

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 enforce 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 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

This procedure applies to complaints alleging discrimination on the basis of race, color, creed, religion, national origin, ancestry, citizenship, gender, transgender, sexual orientation, age or disability.

3. Discrimination

Discrimination includes all violations of rights guaranteed under federal, state or local anti-discrimination laws and regulations. Also, discrimination includes any allegation that, because of a person's race, color, creed, religion, national origin, ancestry, citizenship, gender, sexual orientation, age or disability, a person has been subjected to disparate treatment in terms and conditions of employment, in the delivery of educational services or with respect to the participation in the activities of officially recognized organizations. Harassment complaints brought under section 3.4 of the policy manual shall 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 shall conform to the federal standards employed to prove disparate treatment. These regulations shall neither eliminate nor restrict express exceptions to antidiscrimination laws and regulations provided under federal, state or local law, nor shall they prohibit conduct, action or policies based upon such legitimate nondiscriminatory reasons as are recognized under federal antidiscrimination law.

5. Complaints

Complaints include all allegations or reports that a person, persons or organization subject to this policy has discriminated 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 shall be referred to an administrative officer designated by the institutional chief executive officer as provided in 13(A) below. Questions about the applicability of this chapter to organizations shall be resolved pursuant to the provisions of 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 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 shall 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 shall be significantly inhibited in advocating its desired viewpoints if it cannot restrict its membership based on race, color, creed, religion, national origin, ancestry, citizenship, gender, sexual orientation, age or disability.

6. Complainants

Complainants are persons who have allegedly been subjected to discrimination.

7. Non-retaliation

Persons who bring complaints of discrimination and persons who assist in the investigation and disposition of such complaints shall not be subject to harassment, interference, intimidation, or retaliation.

8. Duty to Cooperate

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

9. Confidentiality

Reasonable effort shall 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. Where formal disciplinary proceedings are instituted, the party alleged to have engaged in discriminatory conduct shall be given the names of the complaining party and the witnesses whose testimony shall be used to support the complaint, together with the substance of their allegations. The formal proceedings themselves need not be open to the public.

10. Timing Requirements

The following provisions address the timing requirements contained in this regulation; different definitions and requirements may apply to the grievance and disciplinary procedures that have been incorporated herein. 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 shall help to achieve the purposes of the regulations. Deadlines may also be extended upon the mutual agreement of the parties. Deadlines shall 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 Board office is open for business.

11. Initiation of Complaint

- A. 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 shall not be entitled to exercise procedural rights granted to complainants.
- B. 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, with any faculty member. Complaints lodged with such individuals shall be referred to the Title IX/EEO coordinator for investigation. This provision shall not be interpreted to require individuals to refer to the Title IX/EEO coordinator accusations addressed to them directly by aggrieved persons.
- C. Third party reports of discrimination and conduct observed directly that may be discriminatory should be investigated as provided in Section 11(D) below.
- D. All inquiries, allegations, reports, or complaints relating to discriminatory conduct shall be forwarded to the Title IX/EEO coordinator for response or investigation. The Title IX/EEO coordinator shall have the responsibility to advise the individual or group of the procedures for investigating and taking action upon the complaint. The Title IX/EEO coordinator shall also advise the complainant of any counseling or support groups that are available for persons who feel that they have been subjected to discriminatory conduct. Having provided this information to the complainant, the Title IX/EEO coordinator shall record the factual basis for the complaint.
- E. If the complaint is referred to the Title IX/EEO coordinator by another administrator or faculty member, the Title IX/EEO coordinator shall 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.
- F. Upon obtaining a statement of the factual basis of the complaint, the Title IX/EEO coordinator shall initiate an investigation of the complaint to determine whether there is a reasonable basis to believe that the complainant was subjected to discrimination. The investigation shall be completed within twenty working days.

12. 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, the Title IX/EEO coordinator shall explain the investigatory findings and conclusions to the complainant and shall offer to meet with the complainant and the person alleged to have engaged in discriminatory conduct to discuss the circumstances that gave rise to the complaint and measures to avoid future misunderstandings.

- 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, shall review the investigation file to determine whether the findings and conclusions of the Title IX/EEO coordinator are based upon substantial evidence.

13. 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 shall notify the vice president or comparable chief administrative officer having supervisory responsibility over the person or persons alleged to have engaged in discriminatory conduct. The Title IX/EEO coordinator shall turn over copies of all investigatory materials to that administrative officer. Thereupon, that administrative officer shall assume primary responsibility for the matter. If the complaint is lodged against officially recognized organizations or against members of such organizations who are not otherwise affiliated with the institution, the institutional chief executive officer shall designate a person to carry out the responsibilities established hereunder.
- B. The administrative officer may attempt an informal resolution of the dispute. If such a resolution is effected, the terms of the resolution shall be reduced to writing and signed by the complainant. The University shall 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 shall be preserved in the complaint file and as otherwise necessary to give effect to the terms of the resolution.
- C. If the administrative officer elects not to attempt an informal resolution, the officer shall initiate disciplinary proceedings against the person alleged to have engaged in discriminatory conduct.
- D. The administrative officer shall institute 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 unless the complainant and the person alleged to have engaged in discriminatory conduct have agreed in writing to extend the time allowed to attempt an informal resolution.

- E. The disciplinary procedures followed shall be those designated for persons in the employee or student classification to which the person or persons alleged to have engaged in discriminatory conduct belong. Faculty members shall be subject to discipline consistent with the COHE contract or the Regents Policy Manual depending upon their unit or non-unit status. CSA employees shall be subject to discipline under CSA regulations. Exempt staff shall be subject to discipline under exempt regulations. Students shall be subject to discipline under the institutional student disciplinary code. If no disciplinary procedures otherwise exist, the institutional chief executive officer shall 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.

14. Procedures for Discipline for Those Who Are Found to Have Discriminated Against Others

- A. Discipline of persons found to have discriminated against others shall be determined and carried out in accordance with the relevant disciplinary procedures.

15. 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 shall determine what disciplinary action, if any, shall be taken to remedy the effects of the discriminatory conduct. In selecting a discipline, the administrative officer shall 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 selected shall be effective to avoid a recurrence of the conduct.
- B. Once the administrative office has selected a proposed discipline, the party charged shall be notified of the proposed discipline at such time and in such a manner as provided under the applicable grievance procedures. The complainant shall be notified of the proposed discipline at the same time. The discipline shall not become finalized if the complainant petitions the institutional chief executive officer for a review.
- C. If the complainant is dissatisfied with the discipline 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, shall 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 shall not recur. The determination of the institutional chief executive officer shall not be subject to further review.

16. Complainants' Right to Appeal from a Finding That Discrimination Has Not Been Proven

- A. If as a result of the disciplinary hearing the party charged is found not to have engaged in discriminatory conduct or the proof of such charges has been found to be inadequate, the complainant shall be entitled to appeal that determination to the institutional chief executive officer.
- B. Before adopting a finding that the party charged has not engaged in discriminatory conduct, the complainant shall be notified of the proposed finding. The party charged shall be notified of the proposed finding at the same time. The proposed finding shall not become finalized if the complainant petitions the institutional chief executive officer for a review. The complainant shall be allowed five working days in which to submit such a petition.
- C. Such petitions shall be taken pursuant to and shall be governed by the grievance procedures designated for persons in the employee or student classification to which the complainant belongs. Where such procedures require hearings to establish the factual basis for a discipline, and where the proposed findings that the party charged had not engaged in discriminatory conduct were themselves reached following a fact-finding hearing, the hearing records developed during the initial hearing process shall be deemed to provide an adequate factual basis for review of the grievance. If the initial proceedings were resolved at the campus level, and if the procedures that govern complainant's grievance provide for a hearing before a Board appointed hearing examiner, the matter shall be heard de novo to the extent permitted under the governing procedures.
- D. If the review provided under section 15 of the policy results in a finding that the complainant was subjected to discriminatory conduct, the findings of fact and conclusions of law reached through that process shall provide the basis for discipline of the party charged. The petition permitted under section 15(C) should be lodged either with the institutional chief executive officer or with the Executive Director, depending upon the stage at which the grievance was determined.

17. Preservation of Records

All records and writings developed in the course of the formal disciplinary hearings shall 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.