

July 6, 2016

MEMORANDUM

TO: State Board of Regents

FROM: David L. Buhler

SUBJECT: Adoption of Regent Policy R256, Student Disciplinary Processes

Issue

Federal law and constitutional due process require certain procedural standards in disciplinary hearings for students. All Utah System of Higher Education (USHE) institutions have hearing processes in place, but they differ from each other, in particular regarding how students are given notice of their rights and whether a student's attorney may actively participate in disciplinary proceedings. This policy creates minimum standards for student disciplinary processes at USHE institutions.

Background

Under Title IX, all institutions must provide students, among other things, an opportunity for a hearing if the school is potentially taking action for violations of its code of conduct. Public institutions must also meet certain due process requirements prior to taking actions against a student. The Regents do not currently have a policy governing how institutions conduct disciplinary proceedings.

This year, the Legislature considered a bill that raised issues about whether students could have attorneys represent them throughout the disciplinary process. The institutions had many concerns with the bill and worked with the sponsoring legislators to resolve them. Ultimately, however, the Regents and USHE took the position that the legislation addressed important issues, but that those issues are better handled by Regent policy. The bill passed the House but did not pass the Senate; during consideration of the bill in committee and in a subsequent meeting of the Legislature's Administrative Rules Committee, the Commissioner assured legislators the Board of Regents would adopt a policy to address issues raised and report back.

During the last six months, staff have worked with the general counsels from each institution as well as Title IX officers and chief student affairs officers to craft a new policy that addresses the issues raised during the session, yet also resolves the institutions' concerns. This proposed policy is a result of these extensive consultations and dialogue.

This proposed policy is limited to matters of non-academic conduct that may result in either expulsion or a minimum 10-day suspension. The policy requires institutions to give students notice of the allegations against them and give them an opportunity to obtain counsel from an attorney or another advisor.

Although advisors may be present during the investigative portion of the process, they may not actively participate. During a formal hearing, the policy allows advisors to advocate on behalf of the student, but with limitations. Specifically, advisors may give opening statements, may submit questions to the hearing committee chair who will then address the questions to witnesses for a response, and may issue a closing statement.

Importantly, institutions may proceed with the disciplinary processes, even if one of the parties chooses not to participate. Institutions may also suspend a student who is alleged to have engaged in misconduct if it is necessary to protect other students and the educational process.

This policy will not apply to law enforcement activities and will not apply to academic disciplinary actions.

Commissioner's Recommendation

The Commissioner recommends the Regents approve R256, *Student Disciplinary Processes* effective immediately.

David L. Buhler
Commissioner of Higher Education

DLB/EJH/GTL
Attachments

R256-1. Purpose: To provide minimum standards of due process for the institutions' disciplinary processes, including the participation of advisors/attorneys.

R256-2. References

- 2.1. Utah Code §53B-1-103 (Powers and Authority of the Board of Regents)
- 2.2. Utah Code §53B-2-106 (Duties and Responsibilities of the President)

R256-3. General Provisions

- 3.1. **Due Process:** Institutions shall provide students due process.
- 3.2. **Discipline Regarding Academic Matters:** In academic discipline matters, institutions shall establish policies and procedures that give students notice of institutional action that may impact the student and an opportunity for the student to respond, in accordance with applicable law.

R256-4. Discipline Regarding Non-academic Matters: In matters of non-academic conduct that may result in either expulsion or a minimum 10-day suspension from the institution, institutions shall establish policies that provide students with the following minimum standards:

- 4.1. Prior to being interviewed about allegations of misconduct, institutions shall provide students with notice of the allegations against them and of their right to have an advisor throughout the process who may, but need not be, an attorney.
 - 4.1.1. Notice may be verbal and may be given immediately before a student is interviewed regarding the issue described in the notice. If a student wishes to seek counsel from an advisor, the institution shall reschedule the interview, giving the student reasonable time to obtain an advisor.
 - 4.1.2. During an inquiry, investigation, or other informal process, an advisor may only advise the student and may not actively participate in the investigation or informal process.
- 4.2. Prior to a formal hearing, unless prohibited by reasonable circumstances, each party shall provide to the hearing committee chair (or hearing officer) copies of the documents they intend to submit as evidence and a list of witnesses they intend to call during the formal hearing. This information will be shared with both parties.
- 4.3. At formal adjudicatory hearings, students may have an advisor advocate for them. The student's advisor may be an attorney. The student's advisor may actively participate in the hearing in accordance with the institution's policies regarding active participation. Students should be encouraged to represent themselves as much as possible, including giving opening and closing statements but institutions shall allow for the following minimum standards for active counsel within formal hearings:
 - 4.3.1. Advisors may give opening statements;

¹ Adopted July 16, 2016.

4.3.2. Advisors may advise students throughout the hearing;

4.3.3. Advisors may question witnesses as allowed by the hearing committee chair (or hearing officer). At minimum, advisors shall be allowed to submit their questions to the committee chair who, in his or her judgment, may then ask the witness the question, ask the advisor to rephrase the question, disallow the question or ask the advisor to move on to another question or area of questioning. During questioning, the parties, advisors and committee chair/members shall treat all persons with respect, particularly in matters of alleged sexual assault.

4.3.4. Advisors may present a closing statement.

4.3.5. Institutions may require students to provide advance notice that they will have an advisor represent them in a formal hearing.

4.3.6. Neither the Rules of Civil Procedure nor the Rules of Evidence govern these hearings.

4.4. Students may waive any rights described herein.

R256-5. Standard of Proof and Administrative Suspension: Students are presumed not to have engaged in a Code of Conduct violation until the institution has established a violation by a preponderance of the evidence. However, institutions may have a process for administratively suspending a student prior to the final outcome of a formal adjudicatory process if necessary to protect the campus community or prevent serious disruption of the academic process. In such circumstances, the adjudicatory process shall follow the suspension as expeditiously as possible

R256-6. Institutional Right to Proceed Absent Student Participation: Students may decline to participate in any proceedings. However, institutions may proceed with the investigation and hearing processes in a timely fashion without the student if he or she declines to participate. Institutions may set reasonable deadlines and move forward with processes regardless of whether a student and/or a student's advisor is able to accommodate those deadlines.

R256-7. Duty to Act in Good Faith: Institutions shall act in good faith to determine the applicability of this policy based on facts known at the time. If institutions later become aware of additional facts indicating this policy governs, institutions shall act in good faith to meet the requirements of this policy when those facts become known.

R256-8. Non-applicability to Law Enforcement Activities: This policy does not apply to law enforcement activities.