

**FLORIDA BOARD OF GOVERNORS
NOTICE OF PROPOSED AMENDED REGULATION**

DATE: 9/17/2020

REGULATION NUMBER AND TITLE: 6.0105, Student Conduct and Discipline

SUMMARY: The regulation is being amended to comply with the new requirements in Title IX of the Education Amendments of 1972 related to student disciplinary proceedings for sexual harassment complaints that fall within the scope of Title IX. The regulation also clarifies the procedures for disciplinary proceedings for sexual misconduct complaints that are outside the scope of Title IX.

FULL TEXT OF THE REGULATION IS INCLUDED WITH THIS NOTICE.

AUTHORITY TO PROPOSE REGULATION(S): Section 7(d), Art. IX, Fla. Const.; BOG Regulation Development Procedure dated March 23, 2006.

THE BOARD OF GOVERNORS' OFFICIAL INITIATING THE PROPOSED REGULATION: Dr. Christy England, Vice Chancellor for Academic and Student Affairs

COMMENTS REGARDING THE PROPOSED REGULATION SHOULD BE SUBMITTED WITHIN 14 DAYS OF THE DATE OF THIS NOTICE TO THE CONTACT PERSON IDENTIFIED BELOW. The comments must identify the regulation on which you are commenting:

General Counsel, Board of Governors, State University System, 325 W. Gaines Street, Suite 1614, Tallahassee, Florida 32399, (850) 245-0466 (phone), (850) 245-9685 (fax), or generalcounsel@flbog.edu.

6.0105 Student Conduct and Discipline.

(1) Each university board of trustees is required to provide a prompt, fair and equitable process for resolving student misconduct. In furtherance of the educational mission of the universities, each university board of trustees shall establish a student disciplinary system that protects the rights of the accused student, complaining parties and the university community, including a code of conduct, which shall include, at a minimum the following provisions:

- (a) A written description of the rights and responsibilities of students, standards of conduct expected by the university, a list of violations, appropriate penalties or sanctions, and procedures for initiating and conducting student disciplinary proceedings.
- (b) Definitions of terms used in the university's code of conduct, such as "student" and "university community."
- (c) A statement that the code of conduct shall govern student behavior both on and off the university's campus.
- (d) A description of the available university disciplinary proceeding forum which may consist of a university official or officials, designee(s) of university official(s), or a committee or panel. Where a committee or panel is used ~~the forum~~, students shall make up at least one-half of the membership, except as provided in paragraphs (8) and (9).
- (e) A written description of the general procedures to be followed in the disciplinary proceeding which shall include a description of each step of the disciplinary process and any assistance that may be available to the accused student at the university for preparing for the disciplinary proceeding.
- (f) A written procedure for the disposition of cases that require immediate action and involve the health, safety, or welfare of the student or a member of the university community.
- (g) A provision stating that the burden of proof in a disciplinary proceeding is not on the accused student subject to the disciplinary proceeding.
- (h) A provision stating that the burden of proof required in disciplinary proceedings shall be a preponderance of the evidence. This means that the information presented supports the finding that it is more likely than not that the violation occurred.
- (i) A provision setting a time limit for charging an accused student with a violation of the university's code of conduct, and a description of those circumstances in which that time limit may be waived by university officials.
- (j) A provision requiring an accurate and complete record of each disciplinary proceeding to be made and preserved. Retention of the

record is subject to the General Records Schedule GS5 for Public Universities and Colleges.

(2) Each university shall publish, at a minimum on its internet website, the regulations and policies comprising its student disciplinary system, including the code of conduct.

(3) Each university shall comply with 20 U.S.C. s. 1232g, the Family Educational Rights and Privacy Act of 1974, as amended and other requirements of state and federal law relating to the confidentiality of the records and reports of students.

(4) Each university shall incorporate the following minimum requirements in its student disciplinary system, except as otherwise provided for certain Title IX matters identified in paragraph (8) below:

- (a) The accused student shall be provided with written notice of the charges in sufficient detail and in sufficient time to prepare for the disciplinary proceeding. In no case shall the written notice of charges be provided to the accused student less than five (5) business days (excluding legal holidays) prior to the disciplinary proceeding, except in cases of emergency as specified below or unless waived by the student. Written notice may be provided by electronic delivery to the accused student's officially designated university email address.
- (b) The accused student shall be entitled to a disciplinary proceeding within timelines established by each university. Except as set forth in ~~Section~~ paragraphs (8) and (9) below, the accused student has a right to a disciplinary proceeding conducted by a committee or panel. This right may only be waived where:
 - (i) permitted by the university; and
 - (ii) requested by the accused student in writing on forms provided by the university which include an explanation of the effect of the waiver.
- (c) The accused student may have, at the student's own expense and initiative, an adviser present at the disciplinary proceeding. It is the accused student's responsibility to make appropriate arrangements for the adviser to attend the disciplinary proceeding which shall not be delayed due to scheduling conflicts of the chosen adviser. The adviser may be present to advise the accused student but shall not speak for or present the case for the student or otherwise participate directly in the disciplinary proceeding.
- (d) Except as set forth in paragraph (8), ~~t~~The accused student and the student's adviser, if any, have the right to inspect all of the information that will be presented during the disciplinary proceeding at least three (3) business days (excluding legal holidays) before the

disciplinary proceeding. The university also has the right to review any information the accused student intends to use at least three (3) business days (excluding legal holidays) before the disciplinary proceeding.

- (e) The accused student may present information at the disciplinary proceeding that is relevant to the proceeding.
- (f) Upon request by the accused student, the complaining partyant, or other participants, the university may permit the individual to provide relevant information during the disciplinary proceeding in a manner that avoids direct contact with the accused student, the complaining partyant, or other participants.
- (g) All parties to the disciplinary proceeding may arrange for witnesses to voluntarily present relevant information during the disciplinary proceeding. The questioning of witnesses shall be facilitated by the person or body conducting the disciplinary proceeding. Each university shall have a procedure for the questioning of witnesses. Pertinent records, reports, exhibits, and written statements may be accepted as information for consideration in the disciplinary proceeding.
- (h) The accused student may not be forced to present testimony that is self-incriminating; however, the university is not required to postpone disciplinary proceedings pending the outcome of a criminal prosecution. The university disciplinary proceeding is not a criminal or judicial proceeding and is designed to address student behavior; therefore, alleged violations of the university's code of conduct will be addressed independently of any penalty imposed by the courts for the criminal offense. This means that the rights and rules of evidence or procedure in a civil or criminal proceeding do not apply in a student disciplinary proceeding.
- (i) The decision of responsible or not responsible on the charges of violating the university's code of conduct must be based solely on the information presented at the disciplinary proceeding.
- (j) An accused student found responsible for a violation of the university's code of conduct shall be subject to sanctions commensurate with the offense with consideration given to any aggravating and mitigating circumstances, including but not limited to the student's conduct record.
- (k) The decision of any university disciplinary proceeding must be presented to the accused student in writing and within a reasonable period of time after the conclusion of the disciplinary proceeding, as specifically prescribed by the university's code of conduct.
- (l) If the decision of a university hearing or review forum arising out of a university disciplinary proceeding constitutes a recommendation to a

university official for official action, the university's code of conduct must specify the actions that the university official may take with respect to adopting, modifying, or rejecting the recommended decision and sanctions, or remanding the matter for a rehearing. Any differences between the recommendation arising out of the university disciplinary proceeding and the university official's disciplinary decision, and the reasons therefore, must be presented to the accused student in writing.

- (m) Each university code of conduct shall describe the internal appeals processes. Each university shall have at least one level of internal appeal. No person may hear or decide an appeal if he or she conducted or participated in the disciplinary proceeding being reviewed on appeal.
- (n) An accused student shall remain eligible to attend classes and university activities pending the university's disciplinary decision, and until any appeal is concluded except as set forth below:
 - 1. in cases where the president or president's designee determines that the health, safety, or welfare of the student or a member of the university community is involved, the accused student may be temporarily suspended from classes and/or university activities,
 - 2. in cases where the sanction(s) determined by the university official(s) in the disciplinary decision include either suspension or expulsion, the accused student's privileges at the university, including the ability to attend classes and engage in university activities may be revoked.
 - 3. If an accused student's privileges are temporarily suspended or revoked as described in this paragraph, but the student is subsequently found not responsible for the violation, the university must:
 - i. Correct any record of the change in enrollment status in the accused student's permanent records and reports in a manner compliant with state and federal laws; and
 - ii. Refund to the accused student a pro rata portion of any charges for tuition and out-of-state fees, as appropriate, if the temporary revocation or suspension of the student's ability to attend classes lasts for more than ten (10) school days.

(5) At the conclusion of the appeals process, the decision of the president or the president's designee shall be final. Final appellate decisions resulting in a suspension or expulsion of a student must include notice to the accused student of the student's right to appeal to an external judicial forum.

(6) An accused student may be subject to discipline for conduct that violates the university code of conduct, even where that conduct occurs off-campus. The action of the university with respect to off-campus conduct shall be taken independently of any off-campus authority.

(7) Each university's code of conduct shall include a description of the rights of alleged victim(s) in the student disciplinary system. The university shall provide notice to the alleged victim(s) of their rights at least five (5) business days (excluding legal holidays) before the disciplinary proceeding is conducted. Each university is encouraged to provide support and assistance programs for alleged victim(s), as appropriate.

(8) Title IX Sexual Harassment Matters. Each university must comply with the federal regulations adopted by the U.S. Department of Education pursuant to Title IX of the Education Amendments of 1972 (the "Federal Regulations") for addressing reports and complaints of "sexual harassment" as defined in the Federal Regulations. The university shall adopt and publish a regulation or a policy that articulates how the university will comply with the requirements of the disciplinary proceedings described in 34 CFR s. 106.45 for such Title IX sexual harassment matters. With respect to such matters, each university's disciplinary process must include the following:

- (a) In a disciplinary hearing, at the university's discretion, the decision-maker(s) shall be either a university official or designee; a committee or panel comprised of only university officials or designees; or a committee or panel where students comprise at least one-half of the membership of such committee or panel.
- (b) All procedures for disciplinary proceedings shall apply equally to the complainant and respondent and must include a live hearing for purposes of determining whether the respondent is responsible or not responsible for the alleged conduct. Each party may be accompanied by an advisor of their choosing at the live hearing; but must be represented by an advisor for purposes of cross-examination of the other party and witness(es). If a party does not have an advisor of their choosing present at the hearing, the university shall provide an advisor of the university's choosing to conduct cross-examination on the party's behalf. All cross-examination of the parties and witnesses must be conducted directly and orally by a party's advisor. At the hearing, before a party or witness can

- respond to a question posed by an advisor, the decision-maker(s) must first determine whether the question is relevant, and if not, explain the basis for disallowing the question.
- (c) Each party shall have the ability to present relevant information and witnesses in the disciplinary proceeding, the right to avoid self-incrimination, notification of the final result of the disciplinary proceeding and any subsequent changes to the final result, and the right to appeal the decision.
 - (d) All information must be objectively evaluated and the decision-maker(s) must avoid credibility determinations based on a person's status as a complainant, respondent, or witness.
 - (e) Information protected under a privilege recognized by state or federal law cannot be disclosed, used, or relied upon unless the person who holds the right to exercise the privilege waives the application of the privilege.
 - (f) Upon request by the parties or other participants, the university may permit an individual to provide relevant information during the disciplinary proceeding in a manner that avoids direct contact with the parties or the other participants. Any hearing that is conducted virtually through technology shall enable the parties to see and hear the party or witness answering questions.
 - (g) The university shall provide the parties at least ten (10) days to review evidence collected during the investigation as set forth in 34 CFR s. 106.45(b)(5)(vi).

~~The following procedures are applicable to complaints arising out of an alleged violation of university prohibitions against sexual misconduct, including gender-based discrimination, sexual harassment, sexual assault, dating violence, domestic violence and stalking:~~

- ~~(a) The university may provide for the student and the complainant to each participate individually in a voluntary informational conference. The purpose of the informational conference is to provide an opportunity for a university representative to review the allegations, the charge(s), and possible sanctions, and explain the conduct process and any alternative forms of dispute resolution that may be available to the student and the complainant.~~
- ~~(b) To the extent allowed by state and federal privacy laws, the complainant shall be permitted to participate in the disciplinary proceeding. Such participation may include the presence of an adviser, the ability to present information and witnesses in the disciplinary proceeding, the right to avoid self-incrimination,~~

notification of the final result of the disciplinary proceeding and any subsequent changes to the final result, and the right to appeal the decision.

- ~~(c) The disciplinary proceeding shall be conducted by a university official or panel of university officials, except a university may provide for a committee or panel where students comprise at least one-half of the membership if such committee or panel is requested by the student and no objection is raised by the complainant.~~
- ~~(d) Upon request by the student, the complainant, or other participants, the university may permit an individual to provide relevant information during the disciplinary proceeding in a manner that avoids direct contact with the student, the complainant, or the other participants.~~
- ~~(e) In the event the student accepts responsibility or is found responsible, any impact statement provided by the complainant and/or victim will be considered by the university official(s) in recommending or issuing the disciplinary sanction(s). The statement may include a description of how the complainant was impacted by the conduct violation and may include a recommendation for sanctions. While the impact statement is not binding, the impact described in the statement together with the totality of the circumstances including the student's conduct record, should be considered by the university official(s) involved in recommending or determining the appropriate sanction(s).~~

(9) Each university shall, as part of its student disciplinary system, adopt and publish a regulation or policy that articulates how the university will address sexual misconduct violations other than Title IX Sexual Harassment. Universities may address sexual misconduct violations other than Title IX Sexual Harassment in accordance with either paragraph (4) or paragraph (8) of this regulation. If a university elects to use the procedures in paragraph (4), then paragraph (4)(b) shall not apply. Instead, the accused student shall be entitled to a disciplinary proceeding within the timelines established by each university and the disciplinary proceeding, at the university's discretion, shall be conducted by a university official or designee; or a committee or panel comprised of only university officials or designees; or a committee or panel where students comprise at least one-half of the membership of such committee or panel.

(10) Each university shall establish a committee, which shall include student representation, for the periodic evaluation of its student disciplinary system.

Authority: Section 7(d), Art. IX, Fla. Const., History--Formerly 6C-6.105,

New 2-18-85, Amended 4-29-01, Amended and Renumbered 6-18-09, Amended 9-3-2015, 8-14-20.