To whom it may concern,

I apologize that I wasn’t aware of the public hearing timing. I thought I would submit an article I recently wrote about informal resolution processes under the 2020 Regulations. I would be happy to answer questions about anything I said in the article. I also published an op-ed in the Cleveland Plain-Dealer on this topic. Thank you for your consideration.

Sincerely,

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Mediate Your Response: Reconciling the Benefits and Drawbacks of the New Title IX Regulations

Despite the investment of considerable time and resources, universities have found it difficult to develop a uniform approach to addressing student allegations of sexual misconduct and harassment on campus, allegations which, if handled improperly, could give rise to Title IX violations. Most recently, university attempts to address student-on-student sexual harassment spawned lawsuits against universities, both from alleged victims and alleged perpetrators, with each claiming that university processes are badly flawed. Shifting guidance from the Department of Education also may have contributed to the problem. A 2011 Dear Colleague Letter from the Department of Education expressly limited the use of informal dispute resolution methods (such as mediation) to cases that did not allege sexual assault (and discouraged informal dispute resolution processes more generally). Whatever the motivation for this restriction, in

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1 Michael E. Moritz Chair in Alternative Dispute Resolution. Many thanks to my husband, Judge Douglas R. Cole and my colleague, Ruth Colker for their comments on this draft and to Briana Soltys and Andrea Hofer for their research assistance. I also want to thank the 2020-21 Editorial Board of the Ohio State Journal on Dispute Resolution for their efforts in putting on a terrific symposium during an international pandemic.

2 Title IX was enacted in 1972 as one of the amendments to the Higher Education Act of 1965. Title IX stated that “no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681 (c).


4 A United Educators (UE is an insurance provider for universities) Study found that students (both victims and alleged perpetrators) challenged over 25% of more than 300 Title IX claims either by filing federal lawsuits or complaints with the Department of Education’s Office for Civil Rights (OCR). http://www.ncdsv.org/ERS_Confronting-Campus-Sexual-Assault_2015.pdf


6 One author described the attitude toward mediation in the 2011 Dear Colleague Letter as a “soft ban” on the process, at least where sexual violence was concerned. Brett A. Sokolow, OCR is About to Rock Our Worlds, www.insidehighered.com/2020/01/15/how-respond-new-federal-title-ix-regulations-being-published-soon-opinion (January 15, 2020). Professor Brian Pappas noted that the interim guidelines allowed colleges to use mediation, even in cases of sexual assault, an approach which contradicts the previous guidelines. Brian A. Pappas, Sexual
practice, this guidance appears to have created more problems and confusion than it resolved. As a result, most schools stopped using informal resolution methods for any disputes. In 2020, the Department reversed course again, issuing rules that both reflect greater openness to such methods, while, at the same time, creating an even more trial-like adjudicatory process for disputes that fail to resolve through informal means.

The recurring theme is that colleges and universities are struggling in their efforts to design a dispute resolution process that adequately reflects the values of Title IX, while, at the same time, providing the kind of due process rights typically associated with traditional adjudication of sexual assault, harassment, and discrimination claims. This Article argues that

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*Misconduct on Campus, Disp. Resol. Mag. 21, 22 (Winter 2019); Katie Vail, The Failings of Title IX for Survivors of Sexual Violence: Utilizing Restorative Justice on College Campuses, 94 Wash. L. Rev. 2085 (2019).*

7 See Jeannie Suk Gersen, How Concerning Are the Trump Administration’s New Title IX Regulations?, www.newyorker.com/news/our-columnists/how-concerning-are-the-trump-administrations-new-title-ix-regulations (May 16, 2020) (“prior guidance had discouraged schools from using informal resolution, such as mediation, for sexual-assault allegations, but the new regulations allow schools to offer the option, as long as . . . both parties voluntarily agree to it, and the process is led by a trained facilitator.”) ATIXA Brief User Guide to the Title IX Process states, at 3, “the regulations have now created options for informal resolution that were discouraged by the Dear Colleague Letter.” ATIXA Members Comprehensive 2020 Title IX Regulations Implementation Guide at 122 (on file with author) stated “[t]he new regulations contain a significant philosophical shift from the 2011 DCL (Dear Colleague Letter) by permitting the use of alternative resolution procedures in cases of sexual assault (and all other sec. 106.30 offenses), such as mediation . . . .”

8 Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance 85 Fed. Reg. 30,026 (May 19, 2020) (to be codified at 34 C.F.R. Part 106 and effective on August 14, 2020). The 2020 rules provide both respondents and complainants strong and equal procedural rights during institutional grievance investigations. *Id.* at 30,050. Many of these procedural protections mirror constitutional due process principles, and include the right to present and review evidence, to receive notice of proceedings and complaints, to have a representative present during proceedings, the right to an impartial decision maker, and an equal opportunity to appeal decisions. *Id.* at 30,053-54.

While the rules include strong trial-like procedural protections for formal grievance procedures, they also provide a section instructing educational institutions in the ways they can support and expand opportunities for informal dispute resolution procedures. *Id.* at 30,399. This section, C.F.R. 106.45(b)(9), allows educational institutions to offer informal dispute resolution processes so long as they ensure that both parties consent to informal resolution and are subsequently afforded procedural protections throughout the process. *Id.* at 30,399-401.

9 Title IX prohibits sexual discrimination in the provision of educational opportunities. The Supreme Court extended Title IX’s coverage to include sexual harassment, which includes acts of sexual misconduct and violence. Many groups criticized schools’ implementations of hearing processes. See ABA Criminal Justice Section Task Force On College Due Process Rights And Victim Protections, Recommendations For Colleges And Universities In Resolving Allegations Of Campus Sexual Misconduct (2017); American College Of Trial Lawyers, Task Force On The Response Of Universities And Colleges To Allegations Of Sexual Violence, White Paper On Campus Sexual Assault Investigations (2017); Rethink Harvard’s Sexual Harassment Policy, Boston Globe (Oct. 15, 2014) (28 Harvard law professors signed op-ed opposing the school’s sexual misconduct adjudication procedures). A number
this struggle arises, at least in part, from reliance on flawed assumptions about informal processes and also reflects an unduly narrow understanding of dispute process design principles.

In short, colleges and universities appear to be striving for a single, uniform, “one size fits all” process that applies across the board to sexual misconduct claims, claims that run the gamut from allegations of sexually inappropriate comments to claims of nonconsensual physical sexual assault. 10 And, perhaps not surprisingly, given the criminal overtones of some of the included conduct, the resulting default approach has been to adopt a model that borrows heavily from traditional adjudicatory processes. 11

That may be a mistake, in part because universities are ill-equipped from a resource standpoint to emulate a true adjudicatory setting. But more importantly, the default move to “adjudicatize” dispute resolution in this setting may merely reflect an ill-founded belief that formal adjudicatory processes are the gold standard for resolving disputes and ensuring procedural justice. A more nuanced view may be to suggest that some of the claims that arise in the university setting should not be adjudicated through a university process at all, but rather should be addressed through the criminal justice system, namely sexual assault claims that rise to the level of criminal behavior. 12 But setting those claims aside, what remains are largely the

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10 This article advocates greater use of informal processes for allegations of sexual misconduct that do not involve claims of sexual violence. Claims of sexual assault and sexual violence, including “physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent”, including “rape, sexual assault, sexual battery, and sexual coercion” would presumptively not be appropriate for mediation. By contrast, gender-based harassment claims, including disparaging comments based on sex, or creation of a hostile environment through verbal or nonverbal actions, would seem more appropriate for mediation. For example, harassment on the basis of failure to conform to gender stereotypes would fall in the latter category as would repeated derogatory statements based on sex.

11 Precluding the use of mediation undoubtedly forced many claims into more formal hearing processes that ultimately imposed penalties without adequate due process.

12 One researcher stated that the following cases should not be mediated or submitted to other informal processes: Crimes with more violence than minimally necessary to compel unwanted sex acts; couples where sexual assault co-occurs in an ongoing cycle of physical violence; persons with previous arrest records for sex crimes or other violent crimes. Mary P. Koss, Q&A: The Restorative Conference Model Perspective,
same types of sexual harassment claims that civil courts have attempted to resolve in the workplace setting for the last fifty years.\textsuperscript{13} Statistics establish that claimants rarely succeed through adjudicatory processes, at least in part because they have the burden of proof and the

\textsuperscript{13} The new regulations require that sexual harassment be both severe and pervasive. To establish workplace sexual harassment, however, an employee need only show that the harassment was either severe or pervasive, not both. Critics of the new rules view this change as problematic because it makes harassment more difficult to establish. https://www.newyorker.com/news/our-columnists/how-concerning-are-the-trump-administrations-new-title-ix-regulations; https://www.saveservices.org/2020/05/aclu-sues-betsy-devos-over-new-campus-sexual-assault-rules/ (the ACLU brought suit to prevent the implementation of the new rules in part because victims have to show that sexual misconduct was severe, pervasive and objectively offensive). Many critics view this change as problematic and see the new rules as rolling back protections for those who are sexually harassed.
cases often turn on credibility determinations. Yet, mediation has provided a path to successful resolution for many of these claims.

In the campus context, the obstacles claimants face are at least as daunting as those faced by employees in the civil dispute system. Many prospective complainants at universities do not report sexual misconduct. For those who do, unlike a harassed employee suing her employer,

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14 Employment discrimination actions rarely prevail at trial or on appeal. See Diane P. Wood, *Sexual Harassment Litigation with a Dose of Reality*, 2019 U. Chi. Legal F. 395 (2019) (reviewing the remarkable lack of success of plaintiffs in sexual harassment lawsuits in the Seventh Circuit); Laura Beth Nielson et al., *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175, 184 (2010) (finding that, of employment discrimination suits filed with federal courts during the period between 1988 and 2003, 19% were initially dismissed and 50% were settled. Of the plaintiffs who failed to settle, and who survive early motions to dismiss, 57% lost on a subsequent motion for summary judgment). See also Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse*, 3 HARV. L. & POL’Y REV. 103, 127-28 (2009) (concluding that between 1979-2006, employment discrimination plaintiffs prevailed in only 15% of cases, and finding that much of that difference is due to plaintiff's striking lack of success at pretrial motions). Clermont & Schwab also found that “appeal courts reverse plaintiffs' wins below far more often than defendants' wins below. The statistically significant differential exists for appeals from wins at the stage of pretrial adjudication (thirty percent compared to eleven percent), and it becomes more pronounced for appeals from wins at the trial stage (forty-one percent compared to nine percent).” Id. at 110-11. See also Monique C. Lillard et al., *Empirical Studies: How Do Discrimination Cases Fare in Court — Proceedings of the 2003 Annual Meeting of the Association of American Law Schools, Section on Employment Discrimination*, 7 Emp. RTS. & EMP. POL’Y J. 533, 536-37 (2003). This study examined 789 employment discrimination cases that involved appeals from the period between 1994 and 1998. The data showed that 88% of the time, defendants were successful at trial, and even when plaintiffs won, they were overturned 60% of the time on appeal. Some scholars have suggested that this pro-defendant trend may be a result of how hard courts have made for defendants to survive summary judgment motions. Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99 (1999). (finding that defendants prevail in 93% of ADA cases, and attributing the pro-defendant system to the district courts' abuse of the summary judgment mechanism).

Of the very few cases that go to trial, plaintiffs tend to lose more frequently than they win. See Laura Beth Nielson & Robert L. Nelson, *Rights Realized – An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663, 699-701 (2005) (examining win rates for employment discrimination plaintiffs in the U.S. District Courts during the period between 1990 and 2001 and finding that plaintiffs tend to win only 35% - 43% of jury trials and only 14%-33% of bench trials. These figures address only those cases that survive summary judgment and are disposed at trial).

15 In mediation, the mediator focuses attention on the parties, seeking to learn about their perceptions, issues, and interests. Mediators listen actively to both parties both to understand each party’s viewpoint and to demonstrate to the party that they have been understood. Active listening helps the mediator demonstrate concern and empathy for the speaker. Following a similar, uninterrupted opportunity for the other party to speak, the mediator obtains additional information through questioning, sets an agenda with the parties' help, and proceeds to assist the parties with developing options that might satisfy the parties' underlying interests, generating movement using reality testing, among other devices, and ultimately helps the parties reach resolution.

16 A study of 33 universities revealed that approximately 23% of female undergraduate students experienced sexual assault and sexual misconduct, threats of physical force, or incapacitation and that rates of reporting to campus officials and law enforcement ranged from 5 to 28% depending on the type of behavior. Mary Sue Coleman, et al, *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct*, American Association of American Universities (2019); https://www.aau.edu/key-issues/campus-climate-and-safety/aau-campus-climatesurvey-2019. Prospective complainants, approximately 40% of those who responded to the survey, gave several reasons for failing to report including that they did not believe school officials would take the complaint seriously.
remedies for a claimant are typically non-monetary in nature, because the traditional economic relationship present in the workplace is absent in the learning environment of the university. And, some complainants do not wish to participate in a formal hearing process. The lack of monetary remedies, together with the problems of proof, the risk of a binary decision, and a desire to avoid the hearing process, among other reasons explored more fully below, argue for greater use of informal dispute resolution processes, particularly mediation and restorative

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Id. The report also noted that 6 out of 10 students surveyed believed that school officials would take the reports seriously. One survey reported that only 12% of college survivors reported sexual assault. Survey of Current and Recent College Students on Sexual Assault, Kaiser Family Fdn. & Wash. Post 24 (June 12, 2015).

17 Some recipients (universities) have been ordered to pay monetary remedies, such as medical and counseling expenses, although it is unclear whether OCR had the authority or statutory basis for requiring a recipient to make such payments. These remedies were part of several resolution agreements. See Tufts University Resolution Agreement ("Tufts Resolution Agreement"), Complaint No. 01-10-2089, 13 (April 17, 2014); Ohio State University Resolution Agreement ("OSU Resolution Agreement"), OCR Docket No. 15-10-6002, 15 (Sept. 8, 2014); Princeton University Resolution Agreement ("Princeton Resolution Agreement"), Case No. 02-11-2015, 12-13 (Oct. 12, 2014); and Southern Methodist University Resolution Agreement ("SMU Resolution Agreement"), Case Nos. 06-11-2126, 06-13-2081, 06-13-2088, 15 (Nov. 16, 2014). The new rules, Section 106.45(b)(1)(ii) (2020), states that remedies "must be designed to restore or preserve equal access to the recipient’s education program or activity." The rule notes that remedies can be supportive, disciplinary, and punitive and may burden the respondent. Id. Notice of potential sanctions or remedies that can be imposed following a determination of responsibility must be provided to respondents. 106.45(b)(1)(vi).

18 For example, under the 2011 Dear Colleague Letter, “if a school determines that sexual harassment that creates a hostile environment has occurred, it must take immediate action to eliminate the hostile environment, prevent its recurrence, and address its effects. In addition to counseling or taking disciplinary action against the harasser, effective corrective action may require remedies for the complainant, as well as changes to the school’s overall services or policies.” Remedies a university might implement include: providing an escort to ensure that the complainant can move safely between classes and activities; ensuring that the complainant and alleged perpetrator do not attend the same classes; moving the complainant or alleged perpetrator to a different residence hall or, in the case of an elementary or secondary school student, to another school within the district; providing counseling services; providing medical services; providing academic support services, such as tutoring; arranging for the complainant to re-take a course or withdraw from a class without penalty, including ensuring that any changes do not adversely affect the complainant’s academic record; and reviewing any disciplinary actions taken against the complainant to see if there is a causal connection between the harassment and the misconduct that may have resulted in the complainant being disciplined.” 2011 DEAR COLLEAGUE LETTER at ___.
justice, for these kinds of claims, along with the abandonment of the notion that adjudicatory processes are the optimal way to achieve justice in this context.

Yet, despite all that informal dispute resolution processes may have to offer, as already noted, the 2011 Dear Colleague Letter (DCL), perhaps the most transformative Department of Education (DOE) effort with regard to Title IX interpretation, essentially prohibited the use of such processes, at least in any case where sexual assault was alleged. And, because the letter was not entirely clear in its definitions surrounding that term, universities largely ceased use of such processes at all, at least in cases that touched on allegations of a sexual nature, leaving formal dispute resolution processes as the only avenue for relief.

This widespread embrace of formalized adjudicatory procedures, and the concomitant rejection of informal processes, left few options for claimants reluctant to use their university’s

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19 Restorative justice, another option with considerable potential to assist in resolution of Title IX complaints, is discussed in Katie Vail, The Failings of Title IX for Survivors of Sexual Violence: Utilizing Restorative Justice on College Campuses, 94 Wash. L. Rev. 2085 (2019); Mary P. Koss, Jay K. Wilgus and Kaaren M. Williamsen, Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance With Title IX Guidance, 15 Trauma, Violence & Abuse 242 (2014) (arguing for building restorative justice practices into student conduct codes to enhance compliance with Title IX, increase options and empower victims); Amy B. Cyphert, The Devil Is in the Details: Exploring Restorative Justice as an Option for Campus Sexual Assault Responses Under Title IX, 96 Denver L. Rev. 51 (2018) (describing critical elements of a successful restorative justice program that survivors might choose).

20 Amy B. Cyphert, The Devil is in the Details, 96 Deny. L. Rev. 51, 59 (2018) (“Many heralded the investigative framework outlined and required by the 2011 Dear Colleague Letter as an attempt to confront the problem of sexual assault on college campuses . . . .”) A number of critics expressed outrage at the move away from the Dear Colleague Letter approach, including Catherine Lhamon, the chair of the U.S. Commission on Civil Rights, who tweeted that Betsy DeVos, the secretary of education under President Trump, was “taking us back to the bad old days . . . when it is was possible to rape and sexually harass students with impunity.” Similar sentiments were expressed by Fatima Goss Graves, the president and CEO of the National Women’s Law Center and Senator Nancy Pelosi, then speaker of the House of Representatives. See Jeannie Suk Gersen, How Concerning Are the Trump Administration’s New Title IX Regulations?, www.newyorker.com/news/our-columnists/how-concerning-are-the-trump-administrations-new-title-ix-regulations (May 16, 2020) (concluding that the potential for increased use of mediation and other informal dispute resolution mechanisms, along with greater due process in the hearing procedures, are improvements to the Title IX procedures).

21 The 2011 Dear Colleague Letter precludes the use of informal dispute resolution processes if there is a claim of sexual assault, defined to include sexual violence. The 1997 and 2001 Guidance documents, by contrast, permitted the use of informal mechanisms, like mediation, for resolving sexual harassment complaints when the parties agreed to do so, while providing some guidelines for how such a process should play out. 62 Fed. Reg. 12034, 12045 (March 13, 1997). The 1997 Guidance also indicated that mediation or informal resolution processes may not be appropriate in all cases, “such as alleged sexual assaults”, even if the parties agreed to use it. Id.
formal process. While the DCL’s prohibition on sexual assault mediation may offer some protection for claimants who might experience trauma if required to interact with their harasser in a mediation setting, that same prohibition also removed a claimant’s ability to control his or her own case. In short, under the DCL, claimants who might have preferred the confidentiality, control, and informality of mediation, were deprived of that opportunity.

At the same time, the trend toward formal grievance procedures also proved problematic for alleged perpetrators who faced serious potential consequences without the assurance of traditional procedural protections. Although attempting to mimic the traditional adjudicatory setting, in many formal Title IX investigations the university acted as both judge and jury, making findings of fact and conclusions of responsibility based on a complaint, response, and several interviews. This kind of “litigation-lite” lacked many of the procedural protections

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22 Not surprisingly, many complainants find formal processes, even in the absence of a risk of cross-examination, problematic and frequently traumatic because these processes cause them to relive the event and be questioned about their role in it and, worse yet, have their credibility questioned by the other party’s representative during cross-examination.

23 Taking power away from a victim may not help them. See Judith Lewis Herman, Trauma and Recovery: The Aftermath of Violence - From Domestic Abuse to Political Terror (1992) (“No intervention that takes power away from the survivor can possibly foster her recovery, no matter how much it appears to be in her immediate best interest.”) In another article, Herman states that, “[t]rauma robs the victim of a sense of power and control over her own life; therefore, the guiding principle of recovery is to restore power and control to the survivor.” She must be the author and arbiter of her own recovery.” Judith L. Herman, Recovery from Psychological Trauma, 52 Psychiatry and Clinical Neurosciences at (January 4, 2002).

24 Some complainants fear traditional disciplinary proceedings. See Tovia Smith, After Assault, Some Campuses Focus on Healing over Punishment, NPR: ALL THINGS CONSIDERED (July 25, 2017). In that story, a rape victim refused to participate in a traditional disciplinary proceeding because testifying would be retraumatizing and unfulfilling. She ultimately pursued a restorative justice option during which her attacker sincerely apologized. Following the RJ process, they joined forces to create a video about the harms associated with sexual assault. In a different story, a Western Michigan student reported that the hearing process was traumatizing. David Jesse, As Devos Pushes for campus sexual assault hearings, both sides describe trauma, https://www.freep.com/story/news/education/2019/02/03/campus-sexual-assault-hearings/2719254002/; Professor Jeannie Suk Gersen suggested that many victims may be more willing to report sexual misconduct to their school and seek assistance if an informal option is available. See Jeannie Suk Gersen, How Concerning Are the Trump Administration’s New Title IX Regulations?, www.newyorker.com/news/our-columnists/how-concerning-are-the-trump-administrations-new-title-ix-regulations (May 16, 2020). ATIXA, an organization that provides education and training for Title IX Coordinators stated that informal processes may be used by parties “to collaboratively determine appropriate remedies and to restore and/or repair their relationship, or facilitate closure, if they so desire.” at p. 124

25 One approach to Title IX claims begins with a Title IX coordinator notifying the alleged harasser of the allegations, and then conducting multiple interviews with the victim, the harasser, and any witness involved in the
typically available to defendants, particularly criminal defendants. For example, in Title IX investigations, a respondent rarely had the opportunity to interview and confront the witnesses testifying against him or her, nor were processes available for the respondent who sought to challenge the university’s decision to consider certain statements and evidence. The university was also empowered to impose serious sanctions on the respondent, regardless of the procedural flaws in the formal grievance procedure. While informal procedures (or at least mediation or restorative justice processes) may likewise lack some of these procedural protections, the respondent (and complainant) both at least have the power to reject any proposed resolution.

Given the concerns that many expressed about the DCL, in 2020, the Department of Education implemented its new rules, following an extensive notice and comment process. The new rules addressed both formal and informal processes. As to the former, it sought to require universities to provide more procedural protections for accused students. And, as to the latter, it

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26 Tamara Rice Lave, Campus Sexual Assault Adjudication: Why Universities Should Reject the Dear Colleague Letter, 64 U. Kan. L. Rev. 915, 916-19 (2016) (explaining how the “Dear Colleague Letter” removed important procedural protections for the accused, including the right to cross examine and the right to have notice of the charges against them).

27 If a university used the single investigator model, one person would take the complaint, investigate the facts, interview witnesses, evaluate credibility and then render a finding or responsibility.

28 The Dear Colleague Letter strongly discouraged universities from permitting the respondent to cross-examine the complainant. DEAR COLLEAGUE LETTER at 12. The letter further stated that permitting cross-examination might be a violation of Title IX, if it escalated or perpetuated a hostile environment. Id.
sought to provide a greater role for the use of informal dispute resolution processes to address Title IX claims.

The immediate reaction to the new rules was largely negative, although not entirely so. Critics’ primary concern was directed at the formal adjudicatory processes—in particular objecting that the new rules created a right to cross examine witnesses (although the rules state that such an examination is permissible only if conducted by a party representative), which may in turn deter reporting. Critics have expressed less interest in issues that might arise when sexual misconduct claims are mediated.

This article attempts to fill that latter void. But, rather than a critique of mediation, the article argues that the implementation of the new, more formal hearing process might provide an opportune time to reconsider mediation as a useful alternative, particularly for claims that do not involve sexual violence. Indeed, in many ways, and with regard to many cases, mediation may be the preferable alternative in the university setting for claims that do not involve


30 R. Shep Melnick, Analyzing the Department of Education’s Final Title IX Rules on Sexual Misconduct, brookings. Edu (June 11, 2020) (“department’s critics have argued that cross-examination threatens to ‘retraumatize’ complainants, discourage the reporting of misconduct, make the process unnecessarily adversarial, and give an unfair advantage to those who can hire lawyers...[but] the “most controversial element of the new regulations is the requirement...[of allowing live hearings and] cross-examination of witnesses”). Whether critics would agree this is the primary concern may be subject to debate. In its motion for a preliminary injunction to prevent the implementation of these rules, plaintiff universities also emphasized changes in administrative enforcement of Title IX as problematic. The universities focused on the requirement of a formal complaint and investigation process, as well as the hearing process, and also noted that the definition of actionable conduct as well as where that conduct occurs, was narrowed in an unacceptable manner. Commonwealth of Pennsylvania v. Devos, 20-cv-01468-CJN (D.D.C. 2020).


32 The time could not be more opportune. Since President Biden took office, a group of 100 Civil Rights organizations have already written a letter to him asking his administration to reinstate the Dear Colleague Letter.
allegations of sexual violence. Allowing complainants to select dispute resolution processes to better align with their interests, while also taking into account respondents’ needs for process protections, may improve the ability of the university, and its students, to resolve disputes and address harms. In short, beyond merely being an available process under the 2020 rules, there is much to recommend mediation as the preferred method for resolving campus sexual harassment claims under Title IX.

But this article also argues that, to deliver on this promise, universities designing dispute resolution systems must learn how to structure such mediation. As already noted, mediation is a flexible process that can be tailored to disputants’ needs. Universities must take full benefit of that flexibility, and the insights that dispute process design principles offer, to craft a system that will best serve their students and the university community as a whole.

I. Are Adjudicatory Processes the Gold Standard for Dispute Resolution?

A. Mediation is an Accepted Alternative to Adjudication for Good Reason

Alternative dispute resolution processes are a social innovation – novel strategies to satisfy human interests and needs. Like other “alternative” dispute resolution processes, mediation frees litigants from the constraints associated with law and legal institutions. In

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33 The most common Title IX claim is a claim for the denial of equal access to athletic opportunities. The U.S. Department of Education Office for Civil Rights receives anywhere from 1,700 to over 6,000 of these claims per fiscal year. The next most common claim is a claim for sexual harassment or sexual violence. There are significantly fewer of these claims than those involving athletic opportunities, but the Office for Civil Rights still sees several hundred of these claims a year on average. Other prominent claims include those for retaliation, denial of benefits, and discrimination in housing, grading, employment, and discipline. 2013-2014 U.S. DEPT. EDUC. OFFICE FOR CIVIL RTS. ANNUAL REPORT TO THE SECRETARY, THE PRESIDENT, AND THE CONGRESS 28; 2015 U.S. DEPT. EDUC. OFFICE FOR CIVIL RTS. ANNUAL REPORT TO THE SECRETARY, THE PRESIDENT, AND THE CONGRESS 26; 2016 U.S. DEPT. EDUC. OFFICE FOR CIVIL RTS. ANNUAL REPORT TO THE SECRETARY, THE PRESIDENT, AND THE CONGRESS 24; 2017-2018 U.S. DEPT. EDUC. OFFICE FOR CIVIL RTS. ANNUAL REPORT TO THE SECRETARY, THE PRESIDENT, AND THE CONGRESS 17.

34 Of course, complainants’ interests may differ from person to person. Fitting the process to the parties’ interests, an issue addressed more fully below, is critical to ensuring that the mediation process is not a re-victimization of a complainant. There may well be cases, for example, where the complainant was unconscious when sexually assaulted, where there is no possibility of misunderstanding or a need to address relational concerns. In such cases, mediation would likely be inappropriate.
particular, mediation creates the opportunity for a more complete resolution of parties’ concerns, allows flexibility in terms of who participates and how they participate, places the dispute into the hands of the disputants, enhances the capacity of individuals to communicate effectively, and enables parties to select resolutions that would not be available in a court proceeding.\textsuperscript{36} Mediation also educates participants about the other’s interests and needs, and helps parties expand their capacity to understand the other and, sometimes, develop a more positive view of them. Mediation allows for exploration of relational, emotional, and behavioral concerns and provides a forum for moral accountability.\textsuperscript{37} And, of course, mediation is faster and more accessible to those without special training or experience in the intricacies of more traditional adjudicatory processes.\textsuperscript{38} In other words, mediation empowers parties to achieve outcomes better tailored to their situation, may improve their relationship with the other party, if that is desired, and enhance their ability to communicate and problem solve.

Of particular relevance to this article, considerations such as these have also led many scholars to argue that mediation can be superior to litigation for resolution of sexual harassment claims.\textsuperscript{39} Maintaining confidentiality, tailoring remedies, and providing a neutral forum in which

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  \item \textsuperscript{36} Kenneth Feinberg, Mediation – A Preferred Method of Dispute Resolution, 16 Pepp. L. Rev. at S6 (1989) (mediation “looks beyond the legal issues to explore the relationship between the parties in an attempt to find a true resolution to the problem between them. Furthermore, the potential outcomes of the mediation process are not limited to preexisting legal remedies, or by the requirement that one or the other party be found in the wrong.”); Professor Frank E. A. Sander argued that mediation offers more flexible solutions, avoids the winner-loser syndrome, and responds better to what the parties want to discuss as opposed to what the judge wants to hear. Frank E.A. Sander, Family Mediation: Problems and Prospects, Mediation Q., No. 2, at 3, 6 (1983). Reflecting on the growth of mediation, Bernard Mayer suggested that the dispute resolution movement was “intended to find better ways for dealing with organizational, family, environmental, and community disputes.” Mayer, Beyond Neutrality 159 (2004).
  \item \textsuperscript{37} Julie Macfarlane, The New Lawyer: How Settlement is Transforming the Practice of Law 71 (2008). A mediator listens to the parties, and lets them know that their concerns are heard and understood. A mediator can also help parties confront differences in perceptions and interests.
\end{itemize}
parties are treated with respect and provided an opportunity to share their perspective, are characteristics of mediation that parties to sexual harassment dispute often value more highly than the benefits they might receive through a public litigation process. Mediating sexual harassment claims creates an opportunity for the offender to apologize, to acknowledge and understand the offensiveness of their behavior, and to appreciate the extent to which the harasser’s behavior harmed the claimant, all of which may “defus[e] the difficult emotional issues in a sexual harassment case so that the parties can focus on the future . . .”

B. Rejection of Mediation in Favor of Traditional Adjudicatory Processes

Mediation is not without its critics, however. When mediation burst on the scene in the 1980s as a potential solution to an overloaded judicial system, some critics dismissed mediation’s potential in favor of the perceived benefits of the traditional adjudicatory process. From Owen Fiss to Richard Delgado, critics of alternative dispute resolution routinely have argued that the “justice” achieved through alternative dispute resolution processes, particularly mediation, is at best a poor cousin to the justice achieved through traditional litigation. These

39 Mary P. Rowe, People Who Feel Harassed Need a Complaint System with Both Formal and Informal Options, 6 Negotiation J. 161, 162 (1990); Rajib Chanda, Mediating University Sexual Assault Cases, 6 Harv. Negot. L. Rev. 265, 278 (2001) (“mediation is a superior alternative to arbitration or litigation for the resolution of sexual harassment claims.”); Barbara J. Gazeley, Venus, Mars, and the Law: On Mediation of Sexual Harassment Cases, 33 Willamette L. Rev. 605, 647 (1997) (experience and research demonstrate that mediation is a much better process for resolving sexual harassment claims than litigation or arbitration . . .”); Carrie A. Bond, Shattering the Myth: Mediating Sexual Harassment Disputes in the Workplace, 65 Fordham L. Rev. 2489, 2513 (1997).

40 Hon. Deanell R. Tacha, A Case for Litigation Alternatives in Metoo Movement, https://www.jamsadr.com/blog/2018/a-case-for-litigation-alternatives-in-metoo-movement (February 2018) (discussing benefits of mediation, as compared to litigation, of sexual harassment claims and concluding that alternative processes are “tailor-made” for sexual harassment claims because they promote listening, neutrality, mutual respect, and confidentiality).

41 Carrie A. Bond, Shattering the Myth: Mediating Sexual Harassment Disputes in the Workplace: 65 Fordham L. Rev. 2489, 2517 (1997). Further, mediation’s flexibility regarding timing, scope, and format gives parties a chance to tell their story and vent about emotional issues that are typical in sexual harassment disputes in a way that cannot be accomplished in court. Id. at 2515.

critics claim, for example, that mediation, as a “privatized resolution process,” does not advance important legal principles, “trivializes the remedial dimensions of a lawsuit,” may disadvantage minorities and women, and unjustifiably shields wrongdoers from the consequences of their actions as a result of confidentiality protections.

Such critiques go too far. To be sure, mediation, like any process, is imperfect. But, while mediation and other dispute resolution processes can always be improved, treating mediation as per se inferior to traditional litigation as a means for vindicating parties’ rights and interests overlooks factors dispute systems designers should value when building a framework for the resolution of any disputes: considering the context and goals of the dispute resolution process, assessing the need for confidentiality, implementing culture change within an institution, and addressing stakeholders’ needs. Rejecting mediation out of hand because mediation outcomes may differ from those produced through a formal hearing process is a mistake — and seems to rest entirely on a misguided assumption that formal hearing processes provide the baseline against which “justice” must be measured. This section explores that issue more fully, and suggests that the time for faith in “one size fits all” justice has come and gone.

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44 Owen M. Fiss, Against Settlement, 93 Yale L. J. 1073 (1984); Richard Delgado et al., Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution, 1985 Wis. L. Rev. 1359 (informal dispute resolution processes may disadvantage minority groups); Laura Nader, Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology,” 9 Ohio St. J. on Disp. Resol. 1 (1993).
45 A discussion of the risks associated with mediation of sexual harassment disputes is important to the discussion as well and accompanies notes 43 to 44.
46 Brian Pappas, JDR article in this symposium.
47 While most scholars recognize that settlement is an immutable characteristic of modern litigation, some nevertheless contend that the fairness of settlements should be evaluated by comparison to court outcomes. Carrie Menkel-Meadow, Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or “The Law of ADR,” 19 Fla. St. L. Rev. 1, 7 n. 25 (1991) (scholars of settlement process “find something philosophically wrong with results that do not track our legal rules.”) J. Maria Glover, The Federal Rules of Civil Settlement, 87 NYU L. Rev. 1713, 1716 (2012) (contending that settlement outcomes should reflect the merits of the case and that the goal of settlement is “to align case outcomes with the dictates of substantive law.”)
Rather, administrators should utilize settled dispute system design principles to tailor a multi-layered process that will best serve the needs of those who participate in it.48

1. Baselines and the problems they create

At first glance, it is perhaps unsurprising that those responsible for providing guidance on resolving disputes in the Title IX setting default to trial-like processes. Given the ubiquity of such processes for over 200 years in the American legal system, and centuries of use before that in England, such processes have in many ways become a baseline for conceptions of justice. And baselines, either because of their longevity or their seemingly organic evolution, sometimes take on the guise of presumed superiority, subsequent departures from which require justification. But, this article argues, traditional adjudicatory procedures may provide a faulty “baseline.” Indeed, it may in some sense be a false baseline, as even at the time the process was developed, it was not the only available option for disputants. Putting that aside, the longstanding use of that process, in and of itself, while perhaps providing a veneer of legitimacy, does not justify its continued use in a given setting, nor should differences from that process ipso facto require justification.49

48 Critics offer additional justifications for disregarding trial procedures and outcomes as the metric for judging whether “justice” has been achieved. William Simon suggested that “[f]ormal systems tend to be more difficult for people without special training or experience to participate in. [The formal] procedures can also subvert conflict and induce acquiescence. They can do so by convincing the disadvantaged that their losses are the result of a fair contest . . . by making disadvantaged litigants feel incompetent . . . .” William Simon, Legal Informality and Redistributive Politics,” 19 Clearinghouse Rev. 385, 386, 388 (1985). Mediator Jennifer Beer suggested that divided communities may select mediation to resolve disputes because it is a process that “favors stability and good relations” over punishment and compensation. Jennifer Beer, Peacemaking in Your Neighborhood: Reflections on an Experiment in Community Mediating 195, 197-98 (New Society Publishers 1986). And, of course, Robert A. Baruch Bush, who famously noted that mediation processes transform the parties who participate in it, increasing their capacity for developing understanding that may ultimately lead to social change. Robert Baruch Bush, The Unexplained Possibilities of Community Mediation: A Comment on Merry and Miller, 21 Law & Soc. Inquiry 715, 732-33 (1996).

49 Jerold S. Auerbach, Justice Without Law? (1983) (describing the many communities, religious sects, and ethnic groups who utilized mediation and arbitration as the primary means for resolving disputes in the United States during colonial times); Japan and other "collectivist" countries viewed conciliation and mediation as the preferable means of resolving disputes. See, for example, Haley, The Politics of Informal Justice: The Japanese Experience, 1922-1942, in 2 THE POLITICS OF INFORMAL JUSTICE 125, 136 (R. Abel ed. 1982).
Professor Cass Sunstein created a baseline concept to describe the tendency of common law courts to treat common law as a form of “natural” law that occupied a privileged space in our legal system. Sunstein’s “baseline” theory contested the notion—arguing that the idea that the common law is “natural law” is a fiction that can and should be challenged. In analyzing *Lochner v. New York*, for example, Professor Sunstein argued that the Supreme Court’s mistake was in presuming that the common law provides a “natural” baseline that carries some inherent presumption of precision and is thus subject to legislative intervention only if there is a strong justification. To the contrary, Sunstein argued, the system of common law rights should itself be understood as a product of positive law (albeit adopted by different legal actors) and therefore subject to legislative amendment just as freely as any other form of law. According to Sunstein, “[t]he Lochner Court [treated] the common law distribution of entitlements and wealth” as natural law instead of a manufactured construct. “Once the common law system came to be seen as a product of legal rules, the baseline from which constitutional decisions were made had to shift.”

In short, Sunstein’s insight was that there is no reason to treat the common law distribution of rights, just by dint of their duration or wide-spread adoption, as somehow more natural or legitimate than those provided by positive law. In other words, baseline distributions can be questioned and challenged just like any other distribution. Preferences in favor of

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50 Cass R. Sunstein, *Lochner’s Legacy*, 87 Colum. L. Rev. 873, 971 (1987) (Sunstein explained that government inaction should be the baseline against which redistributive regulations should be judged: “Market ordering under the common law was understood to be a part of nature rather than a legal construct, and it formed the baseline from which to measure” the constitutionality of state action, resulting in the finding that regulations that redistribute are unconstitutional).

51 As Daniel Farber later opined in a review of Sunstein’s baseline theory, Sunstein asserted that the common law appeared to enforce private ordering, rather than regulate private interaction. “In reality, however, as Sunstein explains, the common law was in some sense just another regulatory system. Judicial decisions about legal enforcement shaped private transactions, and may have done so for reasons of policy not unlike those motivating regulatory statutes.” Daniel A. Farber, *Playing the Baseline: Civil Rights, Environmental Law, and Statutory Interpretation, After the Rights Revolution: Reconceiving the Regulatory State*. by Cass R. Sunstein. Cambridge, Mass.: Harvard University Press, 1990., 91 Colum. L. Rev. 676, 680 (1991). Seen that way, norms articulated in the common law are no more baseline than subsequent attempts at regulation.
baselines should not simply be assumed, nor are deviations from such baselines subject to critique based merely on that deviation.\textsuperscript{52}

While Sunstein applied this insight to the substance of legal rules that apply to disputes, it could also extend to the \textit{processes} that disputants use to achieve resolution. The adversarial adjudicatory system the United States inherited from England, and then further developed here, is not an objectively neutral, “natural” state of affairs. Rather it is a merely one procedural construct, albeit one that disputants have come to routinely expect. Yet, it is not the only such procedural construct. Indeed, other constructs existed even at the time an adjudicatory approach was adopted. For example, Anglo-Saxons used multiple dispute resolution mechanisms, similar to mediation, among others.\textsuperscript{53} And many Puritans actively rejected litigation because they viewed the adversarial system as a “defect of brotherly love.”\textsuperscript{54} Instead, they often used dispute resolution mechanisms that focused on restoring “communal harmony without the assistance of lawyers.”\textsuperscript{55}

The utilization of non-adjudicatory processes may be seen as a means both to demonstrate respect for legal processes and law and to effectuate “the peaceful and enduring

\textsuperscript{52} Professor Jeremy Paul utilized this baseline analysis when critiquing Professor Richard Epstein’s approach to the takings clause. In critiquing Epstein, Paul suggests that identifying private property rights, because they preexisted the state, as a baseline that should not be disturbed when the government seeks a taking, is misguided. Jeremy Paul, \textit{Searching for the Status Quo}, 7 Cardozo L. Rev. 743, 756 (1986). Paul continues, “Each [of Epstein’s proposals] attempts to identify a baseline concept (private law, public good, implicit in-kind compensation) from which determinate answers to takings disputes might be derived. The baselines Epstein seeks, however, either do not exist or are sufficiently open-ended so they could be relied on by both sides in any particular controversy. This section will highlight the repeated pattern whereby Epstein wrongly claims to have demonstrated that specific government practices unjustly depart from an allegedly neutral baseline.” Similarly, Professor Jack Balkin critiqued the judiciary’s approach to regulation of racist speech, suggesting that treating government inaction with regard to speech as a baseline is not appropriate because such a baseline is not “natural” as these rights are not something that people naturally possess. J. M. Balkin, Some Realism about Pluralism: Legal Realist Approaches to the First Amendment, 1990 Duke L.J. 375, 380-82 (1990).


\textsuperscript{55} \textit{Id.}
resolution of disputes, and promoting the reconciliation of the parties.\textsuperscript{56} As Jerold Auerbach declared, “the rule of law was explicitly rejected in favor of alternative means for ordering human relations and for resolving the inevitable disputes that arose between individuals,” with arbitration and mediation as the “preferred alternatives.”\textsuperscript{57} Time, together with the expense and unpredictability of trial processes, served to increase the popularity of mediation and, to a certain extent, arbitration. As the number of trials slowly dwindle, mediation and arbitration have grown to dominate the legal landscape, becoming functionally “mainstream” dispute resolution mechanisms.\textsuperscript{58}

None of this is to say that mediation, or some other form of informal dispute resolution process is necessarily or inherently “better” that an adjudicatory process. Rather, the point is merely that an unquestioning reliance on adversarial processes as the baseline, against which all other dispute resolution processes must be measured, risks importing the same concerns that underlie Sunstein’s baseline argument focused on the substantive common law. Status quo-ism is no more persuasive an explanation for process than it is for substance. One should not treat the widespread adoption of a particular procedural vehicle, such as a trial, as a reason for cloaking that procedural vehicle with the trappings of legitimacy, accuracy, or superiority as to a particular class or classes of disputes.

2. Specialized Courts as a Model for Alternative Approaches to Justice

The underlying insight—that other processes may prove superior as to certain types of disputes—is by no means surprising to dispute systems designers. Resisting a knee-jerk impulse in favor of adjudication, they actively attempt to tailor processes more closely to the problem at

\textsuperscript{56} Id.
\textsuperscript{57} Jerold Auerbach, Justice without law at 2 or 3
hand, largely, but certainly not exclusively, through increased use of mediation. Those efforts have met with considerable success. The legal system has all but adopted the rule of "presumptive mediation" for resolution of disputes, and has done so in large part because the mediation process enables parties to resolve disputes while also achieving other goals like those noted above — recognition, redemption, and empowerment, among others. Adoption of mediation programs, as well as other dispute resolution processes, recognizes that different problems may require different approaches.

Nor is mediation the only example of this approach. The judicial system has largely embraced the concept of specialized courts — mental health courts, drug courts, veterans’ rights courts — all of which use a variety of unique procedural mechanisms, to address problems more nimbly and in a more targeted manner than the traditional court system could.

Drug courts in particular have been at the forefront of the movement towards implementation of innovative dispute resolution procedures. Specialized drug courts developed as a response to the challenges the traditional court system experienced when addressing cases involving offenders who are dependent on drugs or alcohol. Courts typically focus on enforcing

61 Shari S. Diamond and Jessica M. Salerno, Reasons for the Disappearing Jury Trial: Perspectives from Attorneys and Judges, 81 Louisiana L. Rev. 119, 132 (2020) (in a study of 1,460 attorneys and judges (1,282 of the respondents were attorneys), the researchers found that survey respondents ranked mediation “significantly higher than the three other procedures (arbitration, bench trials and jury trials) in predictability, speed, cost effectiveness, and fairness. Respondents also personally preferred it significantly to both arbitration and bench trials, although not to jury trials.”
62 Jerome Eckrich & Roland Loudenburg, Answering the Call: Drug Courts in South Dakota, 57 S.D. L. Rev. 171, 171 (2012) (noting that every state has implemented a drug court, with South Dakota acting as the final state to implement such a program in 2007); Josh Bowers, Contraindicated Drug Courts, 55 UCLA L. Rev. 783, 784 (2008) (stating that drug courts are some of the most significant criminal justice reforms of the last two decades).
the law, and, therefore, tend to send drug offenders to jail. But incarceration alone is often an ineffective means to prevent recurrence of drug use, with the majority of drug offenders not only relapsing back to substance use, but also frequently re-offending within just a few years of release from their incarceration. The idea underlying the drug court approach is that recovery is more likely if the criminal justice system provides a coordinated response to drug or alcohol addicted offenders and that, if recovery occurs and is durable, criminal behavior will cease.

Drug courts seek to achieve this outcome by encouraging collaboration among judges, prosecutors, defense attorneys, therapists, the offender, and others. The drug court concept is proposed to the offender at the time of arrest because that is viewed as the ideal time to persuade the person to enter treatment. Once in the program, the drug court stays the criminal proceeding and implements a multi-stage process that includes stabilizing the offender, detoxification, education, and screening for other concerns. These steps are followed by intensive treatment, often including group and individual counseling. The drug court model’s focus on rehabilitation may also address common challenges to successful reentry to society, including the potential lack of stable housing, minimal or no social support system, and limited vocational

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64 Peggy Fulton Hora & Theodore Stalcup, supra note __, at 721 (noting that “incarceration does little to change substance use patterns” and citing studies that show that over seventy percent of drug offenders are rearrested within three years of their release from incarceration).
opportunities. Drug courts, and other specialized dispute resolution programs, demonstrate that the traditional court system is not always the best fit for a specific kind of dispute or claim.

Of course, one might reasonably ask what a drug court process has in common in with a Title IX procedure and why the drug court model is relevant simply because it takes a different approach to traditional criminal prosecution. The concept underlying drug courts is that persons addicted to drugs need a different approach to their problems. Rather than incarceration, the insight of the drug court model is that the addicted person needs treatment and positive reinforcement, rather than incarceration, to avoid recidivism. Thus, dispute systems designers tailored the process more closely to the needs of the participants. And the empirical research on the effectiveness of the drug court approach at preventing participants from reoffending is promising, at least when compared to the traditional approach taken by the criminal justice system. The Multi-Site Adult Drug Court Evaluation (MADCE) found that drug courts both prevented crime and substance abuse, worked well for most participants, and worked even better when the judge was actively involved in the process. Drug court participants were considerably less likely to relapse into drug use (56% v. 76%) and less likely to report using serious drugs.

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66 Scholars have questioned the effectiveness of the traditional court system in numerous contexts, including recently a call to reconsider dispute resolution procedures employed by internet platforms. Rory Van Loo, Federal Rules of Platform Procedure, U Chi. L. Rev. (forthcoming MONTH 2020). Internet platforms like Facebook and Amazon are now central figures in public discourse, and as such, Professor Van Loo argues that their dispute resolution procedures should be regulated in such a way as to protect the public and to preserve justice. Van Loo suggests that traditional court systems are not well-situated to address these types of disputes. Online disputants need a navigable and accessible dispute resolution system. Disputants cannot find this format in a court, which instead offers them only expensive and complex litigation procedures. Van Loo suggests that instead policy makers should focus on developing a framework that mixes elements from ADR and litigation. For example, this framework might include the presence of a neutral expert who, like a mediator, controls for the serious power imbalance that exists when an individual or small business seeks recourse against a large internet platform. Further, a neutral expert would mitigate the platform’s tendency to prioritize the claims or arguments of high-profit customers when resolving disputes.

67 Shelli B. Rossman, et. al., The Multi-Site Adult Drug Court Evaluation (Urban Institute, November 2011).
They were also significantly less likely than the comparison group to commit crimes.\(^68\) Eighteen months after their baseline interview, 46% of drug court participants reported using drugs as compared to 68% of the comparison group.\(^69\)

While these drug court statistics do not establish the ultimate efficacy of the drug court approach, the discussion of the popular drug court concept is intended to suggest that society now recognizes the need for different procedural approaches to justice in different circumstances. Sometimes, as with specialized courts, justice is best achieved in a court setting, but through processes that deviate from accepted trial-court procedures.\(^70\) But, perhaps not surprisingly, in other cases, justice can be achieved through use of alternative platforms that exist outside courtroom walls. Parties embroiled in a family law dispute, for example, need to work together to maintain an ongoing relationship, despite their disagreements — and in family law — disagreements often run deep. In many of these cases, a contentious court proceeding, and a binary win-lose zero-sum outcome, would only serve to frustrate attempts to compromise or reconcile. Mediation, which empowers parties to think creatively and collaboratively, has largely filled the gap left by the inadequacies of adversarial processes. The successful implementation of mediation in family law disputes rests on the principle that family members

\(^68\) For both of these conclusions, the information was pulled from the year before the participants’ 18 month interview. The sample of participants included 1,156 drug court participants and 625 comparison group members who were interviewed when they were arrested, six months later and 18 months after arrest. The study evaluated participants in 29 drug court and comparison locations. MADCE Executive Summary at 3.

\(^69\) Similarly, a Department of Justice study examined re-arrest rates for drug court graduates and found that nationally, 84 percent of drug court graduates were not re-arrested and charged with a serious crime in the first year after graduation, and 72.5 percent had no arrests at the two-year mark. https://obamawhitehouse.archives.gov/ondcp/ondcp-fact-sheets/drug-courts-smart-approach-to-criminal-justice#:~:text=Drug%20Courts%20A%20Smart%20Approach%20to%20Criminal%20Justice,for%20collaboration%20among%20the%20judiciary%20prosecutors%20community.

\(^70\) For many, the concept of justice is intimately tied to the image of court. In fact, often times, litigants are not even aware of alternative methods of dispute resolution. A recent empirical study by Professor Shestowsky showed that almost three quarters of litigants were unable to correctly identify whether their courts offered court-sponsored mediation or arbitration. Donna Shestowsky, When Ignorance Is Not Bliss: An Empirical Study of Litigant’s Awareness of Court-Sponsored Alternative Dispute Resolution Programs, 22 Harv. Negot. L. Rev. 189, 218 (2017).
have the ability and competence to design workable and durable solutions for their complex problems. In sensitive, personal disputes like those involved in family law matters, collaboration is essential. Some scholars have even suggested that any semblance of the adversarial process, like the presence of attorneys in mediation, undermines the self-determination and collaborative efforts of the parties.

As these examples suggest, a “one size fits all” approach to dispute resolution overlooks the complexity underlying many disputes and fails to address shortcomings of the traditional court system. The ideal process to dispense justice is inevitably going to vary depending on the relationship between the parties and the contours of the dispute at issue.

II. Dispute Resolution Design and the History of Title IX

If dispute-system design principles—and the resulting non-traditional processes—have helped parties find relief in a variety of contexts ranging from complex substance abuse issues to sensitive family law disputes, it makes little sense to ignore the potential benefits that such principles could provide in Title IX cases. For years, the public and the legal community have assumed—without much thought about such principles—that harassment claims should be funneled through the traditional litigation system. As already discussed, though, litigation, and

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72 Id. at 351-52. As a potential solution to this problem, mediators might integrate concepts of collaborative law into their sessions, requiring attorneys to agree that they will not be adversarial, that they will share information, and that they decline to participate in the matter if it proceeds to trial.
73 Fundamental to dispute systems design is that the structure currently utilized to resolve disputes is deficient in some way. Dispute system designers are most helpful when a new dispute resolution structure offers promise for closely meeting users’ goals. A dispute systems designer does not approach a problem with a one size fits all mentality. Instead, the designer ascertains the parties’ goals, establishes priorities among the goals, consults with and obtains input from stakeholders, anticipates and plans for potential problems with the new system, and then helps to implement and reassess the system once it is in place. Goldberg, Sander, Rogers and Cole, Dispute Resolution: Negotiation, Mediation, and Other Processes, at 301-02 (5th ed. 2007). Dispute resolution offers a menu of choices rather than a fixed approach. Frank E. A. Sander & Michael L. Prigoff, Professional Responsibility: Should There Be a Duty to Advise of ADR Options?, 76 A.B.A. J. 50, 50 (1990).
74 See, e.g., Mori Irvine, Mediation: Is it Appropriate for Sexual Harassment Grievances, 9 Ohio St. J. on Disp. Resol. 27, 28 (1993) (suggesting that litigation is the appropriate forum to resolve sexual harassment claims because
adjudicatory processes more generally, may have shortcomings in harassment cases, often forcing sensitive disputes into the limelight and stripping victims of their control over the process and remedy. Against that backdrop, as also noted above, the ongoing reliance on these processes may represent a form of unwarranted status-quo-ism. But the challenges that Title IX cases present calls for creative solutions, ones that may require reorienting assumptions about “best procedure” in Title IX cases. To understand why this is true, it is helpful to trace the development of Title IX, from a statute that was originally seen as a means to achieve equity in athletic opportunity to a statute designed not only for that purpose, but also to address all forms of sexual harassment on campus, including sexual violence and discrimination between students.

A. The History of Title IX

Title IX is an area that is rife with disputes—particularly disputes involving allegations of sexual misconduct. Interestingly, that was not always the case. Originally, the statute was principally seen as a vehicle for promoting gender equity in college sports. As a result of Supreme Court decisions extending its reach to student-on-student sexual harassment issues, however, both the nature and quantity of disputes changed dramatically. And, to meet the it demonstrates a societal condemnation of sexual harassment, and because it mitigates power differentials between the parties).

Those who work in the Title IX space emphasize the importance of developing a variety of methods, not just mediation or a hearing, to address the myriad of issues that their offices face. Brian Pappas, Michigan State School of Law’s Title IX coordinator, emphasized that “no-one-size-fits-all approach will work for every complaint, [and that] universities must have multiple avenues for reporting and handling complaints.” He recommends, among other approaches, ensuring multiple means of reporting and an ombuds to help victims navigate the process. Brett A. Sokolow, president of ATIXA, an organization with a membership of more than 5,500 Title IX professional, advocates the use of Cathartic Confrontation and Conferencing, describing it as a reimagining of restorative and transformative justice models to a school/college environment and to the acts of sexual violence and other sex offenses. (e-mail on file with author).

Title IX covers other claims as well. For example, Title IX requires universities to address sexual harassment and discrimination claims by students, staff, or faculty against university faculty or staff. See next footnote.

mandate under Title IX of assuring a university setting free from the effects of sexual
discrimination, universities were called upon to resolve those disputes. To be sure, they have
received at least some guidance on those efforts from the Department of Education. In 1997,
2001, 2011, and 2020, the Department offered direction to universities as to how to structure
their dispute resolution processes to comply with Title IX. Perhaps reflecting that the student-on-
student matters “looked like” disputes traditionally assigned to adjudicatory processes, or
perhaps because of a default preference for adjudication as a resolution mechanism for the
reasons discussed above, the Department guidance originally downplayed the role for mediation.
This came to a head in the 2011 Department Guidance. But, at least in part as a response to the
problems that ensued, the 2020 Department Rules have revisited the question, and seem to reflect
a greater openness to the use of informal dispute resolution processes—like mediation—for Title
IX claims.

1. The Evolution of Title IX — 1997 and 2001 OCR Guidance Documents

Title IX was enacted in 1972 as an amendment to the Higher Education Act of 1965. It
mandated that “no person in the United States shall, on the basis of sex, be excluded from
participation in, be denied the benefits of, or be subjected to discrimination under any education
program or activity receiving Federal financial assistance.” The statute applies to all schools
receiving federal funding including, as relevant here, colleges and universities. Because federal
assistance is essential to many students’ ability to engage in post-secondary study, compliance
with Title IX is critical to all post-secondary institutions.

At the outset, Title IX required schools to implement procedures that students could
access to register complaints about alleged discrimination. Yet Title IX was viewed primarily as

78 Initially, Title IX’s focus was ensuring women students equity in college admissions and athletic participation, as
well as funding.
a means to achieve gender equity in college sports. Over time, the Office of Civil Rights, in its communications with the public, and the courts through a series of decisions in the late 1990s, expanded Title IX's coverage to include sexual harassment claims.

In 1997, the Office of Civil Rights issued guidance to assist schools in developing an approach to investigating and resolving sexual harassment disputes. At the time the guidance was issued, courts had not uniformly interpreted Title IX to include student-on-student harassment. Even so, the 1997 Guidance provided information about the structure and timing of Title IX complaint resolution for harassment claims. The 1997 Guidance did not require schools to create a separate grievance procedure but permitted them to use a general student disciplinary procedure to resolve Title IX claims. Then, in 1999, the Supreme Court decided Davis v. Monroe County Board of Education, making it the law of the land that Title IX applied to student-on-student sexual harassment.

What did student-on-student sexual harassment claims look like? Such claims run the gamut from rude remarks with a sexual overtone to rape. Mary Koss et al identified a range of potential acts of sexual violence, both contact and non-contact, that could form the basis of a Title IX claim. The “noncontact” acts include “someone . . . looked at the sexual parts of my body after I had asked them to stop. Someone made teasing comments of a sexual nature about my body or appearance after I asked them to stop. Someone sent me sexual or obscene materials . . . showed me pornographic pictures when I had not agreed to look at them.” Other harassing

79 34 CFR 106.8(b). The 1997 Guidance stated that OCR has “long recognized that sexual harassment of students engaged in by . . . other students . . . is covered by Title IX. 1997 Policy Guidance at 12034.
80 Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 633 (1999) (holding that student-on-student sexual harassment, if sufficiently severe, can be actionable under Title IX). The 2001 Guidance also responded to Gebser v. Lago Vista Independent School District, 524 U.S. 274 (1998) (holding that a student complainant alleging sexual harassment by another student can succeed only if she establishes that the institution had actual notice but acted with deliberate indifference).
81 Mary P. Koss, Jay K. Wilgus, and Kaaren M. Williamsen, Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance with Title IX Guidance, 15(3) Trauma, Violence & Abuse 242, 244 (2014)
acts might include a situation where a female student complains that the male student assigned to sit next to her in the classroom continually sneaks stairs at her chest during class time or where a female student is repeatedly visited in her dorm room from a male student who expresses his interest in starting a romantic relationship which she has repeatedly rejected as a possibility. 82

In response to the inclusion of these kinds of sexual harassment claims within the purview of Title IX, the Department of Education’s Office of Civil Rights (OCR) drafted its 2001 Guidance. 83 The 2001 Guidance offered more structured direction to schools 84 to ensure proper enforcement of Title IX. In particular, OCR sought to distinguish Title IX rules from both private litigation and Title VII standards. 85 OCR defined “sexual harassment” 86 as “unwelcome conduct of a sexual nature” that can “deny or limit, on the basis of sex, the student’s ability to participate in or to receive benefits, services, or opportunities in the school’s program.” 87 The Guidance instructed colleges and universities to adopt policies prohibiting sex

82 Koss also lists sexual misconduct that involves contact, including examples of rape, attempted rape and other contact. Id. at 244.
83 According to the 2001 Guidance, DOE revised the 1997 Guidance to reflect Supreme Court cases decided between 1997 and 2001 relating to sexual harassment in schools. Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 66 Fed. Reg. 5512 at 1 (Jan. 19, 2001). DOE identified two cases to which it needed to respond: Gebser v. Lago Vista Independent School District, 524 U.S. 274 (1998) and Davis v. Monroe County Board of Education, 526 U.S. 629 (1999). Both cases addressed the issue of school district liability for a K-12 school when the school becomes aware of alleged sexual harassment. Justice O’Connor, in her opinion in Davis, stated that the recognition of student-to-student sexual harassment as actionable under Title IX was a codification of the 1997 Guidance, issued when Bill Clinton was the President. 526 U.S. 629, 646-48.
84 This article will use the term “school” or “university” to refer to all colleges and universities that receive federal funds from the Department of Education.
85 Id. The 2001 Guidance focused on a school’s “fundamental compliance responsibilities under Title IX and the Title IX regulations to address sexual harassment of students as a condition of continued receipt of federal funding. It . . . outlines the circumstances under which sexual harassment may constitute discrimination prohibited by the statute and regulations and provides information about actions that schools should take to prevent sexual harassment or to address it effectively if it does occur.”
86 Sexual harassment was not mentioned in the original statute and was not the focus of Title IX until the end of the twentieth century when Davis and Gebser were decided.
discrimination and put into place guidelines to ensure the “prompt and equitable resolution” of sex discrimination complaints. 88

For student-to-student misconduct, OCR advised schools to address instances in which a student’s misconduct is so severe and/or pervasive that it creates a hostile environment that “denies or limits [another] student’s ability to participate in or benefit from the program based on sex.” 89 If the school determines that the student’s conduct created such a hostile environment, it must take “prompt and effective action to stop the harassment and prevent its recurrence” as well as remedy the effects of harassment on the impacted student. 90

According to this 2001 Guidance, institutions must act when they have actual or constructive knowledge of the harassment, requiring schools to exercise “reasonable care” in making a “reasonably diligent inquiry” into reports of harassment. 91 Schools must investigate claims of harassment, even if the student chooses not to file a formal complaint. Finally, schools are required to respond in a “timely” manner, while acknowledging that the circumstances surrounding an individual case may impact the timeline for response. 92

The 2001 Guidance suggested that institutions utilize both informal and formal methods for resolving sexual harassment complaints. 93 Informal resolution mechanisms, like mediation, could be used to resolve sexual harassment claims if both parties consented. 94 Yet the Department offered little guidance regarding implementation of informal processes, other than emphasizing that mediation would not be appropriate to resolve sexual assault cases. 95 For

88 The 2001 Guidance also required schools to appoint a Title IX Coordinator and publish a notice of non-discrimination.
89 Id. Employees may also be held liable for quid pro quo harassment, but students may not. Id. at 4.
90 Id. at 8.
91 Id. at 13.
92 Id. at 20.
93 Id. at 21.
94 Id. According to the Guidance, “Grievance procedures may include informal mechanisms for resolving sexual harassment complaints to be used if the parties agree to do so.” (in Guidance at footnote 109).
formal processes, the Guidance emphasized that the parties’ due process rights should be protected but, despite acknowledging the importance of parties’ procedural rights, failed to provide a standard approach to adjudication for student-on-student sexual misconduct.\textsuperscript{96}

\section*{2. Dear Colleague Letter and a Reluctance to Embrace Informal Processes}

OCR’s efforts to address sexual harassment on campus were modest and flew largely under the radar, at least in part because, at the time, the issue of sexual harassment on campus, particularly between students, had yet to receive much attention. But that changed as studies finding that sexual violence on campuses was widespread and underreported led to a call to action for OCR in 2011.\textsuperscript{97} In response, OCR issued the “2011 Dear Colleague Letter” (DCL) detailing requirements for higher education institutions in handling claims of sexual harassment and sexual violence.

More than previous efforts, the DCL formalized disciplinary responses to sexual violence with a focus on protecting complainant’s rights during proceedings. While continuing to define sexual harassment as “unwelcome conduct of a sexual nature,”\textsuperscript{98} the Letter included “sexual

\textsuperscript{93} The 2001 Guidance stated that informal processes may be used to resolve sexual harassment complaints if the parties agree, but “that it is not appropriate for a student who is complaining of harassment to be required to work out the problem directly with the individual alleged to be harassing him or her, and certainly not without appropriate involvement by the school (e.g., participation by a counselor, trained mediator, or, if appropriate, a teacher or administrator).” 2001 Guidance, at 21. Moreover, it stated that complainants must have “the right to end the informal process at any time and begin the formal stage of the complaint process.” Id. And in cases involving alleged sexual assaults, the Guidance stated that “mediation will not be appropriate even on a voluntary basis.” Id


\textsuperscript{97} Assistant Secretary for Civil Rights and head of OCR, Russlynn Ali, stated in 2010 that “the statistics on sexual violence are both deeply troubling and a call to action for the nation.” She went on to say that “[w]e will use all of the tools at our disposal . . . to ensure that women are free from sexual violence.” See Joseph Shapiro, College Justice Falls Short for Rape Victims, NPR (February 26, 2010). OCR may have been prompted to act at least in part by several studies and articles emphasizing the widespread sexual violence on college campuses, including one by the Center for Public Integrity, Sexual Assault on Campus: A Frustrating Search for Justice, Center for Public Integrity (2010), which received considerable attention. Note also the January 22, 2014 Presidential memorandum calling for renewed attention to increase rates of campus sexual assaults on women (White House Council on Women and Girls, 2014).

\textsuperscript{95} OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE at 3 (April 4, 2011) [hereinafter 2011 DEAR COLLEAGUE LETTER], at 3. The definition of sexual harassment included
violence” within the purview of “sexual harassment,” and defined “sexual violence” as “physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent,” including the “rape, sexual assault, sexual battery, and sexual coercion,” as examples of such acts. 99 Unfortunately, the DCL, like the Guidance documents that came before it, failed to define sexual assault.

The DCL also extended Title IX protections more broadly, indicating that it was to apply in “all the academic, education, extracurricular, athletic, and other programs of the school” regardless of where those programs take place. 100 Moreover, the DCL stated that off-campus conduct should be considered in “evaluating whether there is a hostile environment on campus.” 101 Thus, the DCL acknowledged that unwelcome sexual conduct occurring off campus may create a hostile environment on campus, and that schools must consider such acts when investigating hostile environment harassment. 102

OCR reemphasized the importance of confidentiality in the DCL. Reiterating that schools must respect the complainant’s request for confidentiality, the Letter exhorts schools to take “all reasonable steps to investigate and respond to the complaint.” 103 One of the most significant changes OCR implemented was the new requirement for schools to utilize the preponderance of the evidence standard in Title IX cases, stating that schools that use the higher, “clear and

99 Id. at 1-2.
100 Id. at 3.
101 Id. at 4.
102 Id.
103 Id. at 5. The DCL elaborated on the 2001 Guidance, outlining specific factors to consider in weighing a request for confidentiality against the responsibility to provide a safe environment for students and urged schools to inform complainants that confidentiality cannot be ensured.
convincing” standard are “inconsistent with the standard of proof established for violations of the civil rights laws, and are thus not equitable under Title IX.”

Finally, the DCL appeared to prohibit the use of informal resolution mechanisms as part of a school’s grievance procedures for sexual harassment complaints. After expanding sexual assault to include sexual violence, but otherwise not defining the term, OCR stated that, in cases of sexual assault (i.e. sexual violence, minimally), schools should state in their grievance procedures that “mediation will not be used.” The DCL also cautioned schools against requiring complainants to work out problems directly with respondents. As a result, following the DCL, few Title IX cases were mediated.

In formal procedures, schools were “strongly discouraged from allowing the parties personally to question or cross-examine each other.” The rationale underlying this change was that cross-examination could be traumatic or intimidating for complainants, and that such an interaction could heighten the hostility of the environment. And while due process rights must be protected, schools should ensure that the steps taken to protect due process rights “do not

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104 Id. at 11.
105 Id. In prior Obama-era guidance from the DOE Office for Civil Rights, the resolution of sexual misconduct or assault allegations by mediation was not encouraged and, in some situations, was prohibited. Michael W. Hawkins, Title IX and Resolution of Complaints by Mediation, (October 24, 2017), https://www.lexology.com/library/detail.aspx?g=e5c10cc2-8f8c-4d4c-a67f-878267278d4d
106 Id. at 8. The DCL noted that “[a] number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, and sexual coercion.” 2011 DEAR COLLEAGUE LETTER at 1-2. The DCL described sexual violence as a subset of sexual harassment and stated that both are forms of sexual discrimination prohibited by Title IX. Id. at 2, n. 5, 13-14 n. 34, 14 n. 38.
107 I was fortunate to have the opportunity to mediate a Title IX dispute for a local college and the Title IX coordinator told me that her office rarely used mediation because virtually every complaint included a claim of sexual violence. For this dispute, the parties were able to reach an amicable settlement after a day-long mediation. Both parties were represented, one by a lawyer-father and the other by another college administrator and the parties remained in separate rooms for the mediation. For confidentiality reasons, I am not sharing the name of the college. A comment in opposition to the 2011 DCL noted that the prohibition on mediation “needlessly deprives victims of options that may benefit them in the pursuit of equal educational opportunity.” See Tiffany Buffkin, Nancy Chi Cantalupo, Mariko Cool, Amanda Orlando, Widely Welcomed and Supported by the Public: A Report on the Title IX-Related Comments in the U.S. Department of Education’s Executive Order 13777 Comment Call, 9 Cal. L. Rev. Online 71, 99 (2019) (reviewing comments to Department of Education’s Executive Order 13777).
108 Id. at 12.
109 Id.
restrict or unnecessarily delay the Title IX protections for the complainant.\footnote{id} These changes, together with the lower burden of proof for complainants, led to significant litigation following the adoption of the DCL.\footnote{111}

OCR’s decision to prohibit the use informal resolution processes, together with the lower burden of proof and the soft ban on respondents cross-examining complainants, was based on a desire to reduce sexual violence on campus, encourage survivors to come forward, and protect them from harm during the resolution process. OCR believed that the formal hearing process, albeit denuded of one of the major features of trial – cross-examination – would provide the best means of accomplishing its goals.

Once again, faith in a trial-like proceeding as a superior means of dispute resolution carried the day. Yet, in addition to denying respondents their right to due process,\footnote{112} this approach pushed complainants into a formal process that did little to advance many exceptions.

\footnote{id}Id.
\footnote{111}Samantha Harris & KC Johnson, \textit{Campus Courts in Court: The Rise in Judicial Involvement in Campus Sexual Misconduct Adjudications}, 22 N.Y.U. J. LEGIS. & PUB. POL’Y 49, 66 (2019). ("In the twenty-one months following the April 4, 2011 Dear Colleague letter, only seven federal lawsuits were filed, and 2013 brought just seven more complaints. That figure jumped to twenty-five lawsuits in 2014; forty-five in 2015; forty-seven in 2016; and seventy-eight in 2017. The 2018 calendar year featured an additional seventy-eight complaints; through August 16, 2019, fifty-eight federal complaints have been filed."). Harris reported that, since 2011, students accused of Title IX violations brought over 400 lawsuits alleging denial of due process protections during campus sexual misconduct adjudications. Samantha Harris, "Court Exclusion of Evidence, Biased Training, Lack of Cross-examination, Low Evidentiary Standard May Have Violated Students Due Process Rights (Jan. 17, 2019), \url{https://www.thefire.org/court-exclusion-of-evidence-biased-training-lack-of-cross-examination-low-evidentiary-standard-may-have-violated-students-due-process-rights/}

\footnote{112}Samantha Harris & KC Johnson, \textit{Campus Courts in Court: The Rise in Judicial Involvement in Campus Sexual Misconduct Adjudications}, 22 N.Y.U. J. LEGIS. & PUB. POL’Y 49, 66 (2019). ("In the twenty-one months following the April 4, 2011 Dear Colleague letter, only seven federal lawsuits were filed, and 2013 brought just seven more complaints. That figure jumped to twenty-five lawsuits in 2014; forty-five in 2015; forty-seven in 2016; and seventy-eight in 2017. The 2018 calendar year featured an additional seventy-eight complaints; through August 16, 2019, fifty-eight federal complaints have been filed."). See also Marie-Rose Sheinerman, \textit{Student suing U. over expulsion for the alleged Title IX violation will not be reinstated to finish the academic year}, The Daily Princetonian (Apr. 26, 2020), available at dailyprincetonian.com/article/2020/04/title-ix-lawsuit-doe-v-princeton (reporting that Princeton University has faced three Title IX suits in the last year alone and that those students join the ranks of hundreds of other students who filed recent Title IX suits against their universities, including those involved in a large class action against Michigan State University); Title IX For All, \url{https://www.titleixforall.com/} (last visited Jun. 30, 2020) (reporting that over 640 Title IX lawsuits have been filed against Universities since 2013).
complainants’ underlying interests in obtaining acknowledgement of harm or advancing understanding about the harms sexual violence can cause.


The increase in litigation claiming violations of respondents’ rights to due process, together with a change in the executive, led the Department of Education to rethink its approach to Title IX disputes more generally, and in colleges and universities, in particular. In 2017, Secretary of Education Betsy DeVos announced that the Office of Civil Rights would withdraw the 2011 Dear Colleague Letter, replacing it with an interim Question and Answer document that remained in place until the spring of 2020, when the new rules, after an extensive notice and comment period, were finalized. While this section of the article will identify the primary criticisms of the new rules, it is worth noting that these rules focused on creating basic standards that a school must meet, but do not preclude a school from providing more process than the rules mandate.

Response to the new rules has been mixed, with some groups suing immediately to overturn the rules and then-candidate Biden announcing that one of his first acts, if elected president, would be to rescind the rules. Nevertheless, the general reception of the rules has

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113 The 2017 Q &A indicated that, rather than issue Guidance documents, as had been the practice, the Department would engage in rulemaking regarding Title IX. While Guidances can be withdrawn and replaced easily, rules promulgated after notice and comment can only be changed if a law or Presidential Directive requires a formal review process or the public initiates a petition requesting review. The agency itself may also engage in a review process but can only amend or revoke a rule using the notice and comment process again.


115 Harvard Title IX coordinator, Nicole Merhill recently stated, “The work that we do at Harvard in this space goes well beyond the federal legal requirements,” https://www.thecrimson.com/article/2021/1/20/experts-on-title-ix-under-biden/. Thus, she opined that even if the rules changed, Harvard would be unlikely to need to change its Title IX approach. Id.

116 Immediately after the new rules were issued, Joe Biden declared that the new rules governing sexual misconduct in schools aim to “shame and silence survivors,” and vowed to put a “quick end” to it if he becomes the next president. https://www.politico.com/news/2020/05/06/biden-vows-a-quick-end-to-devos-sexual-misconduct-rule-
been considerably more positive than might have been anticipated, in large part because the rules regarding the formal process for a hearing on Title IX claims appear to provide a floor for due process that should survive judicial scrutiny.\textsuperscript{117} Concern about the lack of process for respondents, resulting in expulsions and reputational harm, was certainly a driving force behind the rule changes.

But, before the article explores the benefits and the drawbacks of the new rules as they relate to informal processes, it will review the ways in which the rules have changed. The major changes associated with the final rules include narrowing the definition of sexual harassment, a change in what constitutes notice to, and knowledge of, the institution with respect to a potential Title IX violation, and the modification of the formal hearing process, including the requirement that cross-examination be permitted.\textsuperscript{118} Critics argue that these changes will make it easier to sweep potential Title IX violations under the rug and, with respect to the formal hearing requirements, frighten potential complainants into silence. On these issues, critics have a point. With respect to the sexual harassment definition, which includes sexual harassment, sexual assault, domestic violence, dating violence, and stalking, the new rule requires that harassment be severe \textit{and} pervasive and objectively offensive so “that it denies a person equal educational access”.\textsuperscript{119} Under the DCL, sexual harassment was defined as severe \textit{or} pervasive incidents that

\textsuperscript{241715} Not long after President Biden’s election, 100 civil rights groups signed a letter asking him to reinstate the DCL. See note 9.
\textsuperscript{117} Several news reports emphasized that the changes to Title IX procedures, designed to address legal rulings finding that the school processes were not consistent with due process, include allowing each side to bring an adviser or attorney to the formal hearing and permitting cross-examination of witnesses. Critics suggest that the thought of cross-examination may be enough to discourage victims from reporting an incident. \url{https://www.usnews.com/news/education-news/articles/2020-05-06/trump-administration-publishes-final-title-ix-campus-sexual-assault-regulations} (reporting on survivor advocacy groups’ reaction to the new rules – “these changes unnecessarily burden victims of sexual assault, and can deepen trauma for students by increasing the chances of victims being exposed to their accused assailants.”); \url{https://www.insidehighered.com/news/2020/05/07/education-department-releases-final-title-ix-regulations} (last checked on May 15, 2020) (survivors could be cross-examined by anyone the accused chooses).
\textsuperscript{118} Two other changes of note include limiting investigations to misconduct that occurs only during educational activities and permitting universities to limit the number of employees who are designated as mandatory reporters.
interfere with or limit a student’s access to the school. Critics condemn the change to the definition of sexual harassment, concerned that it may cause some schools to focus only on repeated conduct and because it deviates from the severe or pervasive requirement used to assess workplace claims of sexual harassment.\textsuperscript{120}

Another major change focuses on institutional notice and knowledge. Under the previous iteration, institutions were required to address misconduct about which they “know or reasonably should know”. Under the 2020 revision, an institution must have actual knowledge before it has an obligation to proceed.\textsuperscript{121} Unquestionably, the “actual knowledge” requirement will limit a school’s responsibility for investigation. No longer will implicit or imputed knowledge obligate a school to take action.\textsuperscript{122} Moreover, the institution cannot be held liable for a Title IX violation unless it responds in a manner that is deliberately indifferent. Applying this standard, the question a reviewing court would ask is whether the school’s response was clearly unreasonable in light of known circumstances. Under the previous approach, a court would evaluate whether the institution’s response was “reasonable.” The new rule will likely reduce the risk of institutional liability since “deliberate indifference” is not an onerous standard to satisfy.

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\textsuperscript{119} Note, however, that if the action rises to the level of sexual assault, the complainant does not have to establish that it rises to the level of severe, pervasive, and objectively offensive.
\textsuperscript{120} See Jeannie Suk Gersen, \textit{How Concerning Are the Trump Administration’s New Title IX Regulations?},
\url{www.newyorker.com/news/our-columnists/how-concerning-are-the-trump-administrations-new-title-ix-regulations}
(May 16, 2020);
\url{http://blogs.edweek.org/edweek/rulesforengagement/2018/11/what_new_title_ix_guidance_on_sexual_assault_and_harassment_means_for_k-12_schools.html} (“may cause some schools to only focus on repeated conduct.”); ACLU Comment on Department of Education’s Final Title IX Rule on Sexual Harassment (May 6, 2020) (opposing narrow definition of sexual harassment).
\textsuperscript{121} Actual knowledge means “notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient.” 34 CFR Part 106.30.
\textsuperscript{122} In addition, the institution’s responsibility for seeking out information about sexual harassment or other offenses has changed. The number and type of mandatory reporter has also changed -- rather than specific categories, an institution can now decide whether to make all employees mandatory reporters or to designate some employees who can act as resources to students without triggering a reporting requirement. The ACLU opposes the new knowledge rule. ACLU Comment on Department of Education’s Final Title IX Rule on Sexual Harassment (May 6, 2020).
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Changes to the formal hearing requirement have received both the most attention and the most criticism, as many perceive that the increased formalism of the Title IX hearing process, including the respondent’s right to have a live hearing as well as an advisor to cross-examine the complainant, has swung the pendulum too far in favor of respondents. In addition to mandating a right of cross-examination (although the complainant may opt for that examination to occur online or in a separate room from the respondent and the respondent is not permitted to do the cross-examination), the rules abandon the single investigator model, which empowered a single individual to investigate and adjudicate a complaint. Different individuals must now receive the report of misconduct; investigate the facts; and serve as the decision maker as to sanctions and remedies.

Finally, and most relevant here, neither the grievance procedure nor the informal resolution process can begin until a complainant files a formal complaint. While this obligation sounds onerous, a formal complaint is simply a document filed by a claimant or signed by the Title IX Coordinator that alleges sexual harassment against a respondent and requests that the

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124 Liability extends to off campus activities including buildings “owned or controlled by a student organization that is officially recognized by postsecondary institutions” such as a sorority or fraternity house and, perhaps, additional off campus housing. Yet institutions will not be liable for misconduct occurring on study abroad trips. The rules also permit the institution to require a complainant to meet his or her burden of proof by satisfying either the preponderance of the evidence or the clear and convincing standard. Under the 2011 Letter, OCR had required the use of the lower burden of proof, preponderance of the evidence.
recipient institution investigate the allegation of sexual harassment.\textsuperscript{125} A complaint may be filed with the Title IX Coordinator in person, by mail, or by e-mail.

III. Delivering on the Promise of Informal Resolution Processes Under the 2020 Rules – a Roadmap to Successful Process Design and Training

The new rules provide that, any time prior to reaching a determination of responsibility, a school may facilitate an informal resolution process, like mediation, if it obtains the parties’ voluntary and written consent to the informal process, provides the parties a copy of the formal complaint, together with an explanation of the informal process and its implications, including that resolution under an informal process precludes the parties from resuming the formal process.\textsuperscript{126}

The rules do not define informal resolution, although they do identify mediation, restorative justice, and arbitration\textsuperscript{127} as dispute resolution mechanisms that schools might offer. In addition, the rules mandate that Title IX facilitators receive appropriate training and be free of bias against either complainants or respondents and have no conflicts of interest.\textsuperscript{128} The

\begin{footnotesize}
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\item A formal complaint is a document that the complainant files or the Title IX coordinator signs, that alleges "sexual harassment against a respondent and request[s] that the recipient investigate the allegation of sexual harassment. 34 CFR Part 106.30(a).  
\item While the Department now permits schools to use informal processes, it provides little guidance on how to develop or implement these processes. 
\item I was surprised to see arbitration included as a informal resolution mechanism because it is more formal and is also binding. In addition, the arbitration process would be very similar to the formal resolution process the new rules require. So, it would be odd to include arbitration as the informal mechanism — if arbitration were mandated, the result would be binding and would render a formal resolution process unnecessary and redundant (if it were even to take place). 
\item Section 106.45(b)(1)(iii) indicates that facilitators of informal resolution processes be free of biases or conflict of interest and receive training on the definition of sexual harassment under the rules, the scope of the recipient's education program or activity and how to conduct informal resolution processes. The rule also notes that any materials used to train a facilitator of an informal resolution process must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment.
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Department also delegates the question of which disputes are appropriate for informal resolution to the university’s judgment.129

The Department of Education’s decision to promote an increased use of informal resolution processes arguably rests on a rejection of formal procedures as the gold standard for provision of justice. Emphasizing that mediation and other informal resolution processes have myriad benefits and few drawbacks,130 the Department justified its decision to highlight informal processes as an essential aspect of resolution of sexual harassment claims by citing many comments made during the notice and comment rulemaking process. Commenters recognized many of mediation’s values, including that informal processes empower those willing to resolve their complaints without a formal approach to do so and that both complainants and respondents, particularly when respondents are prepared to take responsibility for their actions, may experience more positive results using mediation than they would had they selected a more formal process.131 Commenters also emphasized that some complainants may simply want to be heard and that the mediation forum can be an effective tool for allowing one or more parties to

129 Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 34 CFR Part 106, https://www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf At p. 1369-70. The Department “believes that recipients’ good judgment and common sense” should guide the decision making about whether claims are appropriate for informal resolution.

130 Despite the Department’s obvious faith in informal processes, it did not make mediation the default option for addressing sexual misconduct claims. Although recognizing that sometimes complainants simply want to be heard and that mediation empowers victims and increases flexibility to address cases, the Department rejected that approach because it believes that the formal grievance process provides the procedural safeguards, ensuring a fair process for all parties, is the better forum for resolving disputes about factual allegations. 2020 Rules at 1366. Moreover, the Department emphasized that requiring parties to participate in informal resolution processes before a formal hearing takes away their ability to choose how the process unfolds and results in a loss of control over the process. Id.

131 Articles written about the new rules have also hailed the adoption of informal process for resolution. See Brett A. Sokolow, OCR is About to Rock Our Worlds, inside highered (January 15, 2020)(“the vast majority of sexual harassment claims can and should be resolved informally, but we need to be sure that the parties are participating voluntarily and not being pressured to minimize the severity of what happened to them.”) Sokolow also expressed concern about ensuring that mediators will be properly trained to resolve allegations of violence. Id. See Brian A. Pappas, Sexual Misconduct on Campus, Disp. Res. Mag. 21, 24 (Winter 2019) (properly designed informal systems strengthen formal procedures by “encouraging complaints and providing a meaningful avenue for communication and healing.”). Pappas also emphasized the importance of ensuring adequate training for neutrals — “neutrals must, of course, be well-trained in trauma-informed practices and should employ a method that seeks to increase mutual understanding rather than pressure participants to reach an agreement.” Id.
express their emotions to the other. Other commenters emphasized that the confidential nature of informal processes may be particularly helpful in those situations where there has been confusion or misunderstanding about what happened between the parties. Yet other commenters noted that informal processes like mediation can empower victims by providing them flexibility to address different or unique situations and develop creative solutions.\textsuperscript{133}

As the Department emphasized, the justice system has made mediation, in particular, widely available to disputants because it can “improve parties’ sense of justice and increase compliance with outcomes, and yield[] remedies more customized to the needs of unique situations.”\textsuperscript{134} The Department cited commenters who advocated for greater use of mediation for sexual harassment disputes, noting that mediation can be appropriate in such cases because parties are often more satisfied with results that they played a role in designing.\textsuperscript{135}

The pivot toward increased use of mediation in the new rules is a recognition that formal processes should not necessarily have primacy, and that many problems can be resolved in alternate ways that the participants and institution may ultimately find more satisfying. To ensure that the implementation of mediation processes is as successful as it can be, however, universities should consider the kinds of objections parties might have to the expanded use of this adaptable process.

A. Addressing Concerns About Coercion

Commentators speculate that complainants may agree to participate in informal processes simply to avoid the more formalized adjudicatory process the rules require, particularly the

\textsuperscript{132} Although live hearings may also be confidential processes, institutions are required to record the hearing and keep the recording (or transcript) for seven years after the proceeding. Confidentiality here means that only the parties, the mediator and the parties’ representatives are permitted to attend an informal resolution process, and it is not recorded. 106.45(b)(6)(i).

\textsuperscript{133} Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 34 CFR Part 106 at 1364, https://www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf

\textsuperscript{134} Id. at 1365.

\textsuperscript{135} Id., citing law review articles.
prospect of cross-examination.\textsuperscript{136} Due process demands, however, that respondents be permitted to cross-examine complainants in hearings adjudicating Title IX claims. To reduce the deleterious impact of that cross-examination on complainant’s mental well-being, the new regulations soften the impact of cross-examination by prohibiting the respondent from conducting the cross-examination and permitting the complainant to be in a room separate from the respondent during the cross-examination process. Nevertheless, some complainants may turn to the informal processes to avoid the confrontation.\textsuperscript{137}

Even in the (hopefully rare) situation when a complainant selects an informal process primarily to avoid the risks associated with participation in the formal process, additional changes made to the Title IX process may lessen the risk of coercion coming from other sources. First, to address concerns about coercion, the Department implemented a written consent requirement. Second, the new rules, by reducing the risk of liability for institutions for failure to investigate Title IX incidents, may lessen the probability that the institution will encourage (perhaps in some cases strong-arm) complainants into using the formal process.\textsuperscript{138}

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  \item The universities’ motion for a preliminary injunction to prevent the implementation of the new rules cited this concern, alleging that DOE ignored evidence that oral cross-examination has the potential to chill reporting and create “potentially inequitable and traumatizing hearings that can harm complainants and respondents alike, and lead to less reliable outcomes.” Brief at __, citing Michelle J. Anderson, Women Do Not Report the Violence They Suffer: Violence Against Women and the State Action Doctrine, 46 Vill. L. Rev. 907, 936-37 (2001) (decision not to report or to drop complaints is influenced by fear of cross-examination). See Katie Vail, at 2017; Katherine Mangan, “Why More Colleges are Trying Restorative Justice in Sex-Assault Cases,” Chron. Higher Educ. (Sept. 17, 2018) (expressing concern that survivors may feel coerced into using restorative justice practices rather than pursuing disciplinary measures).
  \item The Title IX hearing process requirements may well be emotionally and psychologically painful and exhausting to complainants, despite efforts to ameliorate them with the limitations imposed on the cross-examination process.
  \item Following adoption of the Dear Colleague Letter, universities faced increasing risks of liability. By 2018, sexual assault was the top liability for colleges and universities in 2018 with payouts from Title IX procedural challenges surpassing legal costs related to other major risks, such as wrongful termination. LargeLoss Report 2019, United Educators, available at: https://www.ue.org/uploadedFiles/Large%20Loss%20Report%202019.pdf; Greta Anderson, More Title IX Lawsuits by Accusers and Accused, Inside Higher Ed. (October 3, 2019), available at: https://www.insidehighered.com/news/2019/10/03/students-look-federal-courts-challenge-title-ix-proceedings. In Doe v. Purdue Univ., 928 F.3d ___, 664, 667-70 (7th Cir. __), the court noted that decision makers in a Title IX case
\end{itemize}
standard created a risk of liability if a school that “knows, or reasonably should know, about possible harassment” fails to investigate promptly to determine what happened, and then “take appropriate steps to resolve the situation”\(^\text{139}\) The earlier rules also created a risk of liability if the investigation did not occur within a reasonable and prompt time frame. The new rules, by contrast, create a risk of institutional liability only when the university acts with deliberate indifference with respect to the investigation of the complaint about which it has actual knowledge. While the change in standard may have drawbacks, it has the potential benefit of reducing the school’s incentive to push complainants into the formal process out of fear that encouraging the use of informal processes will result in liability. As a result, the complainant’s decision to utilize an informal process will more likely be made independently.

Title IX offices might consider other means for reducing the risk of coercion at both the intake stage and then, again, prior to mediation. Coercion into mediation is, of course, different than coercion during mediation and must be addressed in different ways. To avoid coercion into an informal process, a Title IX office might focus on developing techniques designed to minimize trauma at the time of intake and empower the complainant to choose the approach that best fits their situation.

A shortcoming in the new Title IX rules is the failure to provide a standardized intake procedure for complainants, leaving to the universities the process of designing both the intake process and, ultimately, the entire grievance process.\(^\text{140}\) The regulations should provide may experience gender bias when making their decision because they are under financial pressure from their university and the Department of Education to demonstrate compliance with Title IX.

\(^\text{139}\) DCL at 4.

\(^\text{140}\) The regulations require the university to treat complainants and respondents equitably, offering supportive measures to a complainant and a grievance process that meets the due process requirements outline in § 106.30. See 34 C.F.R. §106.44. Supportive measures are non-disciplinary, non-punitive individualized services offered to complainants. Examples include referral to various forms of counseling as well as educating the institution or community subgroups, changing housing or work arrangements, and safety planning. The university’s process must
institutions with a comprehensive guide to appropriate intake practice for a Title IX claim. Some organizations, like ATIXA, provide guidance for intake procedures to their members. But even these helpful documents provide limited guidance to intake personnel as to how best to interview a traumatized person.

At a minimum, Title IX offices may wish to draw on available neurobiological research, which relies on a more accurate understanding of trauma’s impact on the brain, to develop an intake approach. Reliance on this research may lead to better interviewing practices for investigators as well as more sensitive questioning of victims who have experienced a traumatic event. Adopted in both family law and criminal investigatory settings, a trauma-informed investigation focuses on creating an environment of trust and rapport with the victim so that the victim feels emotionally and physically safe. Transparency in the interviewing process is also essential. This transparency includes both acknowledgement that the victim has suffered a
traumatic event and that the investigation process may require asking difficult questions designed to elicit considerably more detail than the victim may be comfortable sharing. Researchers emphasize the need to ask trauma victims open-ended questions that permit narrative responses with “particular emphasis on emotional and sensory experiences.” In addition, during a trauma-informed questioning process, the questioner is permitted to express empathy but must also remain patient. Trauma victims may not provide information in a chronological order and the view is that the failure of a trauma victim to provide information in a logical or sequential ordering reveals little about the truthfulness or accuracy of the victim’s account. Thus, demanding any sort of ordering in response to questions is unnecessary and likely to be counterproductive. A trauma-informed interviewer should be as non-judgmental as possible during the interview, not asking the victim why they did or did not do something during the

144 ATDCA Twenty-Minute to Trained Guide to Sexual Harassment at 15, https://library.ncherm.org/library/atixa-library/689920-Minutes-to-Trained_Sexual%20Harassment%20Module.pdf?Expires=1608058939&Signature=YxyjgKPQ5YFku7bEliu5lvapLCqVHO-X-pfLGkA7Ye5w6hp8pp9iye9uEGwqYcUEy9oq-zlf6whH9OCubjJyE0mI-nhcIWHFD4q-larZ1KNx68SpRSsRg2MQDd1--Z7xGY2MXXGsW04cDSCcpcEFAnekcEpfj0Ne6dhiBTY4reSY-RouMkoFwboIFswwDtosio-46XwvyC44Gb8jXdnT39kl1UFCV3FUqj0jeYQkxqh2Mvslb4zw10ABh-tag6IL.W2YDDJlDcdo97D52BT8amRLA17CThnY644e---HGElD-6avcznI5DVlhlgVqYADYt-IQoRXdRbpY wqELy37kEyshw_&Key-Pair-Id=APKAJX5BP07EFIFm6Z7SQ

145 For example, the International Association of Chiefs of Police states that national best practices in interviewing sexual assault victims includes asking “the victim to describe the assault, listing as many details and feelings as possible. [including] the details necessary to establish elements such as premeditation/grooming behavior by the perpetrator, coercion, threats and/ or force, and traumatic reaction during and after the incident (e.g. demeanor, emotional response, changes in routines or habits). [and] asking the victim to tell you what they thought, felt, and feared at the time of the assault. – What was the victim experiencing before, during, and after the sexual assault? – What did the victim see, smell, taste, hear, or touch during the incident?” https://www.theiacp.org/sites/default/files/all/s/SexualAssaultGuidelines.pdf.

146 Id. at 7.

147 Expressing empathy involves two components: each of which is necessary to effectively demonstrate empathy: "perspective-taking" and "active expression." See generally Robert H. Mnookin et al., The Tension Between Empathy and Assertiveness, 12 NEGOTIATION J. 217 (1996). Perspective-taking involves the listener’s effort to understand the other’s point of view in a non-judgmental manner. Active expression involves verbalizing that nonjudgmental understanding. As Michael Moffitt described it, “[e]ffective empathy, then, combines a thorough, accurate understanding of the other side’s perspective and an articulate demonstration of that understanding.” Michael Moffitt, Casting Light on the Black Box of Mediation: Should Mediators Make Their Conduct More Transparent? 13 Ohio State J. on Disp. Res. 1, 10 (1997). More recently, Jennifer Reynolds defined empathy as “the ability to see the world through the eyes of someone else, require[ing] careful listening for the thoughts and feelings of other people.” Jennifer W. Reynolds, Talking About Abortion (Listening Optional), 8 Tex. A&M L. Rev. 141, 148, (2020).

148 Id. at 7; see also https://www.theiacp.org/sites/default/files/all/s/SexualAssaultGuidelines.pdf (leaving out details common among trauma victims).
event that precipitated the report. Finally, the intake person should be cognizant of how he or she presents options to the complainant. The presentation of options should “promote respect and dignity” rather than as “second-class justice.”

An institution should also implement mediator training designed in part to reduce coercive impact during the process. In a typical mediation session, the mediator focuses attention on the parties, seeking to learn about their perceptions, issues, and interests. Mediators listen actively to both parties both to understand each party’s viewpoint and to demonstrate to the party that they have been understood. Active listening helps the mediator demonstrate concern and empathy for the speaker. Following a similar, uninterrupted opportunity for the other party to speak, the mediator obtains additional information through questioning, sets an agenda with the parties’ help, and proceeds to assist the parties with developing options that might satisfy the parties’ underlying interests, generating movement using reality testing, among other devices, and ultimately helps the parties reach resolution. A fundamental principle underlying mediation is that the parties can speak for themselves and are best equipped to identify potential solutions to their conflict.

149 This article does not attempt to outline fully the best approach to trauma informed interviewing. Title IX offices could learn much about trauma-informed questioning by studying the work of researchers in family and divorce matters, who have had frequent occasion to consider how best to conduct trauma-informed interviews.


151 The current approach to training intake personnel and mediators is deficient. Under earlier iterations, intake personnel and mediators were only required to participate in four hours of training. While that number is now eight hours, that amount of training, only some of which focuses on interviewing and mediating skills, is insufficient to properly train individuals to meet the needs of the population Title IX serves. Mediators are required to participate in some additional training but it is still woefully deficient. As Brett Sokolow, president of ATIXA observed, “many in the field are rightfully concerned about whether colleges and universities have access to mediators skilled enough to resolve allegations of violence.” Brett A. Sokolow, OCR is About to Rock Our Worlds, INSIDE HIGHER ED (Jan. 15, 2020) https://www.insidehighered.com/views/2020/01/15/how-respond-new-federal-title-ix-regulations-being-published-soon-opinion#:--text=Once%20released%2C%20there%20will%20be%20time%20to%20move%20toward%20compliance [https://perma.cc/DG3Y-BYQX].

This structured approach is likely to reduce the risk of coercion, but mediators can do more. Depending on the needs of the parties, a mediator may decide to conduct the mediation entirely in caucus, with the parties in separate rooms. Alternatively, the mediator might empower the parties to select their mode of communication, allowing them to video conference from separate rooms or even to mediate through teleconference from entirely separate spaces. Giving the parties the ability to control the means and manner of communication empowers parties and recognizes their ability to select the process approach that they believe is best for them.

Mediators may also reduce coercion in mediation through recognition and amelioration of power imbalances between the parties. This issue, discussed more fully below, has long been a concern in family mediation involving domestic violence victims. Adoption of ameliorative approaches to power imbalances is one more way to reduce coercion during the mediation process.

153 Id. at 39. Caucused mediation protects the parties from each other while also alerting the mediator to underlying interests, concerns, or information that the parties might not wish to reveal in a joint session. In addition, caucuses enable the mediator to challenge a parties’ perceptions and beliefs, while also empathizing with the difficulties that might have brought the party to mediation. Caucuses allow parties to be candid with the mediator, based on the mediator’s promise that nothing in the caucus will be revealed to the other party without the speaker’s permission. Id.
154 Shuttle, or caucused, mediation is common in many fields, including family law and commercial disputes. In one state, California, parties in family mediation are empowered to refuse to attend a joint session. Videoconference technology or online platforms are also possibilities. See Fernanda S. Rossi et al., Shuttle and Online Mediation: A Review of Available Research and Implications for Separating Couples Reporting Intimate Partner Violence or Abuse, 55 Fam. Ct. Rev. 390 (2017) (highlighting issues, advantages and disadvantages of shuttle and online mediation as ways to avoid face-to-face meetings in circumstances of partner violence or abuse).
155 Participation in separate rooms may protect the complainant from re-traumatization, a problem some complainants might otherwise face. An experience mediator recently stated that, in student-to-student cases “the value of mediation in which the decision-making power rests with the students can be invaluable and does more to enhance the school’s educational mission than where the decision rests with a third party—no matter how neutral and unbiased. Frequently, it is the need to be heard that is the most crucial desire of the student who feels victimized or the student who feels wrongly accused.” Jane Cutler Greenspan, Mediation for Title IX Cases: A Significant Benefit, University Business.com (December 15, 2020).
B. Process Design Considerations in Addressing and Reducing Concerns Created by Power Imbalances

Another critique that might be leveled at the new rules’ promotion of mediation is that participation in the process may exacerbate potential power imbalances between the victim and the harasser, a claim also made frequently in the employment context or in family disputes. The power imbalance in a student-to-student harassment case might not be as significant as the imbalance between an employer and an employee, or between divorcing spouses, where one alleges abuse, but concerns about the differential are certainly well taken. Unfortunately, no process available, whether negotiation or a hearing (particularly with the availability of cross-examination to satisfy due process concerns) can entirely eliminate this issue. To the extent this problem is present, the existence of power imbalances can, to some degree, be addressed more

156 Craig A. McEwen, Nancy H. Rogers and Richard J. Mainman, Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation, 79 Minn. L. Rev. 1317 (1995); Nicole Duke, Expose Your Pig: The Procedural Failures of Sexual Harassment Mediation and Danger to Abuse Victims, 11 Am. J. Mediation 37 (2018). The power imbalance claim is that the dispute cannot be resolved fairly because the weaker party is incapable of negotiating on equal footing with the stronger party.

157 Commenters contended that all sexual violence situations reflect power dynamics that undermine the characterization of mediation or other informal process as “voluntary.” (p. 1373) That concern, when coupled with the fear of cross-examination, suggested to some commenters that “many parties have no real choice at all.” The Department responded that it attempted to ameliorate this concern by prohibiting schools from mandating informal resolution processes or conditioning the right to go forward on participation in an informal process. In addition, training requirements for mediators, and assuring their independence from the institution, may go far in countering concerns about the coerciveness of the mediation process. No process will address all concerns and there may be complainants who do not go forward because they fear the mediation process as well as the hearing process. Note, however, that empirical evidence offers little support for the assertion that the weaker party will achieve a less desirable outcome because of a power imbalance. Commenters have frequently raised concerns about power imbalances in mediation and whether or not women and ethnic and racial minorities fare worse in mediation as a result. The little research that examines these issues has been done in small claims and divorce cases and provides weak or mixed evidence about “worse outcomes” through mediation. A New Mexico small claims court study found that most, but not all, of the outcome disparities were explained by case characteristics such as whether or not the party was a first-time or repeat court user. Michele Hermann, Gary Lafree, Christine Rack, and Mary Beth West, The Metrocourt Project Final Report at 780 (Albuquerque: University of New Mexico Center for the Study and Resolution of Disputes, 1983). It appears, however, that minority men received less money in mediated than adjudicated cases (id.). Research on outcomes of family mediation and litigation paints a mixed picture — for example, women obtain sole custody more often in litigation than in mediation but appear to do better on child support in mediation. Joan B. Kelly, “Divorce Mediation Research: Is There Empirical Support for the Field?” 22 Conflict Resol. Q. 3 (2004).

158 Not all disputes involving men and women have a gender-based power imbalance and not all imbalances are problematic. In traditional sexual harassment cases, the concern is that the complainant, the employee, is not a bargaining position equal to that of the respondent, typically a supervisor. Yet, some scholars have begun to see that, with training on recognition of power imbalances, mediation may nevertheless be superior to litigation because
effectively in a mediation process with a facilitator trained\textsuperscript{159} in recognizing and addressing power imbalances\textsuperscript{160} than it can be in negotiation or in a hearing process.\textsuperscript{161}

The degree to which parties experience a power imbalance may depend on the type of claim at issue. This is particularly relevant with a statute like Title IX, whose sweeping prohibition on sex discrimination in education includes many different claims within its scope. These claims range from allegations of unwanted sexual comments to claims that involve severe physical sexual violence. The public concern for victims of sexual violence dominates the news, and the sexual violence claims were the primary focus of the 2011 Dear Colleague Letter.\textsuperscript{162}

With the spotlight trained on sexual violence claims, it is easy to forget that most student-on-student Title IX infractions involve sexual harassment rather than sexual violence.\textsuperscript{163} Title IX

\textsuperscript{159} Training may not be a panacea, however. Research only substantiates that mediation experience, not education or substantive expertise, increases settlements. Goldberg, Sander, Rogers & Cole, \textit{DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, ARBITRATION AND OTHER PROCESSES} at 189 (7th ed. 2020).

\textsuperscript{160} There are multiple strategies by which a mediator can control for power imbalances between parties. These practices often revolve around the mediator's responsibility to manage the parties' communications. Mediators can manage communications by structuring the mediation session, controlling the flow of communication, and filtering negative expressions through the reframing of negative thoughts. In these ways, mediators empower both parties while simultaneously steering them away from unproductive exchanges steeped in power-imbalances. Robert A. Baruch Bush, \textit{A Pluralistic Approach to Mediation Ethics: Delivering on Mediation's Different Promises}, 34 Ohio St. J. on Disp. Resol. 459, 472 n.30 (2019) (citing Robert A. Baruch Bush, \textit{Mediation Skills and Client-Centered Lawyering: A New View of the Partnership}, 19 \textit{CLINICAL L. REV.} 429, 436-39 (2012-2013)).

\textsuperscript{161} Mediation might not be appropriate in other situations. Counseling against the use of mediation would be situations where the intake employee or the mediator discovered significant and unresolvable resource disparities between the parties, a risk of violence or threats of violence during mediation, a lack of well-qualified mediators, or school officials' belief that the conduct complained of poses a serious risk to third parties.

\textsuperscript{162} The 19 page-long 2011 Dear Colleague Letter references sexual violence 71 times, provides a list of statistics about the prevalence of sexual violence, and suggests that schools provide special guidance for sexual violence victims in their school handbooks. \textit{2011 DEAR COLLEAGUE LETTER} at 2, 15.

\textsuperscript{163} Statistics from the Office of Civil Rights' Annual Reports demonstrate that, of those sexual based Title IX claims, the vast majority of those claims are bullying/harassment claims (294 per year on average for the last 8 years), and a minority of those claims involve sexual violence (47 per year on average for the last 8 years). Even though the Office has seen a jump in sexual violence claims over the last few years (264 in 2017-2018) they are still far outpaced by claims of bullying/sexual harassment during that same period (598.5). \textit{2017-2018 U.S. DEPT. EDUC. OFFICE FOR CIVIL RTS. ANNUAL REPORT TO THE SECRETARY, THE PRESIDENT, AND THE CONGRESS} 18. A study by The American Association of Universities 2015 had similar results, showing that more students experienced peer on peer sexual harassment (mostly comprised of disparaging comments about their bodies or sexual behavior) rather than more serious claims that rise to the level of a crime (like stalking or sexual violence).
sexual harassment claims, which might involve sexual innuendo, inappropriate staring or claims that a student made offensive comments or told offensive jokes, do not implicate the same power imbalances or emotional trauma that are often present in cases of sexual violence.

These claims, together with more serious allegations, may well be amenable to mediation. The mediation process empowers a harassment victim to voice their anger and frustration, while also enabling the respondent to convey their side of the story. On occasion, it may also provide an avenue for both parties to find closure. Further, mediation provides the respondent an opportunity to learn from their mistakes, to apologize, and even to find ways to make amends. In cases where the offense was simply the result of a miscommunication, mediation allows the parties an opportunity to reach a mutual understanding. This kind of

David Cantor et al., Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct (Oct. 27, 2017) available at https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/AAU-Campus-Climate-Survey-FINAL-10-20-17.pdf. Specifically, the study found that 80.6% of students reported experiencing sexual harassment, whereas only 11.7% reported experiencing attempted or completed sexual penetration or touching. Id. at 85 (sexual harassment), 56 (sexual violence).

164 Cornell University conducted a survey of its students in 2019 and 2017 consistently found that the most common form of gender-based discrimination students experienced was sexual harassment, not stalking or sexual violence. About half of students reported that they had experienced sexual harassment. 2019 CORNELL SURVEY OF SEXUAL ASSAULT AND RELATED MISCONDUCT: OVERVIEW OF SURVEY RESULTS 6. The most commonly experienced forms of harassment were: someone making inappropriate comments about one’s body, appearance, or sexual behavior (41%); and someone making sexual remarks or telling offensive jokes or stories (31%). Id.

165 A recent empirical study by Raines et al. found that the majority of parties with who had experienced domestic violence reported that mediation did not impact their feeling of safety. In addition, few reported that they were coerced to settle and a majority were satisfied with the mediation experience. Susan Raines et al., Safety, Satisfaction, and Settlement in Domestic Relations Mediation: New Findings, 54 Fam. Ct. Rev. 603, 616 (2016) Desmond Ellis & Noreen Stuckless, Mediating and Negotiating Marital Conflicts 96 (1996) (finding that female clients in lawyered, litigated divorces are more likely to be satisfied and to be willing to undertake the process again than female clients resolving their cases in mediation while the inverse is the case for male clients in Ontario); Christine Piper, The Responsible Parent: A Study in Divorce Mediation 192-93 (1993) (arguing on the basis of qualitative study of mediation sessions that emphasis on future rather than on past parenting practices and assumption of equal responsibility for parenting disadvantage women in English divorce mediation); Coker, Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking, 47 UCLA L. Rev. 1 (1999) (reporting on an empirical study of Navajo Peacemaking suggesting that informal methods of adjudication, such as Navajo Peacemaking, may improve the lives of some battered women by enhancing their autonomy but may also strengthen anti-misogynist norms and perpetuate coercion).

166 Miscommunication or misunderstanding may not be present in cases involving sexual violence, making the kinds of compromise often reached through mediation less useful. ATIXA Members Comprehensive Title IX Regulations Implementation Guide at 78 (on file with author).
compromise and flexibility would be hard to achieve in a formal adversarial process, which tends to polarize the parties and their positions.

All of that being said, the problem of power imbalances in mediation is hardly unique to the Title IX setting. Parties to a mediation rarely have identical bargaining power. But well-trained mediators are taught techniques for addressing that issue to ensure that both parties’ voices can be heard. Of course, to address power imbalances, a mediator must first be capable of identifying them. To assist with that, prior to mediation, a mediator should discuss with each party the process of mediation and encourage each party to raise any concerns that party might have about participation in the process. The mediator should explain the mediation process and the ways in which it can be structured to ensure safety and comfort for each party. Among other questions, the mediator might ask the parties whether they believe that they can participate in the mediation and make decisions without coercion. In addition, the mediator should ensure that the parties understand that participation in the process is voluntary and can be ended at any time, and that participation does not require resolution. The mediator, through this pre-mediation inquiry, can also determine whether each party has the emotional and cognitive capacity to participate in the mediation process. The mediator might also consider whether it is worth bringing in a second mediator, who might provide greater gender balance and/or skills (like a therapy background) who will help reduce imbalances during the mediation process. Finally,

167 Michal Cotler-Wunsh, Understanding and Addressing Power Disparities in Divorce Mediation: Family, feminism & Foucault, Proquest, N.p., Aug. 2005 at 92 (April 13, 2016). Some commentators suggest that, to reach a fair agreement, the parties should have equal bargaining power. See, for example, Rose Mirzaie, Divorce Mediation for Women: An Examination of Feminist Critiques, Disp. Resol. J. 161, 167-69 (2016). This aspiration seems unrealistic.

168 As discussed more fully below, a mediator can use many tools during the mediation process to reduce the potential harms that come from a severe power imbalance in mediation. See text at notes to _____.


170 Scott Hughes suggests that “all divorce mediations should be co-mediated with mixed gender teams consisting of an attorney paired with a health provider, either a counselor, psychologist, or therapist.” This approach helps
the mediator can ensure that the parties understand their right to bring a support person to the mediation. Support persons in mediation often help to alleviate concerns about power imbalance between the parties.

Not all Title IX offices will have the capacity to engage in this level of inquiry prior to mediation. An evaluative interviewing tool, the Mediator's Assessment of Safety Issues and Concerns (MASIC), might be useful to Title IX intake and dispute resolution personnel. MASIC is a set of pre-mediation questions a mediator asks to assess the presence and frequency of behaviors that are hallmarks for the presence of domestic violence. The assessment tool provides information to the mediator, based on the party's responses to interview questions, that reveals type of domestic violence that may be present and then guides the mediator as to whether it is appropriate to continue with mediation and, if so, how. Title IX offices could use the MASIC tool, or a similar tool adapted for Title IX issues, as part of their screening process to identify power imbalances, reduce the likelihood of coercion, and root out cases of violence.

170 Lorig Charkoudian and Ellen Kabcenell Wayne also noted that “participants who attended a mediation with no same-gender mediator present saw the mediator(s) as listening judgmentally and as taking sides in the mediation. When the participant was outnumbered in the mediation session because the mediator's gender matched only that of the opponent, these perceived bias effects worsened. In addition, mediation participants with no gender match were also less satisfied with the mediation process.” Lorig Charkoudian & Ellen Kabcenell Wayne, Fairness, Understanding, and Satisfaction: Impact of Mediator and Participant Race and Gender on Participants' Perception of Mediation, 28 CONFLICT RESOL Q. 23, 24 (2010).

171 The Uniform Mediation Act, which is the law in eleven states and the District of Columbia, enshrines in statute the right of a mediation participant to bring a support person to mediation. The commentary to this provision states, “fairness in mediation is premised upon the informed consent of the parties to any agreement reached.” The commentary noted that attorneys have the capacity to “help mitigate power imbalances” in mediation.

where mediation might be harmful. The MASIC tool could be used both as part of the intake
process and then, again, by the mediator, prior to the informal resolution process.¹⁷³

Following careful screening, a mediator might also leverage the structure of mediation to
address the problems associated with power imbalances. Mediation’s structure, because it
empowers parties to create their own resolution after facilitating the exchange of information and
ideas among the parties, reduces power imbalances.¹⁷⁴ The mediator can address imbalance
issues through agenda setting, controlling the discussion, ordering the issues, creating and
enforcing ground rules that, among other things, address the amount of time each party will have
to speak and that party interruptions while the other party is speaking will not be tolerated. The
mediator can address imbalance issues through seating arrangements that prevent the parties
from looking at each other. The mediator can ask the parties to address all comments to the
mediator, rather than to the other party. A mediator might reframe a party’s verbally aggressive
language both to reduce the impact of that language and to create a positive issue that the parties
might then address. Of course, the mediator can always use more evaluative measures, such as
assessing the legal issues in the case and reality testing party assumptions. In addition, as
described above, each party can bring a support person or advisor,¹⁷⁵ which may go far in
ameliorating feelings of coercion and addressing power imbalances. Importantly, if the mediator

¹⁷³ The authors conducted an empirical study that provided “initial validation and reliability” for the MASIC’s
questions, that a substantial number of family mediators have adopted the tool, and that it can be used in an online or
electronic format. Amy G. Applegate et al., In a Time of Great Need, a New, Shorter Tool Helps Screen for
Intimate Partner Violence, 26 Disp. Resol. Mag. 29 (September 2020) (noting that the MASIC-4 documents are free
and downloadable).
¹⁷⁴ Scott H. Hughes, Elizabeth’s Story: Exploring Power Imbalances in Divorce Mediation, 8 Geo. J. Legal Ethics
553, 579 (1995) and Rose Mirzaie, Divorce Mediation for Women: An Examination of Feminist Critiques, Disp.
¹⁷⁵ Both parties are entitled to an advisor, who may be an attorney. The presence of a support person, advisor or
attorney may also ameliorate any power imbalances in mediation. Uniform Mediation Act §. 10 Reporters’ Notes
(Section 10 of the UMA entitles a mediation participant to a representative of their choice during the mediation
process.)
does not believe these approaches are working or will work, the mediator can conduct the process with the parties in separate rooms.¹⁷⁶

Whatever the mediator chooses to do, of potential further comfort is the empirical research regarding the impact participating in mediation has on victims of domestic violence—the prevailing wisdom is that victims of domestic violence, on balance, prefer using mediation when the other option is a traditional court proceeding.¹⁷⁷

C. Does Resolving Disputes in an Informal Setting Minimize the Importance of the Harm?

Another potential criticism, although not mentioned in the commentary to the new rules, is the concern that the availability of an informal process to resolve complaints creates a risk that harms associated with certain forms of sexual harassment will be minimized. If certain claims receive a more formal process or even criminal adjudication, will the use of informal processes for other claims make those processes be perceived as “less than” or unjust? Does it suggest that the sexual harassment claims relegated to informal processes aren’t “real”?¹⁷⁸

¹⁷⁶ Shuttle mediation is common in many fields, including family law and commercial disputes. In one state, California, parties in family mediation are empowered to refuse to attend a joint session. Videoconference technology or online platforms are also possibilities. See Fernando S. Rossi et al., Shuttle and Online Mediation: A Review of Available Research and Implications for Separating Couples Reporting Intimate Partner Violence or Abuse, 55 Fam. Ct. Rev. 390 (2017) (highlighting issues, advantages and disadvantages of shuttle and online mediation as ways to avoid face-to-face meetings in circumstances of partner violence or abuse).


¹⁷⁸ Many female students who experienced sexual harassment or misconduct did not report to their college because they believed their claims would not be taken seriously. https://www.aau.edu/key-issues/campus-climate-and-safety/aau-campus-climate-survey-2019 (45% of those who had an experience with nonconsensual sexual contact by physical force or inability to consent believed their college would treat a report of such behavior seriously).
One response to this contention is that the decision to pursue a more formal process in Title IX cases always remains with the complainant. If the complainant believes a more formal process is needed, it is available. Use of an informal process does not, until a written settlement agreement is signed, preclude either party from requesting the more formal process. As with traditional litigation, mediating parties may, at any time, abandon mediation and pursue their options in the Title IX hearing process. Unlike sexual harassment claims in employment, complainants in Title IX proceedings receive support from Title IX offices and are entitled to an advisor, if they wish to have one. Some schools, like Princeton and Columbia Universities, provide an advisor to students, free of charge, if the student does not have an advisor. Under the new rules, if either party does not have an advisor, the institution must provide one to the party, free of charge, to conduct cross-examination during the hearing. As a practical matter, no advisor, whether attorney or not, could conduct a cross-examination of the complaining party or respondent without preparing for the entire hearing. Thus, it would seem unlikely that

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179 Either party is entitled to an advisor throughout the process, however, the only statement about fees and charges in the rules is that a school must provide to a party who does not have an advisor at the live hearing an advisor of the school’s choice “without fee or charge to that party” to conduct cross-examination on behalf of that party.


181 Rule 106.45(b)(6)(2020). The goal of the advisor cross-examination requirement is to prevent “unnecessary trauma that could arise from personal confrontation between the complainant and the respondent.” 106.45(b)(vii). If untrained advisors perform this task, however, problems may well arise.
financial costs would be an impediment to complainants or respondents proceeding to a formal process in Title IX cases.

Relatedly, critics may contend that the availability of less formal options may send a message to universities that they need not take sexual violence seriously. As a practical matter, of course, victims can reject the informal resolution option and pursue their claim in the more formal process, if they prefer. Survivors’ advocates suggest that universities have an incentive to encourage use of informal processes because the university will not risk a lawsuit for violation of the respondent’s due process rights if the parties agree to resolution during the informal process.182 But this critique ignores the attitude most universities and Title IX offices take toward those who enter their doors. While there may be the occasional Title IX coordinator who fails to take their job seriously, the vast majority of universities, through their Title IX offices, make clear that they view their work as important and essential to the effective execution of the university’s goal to provide a safe and secure environment to all students.183 At Ohio State, for example, every faculty and staff member must undergo annual training in recognizing and addressing sexual harassment. Organizations like ATIXA, which provides support to and training of Title IX coordinators throughout the country, help ensure that Title IX coordinators and their universities understand what is expected of them and how to execute their roles effectively.

182 Jeremy Bauer-Wolf, Mediating Sexual Assault, https://www.insidehighered.com/news/2018/02/20/university-michigan-will-now-allow-mediation-some-sexual-assault-cases (February 20, 2018) (quoting a survivor, Hope Brin, who said, "No matter how much colleges insist otherwise, the choice to use mediation is never voluntary, Brinn said. Institutions have incentives to rely on nonpunitive measures to close sexual assault cases, because otherwise they are exposed to liability.")

183 Erik Wessel, Director of the University of Michigan’s Office of Student Conflict Resolution asserted, in response to that claim, that, "It’s my strong experience in my career that a restorative process with a high degree of accountability, a high degree of support is the sweet spot to ensuring students are learning from the experience.” https://www.insidehighered.com/news/2018/02/20/university-michigan-will-now-allow-mediation-some-sexual-assault-cases.
IV. Conclusion

Students may experience pressure to mediate, whether from fear of cross-examination and participation in a more formal proceeding, because of the formal complaint requirement, or because of pressure from the institution to resolve the dispute through informal means. Yet the availability of mediation or other informal processes will likely be perceived as a benefit to most student participants in Title IX proceedings for multiple reasons. Emotional issues, party motives, the parties’ relationship, parties’ explanations of events, moral accountability, and concerns about future conduct issues may be addressed in mediation in a way that a hearing, focused as it is on legal responsibility, cannot.\(^\text{184}\) Led by a trained third party, mediation allows for a broad exploration of party interests, concerns, and goals, and can take place entirely in separate sessions, if needed.\(^\text{185}\) In that way, mediation provides a safe place for parties to examine emotional and relational concerns and deal directly with them. Mediators assist parties in overcoming anger and resentment that may have resulted from miscommunication or misperception.\(^\text{186}\) Mediators may also encourage parties to explain their actions, if an explanation is possible, or to offer apologies. The mediator assists parties in maintaining a sense of dignity and respect, even when taking responsibility, acknowledging error and, in some cases, accepting compromise.\(^\text{187}\) The requirement under the new rules, that the facilitator be independent of the investigation, free of conflicts of interest, and trained\(^\text{188}\) to conduct the

\(^{184}\) Cole et al., Mediation: Law, Policy & Practice sec. 3:7 at 59 (3rd ed. 2018 supp.)

\(^{185}\) Id.

\(^{186}\) Id. at 61 (3:8).

\(^{187}\) Id. at 61-62, citing Littlejohn and Domenici, A Facework Frame for Mediation, in The Blackwell Handbook of Mediation: Bridging Theory, Research, and Practice 217, 228 (Margaret S. Herrman ed., 2006).

\(^{188}\) The “training” requirement could certainly use improvement. The rules are clear that mediators must not have conflicts of interest nor bias in favor of respondents or complainants more generally as well as bias against particular complainants and respondents and that they must be trained on the definition of sexual harassment contained in 106.30 as well as the scope of the school’s educational program. Beyond that, training requirements are vague – a mediator must be trained in “how to conduct an informal resolution process . . . and how to serve impartially including not prejudging facts”. In addition, the mediator must not rely on sex stereotypes. From my perspective as a mediator trainer, the obligation to train the prospective mediator on “how to conduct and informal resolution
process, is essential to ensuring that the mediation process can achieve these aspirations. Without proper training, mediators may not be capable of deftly balancing parties’ emotional concerns with an interest in putting the issue behind them. To avoid revictimization in informal resolution, it is essential that the school ensure that mediators are adequately trained and experienced in sexual misconduct/harassment disputes. Currently, the rules do not provide much guidance on this issue, an omission that schools must address before implementing any informal resolution program.

Mediation has the potential to assist greatly in the resolution of many Title IX disputes, particularly those involving non-contact sexual harassment. Under the previous rules, mediation was not an available option – but the option that was available, a hearing with no right of cross-examination, was ultimately found to be constitutionally suspect. The new rules, while not perfect, open the door for greater use of informal processes in Title IX disputes. While critics might not have preferred the increased use of mediation, in light of the new (and arguably necessary) cross-examination requirement the rules impose, the potential for mediation should be reexamined. Title IX intake personnel who learn trauma-informed interviewing practices and mediation, with trained, experienced mediators, may provide results provide that are satisfactory to both complainants and respondents and, further, may create benefits to the parties that simply could not be achieved through a hearing process. In light of a university’s role as a provider of education, the opportunity to create a forum in which parties resolve their own problems, take ownership of their mistakes, and develop plans for the future, seems like an option worth exploring.

process” is so ambiguous and susceptible to multiple interpretations that it may well result in some facilitators of informal processes receiving little to no training. While I am confident that many Title IX coordinators will ensure that mediators receive proper training, the absence of this requirement, given concerns about power imbalances in these kinds of mediations, is troubling. One higher education lawyer, Scott Schneider, expressed skepticism about mediator training, stating that, “he doubted that any institution employs anyone with the competency to mediate sexual assault cases.” Id.