” Such a prior restraint on religious speech is viewpoint discrimination in violation of the Free Speech Clause of the First Amendment and cannot be justified by a state constitutional provision.
Under controlling Supreme Court and Eighth Circuit precedent, the current and proposed language for ¶3.A.1 of Board Policy 3:18 and ¶ 6.11 of Board Policy 7:1 is blatantly unconstitutional. The First Amendment of the United States Constitution through either the Free Speech Clause or the Free Exercise Clause prohibits discrimination against religious speech. Neither the federal Establishment Clause nor the South Dakota State Constitution, Article 6, § 3, justifies such discrimination against religious speech.

Indeed, because the unconstitutionality of the current and proposed language is so clearly established, Board members are at risk of incurring individual liability for money damages should a religious student organization sue the Board and win a judgment in court that the policy is unconstitutional. And defending such a lawsuit would be a needless waste of South Dakotans’ tax dollars.

1. In *Rosenberger v. University of Virginia*, the United States Supreme Court held that a Public University Policy that Denied Religious Student Organizations Access to Student Activity Fees Funding Violated the Students’ Freedom of Speech, and Establishment Clause Concerns Did Not Justify a Viewpoint-Discriminatory Policy.

Four landmark United States Supreme Court decisions make clear that a student organization must be *eligible* -- not *ineligible* -- for student activity fee funding “if its predominant activities involve sectarian ceremonies or exercises,” as the current language of ¶ 3.A.1 of Board Policy 3:18 states, or “because it will be used for sectarian ceremonies or exercises,” as the proposed language states.

The leading case is *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995). The Supreme Court required a public university to pay the printing costs of a religious student organization’s publication that promoted religious viewpoints because the University was paying the printing costs of other student organizations’ publications. The Court held that the University had engaged in viewpoint discrimination against the publication’s religious viewpoint, a particularly egregious violation of the Free Speech Clause. As the Court explained, “[f]or the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation’s intellectual life, its college and university campuses.” *Id.* at 836.

In addition, the Court determined that the Establishment Clause would not be violated by the University paying for the printing of a publication that espoused religious viewpoints. *Id.* at 837-845. The Court declared that “[i]f the expenditure of governmental funds is prohibited whenever those funds pay for a service that is, pursuant to a religion-neutral program, used by a group for sectarian purposes, then *Widmar* [v. *Vincent*, 454 U.S. 263 (1981)], *[Board of Education v.] Mergens* [496 U.S. 226 (1990)], and *Lamb's Chapel* [v. *Center Moriches Union Free School District*, 508 U.S. 384 (1993)] would have to be overruled.” *Rosenberger*, 515 U.S. at 843.
In upholding the religious student group’s free speech right to access the student activity fees, the Court explained:

The viewpoint discrimination inherent in the University’s regulation required public officials to scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief. That course of action was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires.

*Id.* at 845–46.

2. In *Widmar v. Vincent*, the Supreme Court ruled that public university officials could not use a state constitutional provision to justify discriminatory treatment of a religious student group’s religious speech, including religious worship or religious instruction.

In deciding *Rosenberger*, the Supreme Court relied heavily on its 1981 decision in *Widmar v. Vincent*, 454 U.S. 263 (1981). The University of Missouri—Kansas City allowed student groups to use classrooms for their meetings, but it withheld recognition of a religious student group that wanted to use meeting space for “religious worship or religious teaching.” *Id.* at 265.

The Supreme Court held that the University had violated the religious student group’s freedom of speech and freedom of expressive association. *Id.* at 269. The Court explained that the University had “discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion. These are forms of speech and association protected by the First Amendment.” *Id.*

The Court rejected as “a novel argument” the sole dissenter’s claim that “religious worship” was not protected by the Free Speech Clause of the First Amendment. *Id.* at 270 n.6. Such a distinction, the Court reasoned, lacked “intelligible content” because “[t]here is no indication when ‘singing hymns, reading scripture, and teaching biblical principles,’ cease to be ‘singing, teaching, and reading’ – all apparently forms of ‘speech,’ despite their religious subject matter – and become unprotected ‘worship.’” *Id.* The Court warned that such a line could not be administered by university officials or courts because “[m]erely to draw the distinction would require the university – and ultimately the courts – to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith.” This inquiry “would tend inevitably to entangle the State with religion in a manner forbidden by our cases.” *Id.* (citation omitted). Finally, the Court rejected the distinction as “lack[ing] a foundation in either the Constitution or in our cases” and “judicially unmanageable.” *Id.* at 271 n.9. See also, *Rosenberger*, 515 U.S. at 845-846.
The University claimed that the federal Establishment Clause justified its discriminatory treatment of “religious worship” and “religious teaching.” *Id.* at 270. But the Supreme Court held to the contrary. The federal Establishment Clause is not violated by granting a religious student group access to meeting space otherwise available to other student groups. *Id.* at 270-275. Indeed, the Supreme Court agreed with the Eighth Circuit Court of Appeals, in its earlier ruling for the religious student group and against the University, that:

> [T]he University would risk greater “entanglement” by attempting to enforce its exclusion of “religious worship” and “religious speech.” See *Chess v. Widmar*, 635 F.2d 1310, 1318 (CA8 1980). Initially, the University would need to determine which words and activities fall within “religious worship and religious teaching.” This alone could prove “an impossible task in an age where many and various beliefs meet the constitutional definition of religion.” There would also be a continuing need to monitor group meetings to ensure compliance with the rule.

*Id.* at 272 n.11 (citations omitted). Note that the Court reiterated this concern, *i.e.*, that the Establishment Clause would be violated by University officials’ determination that a student publication was “proselytizing” and therefore ineligible for student funding, in *Rosenberger* 515 U.S. at 834, quoting *Widmar*, 454 U.S. at 272 n.11.

The Court also rejected the University’s claim that the Missouri Constitution justified its refusal to provide meeting space to a religious student group that engaged in religious worship and religious instruction. *Id.* at 275-276. Specifically, the University’s policy stated that its “general prohibition against use of University buildings and grounds for religious worship or religious teaching is a policy required, in the opinion of The Board of Curators, by the Constitution and laws of the State and is not open to any other construction.” *Id.* at 265 n. 3. The University claimed that “the State of Missouri ha[d] gone further than the Federal Constitution in proscribing indirect state support for religion.” *Id.* at 275. And, indeed the Missouri Supreme Court had so held in other cases. *Id.* at 275 n.16 & 17. Saying that it did not need to know how the state supreme court would rule on the issue of religious student groups’ access, the United States Supreme Court declared that “the state interest asserted here – in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution – is limited by the Free Exercise Clause and in this case by the Free Speech Clause as well.” *Id.* at 276. Therefore, the Court was “unable to recognize the State’s interest as sufficiently ‘compelling’ to justify content-based discrimination against [the student group’s] religious speech.” *Id.* This principle that a state constitutional provision does not justify a violation of the Free Exercise Clause or Free Speech Clause was seen again recently in the Supreme Court’s decision in *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012 (2017).
3. Under the Supreme Court’s decision in Board of Regents v. Southworth, if student activity fees are not allocated in a viewpoint neutral manner, a university’s imposition of student activity fees violates students’ freedom of speech.

In Board of Regents of University of Wisconsin System v. Southworth, 529 U.S. 217, 233 (2000), the Court held that a public university must allocate student activity fees in a viewpoint-neutral manner or else be found to be in violation of the Free Speech Clause. But as already explained, Board Policy 3:18’s categorical denial of funding to a religious student group “if its predominant activities involve sectarian ceremonies or exercises,” as the current language states, or “if the funding is prohibited by Article 6, § 3 of the SD Constitution because it will be used for sectarian ceremonies or exercises,” as the proposed language states, is viewpoint discriminatory, not viewpoint neutral. Either both the current language or the proposed language must be deleted from Board Policy 3:18, or South Dakota public universities and colleges must cease to collect student activity fees from students.

4. In Trinity Lutheran Church v. Comer, the Supreme Court found that exclusion of a religious organization from a government funding program violated the Free Exercise Clause and was not justified by the State’s constitution.

In Trinity Lutheran Church v. Comer, 137 S. Ct. 2012 (2017), the Supreme Court held that the Free Exercise Clause was violated when the Missouri Department of Natural Resources “categorically disqualif[ied] churches and other religious organizations from receiving” otherwise available “state grants to help public and private schools, nonprofit daycare centers, and other nonprofit entities purchase rubber playground surfaces from recycled tires.” Id. at 2017. The State claimed that its policy of excluding churches from its funding program was “compelled by Article I, Section 7 of the Missouri Constitution” which provides inter alia “[t]hat no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion.”

The Court rejected the state government’s “strict and express policy of denying grants to any applicant owned or controlled by a church, sect, or other religious entity.” Id. Because “[t]he Department’s policy expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character,” the Court found that strict scrutiny was triggered, and that the Free Exercise Clause was violated. Id. at 2021.
5. In *Badger Catholic v. Walsh*, the Seventh Circuit ruled against the University of Wisconsin for refusing to grant funding to a religious student group for “worship, proselytizing, and religious instruction.”

Relying on *Rosenberger* and *Widmar*, the Seventh Circuit Court of Appeals ruled that the University of Wisconsin violated a religious student group’s freedom of speech when it denied the group funding from student activity fees because the University refused to “pay for three categories of speech: worship, proselytizing, and religious instruction.” *Badger Catholic v. Walsh*, 620 F.3d 775, 777 (2010). The University was “willing to use student activity fees for what it calls dialog, discussion, or debate from a religious perspective, but not for anything that it labels worship, proselytizing, or religious instruction.” *Id.*

Like the Supreme Court in *Widmar*, the Seventh Circuit did not think that University officials could constitutionally administer such line-drawing between “permissible” religious speech and “impermissible” religious speech, explaining:

> The University’s assurance that it will fund discussion and debate, including discussion with a religious component, because it views discussion and debate as an important part of education, coupled with a declaration that there is just too much devotional activity in Badger Catholic’s program, leads us to wonder how the University would deal with an application by a student group comprising members of the Society of Friends. Quakers view communal silence as religious devotion, and a discussion leading to consensus as a religious exercise.

*Id.* at 780-781.

The University erroneously believed that it did not have to fund a religious student group’s “speech that constitutes the practice of religion.” *Id.* The University “contended that funding for prayer, proselytizing, or religious instruction would violate the Establishment Clause.” *Id.* But the Seventh Circuit affirmed that “[t]he district court correctly read the Supreme Court’s decisions in holding that the University would not violate the Establishment Clause by funding Badger Catholic’s programs,” citing *Widmar* and *Rosenberger*. *Id.* at 778.

6. The Eighth Circuit Court of Appeals has consistently upheld the free speech rights of religious organizations in the face of federal and state Establishment Clause claims.

As already noted, the Eighth Circuit predicted the Supreme Court’s reasoning in *Widmar* when it ruled that the religious student group’s freedom of speech had been violated and that neither the federal nor state Establishment Clause provisions justified the discriminatory
treatment of the students’ religious speech. *Chess v. Widmar*, 635 F.2d 1310, 1318 (8th Cir. 1980). The Eighth Circuit similarly predicted the Supreme Court’s reasoning in *Board of Education v. Mergens*, 496 U.S. 226 (1990), in which both the Eighth Circuit and the Supreme Court required public secondary school officials to recognize a religious student group as an official student group and give it access to meeting space, the school newspaper, the school yearbook, and school bulletin boards. *Mergens v. Board of Education*, 867 F.2d 1076 (8th Cir. 1989). Both courts ruled that the Establishment Clause did not justify discriminatory treatment of students’ religious speech.

In *Good News/Good Sports Club v. Ladue*, the Eighth Circuit required a public junior high to allow a religious community group to meet in its facilities after school on the same basis as other community groups were allowed to meet. 28 F.3d 1501 (8th Cir. 1994), *cert. denied*, 515 U.S. 1173 (1995).

In *Child Evangelism Fellowship of Minnesota v. Minneapolis Special School District No. 1*, the Eighth Circuit ruled that a school district engaged in impermissible viewpoint discrimination when it refused to provide transportation and food services to a religious community group that was meeting after school in an elementary school because a school administrator was concerned about certain religious speech, *i.e.*, “prayer and proselytizing,” that was occurring at the group’s meetings. 690 F.3d 996, 999 (8th Cir. 2012). The Eighth Circuit ruled that penalizing the group because its speech included “prayer and proselytizing” was “prohibited viewpoint discrimination.” *Id.* at 1001. The Eighth Circuit rejected the school district’s argument that viewpoint discrimination had not occurred because the religious group was still allowed to meet albeit on less favorable terms than other groups. Specifically, the Eighth Circuit ruled that “*Rosenberger* confirms that subjecting a religious organization to disfavored treatment because of its religious viewpoint on an otherwise includable subject matter is impermissible viewpoint discrimination, as is excluding the organization from a speech forum altogether.” *Id.* at 1002, citing *Rosenberger*, 515 U.S. at 831, and *Ladue*, 28 F.3d at 1507. The Eighth Circuit then rejected the school district’s claim that the Establishment Clause justified its viewpoint discrimination, explaining that “[i]nstead, the Establishment Clause requires neutrality, as opposed to hostility, towards religion.” *Id.* at 1003, citing *Rosenberger*, 515 U.S. at 839.

In *Wigg v. Sioux Falls School District 49-5*, the Court held that a school district’s policy that prohibited a teacher from attending a religious community group’s meetings after school on school property violated the teacher’s free speech rights. Noting that a “viewpoint-discriminatory regulation is presumed to be unconstitutional,” the Eighth Circuit found that the policy violated the teacher’s free speech rights. 382 F.3d 807, 813-814 (8th Cir. 2004). The Eighth Circuit then concluded that the federal Establishment Clause did not justify the viewpoint discrimination. The Eighth Circuit “reiterate[d] that Establishment Clause cases stress the government’s neutrality towards religion.” *Id.* at 815, citing *Rosenberger*, 515 U.S. at 839, and *Good News Club v. Milford Central School*, 533 U.S. 98, 114 (2001).
Conclusion

As the abundant precedent from the Supreme Court, the Eighth Circuit, and the Seventh Circuit demonstrates, Board Policy 3:18 and Board Policy 7:1 are viewpoint discriminatory in their treatment of religious speech. Such discriminatory treatment is not justified by either federal or state Establishment Clauses. For these reasons, the proposed language changes to Board Policy 3:18 and Board Policy 7:1, as well as the current language of Board Policy 3:18, are unconstitutional.

Because the precedent is overwhelmingly clear, Board members risk individual liability if the Board does not delete the viewpoint-discriminatory language. Deleting the language also will avoid wasting taxpayer dollars to defend such patently unconstitutional language in potential lawsuits.

CLS hopes its comments have been helpful to the Board and thanks it for considering its comments.

Respectfully submitted,

/s/ Kimberlee Wood Colby

Kimberlee Wood Colby
Director, Center for Law & Religious Freedom
Christian Legal Society
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Network Police Policy 4.21

Is it now going to be illegal to send a text, tweet, or email supporting your wife's run for office? Do the College Republicans and College Democrat clubs now have to work without sponsors? Is the BOR going track all the incidents that the implementation of this policy may cause?

The specific language opposed....
Take an active part in political management, political campaigns, or non-political activities except during regularly scheduled working hours, ; "and without the use of Board information and communication technology systems, Board services or Board property that is not available to the public and paid for at the rate offered to the public;"

We strongly oppose the addition of the above language.

The marginal cost of a additional email or twitter comment is essentially 0, so there is no REAL cost basis for this restriction. However, by making it a policy, the board paves the way for any political action to be a punishable offense, if you are using email, twitter or Facebook from a school computer or across a school network.

Besides the obvious restriction of free speech and being able to participate in the democratic process, this policy does not establish what the punishment for transgressions will be, who will enforce it, how it will be enforced evenly, and how much money is going to be wasted in man hours enforcing it and litigating it.

In addition, political activity is not defined, so your tweet for Noem of Sutton may become punishable, as would your support or opposition to any bills pending.

Article 19 from the Declaration of Human Rights: Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Since the state legislature affirmed the declaration of Human Rights in it's last session, and declared Dec 10 Human Rights Day (http://sdlegislature.gov/docs/legsession/2018/Bills/SCR6P.pdf), it would seem prudent for the BOR to not participate in the removal of human rights at the same time as the legislature is supporting them.

Please include the Fiegen photo along with any printing or forwarding of this email.
Re: Written comment on the Board’s free speech policies, particularly as they relate to the funding of student organizations.

Dear Mr. Schieffer and Members of the Board:

My name is Lori Kepner. As an associate legal counsel for Cru, I write today to offer Cru’s perspective as an organization with many religious student chapters all over the country. We are thankful that the Board has strengthened language to ensure that religious groups are able to function authentically and preserve their religious identities and rights of speech and expressive association on public universities in South Dakota. We are concerned, however, that the funding provision, ¶ 3.A.1 of Board Policy 3:18, unconstitutionally singles out religious groups for disfavored treatment, contrary to Supreme Court precedent. We respectfully ask that you revise the section on “Funding of Student Organizations” in order to prevent discrimination against religious groups.

The policy currently states that “No student organization will be eligible for student fee subsidies of its operating expenses: 1. if the funding is prohibited by Article 6, § 3 of the SD Constitution because it will be used for sectarian ceremonies or exercises.” The referenced portion of the South Dakota Constitution states, “No person shall be compelled to attend or support any ministry or place of worship against his consent nor shall any preference be given by law to any religious establishment or mode of worship. No money or property of the state shall be given or appropriated for the benefit of any sectarian or religious society or institution.” S.D. Const. Article VI, §3.

The caselaw on this topic is clear. It does not violate the United States Constitution or the South Dakota Constitution to allow religious student organizations the same opportunity given to non-religious student organizations to receive a distribution from the portion of student activity fees allocated for their use. This is true for several reasons.

First, money distributed from mandatory student activity fees is not money coming directly from state cofers. The Court in Rosenberger v. University of Virginia directly and clearly addresses
this topic, stating that the fee paid by students “is not a general tax designed to raise revenue for the University.” 515 U.S. 819, 841 (1995). In *Rosenberger*, the university refused to pay the printing costs of a publication by a religious student organization because the content was religious. The Supreme Court called it a free speech violation to refuse the religious group funding due to the religious content of its speech. *Id.* at 837.

Second, when a university establishes a structure for students to form student organizations and to provide those groups opportunities to get funding, it has created a limited open forum with the purpose of stimulating extracurricular student expression. The university is not speaking, but enabling speech in a neutral manner. *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217, 235 (2000). In addition, a university may not seek to exclude certain types of religious speech, claiming they are unprotected. Even “worship” is an expressive activity protected by the First Amendment’s Speech Clause. *Widmar v. Vincent*, 454 U.S. 263, 269 (1981).

The Supreme Court has made clear that the Establishment Clause is not violated when religious groups are allowed to participate in these forums. *Widmar*, 454 U.S. at 273 (stating that “an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices”). The most important factor is neutrality; religious speech may not be favored or disfavored. Universities must distribute resources with “neutrality towards religion.” *Rosenberger*, 515 U.S. at 839; *see also Southworth*, 529 U.S. at 233. True neutrality can happen only when the government “extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.” *Rosenberger*, 515 U.S. at 839.

If a university operates a limited open forum in a viewpoint neutral manner, then the fact that a particular voice is religious does not mean the state is “giving preference” to that particular viewpoint. In contrast, excluding religious groups from such a forum is unconstitutional “content-based discrimination against respondents’ religious speech.” *Widmar*, 454 U.S. at 276. The state violates the First Amendment if it silences religious voices by treating them differently. *See Southworth*, 529 U.S. at 233. The Supreme Court calls this violation of the free speech rights of groups “viewpoint discrimination.” *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993).

The Eighth Circuit has continued to affirm this understanding as well. *See Child Evangelism Fellowship of Minn. v. Minneapolis Special Sch. Dist. No. 1*, 690 F.3d 996 (2012) (Finding viewpoint discrimination and rejecting “attempts to justify differential treatment” of religious groups from similar secular groups). In the specific context of a limited open forum, the Eighth Circuit has also affirmed that the government may restrict the purpose of the forum, but must not regulate speech in a viewpoint-discriminatory manner. *Wigg v. Sioux Falls Sch. Dist. 49-5*, 382 F.3d 807, 813. By creating a forum, the government is creating space for private speech, not participating in government speech, and the Establishment clause is not a concern. *Id.*

Third, the caselaw prohibiting the distribution of state funds to sectarian schools does not apply in this circumstance. The Supreme Court recently found the principles of the First Amendment forum doctrine apply when there is a generally available benefit, and that it violates the First Amendment to deny religious groups access to that benefit. *Agostini v. Felton*, 521 U.S. 203, 237 (1997).
Exercise Clause to exclude a group “solely on account of religious identity.” *Trinity Lutheran Church v. Comer*, 137 S.Ct. 2012, 2019, 2021 (2017). In *Trinity*, the Supreme Court stated that a state constitution’s language prohibiting state money use to aid a “church, sect, or denomination of religion” would not override the First Amendment’s guarantees of free speech and free exercise. *Id.* at 2019-20. The court noted particular concern when language “single[s] out the religious for disfavored treatment” and is not “neutral and generally applicable without regard to religion.” *Id.* at 2020. When a religious group desires equal treatment, it is “not claiming any entitlement to a subsidy. It instead asserts a right to participate in a government benefit program without having to disavow its religious character.” *Id.* at 2022.

In addition, the *Trinity* court quotes *Widmar* and specifically notes that a state’s desire to go beyond the Establishment Clause “is limited by the Free Exercise Clause,” and goes “too far” when it denies “a qualified religious entity a public benefit solely because of its religious character.” *Id.* at 2024.

South Dakota cases that prohibit the distribution of public funds to sectarian schools are distinguishable and do not apply in this situation. For example, in *Elbe v. Yankton Indep. Sch. Dist.*, the South Dakota Supreme Court firmly held that the South Dakota Constitution intended to prohibit state funds from going directly to any sectarian school or institution. 372 N.W.2d 113, 116 (1985). Yet the situation the Board of Regents policies are addressing is student activity fees going to student organizations formed by students at public universities in the state of South Dakota. The student organizations are formed within a free speech forum designed by the public university, for the benefit of public university students, and any money given to such groups would be neutrally distributed. Even if some of those student groups affiliate with outside religious organizations, the student group itself is formed as a student club on the public university, under its authority. Any funds allocated to student groups remain for the use of the student organization on that campus only, and are not given to the outside organization it might be affiliated with.

Fourth, it is a well established principle that courts should not resolve controversies involving religious doctrine and practice. It is therefore dangerous to set up structures where administrators or judges have to evaluate what does or does not constitute a “sectarian exercise” for a particular religious group. Such decisions entangle the government in the internal religious affairs of religious groups. *See, e.g.*, *Wipf v. Hutterville Hutterian Brethren, Inc.*, 808 N.W.2d 678 (2012).

Administering a line based on “sectarian ceremonies or exercises” is very similar to what the Supreme Court considered dangerous for courts to set about defining. It would problematically require courts “to inquire into the significance of words and practices to different religious faiths,” which would “entangle the State with religion” much more than allowing an open forum for speech that includes religious speech. *Widmar*, 454 U.S. at 269 n.6. The Supreme Court affirmed this in other cases as well. *See, e.g.*, *Rosenberger*, 515 U.S. at 845 (noting the danger of requiring public officials to review and evaluate a group’s religious expression, stating that it constituted viewpoint discrimination); *Lamb’s Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993).
In conclusion, every registered student organization should have the right to apply for and have the same opportunity to receive student activity funds, and religious groups may not be excluded simply because they participate in religious practices and/or promote a religious belief system. Paragraph 3.A.1 of Board Policy 3:18 results in a complete exclusion of religious groups from requesting money at all. That is religious discrimination.

We respectfully request that you amend the policy accordingly. Thank you for your time and attention to this matter.

Respectfully submitted,

/s/ Lori D. Kepner
Lori D. Kepner
Staff Attorney
Cru—General Counsel’s Office
December 1, 2018

South Dakota Board of Regents
300 East Capital Avenue, Suite 200
Pierre, SD 57501


Dear President Schieffer and Members of the Board of Regents,

On behalf of the General Faculty of Dakota State University, I thank the Board of Regents for proposing an expanded policy on freedom of expression (BOR Policy 1:32). The General Faculty at Dakota State University strongly support protecting the principle of free expression and the commitment to vigorously defending it against attempts to suppress or restrict the practice of these essential rights. We endorse the sense of the draft policy that public universities in South Dakota should affirm their commitment to free, robust, and uninhibited debate.

In the discussions of the draft policy, the faculty did express some concerns about sections of the statement. First, the policy is quite long, and perhaps a more concise statement would be more effective in communicating a strong defense of free expression. One area that could be shortened or perhaps even removed, is the discussion in the third paragraph concerning the climate of mutual respect, specifically where it is stated that both academic freedom and freedom in learning “rely on the discursive order and restraint from disruption that civility demands on each of us.” This reference to “discursive order” is not well-defined and seems to allow a very broad discretion to any authority that may limit expression. Just a few sentences later the policy states “concerns about civility and mutual respect can never be used as a
justification for closing off discussion of ideas.” If questions of civility should not be used as a reason to limit expression, then why even discuss it in the policy?

We hope that these concerns will be noted, but we are pleased that the issue of freedom of expression on campuses is being addressed. Much more input from various stakeholders is needed. Discussions should occur at the campus and system levels, and groups formed to gather input and study the issue in depth. We are committed to addressing free speech issues on our campus, such as developing programming that examines the history and meaning of the First Amendment along with frank discussions of the values and trade-offs that are involved in the practice of free expression. Freedom of expression is a vital element of our culture of higher education and careful, thoughtful deliberations are needed.

Sincerely,

Dale Droge
President of the General Faculty
Dakota State University