

SOUTH DAKOTA BOARD OF REGENTS

Academic and Student Affairs

AGENDA ITEM: 7 – E
DATE: June 26-27, 2019

SUBJECT

Free Speech Policy Revisions – BOR Policies 1:32 & 3:18 and Proposed BOR Policy 6:13:1 (First Reading)

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
[HB1087](#) (2019 Legislative Session) - An Act to promote free speech and intellectual diversity at certain institutions of higher education

BACKGROUND / DISCUSSION

During its [December 2018](#) meeting the Board approved changes to BOR Policies 1:17, 3:3, 3:4, 3:18, 4:21, 6:13, and 7:1, all of which touched on first amendment issues in one respect or another. [HB1087](#) was subsequently passed during the 2019 Legislative Session, which addressed a number of issues germane to various BOR policies. Consequently, the proposed changes to the attached policies, which include the addition of a new policy, have been made to incorporate the relevant text from HB1087, providing further clarity to the campuses on the various first amendment related issues.

The specific policy changes are summarized below:

BOR Policy 1:32 – The proposed amendment incorporates the definition of intellectual diversity used in HB1087 and the annual reporting required thereby, stating that each institution will provide a report to the Executive Director, on or before November 1st of each year, on institutional activities germane to the policy, including (i) all actions taken by the institution to promote and ensure intellectual diversity and the free exchange of ideas, and (ii) a description of any events or incidents that impeded intellectual diversity and the free exchange of ideas.

(Continued)

DRAFT MOTION 20190626_7-E:

I move to approve the first reading of the proposed revisions to BOR Policies 1:31 and 3:18 and proposed BOR Policy 6:13:1.

BOR Policy 3:18 – The proposed changes incorporate clear language from the legislation which prohibits various forms of discrimination against student organizations based on their ideological, political or religious viewpoints.

BOR Policy 6:13:1 – This proposed policy addresses the use of institutional facilities and grounds for expressive activity by students, employees, and their invited guests. This policy is an offshoot of BOR Policy 6:13, which addresses use of institutional facilities and grounds by private parties. The intent of this policy is to provide a clear framework pertaining to the expressive activity of the “campus community” on institutional grounds. Currently, BOR Policy is silent on this topic, which has resulted in uncertainty with respect to the treatment of these individuals in comparison to that prescribed for private parties. The proposed policy provides clear guidance on covered/prohibited activity, the parameters within which the campuses are to operate/further regulate, enforcement, and the process for addressing appeals.

IMPACT AND RECOMMENDATIONS

The changes to BOR Policies 1:32 and 3:18, and addition of BOR Policy 6:13:1, have been proposed to better align with the verbiage contained in HB1087 and to provide greater clarity for institutional leadership as they manage freedom of speech issues on their campuses.

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

ATTACHMENTS

Attachment I – BOR Policy 1:32 Commitment to Freedom of Expression

Attachment II – BOR Policy 3:18 Recognition and Funding of Student Organizations

Attachment III – Proposed BOR Policy 6:13:1 Use of Institutional Facilities and Grounds for Expressive Activity by Students, Employees, and their Guests

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SUBJECT: Commitment to Freedom of Expression

NUMBER: 1:32

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

1. **Intellectual diversity:** Intellectual diversity denotes a learning environment that exposes students to and encourages exploration of a variety of ideological and political perspectives.

C. POLICY

The Board and its institutions have a long history of commitment to the principles of free expression and 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 intellectual 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: (i) mandate new funding by institutions to ensure its enforcement, (ii) limit the authority and responsibility of faculty to maintain pedagogical order in the classroom, or (iii) abridge the rights provided in BOR Policy 1:11.

On or before November 1st of each year, each institution shall provide a report to the Executive Director on institutional activities germane to this policy, which shall include: (i) all actions taken by the institution to promote and ensure intellectual diversity and the free exchange of ideas, and (ii) a description of any events or incidents that impeded intellectual diversity and the free exchange of ideas.

FORMS / APPENDICES:

None

SOURCE:

(RR, 12:02, 1977); BOR March 1993; BOR December 2018.

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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. No such rules or criteria may discriminate against any student or student organization based on the content or viewpoint of their expressive activity.

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. In keeping with these guarantees, an institution may not prohibit an ideological, political or religious student organization from requiring its leaders or members of the organization affirm and adhere to the organization's sincerely held beliefs, comply with the organization's standards of conduct, or further the organization's mission or purpose, as defined by the organization.

- 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.
 - 1.1.1.1. 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 fund to finance the organizations' general operational expenses and to subsidize cultural, social, recreational and informational activities and events sponsored by the organizations.

Funding allocated to student organizations shall be distributed in a nondiscriminatory manner in accordance with applicable state and federal authority, and ~~Funding shall be allocated~~ consistent with the institution's interests as outlined herein; provided that

2.1. No student organization will be eligible for fee subsidies:

- 2.1.1. If the funding is prohibited by Article 6, § 3 of the SD Constitution because it will be used for sectarian ceremonies or exercises;
- 2.1.2. 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 elections, or financing off-campus lobbying or political activities of non-students;
- 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 funding to communicate its position on behalf of all students, either through lobbying efforts before legislative bodies.

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, 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.

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SUBJECT: Use of Institutional Facilities and Grounds for Expressive Activity by Students, Employees, and their Guests

NUMBER: 6:13:1

A. PURPOSE

To promote and facilitate free expression while allowing the institution to ensure such activities do not interfere with the institution's mission and operations or with the rights of others.

B. DEFINITIONS

1. **Coercion** is the inducement of another to perform some act under circumstances which deprives them of their exercise of free will, such as force, threats, attempts to intimidate or badger a person into viewing, listening to, or accepting a copy of communication; or persistently requesting or demanding the attention of a person after that person has attempted to walk away or has clearly refused to attend to the speaker's communication.
2. **Demonstration** is any process of showing an individual or group cause by speech, example, group action or other form of public explanation.
3. **Debate** is a discussion involving different viewpoints in which different sides of an issue are advocated or presented by differing speakers.
4. **Expressive activity** is any lawful noncommercial verbal or written means by which one person communicates ideas to another, and includes peaceful assembly, protests, debate, demonstrations, speeches, distribution of literature, the carrying of signs, and the circulation of petitions.
5. **Prohibited Conduct** is any conduct violating state or federal law, regulation, or policy, including but not limited to coercion, speech unprotected by the United States or South Dakota Constitution, unlawful conduct under state or federal law, rule, or policy, including but not limited to Board or institutional policies.
6. **Institution** means Black Hills State University, Black Hills State University – Rapid City, Dakota State University, Northern State University, South Dakota School of Mines & Technology, South Dakota State University, University Center – Sioux Falls, and University of South Dakota.
7. **Large-scale events** are defined as (i) events that are expected to attract 50 or more

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people or (ii) events that request the use of amplified sound. Such events include invited speakers, marches, parades, protests, and demonstrations.

C. POLICY

1. Policy Statement

The South Dakota Board of Regents recognizes and supports the educational institutions as marketplaces of ideas. The primary function of the institutions is to discover and disseminate knowledge by means of research and teaching. The Board supports the right of students, employees, and their guests to speak in public and to demonstrate for or against actions and opinions with which they agree or disagree. Freedom of expression is vital to the shared goal of the pursuit of knowledge. Such freedom comes with a responsibility to welcome and promote this freedom for all, even in disagreement or opposition. In doing so, however, students, employees, and their guests must comply with this and other Board policies, and institutional policies.

2. General Guidelines

- 2.1 The Board and its institutions are committed to providing an educational, research, and service environment that is conducive to the development of each individual. As a public entity, the Board and its institutions provide both formal and informal forums for the expression of ideas and opinions as long as it is done within the context of federal and state law and Board and institutional policies, and does not impede pedestrian and/or vehicular traffic, disturb or interfere with normal academic, administrative or student activities, or involve prohibited conduct.
- 2.2 Because institutional facilities and grounds are tax-exempt public facilities and grounds, they are not generally available for use for commercial purposes, subject to the specific exception set forth in Board Policy 3:7 and 6:13.

3. Outdoor Areas

- 3.1 To facilitate robust debate and the free exchange of ideas, the outdoor areas within the boundaries of the institution, unless otherwise properly restricted, constitute a designated public forum for the benefit of students, employees, and their guests to engage in expressive activity. This use may be without prior permission from the institution so long as:
 - 3.1.1 The area has not been previously reserved or scheduled for a particular function;
 - 3.1.2 No sound amplification is used;
 - 3.1.3 Participants do not violate any Board or institutional policy or engage in prohibited conduct; and

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3.1.4 The General Guidelines outlined in Section C.2 are followed.

- 3.2 Nothing in this section 3 shall be interpreted as limiting the right of a student's free expression elsewhere on campus, in keeping with the nature of the forum designated by the institution in which the expressive activity occurs and the implementation of Board Policy 6:13, so long as the expressive activities or related conduct do not violate any other applicable Board or institutional policy or constitute prohibited conduct.
- 3.3. An institution may not designate any outdoor area within its boundaries as a free speech zone or otherwise restrict the expressive activities of students, employees and their guests to particular outdoor areas within its boundaries in a manner that is inconsistent with this policy.

4. Institutional Obligations

- 4.1 Each institution shall designate and publicize:
- 4.1.1 the institutional office(s) for scheduling and coordinating large scale events;
 - 4.1.2 the contact information for the person or office to which appeals of this or related institutional policies are submitted, who shall not be the person or office that schedules and coordinates large scale events;
 - 4.1.3 a form, whether physical or electronic, for reserving facilities or grounds; and
 - 4.1.4 the grounds for granting or denying a reservation in keeping with Board Policy 6:13(C)(2.5).
- 4.2 An institution may maintain and enforce additional lawful reasonable time, place, and manner restrictions on the use of outdoor areas within the institutional boundaries, so long as any such restrictions are clear, narrowly tailored in the service of a significant institutional interest, published, content-neutral, viewpoint-neutral, and provide alternate means of engaging in the expressive activity. Any such restrictions shall allow students and employees to spontaneously and contemporaneously assemble in outdoor areas within the boundaries of the institution, unless otherwise properly restricted, as long as their conduct is not unlawful and does not materially and substantially disrupt the functioning of the institution.

5. Guidelines for Expressive Activity by Students and Student Organizations

- 5.1 A student's right of freedom of expression at the institution includes organized demonstrations or events. At the same time, the institution has long recognized that this right does not include the right to engage in conduct that disrupts the institution's operations, infringes other students' freedom in learning, interferes with the academic freedom of faculty, endangers the safety of others, or constitutes prohibited conduct.

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- 5.2 The institution shall require any student or student organization planning a large-scale event to contact the designated institutional office in advance of the large scale event. A representative of the designated institutional office will work with the requesting person to either meet the request or find a reasonable alternate time and location.
- 5.3 The Institution may require the requesting party to provide a parade route, hire security, ensure egress to facilities, or take other steps to maintain the safety of the campus; however, any such requirement(s) must be based on definite and objective criteria that are not content-based. All participants must follow all Board and institutional policies and applicable law.
- 5.4 Access to, and use of, facilities and grounds at institutions shall be equally available to all student organizations, regardless of the ideological, political, or religious beliefs of the organization.

6. Guidelines for Expressive Activity by Guests

- 6.1 Guests of students and employees may engage in expressive activity in outdoor areas in conformity with all applicable policies and in a manner that does not constitute prohibited conduct, or they may seek to reserve select campus facilities pursuant to Board Policy 6:13.
- 6.2 Hosts of guests who are planning a large-scale event must contact the designated institutional office in advance of the large scale event. A representative of the designated institutional office will work with the requesting person to either meet the request or find a reasonable alternate time and location.

7. Enforcement

- 7.1 Students' and employees' guests found violating Board or institutional policies, including this policy, will be subject to immediate removal from the institutional grounds, without prior warning, by appropriate institutional agents or officials and may be subject to appropriate legal action.
- 7.2 Students and/or student organizations violating this policy will be subject to disciplinary action pursuant to the Student Code of Conduct.
- 7.3 Employees violating this policy will be subject to disciplinary action pursuant to applicable Board Policy.

8. Appeals

Individuals who believe that the institution violated this policy may obtain a review as follows:

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- 8.2 The appeal must be presented on the approved form.
- 8.3 The completed written appeal must be presented within five (5) working days after the violation occurred.
- 8.4 The appeal shall state specifically facts that, if proven, would demonstrate:
- 8.4.1 that the denial was based upon an incorrect assessment of material fact or
- 8.4.2 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.
- 8.5 The designated institutional office will respond to such appeals via email within two (2) working days after their receipt by the institution. Should the institutional office deny the appeal, it shall provide in its response a copy of the reservation and the procedure for appealing the decision to the institutional chief executive officer.
- 8.6 If the individual remains dissatisfied, they may appeal to the institutional chief executive officer by filing a written appeal on the same approved form within five (5) working days after the institution issued its response.
- 8.6.1 The institutional chief executive officer shall have five (5) 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 individual, determining whether denial was proper and, if the appeal is denied, informing the individual of the discretionary appeal to the Board of Regents.
- 8.7 After exhausting institutional appeals, the individual may appeal the determination of the institutional chief executive officer by submitting a written appeal to the Executive Director of the Board within ten (10) working days from the effective date of the institutional chief executive officer decision. Such an appeal shall include the completed reservation form, the denial, the appeals and decisions exchanged at the institutional level, and the required appeal form.
- 8.7.1 The Executive Director of the Board shall have 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 five (5) working days thereafter, the Executive Director shall either issue a preliminary recommendation or refer the matter to a hearing examiner to

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determine whether the matter presents contested issues of material fact warranting a hearing or whether denial was proper as a matter of law.

- 8.7.2 If the Executive Director issues a preliminary recommendation that would deny the individual relief, the individual shall be allowed ten (10) working days from the transmission or deposit in the mail of the Executive Director's written response to provide reasons why that response should not become final.
- 8.7.3 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 individual within ten (10) working days from the date of appointment to schedule any necessary exchanges of authorities, hearings or evidentiary hearings.
- 8.7.3.2 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.
- 8.7.4 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.
- 8.7 Appeals from the decision of the Board are governed by SDCL ch 1-26.

FORMS / APPENDICES:

None

SOURCE: