

**SOUTH DAKOTA BOARD OF REGENTS**

**Academic and Student Affairs**

**AGENDA ITEM: 5 – B**

**DATE: June 24, 2020**

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**SUBJECT**

**Title IX Regulation Changes & Draft Board Policy**

**CONTROLLING STATUTE, RULE, OR POLICY**

BOR Policy [3:4](#)

BOR Policy [1:18](#)

**BACKGROUND / DISCUSSION**

On May 6, 2020, the Department of Education issued the long awaited [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;
- 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

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**DRAFT MOTION 20200624\_5-B:**

I move to approve the first reading of the new Sexual Harassment policy set forth in Attachment I.

- 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.

The final rules require an abundance of changes to BOR Policy, the most notable of which are revisions to the Title IX procedures currently covered by BOR Policies 3:4 and 1:18. Given the magnitude of the changes, adjusting the framework within the existing policies would prove problematic given the inter-related nature of the relevant policies with other content, which is subject to differing processes. Consequently, the rough policy draft set forth in Attachment I represents a standalone policy that would be applicable to all sexual harassment matters. Once the substance of that policy is solidified, the ancillary policy adjustments will be addressed accordingly, with the final package coming back to the Board for final approval in August.

Given the extensive commentary and discussion released with the new rules (over 2000 pages), the policy draft in Attachment I remains very much a work in progress. Campus constituencies will be engaged between the June meeting and the August meeting, with additional revisions anticipated to fine tune the operational aspects of the policy and the level of detail necessary for effective campus implementation. While much of the current policy text encompasses explicit requirements stemming from the new rules, there are a couple of exceptions worth noting.

1. **Standard of Evidence.** The new rules do not mandate the standard of evidence applicable, but rather require the campus to select either the preponderance of the evidence or clear and convincing evidence standard, which then must be applied evenly to all proceedings for students and employees. Our current standard is preponderance of evidence, which is used across the spectrum for all administrative matters applicable to students and employees within the Board's purview. Given the foregoing, the recommendation is to maintain the preponderance of the evidence standard moving forward.
2. **Hearing Requirements.** The new rules require a "live" hearing during which evidence may be challenged and witnesses cross-examined. Given the enhanced hearing requirements, the draft policy incorporates the use of a hearing examiner and the contested case proceedings under SDCL ch. 1-26 at the institutional hearing (under

current policy the 1-26 contested case hearing applies when appealed to the Board). Using a hearing examiner and affording full due process at the onset enhances the probability of getting to the correct outcome sooner, rather than a later, an issue that has haunted Title IX nationally in a litany of high profile court appeals in recent years. Additionally, given the enhanced hearing requirements under the new rules, affording the contested case hearing process at the onset alleviates the need to have a second hearing if/when appeals come to the Executive Director, as adequate due process will have already been afforded, leaving the Executive Director's review on appeal limited to a review of the record.

#### **IMPACT AND RECOMMENDATION**

The proposed policy will ensure compliance with the new Title IX rules, which become effective on August 14<sup>th</sup>. 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, subject to any guidance from the Board, and with the caveat the policy remains a work in progress, with revisions expected between now and August.

#### **ATTACHMENTS**

Attachment I – Draft Sexual Harassment Policy

# SOUTH DAKOTA BOARD OF REGENTS

## Policy Manual

**SUBJECT:** Sexual Harassment Policy and Procedures

**NUMBER:** 1:\_\_\_

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**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. 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.
8. Respondent: An employee, student 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 (CAWA).
10. Supportive measures: Non-disciplinary, non-punitive individualized services offered to the complainant or the respondent.
11. Working day: Monday through Friday, except for holidays and other times when the institution's administrative offices are closed.
12. 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.

### 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 Treat complainants and respondents equitably 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 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 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 Require 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.

- 2.2.11.4 Fines – Monetary payments.
- 2.2.11.5 Restitution – Compensation for loss, damage, or injury. This may take the form of appropriate service, money, or material replacement.
- 2.2.11.6 Educational Sanction – work assignments, essays, service to the institution, community service, workshops, or other related educational activities.
- 2.2.11.7 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.
- 2.2.11.8 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.
- 2.2.11.9 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.
- 2.2.11.10 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.
- 2.2.11.11 Adverse Employment Action(s) – the institution may take adverse employment action, to include suspension, with or without pay, reassignment, demotion, and termination.
- 2.2.11.12 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.
- 2.2.11.13 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:

- 3.1.1.1 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.

- 3.1.1.2 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.
- 3.1.1.3 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.
- 3.1.1.4 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.
- 3.1.2 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.
- 3.2 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.
- 3.3 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 take as true, either:
  - 3.3.1 Fail to constitute sexual harassment; or
  - 3.3.2 Did not occur in the institution's education program or activity.
- 3.4 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 the institution; or specific circumstances prevent the institution from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.
- 3.5 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.
- 3.6 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, 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 pursuant to SDCL chapter 1-26 using the contested case proceedings. 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 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 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.

5.5 The institution must provide the written determination to the parties simultaneously. The determination regarding responsibility becomes final either at the conclusion of the appeal to the Executive Director provided for in section 6 below, or if an appeal is not filed by either party in accordance therewith, the date on which the appeal would no longer be considered timely. If no appeal is filed with the timeframe provided in section 6 below, upon the expiration thereof, the determination of the institution shall constitute the final decision on the matter, which is appealable 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**

6.1 The complainant and respondent may appeal an institution's determination regarding responsibility, and an institution's dismissal of a formal complaint or any allegations therein, by appealing 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 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 filed with the Executive Director must include the party's supporting arguments and documentation. Appeals 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, the Executive Director, or their designee, shall provide written notice of the appeal 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 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 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 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 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.