

**SOUTH DAKOTA BOARD OF REGENTS**

**Full Board**

**AGENDA ITEM: 17**

**DATE: June10-11, 2015**

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**SUBJECT: Policy Amendments to Implement the United States Department of Education Final Rule Violence Against Women Act**

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

The new requirements affect three existing Board policies, though not in major ways. Proposed revisions to Board Policy No. 1:17.1 employ sexual offense classifications required under the Final Rule. Proposed revisions to Board Policy No. 1:18 engraft provisions to meet certain procedural requirements that apply specifically to the investigation and review of complaints alleging sexual assaults. Proposed revisions to Board Policy No. 1:6 respond to comprehensive training and staffing requirements by making patent the Board’s charge to presidents and superintendents to assume responsibility for compliance functions.

The most extensive amendments are found in Board Policy No. 1:18. Changes that could easily apply to cases other than those involving sexual assault were framed as general changes affecting all aspects of the policy. These include training of investigators and hearing officers annually, allowing for the challenge of an investigator or rehearing officer on the basis of bias or interest, assuring that complainants are informed how to request assistance or accommodations, illustrating the kinds of accommodations provided, enumerating forms of discipline that may be administered. Where required amendments implicated rights arising under the Family Educational Rights and Privacy Act or otherwise, the policy modifications apply only to complaints alleging sexual assault. These include allowing complainants and accuseds to be accompanied by representatives at interviews and meetings and directing that they receive simultaneous notification of final decisions and disciplinary actions.

The proposed changes for each policy are shown as deletions or additions to the existing policies.

(Continued)

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**RECOMMENDED ACTION**

Approve proposed amendments to Board Policies No. 1:6, No. 1:17.1 and 1:18.

## VAWA Finale Rule Policy Amendments

June 10-11, 2015

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The Final Rules are quite prescriptive, and the proposed amendments have been drawn to track the new requirements closely in order to assure that Board policies comply with the formal requirements of the Final Rules on their effective date. The Final Rules carry forward a number of the emphases that were stated in Title IX guidance statements released in 2011, 2014 and 2015. Among these is an emphasis on the need to train institutional staff who conduct investigations and disciplinary proceedings “to conduct an investigation and hearing process that protects the safety of victims and promotes accountability.” 79 Fed. Reg. 62789 (to be designated as 34 C.F.R. § 668.46(k)(2)(ii) effective July 1, 2015).

Beginning in 2013, training was provided to institutional staff members charged with conducting investigations in matters that might fall within the purview of Title IX or the Violence Against Women Act. In 2014, the Board sponsored a session for both investigators and persons conducting disciplinary procedures. Another round of investigator training has been scheduled for July 2015.

Additionally, the Board has retained an outside firm to review the system complement of policies, communications, staffing, management practices and resources. As system officials acquire more experience administering policies, working with methods conveyed by trainers and considering the comments and recommendations of outside experts, the Board may expect to receive additional recommendations involving these initiatives.

# SOUTH DAKOTA BOARD OF REGENTS

## Policy Manual

**SUBJECT:** Appointment, Authority, and Responsibilities of Presidents and Superintendents

**NUMBER:** 1:6

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### 1. Appointment

The presidents and superintendents shall be appointed by the Board of Regents. The Board may conduct a nationwide search by utilizing a search and screen committee consistent with Board bylaws. The president or superintendent is the chief executive officer of the institution and shall serve on the basis of contracts subject to annual renewal. No president or superintendent who assumes those responsibilities after July 1, 1990, shall receive or retain a tenured faculty appointment. Those individuals who were appointed to presidencies prior to July 1, 1990, and who were granted or allowed to retain tenured faculty rank, shall continue to enjoy such tenure rights, subject to the terms and conditions provided in their annual appointment notices.

### 2. Responsibilities

The president or superintendent of each institution shall be responsible for the administration of the university or special school and the respective component entities. He or she shall have the following specific responsibilities:

- A. Maintain an effective communications link between the campus and the Board, the Executive Director, other System campuses, and all constituencies at the campus levels including faculty, students, administrators, CSA employees, alumni, and community.
- B. Provide academic leadership and promote academic excellence at the campus and formulate educational policies and academic standards consistent with Board policy.
- C. Maintain institutional expenditures within the budgetary authorizations and limitations of the Board of Regents and the Legislature.
- D. Recommend budget allocation and apportion funds within allocations.
- E. Assign specific responsibility for coordinating institutional oversight of compliance with pertinent federal, state and Board constitutional rights and limitations, statutes, regulations and policies, including development of implementing institutional policy statements and practices, and including routine training and periodic compliance

audits, and generally assure enforcement of ~~Enforce the policies and regulations~~ of the Board of Regents, and the constitutions, statutes and regulations of the State of South Dakota and the United States of America.

- F. Present all official business of the institution to the Board of Regents.
- G. Recommend for appointment, tenure, and dismissal all members of academic and non-academic staff in accordance with Board policy and procedures.
- H. Determine the overall administrative organization of the institution and annually present to the Board an outline of the structure noting any recommended changes.
- I. Attend all regular meetings of the Board unless excused by the President of the Board.
- J. Perform such other duties as the Board may from time to time specify.

### **3. Executive Powers**

The presidents and superintendents shall have all powers necessary to carry out their executive responsibilities, including, but not limited to, the following:

- A. Organize a structure of academic governance and provide for the establishment, review and assessment of curricula and instruction, of research and scholarly programs and of public service activities.
- B. Provide for the governance of students and for the establishment of programs to address their educational, social, cultural and ethical development within available resources.
- C. Establish regular or special consultative bodies as deemed useful or necessary.
- D. Determine and manage institutional budgets.
- E. Expend monies and enter into contracts.
- F. Acquire, preserve, register, manage, lease, license or assign institutional properties, including intellectual properties, within the limits of state law and Board policy; and provide assurance of right or of title or make such similar undertakings as may be customarily incidental to the diligent management of such properties.
- G. Recommend the hiring, promotion and termination of employees.
- H. Assign, transfer, evaluate and discipline employees and investigate and adjust their grievances.

- I. Participate on behalf of the institution in the activities of affiliated organizations.
- J. Determine and present official institutional positions, policies and practices.
- K. Preside at all general faculty meetings or delegate that function to another member of the administration or faculty.

The executive powers delegated through this section remain subject to such substantive or procedural limitations as may otherwise be established by law or policy.

**4. Provisional Delegation of Authority in Matters Relating to Governance, Discipline and Grievances.**

The South Dakota Supreme Court, in *Worzella v. Board of Regents of Education*, 77 S.D. 447, 93 N.W.2d 411 (S.D. 1958), held that the South Dakota Constitution limits the Board's power of delegation. The Board may only delegate provisional authority to its subordinates. The court has decided that the Board can neither authorize nor adopt policies that create procedural bars to Board consideration of a matter. Nor can the Board vest a delegatee with the power to prevent the Board from taking up a matter that it deems of public interest.

The court has also held that the legislature may limit the Board's power over certain aspects of certain employment relations. It upheld the Civil Service Act and the Public Employees' Unions Act as legitimate exercises of legislative power, notwithstanding the fact that the acts remove certain employment decisions from final Board action. *South Dakota Board of Regents v. Meister*, 309 N.W.2d 121 (S.D. 1981); *South Dakota Board of Regents v. Meierhenry*, 351 N.W.2d 450 (S.D. 1984).

- A. In order to give effect to the constitutional limitations described in *Worzella*, the delegation of authority provided in this policy shall be understood to be provisional in the following sense.
  1. The authority vested in chief executive officers must, at all times, be exercised in a manner that is consistent with Board policy.
  2. Except as provided in section 4(A)(3), below, the authority to take binding action without specific prior Board approval is subject to the condition that the Board may require that a matter be forwarded to it for review.
    - a. Such a review shall not ordinarily result in a modification of an action that has created third party rights, but the Board may direct that such responsive measures be taken as it deems necessary.
  3. Where the action in question relates to the implementation of Board policy involving governance, discipline or grievances, the Board may reconsider the matter.

- a. In the context of a disciplinary action or a grievance, the Board may:
    - i. Accept the factual findings that were reached below, but modify the conclusions drawn from those facts or the action taken on their basis; or
    - ii. Reject the factual findings that were reached below and hold new hearings, upon due notice, to reconsider the matter in its entirety.
  - 4. Nothing herein shall be interpreted to modify the procedural requirements of regulations or agreements duly adopted pursuant to the Civil Service Act or the Public Employees' Unions Act.
- B. Chief executive officers may delegate provisionally to their subordinates or to such administrative or consultative bodies as they may establish from time to time the authority that the Board has delegated to them.
- 1. A provisional delegation of authority by a chief executive officer shall be understood to authorize only actions that are consistent with Board policy and with institutional policies previously approved by the chief executive officer.
  - 2. The authority to take binding action without specific prior approval by the chief executive officer approval is subject to the condition that the chief executive officer may require that a matter be forwarded for review.
  - 3. Where the action undertaken with delegated authority involves the implementation of Board or institutional policy involving governance, discipline or grievances, the chief executive officer may reconsider the matter anew.
    - a. In the context of a disciplinary action or a grievance, the chief executive officer may:
      - i. Accept the factual findings that were reached below, but modify the conclusions drawn from those facts or the action taken on their basis; or
      - ii. Reject the factual findings that were reached below, and hold new hearings, upon due notice, to re-examine the matter in its entirety.
  - 4. Nothing herein shall be interpreted to modify the procedural requirements of regulations or agreements duly adopted pursuant to the Civil Service Act or the Public Employees' Unions Act.

## **5. Acting Chief Executive Officer**

Each president and superintendent shall designate a staff member to act in his or her place when he or she is outside the state, otherwise not reasonably accessible or subject to temporary illness or disability. Each president and superintendent shall provide the

Executive Director a current list of persons so designated.

**6. Evaluation**

Presidents and superintendents shall be evaluated annually by the Board in a format and setting determined by the Board.

**7. Acceptance of Grant Supplements**

Presidents and superintendents are authorized to receive supplements of existing approved grants that continue previously approved grant activities when the value of the supplement does not exceed \$10,000. The president or superintendent shall notify the Executive Director when this approval authority is exercised.

**SOURCE: BOR, June 1974; BOR Aug. 1979; BOR April 1992; BOR March 1993; BOR, January 1996;**

## SOUTH DAKOTA BOARD OF REGENTS

### Policy Manual

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

**NUMBER:** 1:17.1

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1. State and federal policies proscribe ~~sexual assault~~ 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 ~~sexual assault~~ dating violence, domestic violence, sexual assault ~~and 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 ~~sexual assault~~ dating violence, domestic violence, sexual assault ~~and 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 ~~sexual assault~~ dating violence, domestic violence, sexual assault ~~and 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 ~~sexual assault~~, dating violence, domestic violence, sexual assault ~~and or~~ stalking, including procedures compliant with Board Policy 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 ~~sexual assault~~, 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. 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;~~

- ~~1) For purposes of this section, 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 withdrawn.~~

~~B. Domestic violence includes:~~

- ~~1) Domestic Abuse as defined by SDCL § 25-10-1, which occurs between persons involved in one of the following relationships: (1) spouses or former spouses; (2) significant romantic relationships; (3) one who has a child or is expecting a child with the abusing party; (4) parent and child, including a relationship by adoption, guardianship, or marriage; or (5) siblings, whether of the whole or half blood, including a relationship through adoption or marriage. Further, any protection order violation per SDCL § 25-10-13, stalking per SDCL Ch. 22-19A, or crime of violence per SDCL § 22-1-2(9) constitutes domestic abuse if the act is between persons in such a relationship.~~

- a) ~~For purposes of this section, as provided in SDCL 25-10-3.2, when determining whether a relationship is a significant romantic relationship, the factors for consideration, among others, include the length of time of the relationship, the frequency of interaction between the parties, and the characteristics and type of the relationship.~~

- ~~2) Conduct that occurs between persons who are or have been in a sustained romantic or intimate social relationship, whose kind, duration and frequency of contact would constitute a dating relationship as defined in 42 U.S.C. 13925;~~

~~C. Stalking means stalking as defined in SDCL §§ 22-19A-1, 22-19A-4 through 22-19A-6; and~~

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 D. 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 2013; BOR, June 2014.**

# 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 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.

### 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. Also, discrimination includes any allegation 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 harassment, or sexual assault or other animus-based assault, brought under Board Policy No. 1:17(2)(B) and allegations of sexual assault, domestic violence or stalking as proscribed by Board Policy No. 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, including investigations into allegations relating to dating violence, domestic violence, sexual assault and stalking, as defined in Board Policy No. 1:17.1, in a manner that protects the safety of victims and promotes accountability. The 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 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 No. 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 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 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 No. 1:17.1, both complainant and accused will be proto 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 No. 1:17.1, and, upon request, both a complainant or an accused may bring a representative of their choosing to any meeting or proceeding that they are required or permitted to attend.

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 Policies Policy No. ~~1:17.1~~ or 1:17(2)(B), the complainant will be informed of the finding and sanction.

2. Where the complaint involved conduct proscribed under Board Policy No. 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.
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 within twenty working days.
- 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 interim measures may be available to protect the interests of the ~~accuser~~ complainant and the accused during the investigation.
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, ~~and~~ (c) requests for ~~reasonable accommodations involving other aspects of institutional operations~~ the complainant's academic, living, transportation, and working situation are considered 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 ~~or accuser~~.
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. No later than two working days thereafter, the interim measures will be put into place.

**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 No. 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 No. 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 No. 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.
  3. 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, an informal resolution is not effected, or the complainant in a matter arising under Board Policy No. 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.

B. Depending upon the specific facts and circumstances of an incident, discipline may include:

1. separation of the parties,
2. limitations on contact between the parties,
3. alternative academic, working or housing arrangements, warnings or reprimands,
4. required training or current substance abuse treatment,
5. suspension from classes or suspension from duties with or without pay,
6. reassignment, demotion or discharge from employment or expulsion from the university system or
7. suspension or termination of the right to enter institutional grounds or facilities or to attend or to participate in institutional activities.

B C. 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 D. 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.

**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 Oct. 1991, BOR, October, 1992; BOR, January 1995; BOR, March-April 2011; BOR, December 2013.**