

**BLACK LETTER OF STUDENT SEXUAL MISCONDUCT: PROCEDURAL
FRAMEWORKS FOR COLLEGES AND UNIVERSITIES
TENTATIVE DRAFT NO. 1
AS APPROVED BY MEMBERSHIP IN MAY 2022**

§ 1.1. Sexual Assault and Misconduct as Threats to Student Safety and Educational Opportunity

Sexual assault and related misconduct have been and remain a serious threat to the safety and security of college and university student victims and to their ability to pursue their education on equal terms with their classmates.

§ 1.2. Procedures to be Fair, Impartial, and Respect Basic Tenets of Due Process

The procedures used to respond to complaints of sexual assault and related misconduct should be fair and impartial in their treatment of both complainants and respondents and should respect basic tenets of due process, including notice, a fair opportunity to present evidence, and a decisionmaker who is impartial.

§ 1.3. Evenhanded Treatment of Complainants and Respondents in Proceedings

Colleges and universities should be fair, impartial, and evenhanded in the procedural opportunities provided for complainants and respondents to participate in an investigation, to present their own evidence and contest the evidence of others, and to participate in any related proceedings.

§ 1.4. Balancing Fairness to Complainants and Respondents

Colleges and universities should recognize and accommodate tensions between the demands of fairness to complainants and fairness to respondents in an evenhanded way that is sensitive to both.

§ 1.5. Diversity of Institutions of Higher Education

Principles governing policies and procedures for responding to complaints of sexual assault and related misconduct should be appropriate to the diverse settings and circumstances of U.S. colleges and universities.

§ 1.6. Importance of Flexibility

Principles governing policies and procedures for responding to complaints of sexual assault and related misconduct should be flexible enough to allow colleges and universities to respond appropriately to the range of conduct involved and the many varied contexts in which complaints of such misconduct arise.

§ 1.7. Schools' Educational Missions

College and university responses to sexual assault and related misconduct should be faithful to their mission as educational institutions.

§ 1.8. Procedures Taken as a Whole

Universities and colleges should recognize the interrelationship among different aspects of procedure in achieving overall fairness.

§ 2.1. Providing Notice of Policies

Colleges and universities should provide clear notice of their sexual-misconduct policies, including what conduct is prohibited, the procedures for reporting and resolving complaints of sexual misconduct, and the availability of appropriate support, accommodation, and protection to students.

§ 2.2. Consistent Application of Policies

Colleges and universities should apply their policies with consistency.

§ 2.3. Communicating Policies through Multiple Channels

Colleges and universities should communicate their policies in multiple ways and at multiple times in order to reach students effectively.

§ 2.4. Policies on Interim Measures

Colleges and universities should have and consistently implement clear policies and procedures for providing interim measures and other forms of support, accommodation, and

protection for students who assert that they have been subjected to sexual assault or related misconduct, to remediate, mitigate, and prevent harm to their educational opportunities.

§ 2.5. Providing Support before any Complaint

Colleges and universities should make appropriate support, accommodation, and protective measures available to a student asserting that he or she has been subject to sexual assault or related misconduct, even before a complaint against another student is made.

§ 2.6. Providing Support, Accommodation, and Protection

Colleges and universities should adopt policies and procedures providing for support, accommodation, and protective measures, which should be provided to students on request if available and reasonable in the institution's exercise of its judgment.

§ 2.7. Interim Measures Affecting Only the Requesting Student

Colleges and universities should establish policies and procedures to make available reasonable support, accommodation, and protective measures for a student who asserts that he or she has been subjected to sexual misconduct, or, when appropriate, for a student who is a respondent or potential respondent, when those measures can be provided without restricting the other party.

§ 2.8. Interim Measures Agreed to by the Parties

Colleges and universities should establish policies and procedures to make available interim accommodations and measures, including protective measures, affecting a respondent or potential respondent, if the student(s) affected agree(s) to them and they are reasonable and appropriate.

§ 2.9. Nonconsensual Interim Measures

Colleges and universities should establish policies and procedures to make available interim accommodations and measures, including protective measures, in circumstances in which an affected student does not agree to them. These policies and procedures should provide for the imposition of such measures only if they are reasonable and necessary to

remediate, mitigate, and/or prevent harm to another student's ability to continue his or her education or to protect members of the community from serious risks of harm pending resolution of the disciplinary process. Ordinarily, such measures should be imposed only after providing the affected student an opportunity to explain why such measures are not appropriate, except when the risk is both very serious and potentially imminent. Such measures should be reasonable, no more restrictive of the affected student than is necessary to achieve the above purpose(s), and of limited time duration.

§ 2.10. Review of Nonconsensual Interim Measures

Nonconsensual interim measures should be reviewed regularly by the college or university and should be subject to review at the request of the student(s) affected; refusal to provide interim measures requested by a complainant or potential complainant should likewise be subject to review at the request of the student affected.

§ 2.11. Support and Accommodation for Respondents

Colleges and universities should provide support and accommodation not only to complainants or potential complainants but also to respondents or potential respondents accused of sexual misconduct, if available and reasonable in the institution's judgment.

§ 3.1. Policies to Encourage Reporting

Colleges and universities should adopt policies to encourage and facilitate reporting of sexual assault and related misconduct.

§ 3.2. Multiple Ways to Report Sexual Misconduct

Colleges and universities should provide a range of ways to report sexual misconduct—including anonymous reporting; confidential disclosure for purposes of seeking support, counseling, or assistance; and reporting to request informal or formal resolution—and should advise students of these options as well as of the means to contact local law-enforcement agencies.

§ 3.3. Encouraging Students to Seek Support and Consider Formally Reporting Sexual Misconduct

Colleges and universities should encourage students who have experienced sexual assault or related misconduct to:

(a) report that conduct through disclosures to those able to provide confidential support and care—such as counselors, chaplains, and health-service providers, and

(b) consider reporting that conduct to those college or university administrators who have the responsibility to strive to prevent and redress these forms of misconduct.

§ 3.4. Respecting Complainants' Wishes with Respect to Investigations

To encourage students to be willing to report sexual misconduct, schools' policies should provide that ordinarily the institution will respect the request of an alleged victim not to have the alleged student-perpetrator(s) investigated for that misconduct, unless the institution:

(a) has a legal obligation to report the alleged misconduct, or

(b) believes that investigating the alleged perpetrator is necessary to protect the community from serious risks of harm, or for other similarly substantial reasons.

§ 3.5. Internal Reporting Policies

Colleges and universities should assign responsibility to appropriate faculty and staff to report internally to the designated Title IX coordinator on complaints of sexual assault or related misconduct. In assigning such responsibility, schools should carefully weigh the benefits and risks of assigning obligations of internal disclosure to a broader or narrower group of employees, having in mind the school's educational interests in facilitating students' ability to seek and obtain appropriate support and guidance.

§ 3.5a. Confidential Reporting

Colleges and universities should make clear to students and other members of the community which faculty and staff have mandatory internal reporting obligations, and which are “confidential” resources.

§ 3.5b. Nonconfidential Reporting

Colleges and universities should ordinarily designate deans and most senior administrative staff as mandatory internal reporters, and should consider alternative approaches to designating other mandatory internal reporters and to defining the obligations of those who are neither mandatory reporters nor confidential resources, with a view toward improving the options for students seeking advice and support for responding to sexual misconduct.

§ 3.6. Non-Campus Resources and Reporting to Law Enforcement

Colleges and universities should advise students of resources beyond those available on campus, including how to report to local law-enforcement authorities, and should also advise students of the circumstances in which the college or university is obligated to report incidents to local law-enforcement authorities. Colleges and universities should consider encouraging students to report possible criminal misconduct to local law-enforcement authorities, recognizing that the choice should generally be that of the student, and should provide assistance as appropriate to students who choose to report such conduct to local law-enforcement authorities.

§ 4.1. Inquiries to Be Impartial, Fair, and Context-Sensitive

Colleges and universities should strive in all inquiries and investigations to be impartial, fair, and sensitive to context.

§ 4.2. Prompt Evaluation and Presumption of Full Investigation

Colleges and universities should promptly evaluate student reports or complaints of sexual misconduct made against another student, and if a student seeks discipline of another

student for sexual misconduct through a formal complaint, the school should apply a presumption that all such complaints will be fully investigated.

§ 4.3. Evenhanded Treatment of Complainants and Respondents

Colleges and universities should provide for evenhanded treatment of complainants and respondents in investigations, including in providing notice of the allegations under investigation, in offering opportunities to provide the names of witnesses and other evidence to investigators, and in permitting advisers to accompany students in interviews.

§ 4.4. Presumptive Time Frames for Investigation; Notifications about Delays

Colleges and universities should establish presumptive time frames for the investigation of complaints, and should notify both complainants and respondents of the reason(s) for delay(s) beyond those time frames.

§ 4.5. Advance Identification and Training of Investigators

Colleges and universities should identify qualified, trained investigators or a group of such investigators before there is the need for investigation of any particular complaint and in ways designed to promote the impartiality of the investigation.

§ 4.6. Investigators' Responsibilities to Be Set Forth

Colleges' and universities' policies should set forth investigators' responsibilities, including their role, if any, in making credibility determinations and other evaluations.

§ 4.7. Open-Mindedness in Evaluating Credibility

Investigators should approach their task with an open mind, and evaluate the credibility of parties and witnesses, without predetermined views, based on the information gathered in the particular case.

§ 4.8. Regular Training of Investigators

Colleges and universities should provide all investigators with regular training in how to conduct investigations in ways that are fair, impartial, evenhanded, and sensitive to the nature of the conduct at issue.

§ 4.9. Parties' Opportunities to Comment

The complainant and the respondent should have equivalent opportunities to comment on any written report made by one or more investigators.

§ 5.1. Definition of "Informal Resolution"

An informal resolution is one that involves action agreed upon by a complainant or potential complainant and the school, or, if a respondent or potential respondent is involved in the process, then action agreed upon by the complaining and the responding party, with the school's approval, or, in the case of anonymous reports, general action taken by the school to improve the educational environment.

§ 5.2. Availability of Informal Resolution Processes

Colleges and universities should make available informal resolution processes for reports or complaints of sexual or related misconduct.

§ 5.3. Maintaining Records

Colleges and universities should maintain, for a reasonable period of time and with appropriate protection of confidentiality, records of requests for informal resolutions, formal complaints, anonymous reports, third-party reports, and other communications identifying incidents of alleged sexual misconduct.

§ 5.4. Complainants' and Potential Complainants' Requests Not to Disclose Identities

Colleges and universities should ordinarily respect the request of complainants or of those reported by others to be victims of sexual misconduct not to disclose their names or identities unless:

(a) the school has a legal obligation to report the alleged misconduct including the alleged victim's name, or

(b) the school believes that such disclosure is necessary to protect the community from serious risks of harm, or for other similarly substantial reasons.

§ 5.5. Prompt Response within Reasonable Time Limits

Colleges and universities should respond promptly to student requests for informal resolution; for informal resolution processes involving a respondent, colleges and universities should establish reasonable presumptive time limits for completion of those processes.

§ 5.6. Evenhandedness in Allowing or Excluding Advisers

Colleges and universities should be evenhanded in their approach to participation of advisers (including support persons or counsel) in informal processes involving both complainants and respondents.

§ 5.7. Respecting Complainant Requests for Informal Resolution

Colleges and universities ordinarily should not insist on a formal resolution if the complainant requests an informal resolution; informal resolutions may be made available for the full range of misconduct; and informal resolutions should proceed only if the parties freely and voluntarily agree to them.

§ 5.8. Informal Resolution Processes to be Voluntary and Supervised

Colleges and universities may offer a wide range of informal resolution processes provided that the parties' participation is voluntary and provided that the college or university appropriately supervises the process.

§ 5.9. Wide Range of Informal Resolution Approaches

Informal resolution of complaints or reports may include a wide range of accommodations and remedial measures.

§ 5.10. Confidentiality of Records and Statements; Preservation of Record of Informal Resolution

Records of informal resolution should be maintained by the school and treated as confidential records. Students should be advised whether and to what extent statements made during informal processes will be treated as confidential.

§ 5.11. Options to End Informal Resolution Process and Seek Formal Resolution

Colleges and universities should provide students the option to end an informal resolution process and seek formal resolution.

§ 6.1. Minimal Due Process Standards

Colleges and universities, whether public or private, should not subject their students to formal discipline without procedures meeting the due process minimal standards, which include:

- (a) notice of their alleged wrongful conduct, and
- (b) an opportunity to respond to and counter the allegations against them in a fair proceeding
- (c) before a neutral decisionmaker.

§ 6.2. Notice

Colleges and universities should provide sufficient notice to a student accused of violating the school's sexual-misconduct rules of the nature of the wrongful acts and violations of school policy alleged to have occurred, to enable the student to prepare a defense.

§ 6.3. Impartiality

Colleges and universities should adopt procedures and criteria for selecting impartial decisionmakers.

§ 6.3a. Use of Single Investigator/Resolver

Due process requirements for impartiality in decisionmaking will ordinarily be easier to satisfy when the final decisionmaker as to the facts is different from the fact-investigator.

Colleges and universities that use a single-investigator/resolver model, combining investigation and fact resolution, should take measures to ensure the procedural fairness of that process.

§ 6.3b. Decisionmakers for Resolving Formal Complaints

The decisionmakers, or pool of decisionmakers, for resolving formal complaints of sexual misconduct, and the procedures for how they are to be selected for particular cases, should be defined and announced clearly, ahead of time.

§ 6.3c. Challenges for Bias

Colleges and universities should provide a simple procedure for complainants or respondents to challenge the participation of an investigator or adjudicator in their case.

§ 6.3d. Undergraduates on Hearing Panels

Colleges and universities that require or allow undergraduate students to serve on hearing panels should consider further precautions to promote the fairness of the process.

§ 6.4. Fair Opportunity to Present and Contest the Facts

Colleges and universities must provide, as part of their formal resolution procedures, a fair and evenhanded opportunity for the complainant's allegations to be presented and for the respondent to respond to and contest those allegations.

§ 6.4a. Processes to Evaluate Witness Credibility

When credibility is a central issue in a serious case, colleges and universities should adopt processes that enable the factfinders to evaluate witness credibility and allow questions to be put to complainants, respondents, and other witnesses.

§ 6.4b. Restrictions on Prior-Sexual-History Evidence

Colleges and universities should strongly consider adopting appropriate restrictions on introducing evidence concerning, or posing questions about, complainants' or respondents' prior sexual history with other individuals.

§ 6.4c. Treatment of Respondent's or Complainant's Silence

Colleges and universities should consider adopting policies that a respondent's silence not be treated as equivalent to an admission of responsibility, and a complainant's silence not be treated as equivalent to an admission that allegations of misconduct are false.

§ 6.4d. Challenges in Testifying About Sexual Matters

In designing policies, and applying procedures in particular cases, including the physical setup for any in-person hearing, colleges and universities should be sensitive to the difficulty students may have in testifying about sexual matters, and to the fact that at the hearing stage, both students are members of the community with equivalent interests in pursuing their education.

§ 6.5. The Role of Advisers for Complainants and Respondents

Colleges and universities should allow both complainants and respondents the opportunity to be accompanied by an adviser of their choice, including a lawyer, and should be evenhanded in regulating the role of advisers and in making resources available for either student to have the assistance of an adviser.

§ 6.6. Encouraging Cooperation of Witnesses

Colleges and universities should, through appropriate measures, encourage the cooperation of all members of their school communities in the truth-seeking process, including as witnesses in investigations or hearings, as needed.

§ 6.7. Resolution Based on Evidence Adduced

Decisions in a formal resolution proceeding should be based on the evidence adduced in that proceeding.

§ 6.8. Standard of Proof

Colleges and universities should adopt the same standard of proof for resolving disciplinary claims of sexual misconduct by students as they use in resolving other comparably serious disciplinary complaints against students. Standards that require proof

either by a “preponderance of the evidence” or by “clear and convincing evidence” can satisfy the requirements of procedural due process and fair treatment. Whatever standard of proof is adopted, decisions that the standard of proof is met should always rest on a sound evidentiary basis.

§ 6.9. Expectations Concerning Confidentiality

Colleges and universities should make clear, to the parties and to the community, their expectations about the confidentiality of disciplinary processes for sexual misconduct.

§ 6.10. Reasonable Promptness in Resolving Complaints

Colleges and universities should act reasonably promptly, consistent with principles of fairness, in responding to and resolving complaints of sexual misconduct, and should establish reasonably prompt, presumptive time frames for the complaint-resolution process.

§ 6.11. Statement of Reasons

Colleges and universities should require decisionmakers to provide a written statement explaining their conclusions based on the evidence, at least in all cases in which discipline involving suspension or expulsion has been imposed or requested.

§ 6.12. Training of Decisionmakers

To promote impartiality and evenhandedness by decisionmakers, colleges and universities should provide all decisionmakers with regular training in how to conduct hearings and resolve issues in ways that are fair, impartial, evenhanded, and appropriate to the setting.

§ 7.1. Proportionality, Fairness, and Appropriateness of Sanctions

Sanctions should be fair, proportionate to the severity of the conduct, and individually appropriate.

§ 7.2. Communication to College and University Communities

Colleges and universities should communicate to the community the nature and range of the sanctions that have been and may be imposed for different kinds of sexual misconduct.

§ 7.3. Procedure for Imposing Sanctions

Schools should adopt procedures that are fair to all interested parties and likely to result in fair, proportionate, and individually appropriate penalties.

§ 7.4. Special Procedures for Imposing Most Severe Sanctions

Special procedures for imposition of the most severe penalties may be applied in cases of sexual misconduct if they are applied for imposition of the most severe penalties in cases involving nonsexual misconduct.

§ 8.1. Impartiality and Good Cause

Appeals should be provided to an impartial decisionmaker or decisionmaking body, and that decisionmaker or decisionmaking body should not set aside decisions without good cause as set forth in advance in the school's procedures or policies.

§ 8.2. Procedures for Selecting Decisionmakers

Procedures for selecting impartial appellate decisionmakers should be specified in advance, and appropriate training provided to the decisionmakers.

§ 8.3. Appeals Equally Available to Complainants and Respondents

Appeals should be available on equal terms to both complainants and respondents regarding findings of responsibility and sanctions.

§ 8.4. Single Level of Appeal

The appellate process should ordinarily provide a single appeal, rather than multiple levels of appeal.

§ 8.5. Appeals Distinct from Initial Determinations

Appeals should ordinarily be limited to the record developed in the factfinding stage, which record should be preserved; the grounds for appeal should be specified in advance; and appeals ordinarily should require some showing of good cause to depart from the initial resolution.

§ 8.6. Written Appellate Decisions

Colleges and universities should provide written explanations of decisions on appeal.

§ 9.1. Topics to Address Affecting the Integrity of the Proceedings

Colleges and universities should protect the integrity of their procedures for sexual-misconduct claims by addressing confidentiality, intentional misrepresentation, and retaliation in their policies relating to sexual misconduct.

§ 9.2. Confidentiality

Colleges and universities should strike a careful balance between confidentiality and transparency in dealing with sensitive information about sexual-misconduct charges. This balance may support different approaches to confidentiality at different stages of the disciplinary process.

§ 9.2a. Confidentiality while Proceedings are Ongoing

Colleges and universities should maintain the integrity of their ongoing disciplinary processes, and thus should generally encourage or require the parties, and other participants, including witnesses and support persons, to refrain from communicating about the proceedings in ways that could interfere with the process, while allowing the parties to communicate with others for the purpose of identifying relevant witnesses or evidence and to consult with advisers, family, and close friends for advice, emotional support, or other purposes. Schools should not restrict students' communications with law enforcement or internal communications that may be necessary to implement their policies (for instance, communications among staff necessary to implement accommodations or other interim measures).

§ 9.2b. Confidentiality once Proceedings are Complete

Schools should consider relaxing confidentiality requirements once a disciplinary process (including internal appeals) has concluded, though they may generally require that students continue to maintain confidentiality concerning some aspects of the process.

§ 9.2c. Enforcing Confidentiality Requirements

In enforcing confidentiality requirements, colleges and universities should consider approaches focused on education and counseling, which may be more effective and appropriate than disciplinary sanctions in many circumstances. Colleges and universities should not enforce confidentiality requirements through means that constrain the capacity of members of the college or university community to critique existing procedures.

§ 9.3. Retaliation

Schools should prohibit their own faculty, staff, students, and others from retaliating against those who invoke, participate in, or provide evidence to disciplinary processes for sexual misconduct, while at the same time recognizing and protecting important interests in freedom of speech and association.

§ 9.3a. Enforcing Prohibitions on Retaliation

In addressing retaliation by or among students, schools should provide advance guidance to help distinguish actions that will or will not be viewed as prohibited retaliation. Schools generally should impose disciplinary sanctions on students only in cases of serious or clear-cut retaliation, such as when a student threatens another student's safety, stalks another student or otherwise interferes with the other student's possessions or freedom of movement, or exercises power in a university-sanctioned activity to deny or withdraw privileges to or from another student. When a student's conduct is primarily expressive, or could be construed as retaliatory but is also susceptible to non-retaliatory interpretations, schools should consider employing educative, rather than disciplinary, methods.

§ 9.4. Intentional Misrepresentation

Colleges and universities should prohibit faculty, staff, and students, as well as any other participants in disciplinary proceedings, from intentionally making false or misleading claims, or intentionally misrepresenting or providing false information in connection with the investigation or resolution of a complaint of sexual misconduct.

§ 9.5. Informing the Community about the Disciplinary Process

Schools should inform their communities on a regular basis about reports of sexual misconduct involving students, in terms that are not individually identifying but that are sufficient to convey the nature of the conduct alleged and of the findings, sanctions, or other results of their disciplinary processes.

§ 9.5a. Internal Records and Reviews

Schools should maintain internal, written records sufficient to help develop data, across the institution and over time, of complaints, their resolution, and the sanctions imposed, if any, to aid in review of policies and practices.

§ 9.6. Disclosures Concerning Repeat Offenders

Colleges and universities should develop internal systems to track multiple reports of sexual misconduct by the same student. When multiple complaints of sexual misconduct have been made against one student but no complainant is willing to move forward with a formal disciplinary process, schools should consider whether the student against whom multiple complaints have been made poses an ongoing threat to student safety. If so, schools should consider what steps may be necessary to alleviate the threat, which may include such measures as encouraging one or more complainants to move forward with a formal complaint, providing information and educational programs directed at groups that include the alleged serial offender, or engaging in direct discussion with the alleged serial offender about existing policies.

§ 10.1. Independence of School and Criminal Processes

Colleges and universities should provide a disciplinary process for complaints of sexual assault and related misconduct against students even when a criminal process might also be available for investigating and adjudicating the complained of conduct. Colleges and universities should not discourage students from seeking remedies from the criminal justice system.

§ 10.2. Rebuttable Presumption that School Proceedings Go Forward Notwithstanding Concurrent Law-Enforcement Activity

When a complaint seeks disciplinary action for sexual misconduct, the college or university disciplinary process should presumptively go forward notwithstanding the possibility of parallel criminal proceedings. This presumption can be overcome for good cause, which may include a request from local law enforcement to delay because of legitimate law-enforcement needs in connection with an active investigation or prosecution of some or all of the conduct at issue in the campus proceeding. The campus proceeding may then be suspended pending resolution of those identified needs, but any such suspension of the campus proceeding should not be cause for delaying appropriate accommodations or interim measures. Schools generally should seek to keep suspensions of their proceedings as short as possible, and should require greater showings of good cause for lengthier delays.

§ 10.3. Evaluating Requests for Delay by Law Enforcement

Schools may consider a variety of factors in evaluating a request by law enforcement to suspend or delay a school disciplinary process. A school should consider internal factors, such as the effect of any delay on the parties, and the school's interest in promptly enforcing its policies. Schools also may appropriately consider external factors relating to the law-enforcement request, including the reason behind the request; the expected duration and usefulness of any delay; and the competency, capacity, and willingness of the local criminal justice system to adequately handle sexual-misconduct cases.

§ 10.4. Preserving Parties' Rights in Criminal Proceedings

Colleges and universities should consider measures to preserve parties' rights in potential criminal proceedings.

§ 10.5. Informing Students How to Obtain Orders of Protection

Colleges and universities should provide students who have experienced sexual assault and related misconduct with information about obtaining orders of protection.

§ 10.6. Cooperation between Schools and Law Enforcement

Colleges and universities should seriously consider developing a memorandum of understanding or other communication channels with local law enforcement to enable prompt and effective communication regarding simultaneous investigations.