

SOUTH DAKOTA BOARD OF REGENTS

Academic and Student Affairs
Consent

AGENDA ITEM: 5 – I (2)
DATE: December 13-14, 2023

SUBJECT

**Revised BOR Policy 3.3.1 – Confidentiality of Student Records (Formerly Policy 3:5)
(Second Reading)**

CONTROLLING STATUTE, RULE, OR POLICY

- [BOR Policy 3.3.1](#) – Confidentiality of Student Records
- [BOR Policy 3.3.2](#) – Public Access to Student Directory Information
- [BOR Policy 7.1](#) – Acceptable Use of Information Technology Systems
- [BOR Policy 7.7](#) – Personally Identifiable Information
- [Family Educational Rights and Privacy Act \(FERPA\)](#)

BACKGROUND / DISCUSSION

The Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g; 34 CFR Part 99) is a federal law protecting students’ rights for confidentiality¹. As an Institution of Higher Education (IHE), the Regental system must comply with FERPA.

[BOR Policy 3.3.1](#) (formerly Policy 3:5) – Confidentiality of Student Records was last updated in October 1993; therefore, a new proposed draft of the policy is presented as Attachment I, which if approved will replace the old version currently in place. In the review process, this policy was first evaluated by the Technology Affairs Council (TAC) (chief technology officers) and a recommendation was to increase awareness and policy around FERPA especially if it relates to enhancements of technology. As technology continues to evolve and integrations occur within the Regental system, TAC recommended a policy and guideline evaluation need.

The Academic Affairs Council (AAC) and the Student Affairs Council (SAC) working with legal counsel have since updated the draft found in Attachment I.

¹ FERPA, US Department of Education. <https://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html>

(Continued)

DRAFT MOTION 20231213_5-I(2):

I move to approve the second and final reading of the proposed new draft of BOR Policy 3.3.1, as presented.

This policy now includes the following:

1. Purpose of FERPA
2. Definition Section
3. Policy
 - a. Student Rights
 - b. Directory Information
 - c. Disclosure
 - d. Record Requests
 - e. Security of Personal Identifiable Information
 - f. Annual Notices and Training
4. Institutional Policy Requirements
5. Non-Compliance

The draft provided in Attachment I has been vetted by Academic Affairs, Student Affairs, Technology Affairs, Legal Counsel (BOR, SDSU, and USD) and internally within the Board office. This process of engagement and information gathering occurred over a 12+ month period to ensure that all stakeholders had an opportunity to effectuate policy draft language.

IMPACT AND RECOMMENDATION

The new draft of BOR Policy 3.3.1, presented as Attachment I, will replace the old version currently in place. This policy includes standard language from the FERPA regulations for which each campus currently enforces the rules and regulations. Therefore, this proposed policy revision memorialized the requirements of the federal rules and regulations to ensure that all parties including students, staff, faculty, and third parties understand the requirements for Institutions of Higher Education. No changes have been made since the October 2023 BOR Meeting.

The timeline associated with this policy revision will be as follows:

- First Reading – October 2023 BOR Meeting
- Second and Final Reading – December 2023 BOR Meeting

Board staff approve of the proposed new draft of BOR Policy 3.3.1 as presented.

ATTACHMENTS

Attachment I – Proposed New Draft of BOR Policy 3.3.1 (Formerly Policy 3:5) – Confidentiality of Student Records

SOUTH DAKOTA BOARD OF REGENTS

Policy Manual

SUBJECT: Confidentiality of Student Records

NUMBER: 3.3.1

A. PURPOSE

The purpose of this policy is to inform students, faculty, and staff about the types of student records maintained within the Regental System and to comply with the Family Educational Rights and Privacy Act of 1974 (FERPA) as amended.

B. DEFINITIONS

1. **Board of Regents:** Defined as the constitutional body responsible for governing the Unified System of Public Higher Education in South Dakota, which encompasses its supervision, coordination, management, and regulation. Board of Regents Policy 1.0, 1.1 and SDCL § 13-49 through § 13-53 provides the authority to govern academic programming/policy.
2. **Directory Information:** Information designated by the Regental System or the institutions under its control of the kinds that may be defined as such under FERPA, including without limitation: student's name, class level, degrees received, major and minor programs of study, hometown, dates of attendance, full-time/part-time status, honors and awards, and graduation date.
3. **Education Record:** As defined under FERPA, "Education Record" means records of any format that are directly related to a student and maintained by the Regental System or institutions under its control, or by a party acting for the Regental System or institution, except the following:
 - 3.1. **Alumni Records:** includes records created or received after an individual is no longer a student in attendance and that are not directly related to the individual's attendance as a student;
 - 3.2. **Employment Records:** includes records of employment for an individual, whose employment is not contingent on the fact that the individual is a student, provided the record is used only in relation to the individual's employment;
 - 3.3. **Health Records:** includes records maintained by institutional student health services that are solely for treatment of a student and made available only to those persons providing the treatment;
 - 3.4. **Law Enforcement Unit Records:** includes records maintained by institutions for law enforcement purposes, revealed only to law enforcement agencies at the same

jurisdiction, and separated from other educational records maintained by the institutions;

- 3.5. **Peer Graded Records:** peer graded assignments and papers that are shared among students in a class before and until they are collected and recorded by the class instructor;
 - 3.6. **Psychological Records:** includes records maintained by institutional student counseling services that are maintained solely for the treatment of a student and made available only to those persons providing treatment;
 - 3.7. **Sole Possession Records:** includes records that are temporarily kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record.
4. **Legitimate Educational Interest:** A need to access Student Education Records or PII contained therein for the purpose of performing an appropriate educational, research or administrative function for the Regents System or a governed institution.
 5. **Limited Directory Information:** Regental institutions may designate photographs, videos, or other media containing a student's image or likeness (student images) and institution-issued student electronic mail addresses (email addresses) as Limited Use Directory Information for internal use only.
 6. **Personally Identifiable Information:** As defined in [BOR Policy 7.7](#), Personally Identifiable Information (PII) includes information that can be used to distinguish or trace an individual's identity or, when combined with other personal or identifying information, is linked or linkable to a specific individual. PII includes the specific items set forth in BOR Policy 7.7.
 7. **Regental System:** The six public institutions (universities) and the two special schools.
 8. **School Official:** An individual employed by the Regental System in an administrative, supervisory, academic or research, or support staff position (including law enforcement unit and health personnel); an individual or company with whom the Regental System or an institution under its control has contracted as its agent to provide a service (e.g. attorney, auditor, collection agent); or a Student serving on an official committee or assisting another official in performing their tasks.
 9. **Student:** An individual who is or has been in attendance at the Regental System and for whom the Regental System has maintained an Education Record.

C. POLICY

The Regental System and its institutions observe the rights, privileges, and protections as set forth by the Family Educational Rights and Privacy Act of 1974 (FERPA) as amended relative to individually identifiable Student Education Records.

1. Student rights with regard to Education Records include:

- 1.1. The right to inspect and review the Student's Education Record within 45 days after the day the institution receives a request for access;
- 1.2. The right to request the amendment of the Student's Education Record if the Student believes the record is inaccurate, misleading, or otherwise in violation of the Student's privacy rights under FERPA;
- 1.3. The right to provide written consent before the Regental System or an institution under its control discloses PII from the Student's Education Record, except to the extent that FERPA authorizes disclosure without a consent; and
- 1.4. The right to file a complaint with the U.S. Department of Education concerning alleged failures by the Regental System to comply with the requirements of [FERPA](#). The name and address of the Office that administers FERPA is:

U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202-5901

2. Directory Information

- 2.1. Directory Information may be released to third parties outside the Regental System without written consent of the Student, provided the Student has been given the opportunity to withhold such disclosure and has not opted out of disclosure.
- 2.2. The Regental System and its institution release Directory Information without written consent of the Student upon inquiry by education-related or military third parties or third parties acting as agents to the Regental System. Relevance to educational purposes is determined by the applicable institution.
- 2.3. Students may withhold Directory Information by contacting their institution's qualified official who oversees the institution's compliance with FERPA.

3. Disclosure of Personally Identifiable Information (PII)

- 3.1. PII from Students' Education Records may be released without consent of the Student, if the disclosure meets the conditions within FERPA regulations, including a record of the disclosure where required. Students have a right to inspect and review the record of disclosures.
- 3.2. The Regental System and its institutions may disclose PII from Education Records without obtaining prior written consent of the Student in compliance with FERPA as follows:
 - 3.1.1. To School Officials who have a legitimate educational interest, as defined under FERPA, in the record;
 - 3.1.2. To other School Officials whom the Regental System has determined to have legitimate educational interests, including contractors, consultants, volunteers, or other parties to whom the Regental System or institution has outsourced services or functions;
 - 3.1.3. To officials of another educational institution where the Student seeks or intends to enroll, or where the Student is already enrolled if the disclosure is

for purposes related to the Student's enrollment or transfer and subject to FERPA limitations;

- 3.1.4. To authorized Representatives of the U.S. Comptroller General, the U.S. Attorney General, the U.S. Secretary of Education, or State and local educational authorities, subject to FERPA limitations and in connection with an audit or evaluation of federal- or state-supported education programs, or for the enforcement of compliance with federal legal requirements that relate to those programs;
 - 3.1.5. In connection with financial aid for which the Student has applied or which the Student has received, if the information is necessary to determine eligibility for the aid, determine the amount of the aid, determine the conditions of the aid, or enforce the terms and conditions of the aid;
 - 3.1.6. To organizations conducting studies for, or on behalf of, the Regental System or an institution in order to (a) develop, validate, or administer predictive tests; (b) administer student aid programs; or (c) improve instruction;
 - 3.1.7. To accrediting organizations to carry out their accrediting functions;
 - 3.1.8. To parents of a Student if the Student is a dependent for IRS tax purposes;
 - 3.1.9. To comply with a judicial order or lawfully issued subpoena;
 - 3.1.10. To appropriate officials in connection with a health or safety emergency, subject to FERPA requirements;
 - 3.1.11. Information the Regental System has designated as Directory Information;
 - 3.1.12. To a victim of an alleged perpetrator of a crime of violence or a non-forcible sex offense, subject to FERPA requirements. The disclosure may only include the final results of the disciplinary proceeding with respect to that alleged crime or offense, regardless of the finding;
 - 3.1.13. To the general public, the final results of a disciplinary proceeding, subject to FERPA limitations, if it is determined the Student is an alleged perpetrator of a crime of violence or non-forcible sex offense and the Student has committed a violation of the Regental System's or institution's policies with respect to the allegation(s) made against the Student; or
 - 3.1.14. To parents of a Student regarding the Student's violation of any federal, state or local law, or of any Regental System policy, governing the use or possession of alcohol or a controlled substance if the institution determines the Student committed a disciplinary violation and the Student is under the age of 21.
4. Record requests for and any disclosures of Student Education Records and PII shall be maintained by the record custodian in compliance with the requirements of FERPA and in accordance with the State of South Dakota Bureau of Administration Records Retention and Destruction Schedule.
 5. Security of Student Education Records and PII in Student Education Records:

- 5.1. Student Education Records must be physically secured by the Regents System, its institutions, employees, and agents while in storage or transmission.
- 5.2. FERPA standards will be applied with Regents System data security standards and policies with regards to Student Education Records and PII in information technology systems, including but not limited to appropriate use, storage, transmission, incident handling, tracking, and compliance monitoring.
- 5.3. Security standards and data protection requirements will be contained in all contracts that outsource Regents System or institutional functions to a third party entity that uses or provides access to Student Education Records or PII contained therein.

6. Annual Notices and Training

- 6.1. The Regents System and its institutions will provide annual notification to students in attendance of their rights under FERPA through publication, in course catalogs and handbooks. The annual notification must include information regarding a Student's right to inspect and review their education records, the right to seek to amend the records, the right to consent to the disclosure of PII from the records (except in certain circumstances), and the right to file a complaint with the U.S. Department of Education regarding an alleged failure to comply with FERPA. The notice will also inform the Student of the current definitions of the terms "directory information", "school official" and "legitimate educational interest."
- 6.2. The Regents System and its institutions will ensure training on FERPA and its policies is made available to employees, and contractors related to FERPA obligations.

D. INSTITUTIONAL POLICY/PRACTICE

1. Each Regental institution shall adopt written procedures to comply with the requirements of FERPA and this policy, to ensure that Student Education Records are maintained securely at or on behalf of each institution. At a minimum, each institution must:
 - 1.1. Identify each office that creates or maintains Student Education Records or outsources the creation or maintenance of Student Education Records;
 - 1.2. Identify the location of such Student Education Records, including Student Education Records for which the responsibility for creation and/or maintenance has been outsourced to a third party;
 - 1.3. Designate a qualified official to oversee the institution's compliance with FERPA and this policy;
 - 1.4. Publish requirements that Students, employees and others, as applicable, must follow to ensure the security and confidentiality of Student Education Records created, accessed, or maintained by that individual; and
 - 1.5. Ensure that all faculty, staff, and any other individuals who will create and/or access the institution's Student Education Records receive training to provide general information about FERPA prior to their initial access to Student Education Records.

2. Each Regental institution shall determine on a case-by-case basis whether a School Official has a legitimate educational interest, as defined under FERPA, in the disclosure of PII from an Education Record, based on whether the information to be disclosed is necessary for that official to perform an appropriate task that comes within or is consistent with the official's job duties or the duties spelled out in the official's contract.

E. NON-COMPLIANCE

Failure of any Regental System employee to comply with the requirements of this policy may subject the employee to disciplinary action, up to and including termination.

RELATED POLICIES:

- [BOR Policy 3.2.1 – Institutional Requirements for Informing Students](#)
- [BOR Policy 3.3.2 – Public Access to Student Directory Information](#)
- [BOR Policy 7.1 – Acceptable Use of Information Technology Systems](#)
- [BOR Policy 7.7 – Personally Identifiable Information](#)
- AAC Guideline FERPA Guidelines

FORMS / APPENDICES:

References:

- Classroom Use of Third-Party Sites/External Links
- Records and Registration/Registrar Contacts:
 - [BHSU Registration and Records](#)
 - [DSU Registrar](#)
 - [NSU Records and Registration](#)
 - [SDSMT Office of the Registrar](#)
 - [SDSU Records and Registration](#)
 - [USD Office of the Registrar](#)

SOURCE:

(RR, 12:10, 1977), BOR October 1993; October 2023 (Clerical); BOR December 2023.