

SOUTH DAKOTA BOARD OF REGENTS

Policy Manual

SUBJECT: Sexual Harassment

NUMBER: 1:17

A. PURPOSE

To establish policy prohibiting sexual harassment, the process for investigating and

9. Sexual harassment

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

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

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

credibility determinations may not be based on a person's status as a complainant, respondent, or witness.

- 2.2.4. Institutions must 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

2.2.11.12. Revoking Admission and/or Degree – the institution may revoke admission to, or a degree awarded from, the institution for violation of institutional standards for obtaining admission or the degree, or for

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

3.4.

- 5.2.6. A statement that the hearing is an adversarial proceeding and that a party has the right at the hearing, to be present, to be represented by an attorney, and that these and other due process rights will be forfeited if they are not exercised at the hearing;
 - 5.2.7. A statement that if the amount in controversy exceeds two thousand five hundred dollars or if a property right may be terminated, any party may require the use of the Office of Hearing Examiners by giving notice of the request to the institution no later than ten (10) days after service of the notice required by this section; 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 dete

administrative review under this section are limited those made on the following bases:

6.1.1.

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

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.

