

SOUTH DAKOTA BOARD OF REGENTS

Academic and Student Affairs

AGENDA ITEM: 5 – A(2)

DATE: August 4-5, 2020

SUBJECT

Title IX Policy Revisions

CONTROLLING STATUTE, RULE, OR POLICY

- BOR Policy [3:4](#) – Student Code of Conduct
- BOR Policy [1:18](#) – Human Rights Complaint Procedures
- BOR Policy [1:17](#) – Harassment Including Sexual Harassment
- BOR Policy [1:17.1](#) – Prevention of Sexual Assault, Domestic Violence, and Stalking

BACKGROUND / DISCUSSION

The Board previously approved the first reading of the new Title IX policy at its June meeting, which stemmed from the Department of Education’s release of the [final](#) Title IX rules, which are set to go into effect on August 14, 2020. The key provisions of the new regulations include:

- Defines sexual harassment to include sexual assault, dating violence, domestic violence, and stalking, as unlawful discrimination on the basis of sex;
- Limits the jurisdiction over Title IX matters to those incidents occurring on institutional property or on property owned or controlled by a student organization that is officially recognized by the institution or connected with an education program or activity of the institution;
- Provides a consistent, legally sound framework on which survivors, the accused, and schools can rely;
- Requires schools to offer clear, accessible options for any person to report sexual harassment;
- Empowers survivors to make decisions about how a school responds to incidents of sexual harassment;
- Requires the school to offer survivors supportive measures, such as class or dorm reassignments or no-contact orders;
- Holds colleges responsible for off-campus sexual harassment at houses owned or under the control of school-sanctioned fraternities and sororities;
- Restores fairness on college and university campuses by upholding all students' right to written notice of allegations, the right to an advisor, and the right to submit, cross-examine, and challenge evidence at a live hearing;
- Shields survivors from having to come face-to-face with the accused during a hearing and from answering questions posed personally by the accused;

DRAFT MOTION 2020084_5-A(2):

I move to approve the second and final reading of the new BOR Policy 1:17 set forth in Attachment I, and the first and final reading of the proposed revisions to BOR Policies 3:4, 1:18 and 1:17.1, all of which shall be effective on August 14th.

- Requires schools to select one of two standards of evidence, the preponderance of the evidence standard or the clear and convincing evidence standard – and to apply the selected standard evenly to proceedings for all students and employees, including faculty;
- Provides "rape shield" protections and ensures survivors are not required to divulge any medical, psychological, or similar privileged records;
- Requires schools to offer an equal right of appeal for both parties to a Title IX proceeding;
- Gives schools flexibility to use technology to conduct Title IX investigations and hearings remotely; and
- Protects students and faculty by prohibiting schools from using Title IX in a manner that deprives students and faculty of rights guaranteed by the First Amendment.

A summary of the major provisions of the rules can be found [here](#). Additionally, the following [link](#) includes a comparison of the changes from the Notice of Proposed Rulemaking to the final rules.

Attachment I, which will become the new BOR Policy 1:17, effectively replacing the old BOR Policy 1:17 in its entirety, reflects the changes to policy necessary to accommodate the new rules. While the entirety of Attachment I is new policy, only those changes made since the first reading are tracked. Additionally, Attachment II contains the necessary changes to BOR Policy 3:4 to accommodate the application of the new rules/process in the student conduct setting. In short, all student disciplinary matters constituting sexual harassment will be handled under the new BOR Policy 1:17 and not the student conduct process set forth in BOR Policy 3:4. Likewise, Attachment III contains the necessary changes to BOR Policy 1:18 to remove any overlap between the “standard” discrimination process and those matters which constitute sexual harassment, which are addressed under the new BOR Policy 1:17. Finally, Attachment IV contains an additional reference to the new BOR Policy 1:17, to bring the related policy in line with the process afforded to sexual harassment matters.

IMPACT AND RECOMMENDATION

The proposed policy changes will ensure compliance with the new Title IX rules, which become effective on August 14th. The procedures afforded therein will provide enhanced due process at the institutional level to all involved, with the hearing conducted, and a proposed decision drafted, by a legally trained neutral party.

Staff recommends approval.

ATTACHMENTS

Attachment I – New BOR Policy 1:17 – Sexual Harassment

Attachment II – Revisions to BOR Policy 3:4 – Student Code of Conduct

Attachment III – Revisions to BOR Policy 1:18 – Human Rights Complaint Procedures

Attachment IV – Revisions to BOR Policy 1:17.1 – Prevention of Dating Violence, Domestic Violence, Sexual Assault and Stalking

SOUTH DAKOTA BOARD OF REGENTS

Policy Manual

SUBJECT: Sexual Harassment ~~Policy and Procedures~~

NUMBER: 1:~~17XX~~

A. PURPOSE

To establish policy prohibiting sexual harassment, the process for investigating and determining when sexual harassment has occurred, and the appeal process available when a violation is found.

B. DEFINITIONS

1. **Actual knowledge:** Notice of sexual harassment or allegations of sexual harassment to a Title IX Coordinator, ~~or~~ any employee of the institution who has authority to institute corrective measures on behalf of the institution or any employee at the Special Schools. Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge. This standard is not met when the only employee of the institution with actual knowledge is the respondent.
2. **Complainant:** An individual who is alleged to be the victim of conduct that could constitute sexual harassment.
3. **Consent:** As set forth in BOR Policy 1:17:1(3)E.
4. **Day:** Calendar days.
5. **Education program or activity:** Any locations, events, or circumstances taking place in the United States where the institution exercised substantial control over both the respondent and the context in which the alleged violation occurs—including locations that correspond to land, buildings, facilities, and other property in the possession of, or owned, used, or controlled by, the institution, and adjacent streets and sidewalks. For purposes of this policy, the term also includes any building owned or controlled by a student organization that is officially recognized by the institution.
6. **Formal complaint:** A document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against and respondent and requesting that the institution investigate the allegation of sexual harassment.
7. **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, South Dakota School for the Deaf and South Dakota School for the Blind and Visually Impaired.
8. **Respondent:** An ~~employee, student individual or organization~~ that has been reported to be the perpetrator of conduct that could constitute a violation of this policy.

9. Sexual harassment: Conduct on the basis of sex that satisfies one or more of the following:

- 9.1. An employee of an institution conditioning the provision of education benefits on participation in unwelcome sexual conduct (i.e., quid pro quo); or
- 9.2. Unwelcome conduct that a reasonable person would determine is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the institution's education program or activity; or
- 9.3. Sexual assault (as defined in the Clery Act), dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (VAWA), the definitions of which are set forth in BOR Policy 1:17.1.

10. Special Schools: South Dakota School for the Deaf and South Dakota School for the Blind and Visually Impaired.

10.11. Supportive measures: Non-disciplinary, non-punitive individualized services offered to the complainant or the respondent.

11.12. Working day: Monday through Friday, except for holidays and other times when the institution's administrative offices are closed.

12.13. Written notice: Notice provided either via email to the student and/or employee at their official institutional email account. Notice is deemed received the day after it is sent via email.

C. POLICY

1. Scope

These procedures apply to allegations of sexual harassment occurring in connection with an institution's education program or activity. Allegations of harassment not constituting sexual harassment shall be handled pursuant to BOR Policy 1:18 and/or 3:4, as appropriate.

2. Institutional Response

An institution with actual knowledge of sexual harassment in connection with an education program or activity must respond promptly in a manner that is not clearly unreasonable in light of the known circumstances. An institution must treat complainants and respondents equitably by offering supportive measures, with or without the filing of a formal complaint, and when a formal complaint is filed, by following the grievance process outlined below prior to the imposition of any disciplinary sanctions or other actions that are not supportive measures.

2.1. Supportive Measures

Supportive measures shall be offered at no cost, and should be designed to restore or preserve equal access to the institution's education program or activity without unreasonably burdening the other party, which may include measures designed to protect the safety of all parties or the institution's educational environment, or deter sexual harassment.

- 2.1.1. Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures. The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.
- 2.1.2. The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint.
- 2.1.3. Institutions must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the institution to provide the supportive measure.
- 2.1.4. Nothing contained in this policy shall be construed to preclude an institution from removing a respondent from the institution's education program or activity on an emergency basis, provided that the institution undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal.

2.2. General Requirements

In response to a formal complaint, an institution's grievance process must comply with the requirements of this section, to include the equal application of the same to both parties. Nothing contained herein should be read to restrict any right that would otherwise be protected by the First Amendment of the U.S. Constitution, deprive a person of due process protected by the Fifth and Fourteenth Amendments of the U.S. Constitution, or otherwise restrict any other rights guaranteed against government action by the U.S. Constitution.

- 2.2.1. Institutions must treat complainants and respondents equitable by providing remedies to a complainant where a determination of responsibility of sexual harassment has been made against the respondent in accordance with the process set forth herein.
- 2.2.2. Remedies implemented by an institution must be designed to restore or preserve equal access to the education program or activity. Such remedies may include supportive measures; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent.
- 2.2.3. Institutions must require an objective evaluation of all relevant evidence, including both inculpatory and exculpatory evidence, and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness.

- 2.2.4. Institutions must rRequire the Title IX Coordinator(s), investigator(s), decision-maker(s), or any person(s) designated by an institution to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.
- 2.2.5. Institutions must ensure the Title IX Coordinator(s), investigator(s), decision-maker(s), and any person(s) who facilitate an informal resolution process receive training on the definition of sexual harassment; the scope of the education activity or program; how to conduct an investigation and grievance process including hearings, appeals and informal resolution processes, as applicable; and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.
- 2.2.6. Institutions must ensure the decision-maker(s) receive training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant.
- 2.2.7. Institutions must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence.
- 2.2.8. Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints.
- 2.2.9. Institutions must include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process. Determinations on responsibility will be made using the preponderance of the evidence standard. The preponderance of the evidence indicating responsibility is shown if, in considering all the evidence it is more likely than not that the respondent is responsible for the alleged conduct.
- 2.2.10. Institutions may grant temporary delays or extensions of any deadline set forth in this policy which occur prior to the hearing, for good cause such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity (excluding cooperative agreements); or the need for language assistance or accommodation of disabilities. If any such temporary delays or extensions are granted the institution must notify the parties in writing of the reason for any such short-term delay or extension.
- 2.2.11. Following a determination of responsibility by the institution, the disciplinary sanctions listed below in this section may be imposed on the respondent. More than one of these disciplinary sanctions may be imposed for any single finding of responsibility. Imposition of a disciplinary sanction may be delayed or suspended on such conditions as the institution may prescribe.

- 2.2.11.1. Warning – A statement to the respondent that the respondent has violated this policy.
- 2.2.11.2. Probation – Probation is for a designated period of time and includes the probability of more severe disciplinary sanctions if the respondent is later found to have engaged in any additional violation(s) during the probationary period.
- 2.2.11.3. Loss of Privileges – Denial of specified privileges for a designated period of time. The privileges of continued participation in institutional activities, and/or access to institutional facilities or residences may be conditioned upon participation in or completion of educational programming at the respondent's expense.

~~Fines—Monetary payments.~~

- 2.2.11.4. Restitution – Compensation for loss, damage, or injury. This may take the form of appropriate service, money, or material replacement.
- 2.2.11.5. Educational/Personal Development Sanctions – work assignments, ~~essays,~~ service to the institution ~~or,~~ community ~~service,~~ workshops, counseling or other related ~~educational~~ educational, training or personal development activities.
- 2.2.11.6. 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.
- 2.2.11.7. 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.
- 2.2.11.8. 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.
- 2.2.11.9. 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.
- 2.2.11.10. Adverse Employment Action(s) – the institution may take adverse employment action, to include suspension, with or without pay, reassignment, demotion, and termination.
- 2.2.11.11. Withholding Degree – the institution may withhold awarding a degree otherwise earned until the completion of the grievance process or the completion of all disciplinary sanctions imposed.

2.2.11.12. 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 committed by the respondent prior to graduation.

3. Receipt of Formal Complaint

3.1. An institution must investigate the allegations in a formal complaint. A formal complaint may be filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the institution investigate the allegations of sexual harassment. Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party. Within 5 working days of receiving a formal complaint, the institution must provide written notice to the parties who are known. The written notice shall include:

3.1.1. Notice of allegations of sexual harassment potentially constituting sexual harassment, including sufficient details known at the time and with sufficient time to prepare a response before any initial interviews. Sufficient details include the identities of the parties involved in the incident, if known, the conduct allegedly constituting sexual harassment, and the date and location of the alleged incident, if known.

3.1.2. A statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.

3.1.3. A statement informing the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney; that the advisor may accompany the party to related meetings or proceedings; and that the party and their advisor may inspect and review evidence obtained as part of the investigation that is directly related to the allegations raised in the formal complaint. In the event the institution has established any restrictions regarding the extent to which an advisor may participate in the proceedings pursuant to section 4.4 below, a statement informing the parties of the applicable restriction(s) shall be included.

3.1.3.3.1.4. A statement of the maximum disciplinary sanction(s) that may be imposed on respondent following a determination of responsibility by the institution.

3.1.4.3.1.5. A statement informing the parties of any applicable provision in policy that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

3.2. If, in the course of the investigation, the institution decides to investigate allegations about the complainant or respondent that are not included in the notice provided pursuant to section 3.1 above, the institution must provide notice of the additional allegations to the parties whose identities are known.

3.3. Where the allegations of sexual harassment arise out of the same facts or circumstances, an institution may consolidate formal complaints as to allegations

against more than one respondent, or by more than one complainant against one or more respondents.

- 3.4. Within 10 working days of receiving a formal complaint, the institution shall determine whether the conduct alleged, if taken as true, would constitute sexual harassment, and if the allegations contained in the formal complaint occurred in the institution's education program or activity. The institutional shall dismiss the formal complaint if the factual allegations, if taken as true, either:
 - 3.4.1. Fail to constitute sexual harassment; or
 - 3.4.2. Did not occur in the institution's education program or activity.
- 3.5. An institution may dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing: a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein; the respondent is no longer enrolled or employed by, or otherwise affiliated with, the institution; or specific circumstances prevent the institution from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.
- 3.6. Within 5 working days of dismissing a formal complaint or any allegations therein, the institution shall send written notice of the dismissal and reason(s) therefor simultaneously to the parties.
- 3.7. Nothing contained in this policy shall preclude an institution from placing a non-student employee respondent on administrative leave, in accordance with applicable BOR Policy, during the pendency of a grievance process hereunder.

4. Investigation of a Formal Complaint

- 4.1. Institutions shall ensure that both the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the institution and not on the parties provided.
- 4.2. Institutions shall provide equal opportunity to the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence.
- 4.3. Institutions may not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.
- 4.4. Institutions shall provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding; however, the institution may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties.
- 4.5. Institutions shall provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, at least 5 working days in advance.

- 4.6. ~~At least 15 working days prior to the hearing, a~~An institution shall ensure both parties and their advisors have an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the institution does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation. Prior to completion of the investigative report, the institution must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report. The institution must make all such evidence subject to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination.
- 4.7. Institutions shall create an investigative report that fairly summarizes relevant evidence and, at least 10 working days prior to a hearing (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response.

5. Hearings

- 5.1. Institutions shall provide for a live hearing conducted before a hearing examiner using the contested case proceedings set forth in pursuant to SDCL chapter 1-26 ~~using the contested case proceedings.~~ However, the use of the procedures afforded to contested case proceedings under SDCL chapter 1-26 is not determinative as to the matters status as a contested case under South Dakota law. The individual facts and circumstances shall determine whether or not the matter meets the legal threshold for a contested case, regardless of the process afforded herein. Live hearings may be conducted with all parties physically present in the same geographic location or, at the institution's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other. The institution shall create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.
- 5.2. Institutions shall provide notice to both parties at least 15 days in advance of the live hearing, which notice shall include:
- 5.2.1. A statement of the time, place, and nature of the hearing;
 - 5.2.2. A statement regarding the legal authority and jurisdiction under which the hearing is to be held;
 - 5.2.3. A reference to the particular policy, rules or laws involved;
 - 5.2.4. A short and plain statement of the allegations asserted;

- 5.2.5. A statement of any action authorized, which may affect the parties, as a result of any decision made at the hearing;
- 5.2.6. A statement that the hearing is an adversarial proceeding and that a party has the right at the hearing, to be present, to be represented by an attorney, and that these and other due process rights will be forfeited if they are not exercised at the hearing;
- 5.2.7. A statement that if the amount in controversy exceeds two thousand five hundred dollars or if a property right may be terminated, any party may require the use of the Office of Hearing Examiners by giving notice of the request to the institution no later than ten (10) days after service of the notice required by this section~~the outcome of the matter may terminate a right affording certain due process, and as such, the Office of Hearing Examiners will be used to conduct the hearing;~~ and
- 5.2.8. A statement that the final decision may be appealed to circuit court and the South Dakota Supreme Court as provided by law.
- 5.3. If a party does not have an advisor present at the live hearing, the institution must provide without fee or charge to that party, an advisor of the institution's choice, who may be, but is not required to be an attorney. Without limiting the due process provided for contested case proceedings pursuant to SDCL chapter 1-26, the live hearing must:
- 5.3.1. Permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.
- 5.3.2. Require cross-examination to be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally.
- 5.3.3. If requested by either party, provide for the live hearing to occur with the parties located in separate rooms with technology enabling the hearing examiner and parties to simultaneously see and hear the party or the witness answering questions.
- 5.3.4. Require the hearing examiner to determine whether any question asked of a complainant, respondent, or witness is relevant before they may answer the question and explain any decision to exclude a question as not relevant before a party or witness answers a cross-examination or other question.
- 5.3.5. Ensure questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.
- 5.3.6. Ensure that if a party or witness does not submit to cross-examination at the live hearing, the hearing examiner must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided,

however, the hearing examiner cannot draw an inference about the determination regarding responsibility solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.

- 5.4. The hearing examiner shall issue a proposed determination to the president/superintendent of the institution, or their designee, who cannot be the same person(s) as the Title IX Coordinator or the investigator(s). The institution must then issue a written determination regarding responsibility. To reach this determination, the institution must apply the preponderance of the evidence standard as described in section 2.2.9 above. In reviewing the proposed determination, the institution must give due regard to the hearing examiner's opportunity to observe the witnesses. If the institution rejects or modifies the proposed determination of the hearing examiner, or any part thereof, the institution shall provide the reasons for doing so in writing to the parties. The written determination must include:
 - 5.4.1. Identification of the allegations potentially constituting sexual harassment;
 - 5.4.2. A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
 - 5.4.3. Findings of fact supporting the determination;
 - 5.4.4. Conclusions regarding the application of the institution's code of conduct to the facts;
 - 5.4.5. A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the institution imposes on the respondent, and whether remedies designed to restore or preserve equal access to the institution's education program or activity will be provided by the recipient to the complainant; and
 - 5.4.6. The institution's procedures and permissible bases for the complainant and respondent to appeal petition for administrative review.
- 5.5. The institution must provide the proposed written determination to the parties simultaneously. The proposed determination regarding responsibility becomes final either at the conclusion of the appeal petition for administrative review to the Executive Director provided for in section 6 below, or if ~~an appeal~~ a petition for administrative review is not filed by either party in accordance therewith, the date on which the appeal petition for administrative review would no longer be considered timely. If no appeal petition for administrative review is filed within the timeframe provided in section 6 below, upon the expiration thereof, the proposed determination of the institution shall constitute the final decision on the matter, which is appealable subject to appeal to circuit court in accordance with the provisions of SDCL ch. 1-26.
- 5.6. The Title IX Coordinator is responsible for effective implementation of any remedies.

6. Appeals Petition for Administrative Review

- 6.1. The complainant and respondent may appeal petition for administrative review of an institution's proposed determination regarding responsibility, and an institution's

dismissal of a formal complaint or any allegations therein, by ~~appealing-petitioning~~ in writing to Executive Director of the Board of Regents no later than ten (10) working days after notice of the institution's decision is deemed received. ~~Appeals-Petitions for administrative review~~ under this section are limited those made on the following bases:

- 6.1.1. A procedural irregularity that affected the outcome of the matter;
 - 6.1.2. New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
 - 6.1.3. The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.
- 6.2. ~~An appeal~~A ~~petition~~ filed with the Executive Director must include the party's supporting arguments and documentation. ~~Appeals-Petitions~~ that fail to include supporting arguments and documents or which are not made on one of the bases set forth in section 6.1 above will be rejected.
- 6.3. Within five (5) working days of receiving ~~an appeal~~a ~~petition for administrative review~~, the Executive Director, or their designee, shall provide written notice of the ~~appeal-petition~~ to the other party. That party will have five (5) working days from the date of the notice to submit a written statement to the Executive Director in support of, or challenging, the outcome.
- 6.4. ~~Appeals-Petitions for administrative review~~ will be limited to a review of:
- 6.4.1. The written determination of the institution, which shall include the proposed determination of the hearing examiner;
 - 6.4.2. The verbatim record of the hearing;
 - 6.4.3. Supporting documents submitted as part of the hearing; and
 - 6.4.4. Written statements and/or supporting documentation submitted by the respondent and/or complainant in accordance with the appeal process set forth herein.
- 6.5. After receipt of the non-~~appealing-petitioning~~ party's written statement pursuant to section 6.3 above, or after the expiration of the time provided therefore, the Executive Director will issue a decision on the matter. The Executive Director's review of the ~~appeal-petition~~ will be limited to determining whether: (i) any material decisions lack substantial support in the record, and (ii) any procedural errors materially impacting the integrity of the decision. The Executive Director will not substitute their judgement for that of the institution unless it forms a definite and firm conviction that a mistake has been committed. The Executive Director may affirm the determination of the institution, modify the determination of the institution, in whole or in-part, or return the matter to the institution for reconsideration, additional investigation and/or a new hearing.

- 6.6. The Executive Director will provide their written decision simultaneously to both parties. The decision of the Executive Director shall constitute the final decision on the matter, which is ~~appealable-subject to appeal~~ to circuit court in accordance with the provisions of SDCL ch. 1-26.

7. Informal Resolution

- 7.1. At any point prior to reaching a determination regarding responsibility the institution may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the institution:
- 7.1.1. Provides to the parties written notice disclosing: the allegations, the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;
 - 7.1.2. Obtains the parties' voluntary, written consent to the informal resolution process; and
 - 7.1.3. Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.
- 7.2. An institution may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with this section.
- 7.3. An institution may not require parties to participate in an informal resolution process under this section and may not offer an informal resolution process unless a formal complaint is filed.

8. Title IX Coordinator

- 8.1. Each institution will designate a Title IX Coordinator who will be responsible for carrying out the responsibilities specified in this policy and for monitoring overall compliance with this policy and related federal, state or local legislation, rule or regulation.
- 8.2. Any person may report sex discrimination, including sexual harassment, in person, by mail, by telephone, or by electronic mail, using the contact information listed for an institution's Title IX Coordinator.
- 8.3. Each institution must notify applicants for admission and employment, students, employees, all professional organizations holding professional agreements with the institution, of the name or title, office address, electronic mail address, and telephone number of the employee designated as the institution's Title IX Coordinator, and that the institution does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required by Title IX not to discriminate in such a manner. Each institution must also prominently display the aforementioned contact

information for the institution's Title IX Coordinator, and any applicable Title IX policies, on its website.

- 8.4. Nothing contained in this section 8 should be construed to prohibit or prevent institutions from using shared employees, resources and/or services to carry out and administer this policy, unless this policy and/or applicable federal, state or local legislation, rule or regulation explicitly requires the institution's Title IX Coordinator to perform or be responsible for the same.

9. Retaliation

- 9.1. No institution or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or this policy, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this policy. Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX or this policy, constitutes retaliation. The institution must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder. Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination under this policy.
- 9.2. The exercise of rights protected under the First Amendment does not constitute retaliation prohibited under section 9.1 above.
- 9.3. Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation prohibited under section 9.1 above, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

10. Preservation of Records

- 10.1. The following records must be maintained for a period of seven (7) years:
- 10.1.1. Each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript required pursuant to section 5.1 above, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the institution's education program or activity;

- 10.1.2. Any appeal and the result therefrom;
 - 10.1.3. Any informal resolution and the result therefrom; and
 - 10.1.4. All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. Institutions must make these training materials publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.
- 10.2. For each response required under section 10.1 above, records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment. In each instance, the recipient must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the institution's education program or activity. If an institution does not provide a complainant with supportive measures, then the institution must document the reasons why such a response was not clearly unreasonable in light of the known circumstances. The documentation of certain bases or measures does not limit the recipient in the future from providing additional explanations or detailing additional measures taken.

FORMS / APPENDICES:

None

SOURCE:

BOR August 2020.

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.
3. **Board Policy:** The written policies of the South Dakota Board of Regents contained in the policy manual.
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.
8. **FERPA:** the Family Educational Rights and Privacy Act of 1974, as amended.
9. **Human Rights Violations:** Violence, Harassment, Stalking, ~~Sexual Misconduct~~, Discrimination, and Retaliation under this Student Code not constituting Sexual Harassment as defined by section 2.4.6 below.

- 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.
- 21. Student Code:** The Student Code of Conduct contained in this Board Policy 3:4.
- 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 engage in Harassment.
 - 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 is so severe, or pervasive, and enough to create an objectively offensive and subjectively intimidating, hostile, or demeaning environment that it substantially interferes with ~~effectively denies~~ the individual's ability to participate in or to realize the intended benefits of an Institutional activity or resource; and

2.4.6. Sexual Harassment, which is conduct on the basis of sex that satisfies one or more of the following: subjecting another person to unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature where:

2.4.6.1. An employee of an institutional conditioning the provision of education benefits on participation in unwelcome sexual conduct (i.e., quid pro quo); or

2.4.6.2. Unwelcome conduct that a reasonable person would determine is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the institution's education program or activity; or

2.4.6.3. Sexual assault (as defined in the Clery Act), dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (VAWA), the definitions of which are set forth in BOR Policy 1:17.1.

~~2.4.5.1.—~~

~~2.4.5.2. 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.~~

~~2.4.6.2.4.7.~~ 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.

~~2.4.6.1.2.4.7.1.~~ "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.

~~2.4.6.2.2.4.7.2.~~ "Substantial emotional distress" means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling

~~2.4.7.2.4.8.~~ 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.

~~2.4.7.1.2.4.8.1.~~ 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.

~~2.4.8. 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;~~

~~2.4.8.1. Intimate parts include, but is not limited to, genitalia, groin, breast, buttocks, mouth, or clothing covering the same.~~

~~2.4.8.2. 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.~~

~~2.4.8.3.2.4.8.2.~~ 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.

~~2.4.8.4.2.4.8.3.~~ 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
- 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 of Sexual Harassment

3.1.1. Allegations of sexual harassment against a student shall be addressed exclusively through BOR Policy 1:17.

3.2. Allegations other than Sexual Harassment

~~3.1.1.~~ 3.2.1. All allegations other than sexual harassment against a student shall be addressed as set forth herein. 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.~~ 3.2.1.1. Allegations of Academic Misconduct will be reported to the Student Conduct Officer but are initially addressed through Board Policy 2:33.

3.1.1.2.3.2.1.2. Allegations of Human Rights Violations shall follow the process outlined in Board Policy 1:18.

3.1.1.2.1.3.2.1.2.1. 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.

3.1.1.2.2.3.2.1.2.2. 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.

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

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

3.1.1.2.5.3.2.1.2.5. 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.

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

3.1.2.3.2.2. 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.

3.1.2.1.3.2.2.1. 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.

3.1.2.2.3.2.2.2. 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.

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

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

3.1.3.3.2.3. 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.

3.1.4.3.2.4. 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.

3.1.5.3.2.5. 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.

3.1.6.3.2.6. 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.

3.1.7.3.2.7. 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.

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

3.1.7.2.3.2.7.2. 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.

3.2.3.3. 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.

3.2.1.3.3.1. 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.

3.2.1.1.3.3.1.1. 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.

3.2.1.2.3.3.1.2. 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.

3.2.1.3.3.3.1.3. 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.

3.2.1.4.3.3.1.4. 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.

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

3.2.2.1.3.3.2.1. 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;

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

3.2.2.3.3.3.2.3. 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.

3.2.3.3.3.3. During the interim suspension, the student may be denied access to residence facilities, the campus (including classes), and all other institutional activities or privileges.

3.2.4.3.3.4. A student placed on interim suspension shall be given written notice of interim measures, which shall include:

3.2.4.1.3.3.4.1. The reasons for the interim suspension;

3.2.4.2.3.3.4.2. The parameters of the interim suspension; and

3.2.4.3.3.3.4.3. Information concerning the right to appeal the interim suspension.

3.2.5.3.3.5. Interim Suspension Appeal Process

3.2.5.1.3.3.5.1. The student must submit a written request for a meeting to the Senior Student Affairs Officer.

3.2.5.2.3.3.5.2. 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.

3.2.5.3.3.3.5.3. The Senior Student Affairs Officer has sole discretion regarding interim measures.

3.3.3.4. Informal Resolution

3.3.1.3.4.1. 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.

- 3.3.1.1.3.4.1.1. 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.
- 3.3.1.2.3.4.1.2. 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.
- 3.3.2.3.4.2. Informal resolution may be reached where:
- 3.3.2.1.3.4.2.1. The parties involved mutually agree to a full resolution of the alleged misconduct that is acceptable to the Student Conduct Officer.
- 3.3.2.1.1.3.4.2.1.1. This must be documented in writing and signed by the complainant, respondent, and Student Conduct Officer.
- 3.3.2.2.3.4.2.2. The respondent waives a formal hearing by admitting to the misconduct and accepting the proposed conduct sanctions.
- 3.3.2.2.1.3.4.2.2.1. This must be documented in writing and signed by the respondent and the Student Conduct Officer.
- 3.3.2.2.2.3.4.2.2.2. This type of informal resolution is not available in matters involving allegations of Human Rights violations.
- 3.3.3.3.4.3. 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.
- 3.3.3.1.3.4.3.1. This must be documented in writing and signed by the respondent and the Student Conduct Officer.
- 3.3.3.2.3.4.3.2. In matters involving allegations of Human Rights violations, the complainant must also agree in writing to this partial informal resolution.
- 3.3.4.3.4.4. 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.
- 3.3.5.3.4.5. 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.
- 3.3.6.3.4.6. 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~~3.4.6.1. 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.

3.4.3.5. Formal Resolution

~~3.4.1~~3.5.1. If the alleged misconduct is not fully resolved through informal resolution, any unresolved matter proceeds to a hearing.

~~3.4.2~~3.5.2. The composition of the Student Conduct Panel shall be determined as follows:

~~3.4.2.1~~3.5.2.1. 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~~3.5.2.1.1. Option 1 – only the Student Conduct Officer; or

~~3.4.2.1.2~~3.5.2.1.2. 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~~3.5.2.2. 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~~3.5.2.3. 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~~3.5.3. Hearings shall be conducted by a Student Conduct Panel according to the following guidelines:

~~3.4.3.1~~3.5.3.1. 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~~3.5.3.2. 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;

3.4.4.3.5.4. _____ 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.

3.4.5.3.5.5. _____ 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.

3.4.6.3.5.6. _____ 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.

3.4.7.3.5.7. _____ 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.

3.4.8.3.5.8. _____ The Student Conduct Officer shall record the audio of the hearing.

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

3.4.9.1.3.5.9.1. _____ 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.).

3.4.9.2.3.5.9.2. 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.

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

3.4.9.3.1.3.5.9.3.1. 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.

3.4.9.3.2.3.5.9.3.2. 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.

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

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

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

3.4.9.3.6.3.5.9.3.6. 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.

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

3.4.9.4.1.3.5.9.4.1. 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.~~3.5.9.4.2. 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.~~3.5.9.4.3. The Student Conduct Panel will then ask questions of the witness.

~~3.4.9.4.4.~~3.5.9.4.4. 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.~~3.5.9.4.5. The Chair will ask the witness any questions provided by the complainant that the Chair determines to be relevant.

~~3.4.9.4.6.~~3.5.9.4.6. 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.~~3.5.9.5. 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.~~3.5.9.6. 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.~~3.5.10. 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.~~3.5.11. 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.~~3.5.12. 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.~~3.5.12.1. 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.~~3.5.12.2. 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.~~3.5.13. 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.~~3.5.13.1. In matters involving allegations of Academic Misconduct, the Chair's written findings shall also be provided to the faculty member.

~~3.4.13.2.~~3.5.13.2. In matters involving allegations of Human Rights violations, the complainant must also be provided information about appeal rights.

~~3.4.14.~~3.5.14. 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.~~3.5.14.1. 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.~~3.5.14.2. 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.~~3.5.14.3. Except as required by law, the institution shall not be required to change the form in which the record is maintained.

~~3.5.3.6.~~ Sanctions

~~3.5.1.~~3.6.1. Individual Conduct Sanctions

~~3.5.1.1.~~3.6.1.1. 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.~~3.6.1.1.1. 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.~~3.6.1.1.2. 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.~~3.6.1.1.3. 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.~~3.6.1.2. 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.~~3.6.1.3. 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.~~3.6.1.3.1. 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.~~3.6.1.3.2. 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.~~3.6.1.3.3. 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.~~3.6.1.3.4. 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.~~3.6.1.4. 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.~~3.6.1.5. 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.

3.5.1.6.3.6.1.6. 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.

3.5.1.7.3.6.1.7. 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.

3.5.1.8.3.6.1.8. Students enrolled in one institution shall be held accountable for their conduct while visiting or enrolled at all other institutions. Students may be required, as a condition of continued enrollment, reenrollment, or transfer or admission to another institution, 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.

3.5.1.8.1.3.6.1.8.1. 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.

3.5.1.8.2.3.6.1.8.2. 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.

3.5.2.3.6.2. Organizational Conduct Sanctions

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

- Those conduct sanctions listed above in Section C.3.5.1.

3.6.3.7. Appeals3.6.1.3.7.1. Appeal as a Matter of Right

3.6.1.1.3.7.1.1. 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.

3.6.1.2.3.7.1.2. 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.

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

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

3.6.1.2.3.3.7.1.2.3. 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

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

3.6.1.3.3.7.1.3. 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)

3.6.1.4.3.7.1.4. 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.

3.6.1.5.3.7.1.5. 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 as soon as practicable. The Senior Student Affairs Officer has sole discretion to adopt or reject the recommendation.

3.6.1.5.1.3.7.1.5.1. 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.

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

3.6.1.5.3.3.7.1.5.3. 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.

3.6.1.6.3.7.1.6. The Senior Student Affairs 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.

3.6.1.6.1.3.7.1.6.1. 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.

3.6.2.3.7.2. Appeal to the President of the Institution

3.6.2.1.3.7.2.1. 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.

3.6.2.2.3.7.2.2. 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.

3.6.2.3.3.7.2.3. 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.

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

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

3.6.2.3.3.3.7.2.3.3. 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

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

3.6.2.4.3.7.2.4. 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.

3.6.2.5.3.7.2.5. 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.

3.6.2.6.3.7.2.6. 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.

3.6.2.6.1.3.7.2.6.1. 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.

3.6.3.3.7.3. Appeal to the Board of Regents

3.6.3.1.3.7.3.1. 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.

3.6.3.2.3.7.3.2. 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.

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

3.6.3.4.3.7.3.4. 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.

3.6.3.4.1.3.7.3.4.1. 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.

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

3.6.3.4.3.3.7.3.4.3. 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.

~~3.6.3.5.3.7.3.5.~~ 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.

~~3.6.3.5.1.3.7.3.5.1.~~ The Executive Director will have fifteen (15) working days within which to attempt, at his or her discretion, a resolution through informal means.

~~3.6.3.5.2.3.7.3.5.2.~~ 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.

~~3.6.3.5.2.1.3.7.3.5.2.1.~~ Contested case proceedings may be conducted under protective orders entered pursuant to SDCL §§ 1-26-19 and 15-6-26(c).

~~3.6.3.5.2.2.3.7.3.5.2.2.~~ 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:

BOR February 1969; RR, 12:06, 1977; BOR 1980; BOR April 1987; BOR June 1990; BOR December 1994; BOR October 1996; BOR December 1999; BOR March 2006; BOR December 2006; BOR August 2009; BOR August 2011; BOR December 2013; BOR June 2014; BOR August 2015; BOR May 2016; BOR August 2016; BOR December 2017; BOR December 2018; September 2019 (Clerical); [BOR August 2020](#).

SOUTH DAKOTA BOARD OF REGENTS

Policy Manual

SUBJECT: Human Rights Complaint Procedures

NUMBER: 1:18

1. Purpose of Regulations

The South Dakota Board of Regents has a legal obligation to implement federal, state, and local laws and regulations prohibiting discrimination in employment, in the delivery of educational services and in the other activities carried on under its authority. Inherent in its function as constitutional governing board for publicly funded higher education is the additional duty to assure all individuals in its employ or attending institutions under its jurisdiction equal access to the employment and educational opportunities it controls. ~~The South Dakota Board of Regents recognizes that discrimination based on archaic and overbroad assumptions about the relative needs and capacities of certain categories of persons forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities. It thereby both deprives persons of their individual dignity and denies society of the benefits of wide participation in political, economic, educational, and cultural life.~~ These human rights complaint procedures have been adopted to afford individuals a means to protect the rights guaranteed to them under federal, state, and local laws and regulations and to vindicate the deprivation of personal dignity that accompanies denials of equal opportunity.

2. Scope of Regulations

These procedures apply to complaints alleging discrimination, other than sexual harassment which is covered by BOR Policy 1:17, on the basis of sex, race, color, creed, religion, national origin, ancestry, citizenship, gender, gender identity, transgender, sexual orientation, age, or disability, genetic information, veteran status, other status that may become protected under law against discrimination, ~~or any other grounds unrelated to reasonable employment, educational or programmatic expectations. These procedures also apply to allegations of sexual harassment or other forms harassment proscribed under Board Policy 1:17 and to allegations of dating violence, sexual assault, domestic violence or stalking as proscribed by Board Policy 1:17.1.~~ If the accused is a student (as defined in Board Policy 3:4), the application of this Board Policy 1:18 must be done in a way that is consistent with the requirements found in Board Policy 3:4.

3. Discrimination

Discrimination and cognate forms of that term when used in this policy include all violations of rights guaranteed under federal, state, or local antidiscrimination laws and regulations except violations of sexual harassment as defined in BOR Policy 1:17, which violations shall be subject to the provisions contained therein. Also, discrimination includes any

allegation, other than allegations constituting sexual harassment under BOR Policy 1:17, that, because of a person's sex, race, color, creed, religion, national origin, ancestry, citizenship, gender, gender identity, transgender, sexual orientation, age, or disability, genetic information, veteran status or any other status that may become protected under law against discrimination ~~or other grounds unrelated to reasonable employment, educational or programmatic expectations,~~ a person has been subjected to disparate treatment in terms and conditions of employment, in the delivery of educational services, programs or activities, or with respect to the participation in the activities of officially recognized organizations. Allegations, reports or complaints involving sexual harassment shall be governed by, and subject to, BOR Policy 1:17. ~~, or sexual assault or other animus-based assault, brought under Board Policy 1:17(2)(B) and allegations of sexual assault, domestic violence or stalking as proscribed by Board Policy 1:17.1 will also constitute discrimination complaints within the meaning of these regulations, notwithstanding the fact that they may not otherwise be encompassed hereunder.~~

4. Proof of Discrimination

Except as otherwise provided under federal, state, and local law, proof of discrimination under these regulations will conform to the federal standards employed to prove disparate treatment. These regulations will neither eliminate nor restrict express exceptions to antidiscrimination laws and regulations provided under federal, state or local law, nor will they prohibit conduct, action or policies based upon such legitimate nondiscriminatory reasons as are recognized under federal antidiscrimination law.

- A. 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 discrimination.

5. Complaints

Complaints include all allegations or reports of discrimination by a person, persons, or organization subject to this policy against a person protected under this policy.

- A. All organizations recognized by an institution are subject to this policy, except insofar as the application of the policy would impermissibly invade the members' freedom of intimate association or freedom of expressive association.
 1. Challenges to the applicability of these regulations will be referred to an administrative officer designated by the institutional chief executive officer as provided in section 13(A) below. Questions about the applicability of this chapter to organizations will be resolved pursuant to the provisions of section 13 and following.
 2. If an organization challenges the application of these policies to it or to its activities, resolution of the challenge must address the following issues:

- a. Will application of the regulations serve a compelling state interest?
 - i. The Board has determined that it has a compelling interest in applying these regulations to individuals and organizations whose activities affect the ability of others to participate in and to enjoy the benefits of institutional employment, educational services or the activities of officially recognized organizations, so this issue may ordinarily be resolved through reference to sections 1 and 2 above.
- b. Application of the regulations is unrelated to the suppression of ideas.
 - i. This issue requires a factual inquiry into the purpose of applying the regulations to particular organizations. An institution may not apply the regulations in order to suppress a particular point of view. The mere dissemination of ideas, however offensive to good taste and common decency such ideas may be, does not afford grounds for regulation.
- c. Can the state's compelling interest be achieved through means significantly less restrictive of associational freedoms?
 - i. This issue requires a two-step analysis. First, it must be determined whether application of the regulations would infringe associational rights of organization members. If so, a determination must be made whether some less intrusive measures might suffice to protect the Board's compelling interests.
 - (a) The following principles will be used to determine whether application of the Board's policies to an organization might invade the association rights of organization members:
 - (1) Freedom of intimate association refers to those relationships that presuppose deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences and beliefs, but also distinctively personal aspects of one's life.

Factors that suggest that freedom of intimate association is implicated 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.

(2) Freedom of expressive association is implicated where an organization is created for specific expressive purposes and the organization will be significantly inhibited in advocating its desired viewpoints if it cannot restrict its membership based on sex race, color, creed, religion, national origin, ancestry, citizenship, gender, gender identity, transgender, sexual orientation, age, disability, genetic information or veteran status any other status that may become protected under law against discrimination.

6. **Complainants**

Complainants includes persons who have allegedly been subjected to discrimination, whether they have initiated a complaint with the ~~Title IX~~/EEO Coordinator or whether they were identified as victims in a report submitted by a third party to the ~~Title IX~~/EEO Coordinator.

7. **~~Title IX~~/EEO Coordinator**

Each institution will designate a ~~Title IX~~/EEO Coordinator who will be responsible for administering a centralized complaint filing system; for analyzing trends revealed by complaints, investigations and enforcement activities; and for monitoring on behalf of the institution overall compliance with this policy and related federal, state or local legislation and regulation.

- A. The institution may designate one or more deputy Coordinators to assist the ~~Title IX~~/EEO Coordinators. Such deputies will be authorized to receive complaints and will have full power to conduct reviews and investigations as directed by the institutional ~~Title IX~~/EEO Coordinator.

- B. Whenever the phrase “~~Title IX~~/EEO Coordinator” appears in this policy and other policies in connection with administering an individual complaint, it will be understood to include both the Coordinator and any deputy Coordinators who may have been assigned responsibilities to administer the matter.
- C. The ~~Title IX~~/EEO Coordinator will assure that persons entrusted with the investigation of complaints have been undergone annual training in the conduct of investigations ~~under this policy, including investigations into allegations relating to dating violence, domestic violence, sexual assault and stalking, as defined in Board Policy 1:17.1,~~ in a manner that protects the safety of victims and promotes accountability. The ~~Title IX~~/EEO Coordinator will also assure that persons entrusted with investigations are unbiased and disinterested.
1. In the event that a complainant or accused alleges that an investigator is biased or has a conflict of interest, the ~~Title IX~~/EEO Coordinator will review the evidence of bias or interest, and will reassign responsibility for the investigation when reasonable, well-informed observer of the administrative process would believe that there may be an appearance of bias or conflict, even though none actually exists.
 - a. When determining whether there are reasonable, objective grounds for concluding that an appearance of bias or conflict of interest exists, the ~~Title IX~~/EEO Coordinator will consider, without limitation, evidence of
 - i. personal bias or prejudice against the complainant or accused or personal knowledge of the disputed facts
 - ii. prior involvement in the incident or institutional response to the reports,
 - iii. economic interests, including interests of immediate family members, that may be substantially affected by the outcome of the investigation, or
 - iv. close relationships, either directly or indirectly through immediate family members, with a complainant, an accused or witnesses involved in the proceeding.
- D. The ~~Title IX~~/EEO Coordinator will assure that persons entrusted with the conduct of disciplinary proceedings have been undergone annual training in the conduct of disciplinary proceedings ~~, including proceedings involving allegations relating to dating violence, domestic violence, sexual assault and stalking, as defined in Board Policy 1:17.1,~~ in a manner that protects the safety of victims and promotes accountability.

1. In the event that a complainant or accused alleges that a person entrusted with the conduct of disciplinary proceedings is biased or has a conflict of interest, the ~~Title IX~~/EEO Coordinator will review the evidence of bias or interest, and will submit a recommendation to the institutional chief executive officer whether responsibility for the disciplinary proceeding should be reassigned.
2. In order to discourage abuse of the reassignment process, reassignment will not be routine, but may be proper where reasonable, well-informed observer of the administrative process would believe that there may be an appearance of bias or conflict, even though none actually exists
 - a. When determining whether there are reasonable, objective grounds for concluding that an appearance of bias or conflict of interest exists, the ~~Title IX~~/EEO Coordinator will consider, without limitation, evidence of
 - i. personal bias or prejudice against the complainant or accused or personal knowledge of the disputed facts
 - ii. prior involvement in the incident or institutional response to the reports,
 - iii. economic interests, including interests of immediate family members, that may be substantially affected by the outcome of the investigation, or
 - iv. close relationships, either directly or indirectly through immediate family members, with a complainant, an accused or witnesses involved in the proceeding.

8. Non-retaliation

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.

- A. The right to be free from harassment, interference, intimidation or retaliation is ongoing, and the ~~Title IX~~/EEO Coordinator will inform the complainant, the accused and all persons involved in the investigation or disposition of complaints of the right and provide them with information detailing how they may report violations.

9. Duty to Cooperate

All students and employees whose assistance is needed in the investigation of a complaint or in the course of disciplinary action will be required to cooperate with the ~~Title IX~~/EEO Coordinator, ~~any designated Title IX Deputy,~~ and other parties who are duly authorized to investigate or to discipline. Persons who are accused of having engaged in discriminatory conduct will be entitled to such cooperation when necessary to obtain witnesses in any formal disciplinary proceedings that may be initiated. Where necessary, adjustments will be made to work schedules, classroom schedules, and other academic or

employment obligations.

10. Confidentiality

Reasonable efforts will be made to maintain the confidentiality of the complaints. Complainants and witnesses must understand that it may become necessary to disclose their identities, either directly or indirectly, in the course of investigation. Institutions are required to respond to and investigate allegations of discrimination.

- A. Even if the complainant requests confidentiality or asks the complaint not be pursued, institutions will; 1) take all reasonable steps to investigate and respond to the complaint to the extent possible consistent with the alleged victim's wishes; 2) notify the alleged victim that the failure of the alleged victim to pursue a complaint may limit the institutions' ability to fully address the matter; and 3) report the incident to local law enforcement authorities if it appears to involve a crime that is required to be reported or a health or safety emergency as defined by state or federal law requires such reporting.
- B. Where formal disciplinary proceedings are instituted, the party alleged to have engaged in the conduct will be given the names of the complaining party and the witnesses whose testimony will be used to support the complaint, together with the substance of their allegations.

~~1. Where the complaint involved conduct proscribed under Board Policy 1:17.1, both complainant and accused will be provided access to any information that will be used during informal and formal disciplinary meetings and hearings.~~

- C. Disciplinary hearings at the institutional level ordinarily are not open to the public, but, in some instances, persons accused of misconduct may have appeal rights that could result in a public hearing. The ~~Title IX~~/EEO Coordinator will inform complainants whether the accused has a right to a public hearing under South Dakota law and at what point that hearing may occur. In the event of a public hearing, the pleadings, motions, documents and recorded testimony assembled at or incidental to the hearing will be public records.
- D. ~~Where the complaint involved conduct proscribed under Board Policy 1:17.1, and, upon request, both complainants and accuseds may bring advisors of their choosing to any institutional disciplinary proceeding or any related meeting or proceeding that they are required or permitted to attend. Both complainants and accuseds will be given written notice of meetings at which one or the other or both may be present and accompanied by their chosen advisors. The notice will be given with reasonable time to allow complainants and accuseds opportunity to make arrangements for the advisor to attend, but the institution need not cancel or delay a meeting simply because an advisor could not be present, so long as the institution gave timely, written notice of the meeting. Electronic notification may be used if permitted under the relevant disciplinary procedures.~~

E. Where complaint results in a formal disciplinary action, the complainant will be informed in writing whether the institutional procedures resulted in a finding of discrimination.

~~1. Where the complaint involved conduct proscribed under Board Policy 1:17(2)(B), the complainant will be informed of the finding and sanction.~~

~~2. Where the complaint involved conduct proscribed under Board Policy 1:17.1, both complainant and accused will be informed of any initial, interim, and final decision involving sanctions, the rationale for the decision and, where sanctions are imposed, the sanction imposed.~~

~~a. Personally identifying information about third party student witnesses will be redacted to the extent feasible.~~

11. Reports to Law Enforcement

In keeping with the requirements of SDCL § 22-11-12, once the ~~Title IX~~/EEO Coordinator acquires knowledge, that is not privileged, of the commission of a felony, the Coordinator will immediately disclose the felony, including the name of the perpetrator, if known, and all of the other relevant known facts to appropriate law enforcement authorities.

A. The ~~Title IX~~/EEO Coordinator, in consultation with appropriate institutional officials, will analyze each report of sexual assault, domestic violence or stalking to determine if the circumstances require a report under SDCL § 22-11-12 or present health or safety emergency. In such case, information relating to the complaint may be disclosed to appropriate persons including law enforcement personnel.

B. Reports of crimes may be filed with law enforcement with or without the assistance of the institutions. The ~~Title IX~~/EEO Coordinator will report complaints of sexual violence to law enforcement agencies when requested to do so by an alleged victim.

C. A campus ~~Title IX~~/EEO Coordinator may disclose the fact and nature of sexual assault, domestic violence or stalking to local law enforcement officials in accordance with local law enforcement agreements.

D. Timely warnings or emergency notifications issued under the Clery Act related to sexual assault will also be sent to local law enforcement agencies.

12. Timing Requirements

Timing requirements contained in this policy fix standards for the investigation and preliminary phases of complaint management. Where an investigation results in the initiation of formal disciplinary procedures, the timelines set forth in those procedures will govern.

Deadlines stipulated for action may be relaxed where, in the judgment of the ~~Title IX~~/EEO Coordinator or other administrative officer having responsibility for the complaint, this will help to achieve the purposes of the regulations. Investigation and responses related to allegations of ~~sexual abuse, domestic violence~~, stalking or conduct constituting a crime of violence may be delayed to the extent required for law enforcement to investigate the facts of the case.

Deadlines may also be extended upon the mutual agreement of the parties.

Deadlines will be extended if necessary to accommodate holidays and vacation periods that form part of the academic calendar or days on which an institution is closed for weather or other emergency purposes. Working days are those on which the offices of the institution or Board are open for business.

Extensions will not exceed the bounds allowed by applicable law and regulations.

13. Initiation of Complaint

A. All inquiries, allegations, reports, or complaints relating to discriminatory conduct, ~~including conduct proscribed by Board Policies 1:17 and 1:17.1~~ will be forwarded to the ~~Title IX~~/EEO Coordinator for response or investigation.

1. Persons who believe that they have been subjected to discrimination may bring complaints under these procedures by contacting the ~~Title IX~~/EEO Coordinator. Collective bargaining agents may also initiate complaints hereunder, but only where they would have standing to do so under state or federal law. Collective bargaining agents will not be entitled to exercise procedural rights granted to complainants.
2. A person who believes that he or she has been the victim of discrimination may also lodge a complaint with any administrator or, in the case of students, also with any faculty member. Complaints lodged with such individuals will be referred to the ~~Title IX~~/EEO Coordinator for investigation. This provision will not be interpreted to require individuals to refer to the ~~Title IX~~/EEO Coordinator accusations addressed to them directly by aggrieved persons.
3. Third party reports of discrimination and conduct observed directly that may be discriminatory should be investigated as provided herein.
4. Any campus employee informed of an allegation of sexual abuse, domestic violence or stalking with a clear connection to institutional programs, personnel or students must promptly notify the ~~Title IX~~/EEO Coordinator.

Employees serving in certain professional roles which enjoy a statutory privilege are required to disclose information only in accordance with applicable statutory authority.

- B. Upon receipt of inquiries, allegations, reports, or complaints relating to discriminatory conduct ~~or sexual violence~~, the ~~Title IX~~/EEO Coordinator will respond or investigate. If the accused is a student (as defined in Board Policy 3:4), the investigation must be done consistent with the requirements found in Section 4.A.b. of Board Policy 3:4.
1. The ~~Title IX~~/EEO Coordinator will have the responsibility to advise the individual or group of the procedures for investigating and taking action upon the complaint.
 - a. The ~~Title IX~~/EEO Coordinator will advise the complainant of any counseling or support groups that are available for persons who feel that they have been subjected to discriminatory conduct and their options to avoid contact with the alleged perpetrator pending the results of the investigation and any related proceedings.
 - b. The complainant will also be informed of the right to file other applicable administrative or criminal complaints and will not be dissuaded from doing so.
 - c. Complainants will be informed that the ~~Title IX~~/EEO Coordinator will investigate allegations and take appropriate action, even if the complainant does not wish to pursue the disciplinary process, but that any response by the University may be hindered by the complainant's wishes for anonymity or inaction or both.
 2. Having provided this information to the complainant, the ~~Title IX~~/EEO Coordinator will record the factual basis for the complaint.
- C. If the complaint is referred to the ~~Title IX~~/EEO Coordinator by another administrator or faculty member, the ~~Title IX~~/EEO Coordinator will contact the complainant within five working days to provide information about procedures and resources and to record an initial statement of the factual basis for complaint.
- D. Upon obtaining a statement of the factual basis of the complaint, the ~~Title IX~~/EEO Coordinator will initiate an investigation of the complaint to determine whether there is a reasonable basis to believe that the complainant was subjected to discrimination or sexual violence. The investigation will be completed in a timely manner.
- E. ~~If the complaint involves an alleged violation of Board Policies 1:17 or 1:17.1,~~ The ~~Title IX~~/EEO Coordinator will determine what, if any, interim measures may be available and appropriate to protect the interests of the complainant and the accused during the investigation. If the accused is a student (as defined in Board Policy 3:4), any interim measures must be done consistent with the requirements found in Section

4.B. of Board Policy 3:4.

1. In concert with the senior institutional officer whose administrative responsibilities include supervision of the person accused of misconduct, the ~~Title IX~~/EEO Coordinator will take action to assure that (a) the complainant is protected from retaliation for having made a complaint or responded to inquiries initiated in response to a complaint, (b) necessary or appropriate interim measures are taken to guard against a recurrence of the conduct that gave rise to the complaint, (c) requests for the complainant's academic, living, transportation, and working situation are reviewed case by case through an interactive process and granted if they are reasonably available and (d) the complainant is informed of the options to request protection or accommodation and how to request such assistance.
2. When selecting interim measures, the ~~Title IX~~/EEO Coordinator and senior institutional officer will consider nature and circumstances of the misconduct alleged, together with the strength of prima facie evidence and any indications relative to the risk of recurrence, and will prefer measures that minimize the relative inconvenience to the complainant.
3. The ~~Title IX~~/EEO Coordinator will meet with the complainant or victim within three working days after receipt of the complaint or after meeting with the victim to discuss the proposed interim measures that. Any interim measures will be put into place in a timely manner.

14. Procedure Where ~~Title IX~~/EEO Coordinator Determines That There is Not a Reasonable Basis to Proceed

- A. If the ~~Title IX~~/EEO Coordinator determines that there is not a reasonable basis for believing that complainant has been subjected to discrimination ~~or sexual violence~~, the ~~Title IX~~/EEO Coordinator will inform the complainant of the conclusion ~~and will proceed as set forth in Board Policy 1:17(3)(B)(3)~~.
- B. If the complainant believes that the ~~Title IX~~/EEO Coordinator erred in concluding that the complaint did not have a reasonable basis, the complainant may petition the institutional chief executive officer for a review of that determination. The petition must be received within fifteen working days after the complainant has been notified that the ~~Title IX~~/EEO Coordinator has determined that there is no reasonable basis to believe that the complainant was subjected to discrimination. The institutional chief executive officer, either personally or through a delegatee, will review the investigation file to determine whether the conclusions of the ~~Title IX~~/EEO Coordinator are based upon substantial evidence. The chief executive officer will respond in writing to the complainant and the accused at the conclusion of this review. If the chief executive officer concludes that the evidence supports the conclusions of the ~~Title IX~~/EEO Coordinator, the response will summarize the findings that lead to that conclusion to the extent that this may be done without compromising the privacy of third parties, persons accused of misconduct or the

complainant.

- C. The decision of the chief executive officer is not subject to an appeal as a matter of right. If the complainant remains dissatisfied with the determination, the complainant may request that the Executive Director review the conclusions reached by the chief executive officer and to advise the Board pursuant Board Policy 1:6(4). The request for such a review should identify with specificity the factual findings that the complainant believes to be erroneous or the conclusions that the complainant believes mistake or misapply the requirements of Board Policy or governing law.

15. Procedures Where ~~Title IX~~/EEO Coordinator Determines That There is a Reasonable Basis to Proceed

- A. If the ~~Title IX~~/EEO Coordinator concludes that there is a reasonable basis for the complaint, the ~~Title IX~~/EEO Coordinator will notify the vice president or comparable chief administrative officer or their appropriate designee, having supervisory responsibility over the person or persons alleged to have engaged in discriminatory conduct ~~or sexual violence~~. The ~~Title IX~~/EEO Coordinator will provide copies of all investigatory materials to that administrative officer. Thereupon, that administrative officer will participate in resolution of the matter. If the complaint is lodged against officially recognized organizations or against members of such entities who are not otherwise affiliated with the institution, the institutional chief executive officer will designate a person to carry out the responsibilities established hereunder.
- B. The ~~Title IX~~/EEO Coordinator and the administrative officer may attempt an informal resolution of the dispute.
1. If the matter appears to them to lend itself to informal resolution, they will meet with the complainant to determine whether the complainant is willing to pursue an informal resolution and how the necessary discussion with the person accused of misconduct may be structured.

~~2. In cases involving allegations of conduct violating Board Policy 1:17.1 mediation will not be used as an informal dispute mechanism and in such cases, the complainant will be notified of their right to stop the informal process and initiate the formal resolution process at any time.~~

23. If an informal resolution is effected, the terms of the resolution will be reduced to writing and signed by the complainant. The University will document the administration of any agreed upon discipline or remedial action through such means as are appropriate and customary under the relevant disciplinary procedures or are in keeping with other relevant administrative practices. Copies of the signed document will be preserved in the complaint file and as otherwise necessary to give effect to the terms of

the resolution.

- C. If the ~~Title IX/EEO~~ Coordinator and administrative officer elect not to attempt an informal resolution, or an informal resolution is not effected, ~~or the complainant in a matter arising under Board Policy 1:17.1 elects to pursue a formal resolution process,~~ the administrative officer will initiate disciplinary proceedings against the person alleged to have engaged in discriminatory conduct.
- D. The administrative officer will institute formal disciplinary proceedings within fifteen working days from the time that the file has been submitted to the officer, unless an informal resolution has been effected or the complainant and the person alleged to have engaged in discriminatory conduct or sexual violence have agreed in writing to extend the time allowed to attempt an informal resolution.
- E. The disciplinary procedures followed will be those designated for persons in the classification to which the person or persons alleged to have engaged in discriminatory conduct belong. ~~Faculty members will be subject to discipline consistent with the COHE contract or the Regents Policy Manual depending upon their unit or non-unit status.~~ CSA employees will be subject to discipline under CSA regulations. Exempt staff will be subject to discipline under exempt regulations. Students will be subject to discipline under the institutional student disciplinary code. If no disciplinary procedures otherwise exist, the institutional chief executive officer will appoint a hearing examiner to conduct a hearing to determine the facts and to recommend to the institutional chief executive officer what disposition should be made of the matter.

16. Procedures for Disciplining Persons Found to Have Committed Acts of Discrimination

- A. Discipline of persons found to have committed acts of discrimination will be determined and carried out in accordance with the relevant disciplinary procedures.

17. Disciplinary Action

- A. If the discriminatory conduct is admitted or, as a result of the disciplinary proceedings, proven, the administrative officer who initiated the disciplinary procedures will determine what disciplinary action, if any, will be taken to remedy the effects of the discriminatory conduct. In selecting a discipline or action, the administrative officer will consider (1) the extent to which the party charged exercised undue influence over the complainant by virtue of the office and authority entrusted to the party charged or otherwise, (2) the gravity of the offense established, and (3) the likelihood that the discipline or action selected will be effective to avoid a recurrence of the conduct. The discipline may include suspension or termination of an individual's employment, enrollment or right to enter institutional grounds or facilities or to attend or participate in institutional activities.
- B. Once the administrative office has selected a proposed discipline or action, the party charged will be notified of the proposed discipline or action at such time and

in such a manner as provided under the applicable grievance procedures. The complainant will be notified of the proposed discipline at the same time. The discipline or action will not become finalized if the complainant timely petitions the institutional chief executive officer for a review.

- C. If the complainant is dissatisfied with the discipline or action selected, the complainant may petition the institutional chief executive officer for a review of that determination. The petition must be received within five working days after the complainant has been notified of the proposed discipline. The institutional chief executive officer, either personally or through a delegate, will review the investigation files, hearing records and findings, and other documents relating to the matter to determine whether a discipline provided is commensurate with the gravity of the offense established, considering the relation to the parties, and whether it may reasonably be thought to assure that the conduct will not recur. The determination of the institutional chief executive officer will not be subject to further review.
1. Disciplinary measures themselves may involve, depending upon the specific facts and circumstances, separating the parties, placing limitations on contact between the parties, making alternative academic, working or housing arrangements, warnings or reprimands, required training or current substance abuse treatment, suspension from classes, suspension from duties with or without pay, reassignment, demotion or discharge from employment or expulsion from the university system.

18. Preservation of Records

All records and writings developed in the course of the formal disciplinary hearings will be preserved in the complaint file and in other records as required under related grievance policies.

SOURCE:

BOR October 1991; BOR October, 1992; BOR January 1995; BOR March-April 2011; BOR December 2013; BOR June 2015; BOR August 2015; BOR December 2017; [BOR August 2020](#)

SOUTH DAKOTA BOARD OF REGENTS

Policy Manual

SUBJECT: Prevention of Dating Violence, Domestic Violence, Sexual Assault and Stalking

NUMBER: 1:17.1

1. State and federal policies proscribe dating violence, domestic violence, sexual assault and stalking, often treating such actions as criminal offenses. These forms of misconduct interfere with the ability of victims to realize the benefits of the educational, cultural and social programs offered by the universities and special schools. Any student, employee or other person participating in institutional activities or using institutional facilities who engages in conduct that would constitute dating violence, domestic violence, sexual assault or stalking, as defined in this policy, or sexual assault, domestic abuse or stalking as defined under South Dakota law, in circumstances that implicate the person's fitness to study, work, participate in the functions or use the facilities at the institution may be expelled, terminated, denied further participation in institutional programs or use of institutional facilities, or otherwise disciplined, upon notice and opportunity to be heard. The decision to pursue disciplinary charges of dating violence, domestic violence, sexual assault or stalking will not preclude pursuit of additional, related charges arising from the same facts.

2. Each institution will review reports of such conduct to determine whether the employee or student be disciplined, and each institution will establish programs designed to help prevent dating violence, domestic violence, sexual assault or stalking;
 - A. by holding perpetrators accountable for their conduct;
 - B. by encouraging victims to report incidents; and
 - C. by informing students, staff and visitors of:
 - 1) Board policies proscribing, dating violence, domestic violence, sexual assault or stalking, including procedures compliant with Board Policies [1:17](#) and [1:18](#) to enforce those policies;
 - 2) strategies individuals may use to protect themselves;
 - 3) contact information for institutional officials responsible for investigating reports of, dating violence, domestic violence, sexual assault or stalking;
 - 4) institutional resources to assist in reporting incidents and preserving evidence;

and

5) institutional and community resources to assist victims.

3. As used in this policy,

A. Dating violence means violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.

1) The existence of such a relationship shall be determined based on the reporting party's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

2) For the purposes of this definition,

a) Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.

b) Dating violence does not include acts covered under the definition of domestic violence.

B. Domestic violence means

1) a felony or misdemeanor crime of violence committed

a) By a current or former spouse or intimate partner of the victim;

b) By a person with whom the victim shares a child in common;

c) By a person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner;

d) By a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred, or

e) By any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.

2) For purposes of this section violent crimes are determined under the Federal Bureau of Investigation's (FBI) Uniform Crime Reporting (UCR) program, which classifies four offenses involving involve force or threat of force as

violent crimes: murder and nonnegligent manslaughter, rape, robbery, and aggravated assault, as set forth in 34 C.F.R. part 668 Appendix A to Subpart D of Part 668—Crime Definitions in Accordance With the Federal Bureau of Investigation's Uniform Crime Reporting Program:

- a) Murder and Nonnegligent Manslaughter means the willful (nonnegligent) killing of one human being by another.
- b) Rape means the penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.
- c) Robbery means the taking or attempting to take anything of value from the care, custody, or control of a person or persons by force or threat of force or violence or by putting the victim in fear.
- d) Aggravated Assault means an unlawful attack by one person upon another for the purpose of inflicting severe or aggravated bodily injury. This type of assault usually is accompanied by the use of a weapon or by means likely to produce death or great bodily harm. (It is not necessary that injury result from an aggravated assault when a gun, knife, or other weapon is used which could and probably would result in serious personal injury if the crime were successfully completed.)

C. Sexual assault means any offense that constitutes rape, fondling, incest, or statutory rape:

- 1) Rape has the same meaning as given above in § 3(B)(2)(b).
- 2) Fondling means the touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity.
- 3) Incest means sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by SDCL § 25-1-6, which provides that:

Marriages between parents and children, ancestors and descendants of every degree, and between brothers and sisters of the half as well as the whole blood, and between uncles and nieces, or aunts and

nephews, and between cousins of the half as well as of the whole blood, are null and void from the beginning, whether the relationship is legitimate or illegitimate. The relationships provided for in this section include such relationships that arise through adoption.

- 4) Statutory Rape means sexual intercourse with a person who is under the statutory age of sixteen.

D. Stalking means:

- 1) Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:
 - a) Fear for the person's safety or the safety of others; or
 - b) Suffer substantial emotional distress.
- 2) For the purposes of this definition:
 - a) 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.
 - b) Reasonable person means a reasonable person under similar circumstances and with similar identities to the victim.
 - c) Substantial emotional distress means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

E. Consent may be implied from the facts and circumstances surrounding the commission of an act. Consent will not be found where an act has been done through the use of force, coercion, or threats of immediate and great bodily harm. Submission does not equal consent, and to establish consent, a party charged must utterly negate any element of force, coercion, or threat. Consent, once given, may be retracted. Consent will not be found under any of the following circumstances:

- 1) if the victim is less than thirteen years of age; or
- 2) through the use of force, coercion, or threats of immediate and great bodily harm against the victim or other persons within the victim's presence, accompanied by apparent power of execution; or
- 3) if the victim is incapable, because of physical or mental incapacity, of giving

- consent to such act; or
- 4) if the victim is incapable of giving consent because of any intoxicating, narcotic, or anesthetic agent or hypnosis; or
 - 5) if the victim is thirteen years of age, but less than sixteen years of age, and the perpetrator is at least three years older than the victim.
4. To the extent that this policy is intended to implement protections arising under the criminal law, amendments to those underlying statutes will be deemed to have been incorporated hereto on the effective date of such amendments.
 5. For purposes relating to the annual security report required under the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (20 USC § 1092(f)), conduct constituting Dating Violence, Domestic Violence Sexual Assault and Stalking under § 3 of this policy shall be reported as crime, irrespective of its treatment under South Dakota law.
 - A. For purposes of its annual security report a statement of policy that addresses the institution's programs to prevent dating violence, domestic violence, sexual assault, and stalking, the South Dakota criminal law classifications align with the definitions set out in § 3 of this policy as follows:
 - 1) Consent is defined as set forth in § 3(E) above;
 - 2) Dating violence includes domestic abuse as defined in SDCL ch 25-10 that occurs between persons involved in a romantic relationship as defined in SDCL § 25-10-3.2 who are not cohabiting and who have never cohabited;
 - 3) Domestic violence includes domestic abuse as defined in SDCL ch 25-10 that occurs between persons involved in a romantic relationship as defined in SDCL § 25-10-3.2 who are cohabiting and who have cohabited;
 - 4) Sexual assault includes rape as defined in SDCL § 22-22-1; sexual contact with a minor as defined in SDCL § 22-22-7; sexual contact as defined in SDCL § 22-22-7.1 without consent as set forth in SDCL § 22-22-7.4 or with a person incapable of consenting as set forth in SDCL § 22-22-7.2; and attempts to commit such offenses as defined in SDCL § 22-4-1; and
 - 5) Stalking includes stalking as defined in SDCL ch 22-19A.

SOURCE:

BOR, December 201d3; BOR, June 2014; BOR June 2015; [BOR August 2020](#).