

THE FAILINGS OF TITLE IX FOR SURVIVORS OF SEXUAL VIOLENCE: UTILIZING RESTORATIVE JUSTICE ON COLLEGE CAMPUSES

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Abstract: Universities should adopt restorative justice practices to serve the legal and personal needs of student survivors of sexual violence. Title IX¹ prohibits discrimination on the basis of sex in education programs and activities operated by recipients of federal financial assistance. Since 1997, the Department of Education’s Office for Civil Rights has issued “Dear Colleague Letters” to federally funded institutions to assist with Title IX compliance and implement procedures for complaints of sexual violence. In 2011, Assistant Secretary for Civil Rights Russlyn Ali under the Obama administration issued a Dear Colleague Letter, which expanded protections for survivors. However, it prohibited the use of mediation to resolve claims of sexual violence and raised concerns regarding the rights of students accused of committing sexual violence.

In 2018, Secretary of Education Betsy DeVos, under the Trump administration, proposed a new Dear Colleague Letter that threatened the rights of many survivors on campuses. However, this new guidance also created the opportunity for universities to hold students accused of sexual violence accountable by allowing informal resolution practices, including restorative justice. Restorative justice is a process through which the harmed party, offender, and affected community come together to discuss the harm that occurred and find ways to repair the harm. This Comment proposes that universities take advantage of DeVos’s new Dear Colleague Letter and implement restorative justice practices to give survivors another option to heal and find justice.

INTRODUCTION

Rape and sexual assault are two of the most underreported crimes in the United States.² On college campuses, these crimes are reported especially infrequently.³ The U.S. Justice Department estimates that 95%

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1. Title IX is codified at 20 U.S.C. § 1681 (2012).

2. HEATHER M. KARJANE ET AL., NAT’L INST. OF JUSTICE, NCJ 205521, SEXUAL ASSAULT ON CAMPUS: WHAT COLLEGES AND UNIVERSITIES ARE DOING ABOUT IT 3 (2005); RACHEL E. MORGAN & JENNIFER L. TRUMAN, U.S. DEP’T OF JUSTICE, NCJ 252472, CRIMINAL VICTIMIZATION, 2017 (2018); *The Criminal Justice System: Statistics*, RAINN, <https://www.rainn.org/statistics/campus-sexual-violence> [<https://perma.cc/VV4S-LU67>] [hereinafter *The Criminal Justice System: Statistics*].

3. *The Criminal Justice System: Statistics*, *supra* note 2.

of survivors choose not to report their assaults to campus officials.⁴ Survivors choose not to report for a variety of reasons.⁵ For example, some students believe that if they report, nothing will happen.⁶ On the other hand, students that do report and proceed with a campus conduct proceeding often express dissatisfaction with the final resolution of their claim.⁷ Campus conduct proceedings for cases of sexual violence are governed by Title IX,⁸ a federal civil rights law that prohibits discrimination on the basis of sex in educational programs and activities.⁹ Title IX was created to give women equal opportunities in educational programs.¹⁰ However, it has evolved into an avenue for the federal government to offer “guidance” to universities on how to structure their code of conduct systems in relation to sexual violence proceedings.¹¹

Publicly funded universities receive guidance from the Department of Education’s Office for Civil Rights (OCR) in the form of Dear Colleague Letters (DCLs).¹² Since 2011, DCL guidance has changed drastically

4. The American Civil Liberties Union (ACLU) estimates that at least 95% of campus rapes in the United States go unreported. Suzanne Ito, *New Report Shows 95% of Campus Rapes Go Unreported*, ACLU (Feb. 25, 2010, 12:10 PM), [https://www.aclu.org/blog/smart-justice/mass-incarceration/new-report-shows-95-campus-rapes-go-unreported](https://www.aclu.org/blog/smart-justice/mass-incarceration/new-report-shows-95-campus-rapes-go-unreported?redirect=blog/speakeasy/new-report-shows-95-campus-rapes-go-unreported) [https://perma.cc/UX5N-GG53].

5. AJ Willingham & Christina Maxouris, *These Tweets Show Why People Don’t Report Sexual Assaults*, CNN (Sept. 21, 2018), <https://www.cnn.com/2018/09/21/health/why-i-didnt-report-tweets-trnd/index.html> [https://perma.cc/R2C2-FJ89]; MD. COAL. AGAINST SEXUAL ASSAULT, REPORTING SEXUAL ASSAULT: WHY SURVIVORS OFTEN DON’T, <https://ocrsm.umd.edu/files/Why-Is-Sexual-Assault-Under-Reported.pdf> [https://perma.cc/QA8G-6TCV] (“Survivors cite the following reasons for not reporting a sexual assault: [f]ear of reprisal[,] personal matter[,] not enough proof[,] fear of the justice system[,] [they] did not know how”); see also *The Criminal Justice System: Statistics*, *supra* note 2.

6. Kathryn J. Holland & Lilia M. Cortina, *“It Happens to Girls All the Time”: Examining Sexual Assault Survivors’ Reasons for not Using Campus Supports*, 59 AM. J. COMMUNITY PSYCHOL. 50, 59 (2017).

7. John D. Foubert & Dallas Durant, *Sexual Assault Survivors’ Perceptions of Campus Judicial Systems.*, 155 ILL. COUNSELING ASS’N J., 10 (2007) (“Participants indicated how satisfied they were with the outcome of their judicial process; the mean response was 2.25, on the [] scale of one to ten.”).

8. 20 U.S.C. § 1681 (2012).

9. U.S. DEP’T EDUC.: OFFICE FOR CIVIL RIGHTS, *Title IX and Sex Discrimination*, https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html [https://perma.cc/2HJR-GEFV] [hereinafter *Title IX and Sex Discrimination*].

10. See 20 U.S.C. § 1681 (2012).

11. Diane Heckman, *The Role of Title IX in Combatting Sexual Violence on College Campuses*, 325 ED. LAW REP. 1, 8–12 (2016); Dear Colleague Letter from Russlynn Ali, Assistant Sec’y, Office for Civil Rights, U.S. Dep’t of Educ., to Title IX Coordinators (Apr. 4, 2011) [hereinafter Ali], <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [https://perma.cc/CFG4-LQNV].

12. Ali, *supra* note 11, at 1–3; Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462, 61,463 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106).

because of rising concerns for both survivors and students accused of sexual violence.¹³ Under the 2011 DCL issued by Assistant Secretary for Civil Rights Russlyn Ali, OCR prohibited the use of voluntary informal mechanisms—such as mediation—due to a concern for survivors’ rights during proceedings.¹⁴ This prohibition dissuaded universities from using mechanisms such as restorative justice out of fear it would be considered “mediation.”¹⁵ However, on September 7, 2017, Betsy DeVos, the Secretary of Education for President Donald Trump, rescinded the 2011 DCL and the “2014 Questions and Answers on Title IX Sexual Violence” document.¹⁶ On November 29, 2018, she then proposed new DCL guidance, which stated that universities could hold informal resolution proceedings, such as restorative justice.¹⁷

Restorative justice is a process through which the survivor, offender, and the affected community come together to discuss the harm that occurred and how the offender can make amends for their conduct.¹⁸ While restorative justice has often been used in less severe cases on college campuses—for example, in cases involving theft, underage drinking, and vandalism—some college campuses have implemented restorative justice in cases involving sexual violence.¹⁹ In cases of sexual violence, restorative justice is only appropriate where the survivor feels it is in their best interest²⁰ and the offender is willing to admit to their

13. See Ali, *supra* note 11, at 2; Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462, 61,462.

14. Ali, *supra* note 11, at 8 (“Moreover, in cases involving allegations of sexual assault, mediation is not appropriate even on a voluntary basis.”).

15. DAVID R. KARP ET AL., CAMPUS PRISM: A REPORT ON PROMOTING RESTORATIVE INITIATIVES FOR SEXUAL MISCONDUCT ON COLLEGE CAMPUSES 28 (2016), https://www.skidmore.edu/campustj/documents/Campus_PRISM_Report_2016.pdf [<https://perma.cc/YWF5-STWF>] (“Because mediation and [restorative justice] are often confused, [the 2011 DCL] stipulation has had a chilling effect on the application of [restorative justice] for sexual and gender-based misconduct.”).

16. See Press Release, U.S. Dep’t of Educ., Department of Education Issues New Interim Guidance on Campus Sexual Misconduct (Sept. 22, 2017), [hereinafter *Interim Guidance*] <https://www.ed.gov/news/press-releases/department-education-issues-new-interim-guidance-campus-sexual-misconduct> [<https://perma.cc/WC5L-743J>].

17. See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462, 61,479 (amending § 106.45(b)(6)).

18. DAVID R. KARP, THE LITTLE BOOK OF RESTORATIVE JUSTICE FOR COLLEGES AND UNIVERSITIES 4 (2013).

19. See Katherine Mangan, *Why More Colleges are Trying Restorative Justice in Sex-Assault Cases*, CHRON. HIGHER EDUC. (Sept. 17, 2018), <https://www.skidmore.edu/campustj/karp-vitae-files/media/Why-More-Colleges-Are-Trying-Restorative-Justice-in-Sex-Assault-Cases.pdf> [<https://perma.cc/4LZG-XB37>].

20. The *Washington Law Review* uses the singular “they” and “their” instead of “he” or “she” to

conduct and make amends.²¹ As a result of concerns that student survivors do not want to use the student code of conduct system, some universities are beginning to offer restorative justice practices as an alternative.²²

In light of the lack of reporting of sexual violence incidents, survivors' dissatisfaction with the student conduct system, and fluctuating Title IX guidance, this Comment argues that universities should amend their codes of conduct to permit the use of restorative justice.²³ Many survivors have the desire to heal and to have the student accused of sexual violence make meaningful reparations for the harm they caused. Restorative justice could serve as a better forum to achieve these goals, as opposed to student conduct proceedings, which focus on adjudication and discipline.

This Comment proceeds in three Parts. Part I discusses the history of Title IX, the student conduct system, and the ways in which political administrations have used DCL guidance to instruct campus conduct proceedings. Part II discusses restorative justice and how it has been applied on college campuses in claims that involve sexual violence. Part III explains why restorative justice is a better method for addressing claims of sexual violence than traditional procedures, and why schools should take advantage of the proposed DCL changes to add restorative justice practices to their campuses.

avoid gender-specific language.

21. See KARP, *supra* note 18, at 12–14; Tovia Smith, *All Things Considered: After Assault, Some Campuses Focus On Healing Over Punishment*, NPR (July 25, 2017, 4:30 PM), <https://www.npr.org/2017/07/25/539334346/restorative-justice-an-alternative-to-the-process-campuses-use-for-sexual-assault> [<https://perma.cc/PX4Y-97P3>] [hereinafter Smith, *All Things Considered*] (statement by a survivor of sexual assault that the typical campus adjudication process, aimed at punishing the perpetrator, “wouldn’t have really fixed anything” and “it wouldn’t have healed any hurt”).

22. See SWARTHMORE COLL., PROCEDURES FOR RESOLUTION OF COMPLAINTS AGAINST STUDENTS 7, 17 (2019–2020), https://www.swarthmore.edu/sites/default/files/assets/documents/office-title-ix-coordinator/2019-2020_Student_Procedures.pdf [<https://perma.cc/EB4X-JUD7>]; Mangan, *supra* note 19, at 1–4; *Restorative Responses to SV/SH*, U. CAL. BERKELEY RESTORATIVE JUST. CTR., <http://rjcenterberkeley.org/restorative-responses/> [<https://perma.cc/YQF5-V43N>] [hereinafter *Restorative Responses to SV/SH*].

23. As of September 3, 2019, the proposed DCL had not taken effect. The public comment period for the proposed DCL ended in February 2019. Although the proposed guidance is subject to change before final adoption, nonetheless, Title IX and college campuses would benefit if restorative justice is used as an informal mechanism to address campus sexual violence. U.S. DEP’T EDUC., *U.S. Department of Education Announces One Day Reopening of Comment Period for Proposed Title IX Rule* (Feb. 14, 2019), <https://www2.ed.gov/about/offices/list/ocr/newsroom.html#2018> [<https://perma.cc/B96M-ZQYN>].

I. TITLE IX AND STUDENT CONDUCT CODES

Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in any educational program or activity that receives federal financial assistance.²⁴ While Title IX was initially passed in response to the educational inequalities faced by women in academia,²⁵ political administrations have more recently used DCLs to inform universities of their Title IX obligations regarding student conduct proceedings.²⁶

In 2011, Assistant Secretary for Civil Rights Russlyn Ali issued the 2011 DCL that substantially expanded protections for survivors of sexual violence.²⁷ However, it also limited the available procedural remedies for universities and survivors, in prohibiting the facilitation of any sort of involuntary informal mechanism, such as mediation.²⁸ In 2017, Betsy DeVos, the Secretary of Education for President Donald Trump, rescinded the 2011 DCL and "2014 Questions and Answers on Title IX and Sexual Violence" document.²⁹ In her proposed 2018 DCL, DeVos created more protections for students accused of sexual violence and allowed universities more flexibility in proceedings, including permitting universities to hold alternative proceedings if both the student accused of sexual violence and survivor agree to participate.³⁰

A. *The Origins and Uses of Title IX*

Prior to the passage of Title IX, female students and employees were denied equal opportunities under the law.³¹ This was the result of

24. 20 U.S.C. § 1681(a) (2012).

25. U.S. DEP'T OF JUSTICE, *Equal Access to Education: Forty Years of Title IX* (June 23, 2012) <https://www.justice.gov/sites/default/files/crt/legacy/2012/06/20/titleixreport.pdf> [<https://perma.cc/27QY-4CEK>].

26. See, e.g. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462, 61,463 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106) ("In the four decades since HEW issued the 1975 rule, no Title IX regulations have been promulgated to address sexual harassment as a form of sex discrimination; instead, the Department has addressed this subject through a series of guidance documents."); Ali, *supra* note 11, at 1–2 (Expanding the definition of sexual harassment "Title IX pertaining to sexual harassment also cover[s] sexual violence"); *id.* at 2 (Explaining "schools' responsibility to take immediate and effective steps to end sexual harassment and sexual violence" on campuses).

27. Ali, *supra* note 11, at 4–16.

28. *Id.* at 8 ("Moreover, in cases involving allegations of sexual assault, mediation is not appropriate even on a voluntary basis.").

29. See *Interim Guidance*, *supra* note 16.

30. See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462, 61,471.

31. RISA LIEBERWITZ ET AL., AM. ASS'N OF UNIV. PROFESSORS, THE HISTORY, USES, AND ABUSES

Congress's belief that "educational institutions were autonomous entities that ought not to be subjected to government interference."³² As a result of intense campaigning by feminists who wanted to call attention to the discrimination that was occurring, Congress created and enacted Title IX.³³ Title IX states that "[n]o 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."³⁴

Since Title IX's passage, the statute has been used for three primary purposes by sexual violence survivors at universities. The first use of Title IX is as a basis for a tort claim.³⁵ In *Davis ex rel. Lashonda D. v. Monroe County Board of Education*,³⁶ the Supreme Court laid out the necessary elements a plaintiff must prove to establish a claim under Title IX:

(1) the defendant must receive federal funding; (2) the defendant must have actual knowledge of the sexual harassment; (3) the harassment must have been severe, pervasive, and objectively offensive; (4) the defendant must have exhibited deliberate indifference to the harassment; and (5) the victim must have effectively been barred access to educational opportunities or benefits.³⁷

Meeting the last four requirements is "often too high of a bar for plaintiffs" and has resulted in Title IX becoming inaccessible as a tort claim.³⁸

The second use of Title IX has been through OCR's enforcement of Title IX complaints. If a student believes that their campus proceeding was not conducted in accordance with Title IX and the current administration's DCL, then the student can file a complaint to OCR, alleging that their university's conduct was in violation of the statute.³⁹ After a student files a Title IX complaint, OCR will choose whether to

OF TITLE IX 2 (2016).

32. *Id.*

33. *Id.*

34. 20 U.S.C. § 1681(a) (2012).

35. Corey Yung, *Is Relying on Title IX a Mistake?*, 64 KAN. L. REV. 891, 894 (2016).

36. 526 U.S. 629 (1999) (finding that although Congress provided no express private right of action for Title IX's enforcement, students had an implied right of action under Title IX in cases of peer-to-peer sexual harassment).

37. *Id.* at 633.

38. Yung, *supra* note 35, at 896.

39. See U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, COMPLAINT PROCESSING PROCEDURES (2018), <https://www2.ed.gov/about/offices/list/ocr/docs/complaints-how.pdf> [<https://perma.cc/CGX2-53WH>].

proceed or dismiss the claim.⁴⁰ OCR may dismiss a claim because there is not enough evidence to substantiate the claim or because there is not a violation of Title IX.⁴¹ However, if OCR chooses to investigate the complaint, OCR may (1) facilitate a meeting between the student and administration to reach a resolution; (2) issue a letter finding for or against the school; or (3) dismiss the complaint.⁴² After an investigation, if OCR finds that the school was not in compliance with Title IX, it may try to reach a resolution and monitor the school's compliance with its commitments under the agreement.⁴³

The third use of Title IX has been through DCLs, which are issued by OCR.⁴⁴ DCLs are a form of "sub-regulatory guidance."⁴⁵ Sub-regulatory guidance cannot alter existing regulations, but can mandate how rules are implemented.⁴⁶ Thus, DCLs allow the presidential administration to create or revise protections for groups⁴⁷ based on the current administration's beliefs and understandings of campus sexual violence.⁴⁸ Since 1997, the Department of Education has issued DCL guidance for universities.⁴⁹ In 2011, Title IX guidance was expanded by the Obama administration to afford greater protections to survivors.⁵⁰ However, in

40. *Id.* at 1–2.

41. *Id.* at 3–4.

42. *Id.* at 4.

43. *Id.*

44. See Ali, *supra* note 11, at 1 n.1 ("The Department has determined that this Dear Colleague Letter is a 'significant guidance document' under the Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices . . .").

45. Diana Ali, *The Rulemaking Process: Differences in Federal Regulatory and Sub-Regulatory Guidance*, NASPA (Oct. 19, 2017), <https://www.naspa.org/rpi/posts/the-rule-making-process-differences-in-federal-regulatory-and-sub-regulator> [<https://perma.cc/46DP-7HNJ>].

46. *Id.*

47. See Naomi M. Mann, *Taming Title IX Tensions*, 20 U. PA. J. CONST. L. 631, 632 (2018) ("Title IX has become increasingly politicized, with enforcement largely dependent upon who is in power in the Executive Branch.").

48. *Id.*

49. Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg., 12,034, 12,035 (Mar. 13, 1997) (final policy guidance).

50. See Ali, *supra* note 11, at 4 ("Schools may have an obligation to respond to student-on-student sexual harassment that initially occurred off school grounds, outside a school's education program or activity."); *id.* at 7 ("Recipients must ensure that employees designated to serve as Title IX coordinators have adequate training on what constitutes sexual harassment, including sexual violence, and that they understand how the recipient's grievance procedures operate."); *id.* at 8 ("Title IX regulations require all recipients to adopt and publish grievance procedures providing for the prompt and equitable resolution of sex discrimination complaints."); *id.* at 11 ("[I]n order for a school's grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard."); *id.* at 12 ("OCR strongly discourages schools from allowing the parties personally to question or cross-examine each other during the hearing. Allowing an alleged

2017 and 2018, the Trump administration rescinded the 2011 DCL and proposed the 2018 DCL, which reduced protections for survivors and created greater protections for students accused of sexual violence.⁵¹ Both administrations' DCLs attempted to create safeguards for survivors and students accused of sexual violence. However, they also created confusion and inconsistencies among campuses, resulting in further mistrust in the student code of conduct system.⁵²

B. *University Student Conduct Codes*

University student conduct codes lists morals and rules by which students are expected to abide.⁵³ Courts generally have taken a “hands off” approach when dealing with universities.⁵⁴ In his concurrence in *Sweezy v. New Hampshire*,⁵⁵ United States Supreme Court Justice Frankfurter wrote:

It is the business of a university to provide [an] atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail “the four essential freedoms” of a university—to determine for itself on academic

perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment.”).

51. *See, e.g.*, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,469–70, 61,476–77 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106) (modifying: section 106.45(b)(4)(i) to provide that educational institutions are allowed to use either a preponderance of evidence standard or a clear and convincing standard; section 106.45(b)(3)(vi) to require that students be available for direct cross-examination by an advisor of a party in a live hearing; and section 106.30 to eliminate the requirement that educational institutions provide supportive measures for survivors).

52. *See, e.g.*, Letter from Various United States Senators to Betsy DeVos (Sept. 27, 2017), <https://www.help.senate.gov/imo/media/doc/092717%20Title%20IX%20Guidance%20Rollback.pdf> [<https://perma.cc/E42H-YRYS>]; Peter Lake, *Interim Guidance on Title IX Creates Confusion, Not Clarity*, CHRON. HIGHER EDUC. (Sept. 24, 2017), <https://www.chronicle.com/article/Interim-Guidance-on/241282> [<https://perma.cc/VDB4-AV5L>]; Jake New, *Must vs. Should*, INSIDE HIGHER ED (Feb. 25, 2016), <https://www.insidehighered.com/news/2016/02/25/colleges-frustrated-lack-clarification-title-ix-guidance> [<https://perma.cc/5XXW-GVXW>].

53. *See* SEATTLE UNIV., THE REDHAWK COMMITMENT & CODE OF STUDENT CONDUCT (2019–2020), https://www.seattleu.edu/media/dean-of-students/files/policies/Code_19_20_FINAL.pdf [<https://perma.cc/3UDG-NF8B>]; SWARTHMORE COLL., SWARTHMORE COLLEGE SEXUAL ASSAULT & HARASSMENT POLICY (2018–2019), <https://www.swarthmore.edu/title-ix/sexual-assault-and-harassment-policy> [<https://perma.cc/R3PP-9JG2>]; UNIV. OF CAL., BERKELEY, BERKELEY CAMPUS CODE OF STUDENT CONDUCT (Jan. 2016) [hereinafter UNIVERSITY OF CALIFORNIA, BERKELEY], http://sa.berkeley.edu/sites/default/files/Code%20of%20Conduct_January%202016.pdf [<https://perma.cc/CW6T-SQ85>].

54. J. Wes Kiplinger, Comment, *Defining Off-Campus Misconduct That “Impacts the Mission”*: A *New Approach*, 4 U. ST. THOMAS L.J. 87, 89–90 (2006) (citing *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)).

55. 354 U.S. 234 (1957).

grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.⁵⁶

However, in cases of sexual violence, federally funded educational institutions must shape their policies, procedures, and remedies to comply with current DCL guidance, in order to avoid facing Title IX complaints.⁵⁷ While there is a discussion that school administrators should not be part of the adjudication of sexual violence, currently, campuses must respond to incidents in order to abide by Title IX guidance.⁵⁸ When responding to incidents of sexual violence, DCL guidance requires that schools determine whether students accused of sexual violence are responsible for conduct that “threatens the health or safety of another person.”⁵⁹

While universities’ adjudication models can differ, most campuses use one of three different models to adjudicate claims of sexual violence: (1) the hearing model; (2) the investigative model; or (3) a hybrid of the hearing and investigative models.⁶⁰

1. *The Hearing Model*

The hearing model is the traditional model of student adjudication, which appears like a traditional trial.⁶¹ To file an allegation of sexual violence, a report is filed with the university’s Title IX coordinator or code of conduct office.⁶² Most campuses receive reports from municipal

56. *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring).

57. See *Title IX and Sex Discrimination*, *supra* note 9; ASS’N FOR STUDENT CONDUCT ADMIN., STUDENT CONDUCT ADMINISTRATION & TITLE IX: GOLD STANDARD PRACTICES FOR RESOLUTION OF ALLEGATIONS OF SEXUAL MISCONDUCT ON COLLEGE CAMPUSES 3 (2014) [hereinafter ASCA], <https://www.theasca.org/files/Publications/ASCA%202014%20Gold%20Standard.pdf> [https://perma.cc/T7Y2-JHX3].

58. See ASCA, *supra* note 57, at 3; Ashley Sarkozi, *Criminals, Classrooms, and Kangaroo Courts: Why College Campuses Should Not Adjudicate Sexual Assault Cases*, 50 LOY. L.A. L. REV. 123, 142–47 (2017); Ashe Schow, *Yet Another Example of Why Colleges Should Adjudicate Campus Sexual Assault*, WASH. EXAMINER (June 1, 2016), <https://www.washingtonexaminer.com/yet-another-example-of-why-colleges-shouldnt-adjudicate-campus-sexual-assault> [https://perma.cc/C3MT-G4TS].

59. ASCA, *supra* note 57, at 6.

60. *Id.* at 15–16.

61. *Id.* at 15; Nicole E. Smith, Comment, *The Old College Trial: Evaluating the Investigative Model for Adjudicating Claims of Sexual Misconduct*, 117 COLUM. L. REV. 953, 964 (2017).

62. STANFORD UNIV., STANFORD STUDENT TITLE IX INVESTIGATION & HEARING PROCESS 12, 6 (2016) [hereinafter STANFORD UNIVERSITY], <https://stanford.app.box.com/v/student-title-ix-process> [https://perma.cc/E6LC-NS7L]; *Board of Regents Policy Manual: 6.7 Sexual Misconduct*, U. SYS. GA., <https://www.usg.edu/policymanual/section6/C2655> [https://perma.cc/8H4W-KRP9]; *Community Standards & Student Conduct: Student Conduct Process*, U. WASH., <https://www.washington.edu/cssc/for-students/overview-of-the-student-conduct-process/> [https://perma.cc/9C59-6TFT] [hereinafter UNIVERSITY OF WASHINGTON]; *Student Conduct Policies and Procedures*, SWARTHMORE COLL., <https://www.swarthmore.edu/student-handbook/student-conduct-policies-and-procedures> [https://perma.cc/Q2N4-D2UH].

police departments, campus police departments, residential life staff, faculty members, other university staff, and/or students.⁶³ After a report of sexual violence is filed, these reports are forwarded to the Title IX coordinator⁶⁴ who will then reach out to the survivor to determine (1) if there was a violation of the student conduct code; and (2) whether an investigation is appropriate.⁶⁵ During this meeting, the coordinator will inform the survivor about the investigative process, including the student's rights and other reporting options.⁶⁶ The coordinator can also help implement interim safety measures to protect the survivor and ensure the survivor has equal access to the university.⁶⁷ This includes implementing classroom changes, counseling services, academic accommodations, and no contact directives.⁶⁸ While a survivor may initially agree to proceed with an investigation, they may later decide that they do not want to proceed with their claim.⁶⁹ While schools usually respect the wishes of the survivor, the campus may decide to pursue the

63. See AM. ASS'N OF UNIV. PROFESSORS, *CAMPUS SEXUAL ASSAULT: SUGGESTED POLICIES AND PROCEDURES* 366, 369 (2012); UNIV. OF CAL., L.A., *SEXUAL VIOLENCE AND SEXUAL HARASSMENT* 8 (2019) [hereinafter *UCLA*], sexualviolence.ucla.edu/Portals/33/Documents/2019%20SVSH%20Policy.pdf [https://perma.cc/7PCC-2EQN].

64. There is no one-size-fits-all policy. Universities implement different policies that may require a student to meet with a Title IX coordinator or investigator prior to filing an allegation of sexual violence. See *UCLA*, *supra* note 63, at 12; N.Y. UNIV., *REPORTING, INVESTIGATING, AND RESOLVING SEXUAL MISCONDUCT, RELATIONSHIP VIOLENCE, AND STALKING—COMPLAINTS AGAINST STUDENTS* 1 (2017) [hereinafter *NEW YORK UNIVERSITY*], https://www.nyu.edu/content/dam/nyu/compliance/documents/SexualMisconduct_ProceduresforStudentRespondent.2017_08_25.pdf [https://perma.cc/X2ZX-RGWM]; *Board of Regents Policy Manual, Discipline of Students*, U. GA., https://www.usg.edu/policymanual/section4/C332/#p4.6.5_standards_for_institutional_student_conduct_investigation [https://perma.cc/HN3Z-Z9DK] [hereinafter *UNIVERSITY OF GEORGIA*]; *Reporting and Complaint Resolution Process*, MACALESTER C., <https://www.macalester.edu/titleix/reporting/> [https://perma.cc/F5Y3-XRYF] [hereinafter *MACALESTER COLLEGE*]; *Title IX Investigation Office*, U. WASH.: COMPLIANCE <https://www.washington.edu/compliance/tixio/> [https://perma.cc/AH92-D9XD].

65. *UNIVERSITY OF WASHINGTON*, *supra* note 62; *UCLA*, *supra* note 63, at 13–14; *Section C: If Student Conduct Action is Started Based on a Formal Complaint*, U. OR., <https://investigations.uoregon.edu/section-c-if-student-conduct-action-started-formal-complaint> [https://perma.cc/X67W-XUDM].

66. *UCLA*, *supra* note 63, at 15; UNIV. OF TENN., KNOXVILLE & UNIV. OF TENN. INST. OF AGRIC., *SEXUAL MISCONDUCT AND RELATIONSHIP VIOLENCE: INTERIM POLICY, PROCEDURES, PROGRAMS, AND RESOURCES* 10–11 (2014), http://titleix.utk.edu/wp-content/uploads/sites/9/2014/08/Sexual-Misconduct-and-Relationship-Violence-Policy-UTK_UTIA-Interim.pdf [https://perma.cc/U75C-VSY6]; *Making a Report to the UW*, U. WASH.: SEXUAL ASSAULT RESOURCES, <https://www.washington.edu/sexualassault/reporting/uw/> [https://perma.cc/UQ88-ZSBL].

67. *STANFORD UNIVERSITY*, *supra* note 62, at 7; *MACALESTER COLLEGE*, *supra* note 64; *NEW YORK UNIVERSITY*, *supra* note 64, at 4; *UNIVERSITY OF GEORGIA*, *supra* note 64.

68. *STANFORD UNIVERSITY*, *supra* note 62, at 7, 27; *MACALESTER COLLEGE*, *supra* note 64; *UCLA*, *supra* note 63, at 13; *UNIVERSITY OF GEORGIA*, *supra* note 64.

69. *ASCA*, *supra* note 57, at 11.

complaint without the survivor's consent if it determines that doing so is necessary to protect the campus community.⁷⁰

If the Title IX coordinator decides to move forward with an investigation, the student accused of sexual violence⁷¹ is then notified that a complaint has been filed and that they need to schedule an appointment to meet with the investigator assigned to their case.⁷² The investigator then conducts procedural interviews with both the student accused of sexual violence and the survivor, interviews witnesses, and examines and gathers relevant documentation.⁷³ After completing fact-finding, the investigator issues a report to both students.⁷⁴ The report states whether or not a reasonable fact-finder could determine that there is sufficient evidence to support a finding that the student accused of sexual violence violated the student conduct code,⁷⁵ whether a sanction is appropriate, whether a hearing is needed, and whether the code violation was so egregious as to warrant suspension or dismissal.⁷⁶

If the Title IX coordinator or investigator concludes that a hearing is warranted, they will refer the matter to either an administrative panel or hearing panel.⁷⁷ An administrative panel generally involves only one

70. *Id.*; HARVARD UNIV., PROCEDURES FOR HANDLING COMPLAINTS INVOLVING STUDENTS PURSUANT TO THE SEXUAL AND GENDER-BASED HARASSMENT POLICY 7 (2017), http://titleix.harvard.edu/files/titleix/files/harvard_student_sexual_harassment_procedures.pdf [<https://perma.cc/4FT5-X6XV>]; UCLA, *supra* note 63, at 16; MACALESTER COLLEGE, *supra* note 64.

71. Incidents of sexual violence sometimes involve more than one student. For this Comment, I have chosen to describe the student conduct code in terms of incidents involving only one survivor and one student accused of sexual violence. See Devon Sayers and Darran Simon, *Baylor University Lawsuit Alleges Gang Rape*, CNN (May 18, 2017) <https://www-m.cnn.com/2017/05/17/us/baylor-university-gang-rape-lawsuit/index.html?r=https%3A%2F%2Fwww.google.com%2F> [<https://perma.cc/D8KU-FQ69>]; see Terrence McCoy, *The Alleged Rape at a University of Virginia Frat House and the Fraternity Gang-Rape Culture*, WASH. POST (Nov. 24, 2014) [<https://perma.cc/L4PF-J33L>].

72. See NEW YORK UNIVERSITY, *supra* note 64, at 5; STANFORD UNIVERSITY, *supra* note 62, at 10; UNIVERSITY OF GEORGIA, *supra* note 64; MACALESTER COLLEGE, *supra* note 64; UNIVERSITY OF WASHINGTON, *supra* note 62.

73. NEW YORK UNIVERSITY, *supra* note 64, at 5; STANFORD UNIVERSITY, *supra* note 62, at 10–11; UCLA, *supra* note 63, at 16–17; UNIVERSITY OF WASHINGTON, *supra* note 62.

74. NEW YORK UNIVERSITY, *supra* note 64, at 6; STANFORD UNIVERSITY, *supra* note 62, at 11–12; UCLA, *supra* note 63, at 19–20; UNIVERSITY OF GEORGIA, *supra* note 64.

75. Under the 2011 DCL, universities were required to use the preponderance of evidence standard to determine if an accused student was responsible for violating the student conduct code. See STANFORD UNIVERSITY, *supra* note 62, 11–12; UCLA, *supra* note 63, at 19.

76. NEW YORK UNIVERSITY, *supra* note 64, at 6; STANFORD UNIVERSITY, *supra* note 62, at 11–12; UNIVERSITY OF GEORGIA, *supra* note 64.

77. Coordinators or investigators may decide when a case should go to a hearing. See CORNELL UNIV., THE CAMPUS CODE OF CONDUCT, <http://theuniversityfaculty.comell.edu/news/the-campus-code-of-conduct/t3a3/> [<https://perma.cc/PG5G-XXXM>]; NEW YORK UNIVERSITY, *supra* note 64, at 6; STANFORD UNIVERSITY, *supra*

adjudicator who is trained in student conduct.⁷⁸ A hearing panel, however, can consist of a board of faculty, staff, students, or a combination of all three, who will determine whether the student violated the code of conduct.⁷⁹ During either the administrative or panel hearing, a university must give the student accused of sexual violence and the survivor certain safeguards based on DCL guidance.⁸⁰ For example, students accused of sexual violence must be afforded time to examine evidence, time to send a response and send evidence to the decision-maker deciding their case, and an opportunity to explain their version of the events to a decision-maker.⁸¹ After hearing both students' cases, the decisionmaker will then

note 62, at 11. Universities can either hold administrative panels or hearing panels. See BUFFALO UNIV., ADMINISTRATIVE HEARING PROCEDURES AND TITLE IX/VAWA SEXUAL MISCONDUCT ADDENDUM 1–2, [<https://perma.cc/H2X9-FHRY>] [hereinafter BUFFALO UNIVERSITY] (administrative hearing); STANFORD UNIVERSITY, *supra* note 62, at 2 (hearing panel); UNIV. OF KY., UNIVERSITY OF KENTUCKY PROCEDURES FOR ALLEGATIONS OF SEXUAL VIOLENCE, STALKING, DOMESTIC VIOLENCE AND DATING VIOLENCE 2, 6–8 [hereinafter UNIVERSITY OF KENTUCKY], https://www.uky.edu/regis/sites/www.uky.edu/regis/files/files/ar/ar6-2_final_0682018_08-01-18_corrections.pdf [<https://perma.cc/2UZ8-R45T>] (panel hearing); UNIV. OF MICH., THE UNIVERSITY OF MICHIGAN INTERIM POLICY AND PROCEDURES ON STUDENT SEXUAL AND GENDER-BASED MISCONDUCT AND OTHER FORMS OF INTERPERSONAL VIOLENCE 31–34 (2019), <https://studentsexualmisconductpolicy.umich.edu/files/smp/SSMP-Policy-PDF-Version011519.pdf> [<https://perma.cc/ND3X-CPJZ>] [hereinafter UNIVERSITY OF MICHIGAN] (administrative hearing); *Administrative Reviews*, U. WASH.: STUDENT CONDUCT, <https://www.washington.edu/studentconduct/administrative-reviews/> [<https://perma.cc/Z4ZN-LGRX>] (hearing or administrative panel); *Investigation Process*, U. REDLANDS: TITLE IX SEXUAL MISCONDUCT, <https://sites.redlands.edu/title-ix-sexual-misconduct/investigation-and-hearing-process/> [<https://perma.cc/4YDL-QJC2>] (panel hearing); *Sexual Misconduct*, PEPP. U., https://www.pepperdine.edu/student-life/student-code-of-conduct/overlay-pages/overlay_sexual_misconduct.htm [<https://perma.cc/6MM5-GCTD>] [hereinafter PEPPERDINE UNIVERSITY] (administrative hearing and student disciplinary committee hearings); *Student Sexual Misconduct Policy and Procedures: Duke's Commitment to Title IX*, DUKE UNIV., <https://studentaffairs.duke.edu/conduct/z-policies/student-sexual-misconduct-policy-dukes-commitment-title-ix> [<https://perma.cc/KU5E-YXAR>] [hereinafter DUKE UNIVERSITY] (hearing or administrative panel); UNIVERSITY OF CALIFORNIA, BERKELEY, *supra* note 53, at 1 (administrative hearing or panel hearing).

78. ASCA, *supra* note 57, at 15; see UNIVERSITY OF CALIFORNIA, BERKELEY, *supra* note 53, at 1; DUKE UNIVERSITY, *supra* note 77, at 15; PEPPERDINE UNIVERSITY, *supra* note 77. *But see* BUFFALO UNIVERSITY, *supra* note 77, at 1 (“The Director of the Student Conduct and Advocacy . . . selects at least two persons in an administrative capacity . . .”); UNIVERSITY OF WASHINGTON, *supra* note 62 (“reviewing officer(s)”).

79. Some schools only allow faculty to be on their boards. However, schools have the option to choose how to construct their hearing panels. ASCA, *supra* note 56, at 12; DUKE UNIVERSITY, *supra* note 77, at 15–16; UNIVERSITY OF CALIFORNIA, BERKELEY, *supra* note 53, at 1; UNIVERSITY OF KENTUCKY, *supra* note 77, at 2; UNIVERSITY OF REDLANDS, *supra* note 77.

80. See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106); Ali, *supra* note 11, at 11–13.

81. ASS’N FOR STUDENT JUDICIAL AFFAIRS, THE STUDENT CONDUCT PROCESS: A GUIDE FOR PARENTS (2006) [hereinafter ASJA]; UNIVERSITY OF GEORGIA, *supra* note 64; UCLA, *supra* note 63, at 18; *Accused Students*, DUKE UNIV.: STUDENT AFF., <https://studentaffairs.duke.edu/conduct/information-for%E2%80%A6accused-students> [<https://perma.cc/U8TR-XGA2>]; MACALESTER COLLEGE, *supra* note 64; *The Formal Process*, U. OR.: OFF. INVESTIGATIONS & C.R. COMPLIANCE, <https://investigations.uoregon.edu/section-e->

weigh the evidence and the arguments on both sides.⁸² If the decisionmaker decides the student accused of sexual violence is responsible for violating the conduct code, they may sanction the student.⁸³ Sanctions vary depending on what the decisionmaker deems is appropriate.⁸⁴ For example, sanctions can include expulsion,⁸⁵ suspension, letters of apology, reflection papers, removal from residence halls, community service, and probationary status.⁸⁶

If the panel finds the student accused of sexual violence violated the student conduct code, the student has the right to appeal the decision.⁸⁷

formal-process [<https://perma.cc/W322-KUBK>].

82. BUFFALO UNIVERSITY, *supra* note 77, at 1–2; MACALESTER COLLEGE, *supra* note 64; PEPPERDINE UNIVERSITY, *supra* note 77; UNIVERSITY OF CALIFORNIA, BERKELEY *supra* note 53, at 13; UNIVERSITY OF GEORGIA, *supra* note 72.

83. UNIVERSITY OF MICHIGAN, *supra* note 77, at 34; PEPPERDINE UNIVERSITY, *supra* note 77; MACALESTER COLLEGE, *supra* note 64; UNIVERSITY OF CALIFORNIA, BERKELEY, *supra* note 53, at 13; UNIVERSITY OF GEORGIA, *supra* note 64.

84. UNIVERSITY OF MICHIGAN, *supra* note 77, at 34 (“If the Respondent is found responsible for Prohibited Conduct, the University will initiate a sanctioning process designed to eliminate the conduct, prevent its recurrence, and remedy its effects, while supporting the University’s educational mission and fulfilling its Title IX obligations. Sanctions or interventions may also serve to remedy the discriminatory effects of the Prohibited Conduct on the Claimant and others as appropriate, including any systemic actions found to be appropriate for the broader university community.”); MACALESTER COLLEGE, *supra* note 64 (“[The adjudicators] will impose remedies and/or sanctions as necessary to end the misconduct, prevent its recurrence, and address its effects.”); UNIVERSITY OF CALIFORNIA, BERKELEY *supra* note 53, at 20 (“Any sanction imposed should be appropriate to the violation, taking into consideration the context, previous violations, and seriousness of the violation.”); UNIVERSITY OF GEORGIA, *supra* note 64 (“In determining the severity of sanctions or corrective actions the following should be considered: the frequency, severity, and/or nature of the offense; history of past conduct; an offender’s willingness to accept responsibility; previous institutional response to similar conduct; strength of the evidence; and the wellbeing of the university community.”).

85. According to data analyzed by the *Huffington Post*, less than one-third of students found responsible for sexual assault are expelled from their colleges. See Tyler Kingkade, *Fewer Than One-Third of Campus Sexual Assault Cases Result in Expulsion*, HUFF. POST (Sept. 29, 2014), https://www.huffpost.com/entry/campus-sexual-assault_n_5888742?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xiLmNvbS8&guce_referrer_sig=AQAAACWLVHL_81267BmBwkV-mY4DZPX4QqNMZdWgiMzQrp7h3cZAw5L28LHcnfzR22Wpbwz_c54SgVcksuiRQKpFXKD8k48zHEdrNP9ZX-2gWjySM2w4NhXI20THzr3m5DGLdrgEngwecrByQwxWwwwfgqhlGe9gQ0qrBW7hZIAWK5B [<https://perma.cc/A456-SUWC>].

86. ASJA, *supra* note 81, at 5; UNIVERSITY OF MICHIGAN, *supra* note 77, at 36–37; UNIVERSITY OF KENTUCKY, *supra* note 77, at 8–9; DUKE UNIVERSITY, *supra* note 77; MACALESTER COLLEGE, *supra* note 64; UNIVERSITY OF CALIFORNIA, BERKELEY, *supra* note 53; PEPPERDINE UNIVERSITY, *supra* note 77.

87. Both parties may appeal a finding on four potential grounds: (1) there was a significant deviation in procedure, which impacted the outcome of the investigation, (2) there is new and relevant information that was unavailable at the time of the hearing, and this evidence is sufficient to change the outcome of the hearing, (3) the sanction was inappropriate and/or disproportionate to the conduct, (4) the hearing decision was not based on substantial information, or (5) bias or conflict of interest by

The survivor also has the right to appeal if the panel finds that the student accused of sexual violence did not violate the code of conduct.⁸⁸ During an appeal, the appeal board only reviews the record of the case and written statements submitted by both parties.⁸⁹ The appeal board then determines if there were serious errors made, if new evidence has come to light, or if the sanctions are appropriate.⁹⁰

2. *The Investigative Model*

The investigative model, on the other hand, “removes the need for an in-person hearing, while still providing procedural protections to both [parties].”⁹¹ When the Title IX coordinator receives the initial complaint, they will assign an investigator to interview the survivor to determine if there was a potential violation of the code of conduct, and help implement temporary remedies—such as classroom or housing changes—or help the survivor find a counselor.⁹² If the investigator finds that there is a potential violation, the investigator then informs the student accused of sexual

an investigator or panel member. Universities’ bases for appeals differ. ASJA, *supra* note 81, at 7; UNIVERSITY OF MICHIGAN, *supra* note 77, at 38–39; UNIVERSITY OF KENTUCKY, *supra* note 77, at 9; DUKE UNIVERSITY, *supra* note 77; MACALESTER COLLEGE, *supra* note 64; BUFFALO UNIVERSITY, *supra* note 77; UNIVERSITY OF CALIFORNIA, BERKELEY, *supra* note 53, at 14–15; UNIVERSITY OF GEORGIA, *supra* note 64; PEPPERDINE UNIVERSITY, *supra* note 77.

88. FORDHAM UNIV., SEXUAL AND RELATED MISCONDUCT POLICY AND PROCEDURES FOR THE FORDHAM UNIVERSITY COMMUNITY 27 (Aug. 27, 2019), https://www.fordham.edu/download/downloads/id/13565/sexual_and_related_misconduct_policy_and_procedure.pdf [<https://perma.cc/6CHN-4UNK>] [hereinafter FORDHAM UNIVERSITY]; DUKE UNIVERSITY, *supra* note 75.

89. UNIVERSITY OF MICHIGAN, *supra* note 77; UNIVERSITY OF KENTUCKY, *supra* note 77, at 10; DUKE UNIVERSITY, *supra* note 77, at 18–19; MACALESTER COLLEGE, *supra* note 64, at 3; UNIVERSITY OF CALIFORNIA, BERKELEY, *supra* note 53, at 15; PEPPERDINE UNIVERSITY, *supra* note 77.

90. UNIVERSITY OF KENTUCKY, *supra* note 77, at 10; DUKE UNIVERSITY, *supra* note 77; MACALESTER COLLEGE, *supra* note 64; UNIVERSITY OF CALIFORNIA, BERKELEY, *supra* note 53, at 15; PEPPERDINE UNIVERSITY, *supra* note 77.

91. ASCA, *supra* note 57, at 16.

92. *See id.*; NW. UNIV., COMPREHENSIVE POLICY ON SEXUAL MISCONDUCT 10, 25 (2019) [hereinafter NORTHWESTERN UNIVERSITY], https://www.northwestern.edu/sexual-misconduct/docs/sexual_misconduct_policy.pdf [<https://perma.cc/3GFN-FJDE>]; *Administrative Policies and Procedures Manual - Policy 2740: Sexual Misconduct*, U. N.M.: POL’Y OFF. (Feb. 26, 2018), [<https://perma.cc/6U34-HGD9>] [hereinafter UNIVERSITY OF NEW MEXICO]; *Discrimination and Harassment Complaint Resolution Procedure, Step 3: Review of the Complaint*, LESLEY U., <https://lesley.edu/students/policies/behavior-policies/discrimination-and-harassment-complaint-resolution-procedures> [<https://perma.cc/4XM5-E5S5>] [hereinafter LESLEY UNIVERSITY]; *Sexual Assault and Sexual Harassment*, U. ARK.: FAYETTEVILLE POLICIES & PROC. 418.1, <https://vcfa.uark.edu/fayetteville-policies-procedures/oeoc/4181.php> [<https://perma.cc/979N-S4VG>] [hereinafter UNIVERSITY OF ARKANSAS]; *Sexual Harassment and Sexual Violence*, U. KAN.: INSTITUTIONAL OPPORTUNITY & ACCESS PROC., <https://policy.ku.edu/IOA/sexual-harassment-sexual-violence-procedures> [<https://perma.cc/AU44-HLLX>] [hereinafter UNIVERSITY OF KANSAS].

violence about the complaint and interviews them.⁹³ This allows both students to provide their accounts and provide witnesses for the investigator to contact.⁹⁴

After conducting fact-finding, the investigator will issue a report of their findings for both students to review.⁹⁵ If the investigator determines that the student accused of sexual violence violated the code of conduct, instead of sending their report to a panel to decide if the conduct code was violated, the investigator will determine the appropriate resolution, determine sanctions, or forward the report to an adjudicator to issue sanctions.⁹⁶

If either the student accused of sexual violence or the survivor disagrees with the investigator's decision, they have the right to appeal the decision to an appeal board.⁹⁷ Appeal boards have the ability to uphold the decision, change sanctions, or remand to the investigator for further hearing.⁹⁸

3. *The Hybrid Model*

University hybrid models can incorporate aspects of both the hearing and the investigative models.⁹⁹ For example, while a Title IX investigator may conduct the initial investigation, another staff member could offer an administrative resolution.¹⁰⁰ If either the student accused of sexual violence or the survivor disagrees with the resolution, then the case can go to an administrative or hearing panel.¹⁰¹ The panel would then review

93. NORTHWESTERN UNIVERSITY, *supra* note 92, at 26–27; LESLEY UNIVERSITY, *supra* note 92; UNIVERSITY OF ARKANSAS, *supra* note 92; UNIVERSITY OF KANSAS, *supra* note 92; UNIVERSITY OF NEW MEXICO, *supra* note 92;

94. *See* NORTHWESTERN UNIVERSITY, *supra* note 92, at 26–27; LESLEY UNIVERSITY, *supra* note 92; UNIVERSITY OF ARKANSAS, *supra* note 92; UNIVERSITY OF KANSAS, *supra* note 92; UNIVERSITY OF NEW MEXICO, *supra* note 92;

95. *See* NORTHWESTERN UNIVERSITY, *supra* note 92, at 26–27; LESLEY UNIVERSITY, *supra* note 92; UNIVERSITY OF ARKANSAS, *supra* note 92; UNIVERSITY OF KANSAS, *supra* note 92; UNIVERSITY OF TEXAS, *supra* note 92.

96. *See* NORTHWESTERN UNIVERSITY, *supra* note 92, at 27–28; LESLEY UNIVERSITY, *supra* note 92; UNIVERSITY OF ARKANSAS, *supra* note 92; UNIVERSITY OF KANSAS, *supra* note 92; UNIVERSITY OF NEW MEXICO, THE PATHFINDER – UNM STUDENT HANDBOOK (Jan. 13, 2016), <http://pathfinder.unm.edu/student-grievance-procedure.html> [<https://perma.cc/9PSG-XR6W>].

97. FORDHAM UNIVERSITY, *supra* note 88, at 27; UNIVERSITY OF NEW MEXICO, *supra* note 92.

98. FORDHAM UNIVERSITY, *supra* note 88, at 27; UNIVERSITY OF NEW MEXICO, *supra* note 92.

99. *See* ASCA, *supra* note 57, at 16.

100. *Id.* at 16.

101. *Id.*

the information, determine if there was a violation of the student conduct code, and issue sanctions.¹⁰²

At Yale University, the administration utilizes both the hearing and investigative models.¹⁰³ If the University-Wide Committee on Sexual Misconduct decides that a formal disciplinary hearing is necessary, then the chair of the committee appoints an outside investigator to investigate the complaint.¹⁰⁴ After the investigator conducts fact-finding, the investigator issues a report to the adjudicatory panel.¹⁰⁵ After both parties testify in front of the panel, the panel will make findings of responsibility based on the testimony given at the hearing and the investigator's report.¹⁰⁶

While university student conduct processes are meant to afford protections to both survivors and students accused of sexual violence, in reality, they have not fulfilled expectations. Many students have expressed concerns with the code of conduct system because of significant wait times,¹⁰⁷ lack of due process,¹⁰⁸ and confidentiality issues.¹⁰⁹ Further, many students have criticized student conduct codes and DCL guidance for inadequately protecting survivors and students accused of sexual violence.

C. *Controversies Surrounding Student Conduct Codes and DCL Guidance*

Student conduct codes are controversial. They are criticized for being overly pro-survivor or overly pro-accused, or for lacking adequate protections for either party.¹¹⁰ While DCL guidance is supposed to address

102. *Id.*

103. Smith, *The Old College Trial*, *supra* note 61, at 965.

104. *Id.*

105. *Id.*

106. *Id.*

107. ASJA, *supra* note 81, at 8.

108. Curtis J. Berger & Vivian Berger, *Academic Discipline: A Guide to Fair Process for the University Student*, 99 COLUM. L. REV. 289, 295 (1999); Marie T. Reilly, *Due Process in Public University Discipline Cases*, 120 PENN. ST. L. REV. 1001, 1023–24 (2016) (citing *Furey v. Temple Univ.*, 884 F. Supp. 2d 233 (E.D. Pa. 2012)).

109. Sine Anahita, *Trouble with Title IX: Mandatory Reporting, Title IX Profiteers and Administrators, and Academic Governance*, AM. ASS'N U. PROFESSORS (2017), <https://www.aaup.org/article/trouble-title-ix#.Xa15f-dKiRt> [<https://perma.cc/4V25-KANV>].

110. Mann, *supra* note 47, at 634–35; Joe Drape & Marc Tracy, *A Majority Agreed She Was Raped by a Stanford Football Player. That Wasn't Enough*, N.Y. TIMES (Dec. 29, 2016), <https://www.nytimes.com/2016/12/29/sports/football/stanford-football-rape-accusation.html> [<https://perma.cc/FC9C-GEQU>]; Erica L. Green, *Sex Assault Rules Under DeVos Bolster Defendants' Rights and Ease College Liability*, N.Y. TIMES (Nov. 16, 2018), <https://www.nytimes.com/2018/11/16/us/politics/betsy-devos-title-ix.html> [<https://perma.cc/XV5G-WQPA>].

these concerns, the creation of DCL guidance is inherently political and protections for students are often created based off political administrations' varied concerns for parties.¹¹¹

When the 2011 DCL was released, the Obama administration was concerned with the frequency of sexual assaults that were occurring on campuses.¹¹² To combat sexual assault, OCR attempted to create conduct proceedings, which would protect survivors and hold students accused of sexual violence accountable if found in violation.¹¹³ For example, OCR required that universities lower the standard of proof to the preponderance of the evidence standard,¹¹⁴ rather than the clear and convincing standard¹¹⁵ in conduct proceedings. The argument in favor of using the preponderance of the evidence standard is that using any higher standard is tilted in favor of the student accused of student violence, and thus would be inconsistent with equality.¹¹⁶

While many applauded this protection, others worried that universities would sacrifice the due process rights of students accused of sexual violence.¹¹⁷ Those critics were correct. Since 2011, there have been more than 400 lawsuits brought by accused students alleging they were denied fair process in campus sexual misconduct adjudications.¹¹⁸ More recently, in August of 2019, a class action lawsuit was filed against the University of California system, arguing that the procedures used to find accused students responsible for sexual misconduct were unfair and failed to provide due process.¹¹⁹

111. Mann, *supra* note 47, at 632 (“Title IX has become increasingly politicized, with enforcement largely dependent upon who is in power in the Executive Branch.”).

112. Ali, *supra* note 11, at 2 (“The statistics on sexual violence are both deeply troubling and a call to action for the nation.”).

113. *Id.* at 3–14.

114. *Id.* at 11. (A preponderance of the evidence standard requires that an adjudicator find “it is more likely than not that sexual harassment or violence occurred”).

115. *Id.* (The clear and convincing standard requires that an adjudicator find “it is highly probable or reasonably certain that the sexual harassment or violence occurred.”).

116. Jeannie Suk Gersen, *Assessing Betsy DeVos’s Proposed Rules On Title IX and Sexual Assault*, THE NEW YORKER (Feb. 1, 2019), <https://www.newyorker.com/news/our-columnists/assessing-betsy-devos-proposed-rules-on-title-ix-and-sexual-assault> [<https://perma.cc/M93G-ALHQ>].

117. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462, 61,464 (Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106); Tamara Rice Lave, *Campus Sexual Assault Adjudication: Why Universities Should Reject the Dear Colleague Letter*, 64 U. KAN. L. REV. 915, 916–17 (2016).

118. *Due Process*, FIRE (Apr. 9, 2019), <https://www.thefire.org/issues/due-process/> [<https://perma.cc/4KVU-796V/>].

119. Teresa Watanabe, *Students Accused of Sexual Harassment Sue California Universities*, L.A. TIMES (Aug. 3, 2019, 9:00 AM), <https://www.latimes.com/california/story/2019-08-02/california-universities-face-class-action-suits-by-students-accused-of-sexual-harassment>

In contrast to the Obama administration, the Trump administration has focused on protecting students accused of sexual violence.¹²⁰ Thus, in 2018, OCR proposed new guidance regarding standards of evidence.¹²¹ The new guidance proposed that schools use either the preponderance of the evidence standard or the clear and convincing standard.¹²² However, to use the preponderance of the evidence standard, OCR requires that schools use the same evidentiary “standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction.”¹²³

DCL guidance has and likely will continue to fluctuate between different administrations, based on their beliefs on campus sexual violence. This will result in universities struggling to comply with DCL guidance and mistrust from students in using student conduct systems.¹²⁴

While the 2011 DCL increased protections for survivors, it also limited the available alternative remedies survivors could use to find healing and justice.

D. *The 2011 Dear Colleague Letter*

In 2011, the federal government was prompted to address sexual violence due to rising attention and concern regarding sexual assaults on university campuses.¹²⁵ The 2011 DCL clarified OCR’s interpretation of

[<https://perma.cc/N4QX-XEZC>].

120. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462,

121. *Id.* at 61,477.

122. *Id.*

123. *Id.*

124. Holland & Cortina, *supra* note 6, at 50, 61–62 (“Collectively, our findings suggest that community norms and institutional policies can make it challenging for survivors to use campus supports Within recent years, federal and institutional policies have attempted to address [the impacts of sexual assault], and many college students have more formal support options than survivors in other contexts; yet, very few student survivors report or seek help.”).

125. Ali, *supra* note 11, at 2 (“The statistics on sexual violence are both deeply troubling and a call to action for the nation. A report prepared for the National Institute of Justice found that about 1 in 5 women are victims of completed or attempted sexual assault while in college. The report also found that approximately 6.1 percent of males were victims of completed or attempted sexual assault during college.”); Lave, *supra* note 117, at 765–66; see also KC Johnson & Stuart Taylor, *The Path to Obama’s “Dear Colleague” Letter*, WASH. POST (Jan. 31, 2017, 8:34 AM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/31/the-path-to-obamas-dear-colleague-letter/> [<https://perma.cc/KMC4-2AF3>] (discussing how prior to the DCL’s issuance in 2011, OCR had never dictated campus procedures. *Id.* Campuses were told to implement a statement of policy regarding campus sexual assault and procedures followed once a sex offense had occurred, according to the Higher Education Amendments; however, universities had the freedom to choose their policies. *Id.*

Title IX.¹²⁶ It urged universities to better investigate and adjudicate cases of sexual violence on and off campus, and permitted students to file Title IX complaints against their universities if they failed to act.¹²⁷ In response, universities changed their conduct policies to comply with the DCL.¹²⁸

The 2011 DCL created procedural requirements for universities aimed at protecting students' rights (both survivors and students accused of sexual violence).¹²⁹ To comply with the procedural requirements of Title IX, a recipient of federal funds needed to (1) publish a notice of nondiscrimination and information regarding Title IX complaints; (2) designate one employee to act as a Title IX coordinator; and (3) adopt and publish grievance procedures for both student and employee complaints of sex discrimination.¹³⁰ While the requirements were meant to appreciate the rights of both parties, in reality, they disproportionately favored survivors, by emphasizing the notion that adjudicative experiences would be traumatic to survivors.¹³¹ The OCR requirements also instituted better protections for survivors by: (1) requiring that schools conduct proceedings in a reasonable amount of time;¹³² (2) giving student survivors access to resources such as counseling and mental health services;¹³³ and (3) "strongly discourag[ing] schools from allowing the parties personally to question or cross-examine each other during the hearing."¹³⁴

While the 2011 DCL did increase protections for survivors it also limited the ability of universities to hold mediations to resolve cases of sexual harassment and violence.¹³⁵ OCR made clear that, while grievance procedures may include voluntary methods (such as mediation for resolving some types of sexual harassment complaints), in cases involving allegations of sexual assault, mediation is inappropriate—even if it is

126. See generally Ali, *supra* note 11.

127. *Id.* at 3–19.

128. Jeannie S. Gersen, *Assessing Betsy DeVos's Proposed Rules on Title IX and Sexual Assault*, NEW YORKER (Feb. 1, 2019), <https://www.newyorker.com/news/our-columnists/assessing-betsy-devos-proposed-rules-on-title-ix-and-sexual-assault> [<https://perma.cc/65CE-8BDK>]; Lave, *supra* note 117, at 766.

129. See Ali *supra* note 11, at 6.

130. *Id.* at 4, 7.

131. *Id.* at 12 ("Allowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment."); see also *id.* at 13 n.33.

132. *Id.* at 9, 12.

133. *Id.* at 16.

134. *Id.* at 12.

135. *Id.* at 8.

elected voluntarily by the survivor.¹³⁶ In its reasoning, OCR relied on advice previously given to schools stating that it believed “it [wa]s improper for a student who complains of harassment to be required to work out the problem directly with the alleged perpetrator, and certainly not without appropriate involvement by the school.”¹³⁷

Many proponents of the 2011 DCL agreed that mediation would not be an appropriate tool for on-campus sexual violence cases because mediation would involve asking survivors to “compromise, self-reflect or reconcile relationships with someone that assaulted them.”¹³⁸ While OCR never discussed restorative justice directly in the DCL, restorative justice has incorrectly been categorized as a type of mediation.¹³⁹ As a result, many schools chose not to implement restorative justice practices, even though it was not expressly rejected.¹⁴⁰ However, even if restorative justice had been expressly allowed, many individuals and universities remained concerned, that it would be inappropriate when sexual violence had been alleged.¹⁴¹ For example, some administrators were concerned that students may feel pressured to bypass a formal investigation, or would regret their decision later if they choose to not take part in an investigation.¹⁴² Further, opponents of mediation and restorative justice usage in sexual violence cases worried that the associated penalties were not severe enough.¹⁴³

136. *Id.*

137. *Id.*

138. Grace Watkins, *Sexual Assault Survivor to Betsy DeVos: Mediation Is Not a Viable Resolution* (Oct. 2, 2017), <https://time.com/4957837/campus-sexual-assault-mediation/> [<https://perma.cc/38SF-GKME>]; see also WOMEN’S LAW PROJECT, THE NEW PROPOSED TITLE IX RULES: DETAILED ANALYSIS & INVITATION TO SUBMIT COMMENT 8 (Dec. 17, 2018), <https://www.womenslawproject.org/wp-content/uploads/2018/12/TitleIX-Complete-Analysis-Dec-17.pdf> [<https://perma.cc/DM7J-A4ZD>]; Mangan, *supra* note 19, at 7–8.

139. There is a debate as to whether restorative justice is a type of mediation. See KARP ET AL., *supra* note 15, at 29 (“Restorative justice and mediation share several features . . . [however,] [r]estorative justice and mediation diverge in important ways.”); Mangan, *supra* note 19, at 3 (“But when it comes to sexual harassment or assault, few colleges have been willing to promote it as an option. That’s largely because federal guidelines, at least until now, discourage or even prohibit the use of mediation in such cases, and restorative justice is often lumped — incorrectly, proponents argue — into the same category as mediation.”),

140. KARP ET AL., *supra* note 15, at 28.

141. Mangan, *supra* note 19, at 7–8.

142. *Id.* at 2; Smith, *All Things Considered*, *supra* note 21.

143. Mangan, *supra* note 19, at 7.

E. The 2018 Proposed Dear Colleague Letter

Ten months after President Trump's election, Betsy DeVos, the Secretary of Education for the Trump Administration, rescinded the Obama Administration's 2011 DCL and the "2014 Questions and Answers on Title IX and Sexual Violence" document.¹⁴⁴ In September 2017, OCR issued interim guidelines to help universities meet their Title IX obligations.¹⁴⁵ And on November 29, 2018, OCR released its proposed DCL guidance.¹⁴⁶

In contrast to the 2011 DCL, the 2018 proposed DCL created barriers for survivors to report their claims of sexual violence and afforded them fewer protections during conduct proceedings. For example, the proposed guidance redefined the kinds of sexual harassment that schools must respond to.¹⁴⁷ OCR proposed that sexual harassment include "unwelcome conduct on the basis of sex that is *so severe, pervasive, and objectively offensive* that it effectively denies a person equal access to the recipient's education program or activity."¹⁴⁸ In addition, the proposed guidance requires survivors to be available for and subject to direct cross-examination by an advisor¹⁴⁹ of a party in a live hearing.¹⁵⁰

While the proposed DCL generally favors students accused of sexual violence, it does allow for survivors to be able to pursue alternative

144. See *Interim Guidance*, *supra* note 16; Brian Pappas, *Sexual Misconduct on Campus*, A.B.A. (Winter 2019), https://www.americanbar.org/groups/dispute_resolution/publications/dispute_resolution_magazine/2019/winter-2019-me-too/sexual-misconduct-on-campus/ [<https://perma.cc/R9WZ-8PL5>].

145. U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, Q&A ON CAMPUS SEXUAL MISCONDUCT (2017), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf> [<https://perma.cc/384Z-Q47Y>].

146. Betsy DeVos's Title IX regulations had not gone into effect as of April 2019. The proposed 2018 DCL is still in effect. The review period for the proposed regulations ended in February 2019. See *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 83 Fed. Reg. 61,462, 61,462 (Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106).

147. *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 83 Fed. Reg. at 61,466.

148. *Id.* (emphasis added).

149. An advisor is an individual who has been selected by either the complainant or respondent, to assist them during the student conduct hearing process. An advisor can be anyone of the student's choosing. This includes: an attorney, staff member, friend, faculty member, family member, or another student. See *Conduct Process*, DREXEL U., https://drexel.edu/studentlife/community_standards/code-of-conduct/conduct-review-process/ [<https://perma.cc/3CUF-UYCZ>]; *FAQs: Advisors, Student Conduct*, GEORGE WASH. U., studentconduct.gwu.edu/advisors-role [<https://perma.cc/VQB8-PSRC>]; *Guide for Advisors in the Student Conduct Process*, OKLA. ST. U., <https://studentconduct.okstate.edu/advisors> [<https://perma.cc/T2VU-EPL5>].

150. *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 83 Fed. Reg. at 61,474–77.

models of justice, such as restorative justice.¹⁵¹ In cases of informal resolution, OCR will allow for universities to

facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the [university] provides to the parties a written notice disclosing . . . [t]he allegations; [t]he requirements of the informal resolution process . . . ; [a]ny consequences resulting from participating in the informal resolution process . . . ; [and] obtain the parties' voluntary, written consent to the informal resolution process.¹⁵²

In OCR's reasoning for including informal resolution practices, it noted the importance of taking "into account the needs of the parties . . . some of whom may prefer not to go through a formal complaint process."¹⁵³ Informal resolution can lead to more favorable outcomes if both parties agree to participate in the process, based on a variety of factors.¹⁵⁴ OCR stated that, to ensure that parties do not feel forced into informal resolution practices, it would require recipients to inform the parties in writing of (1) the allegations; (2) the requirements of the informal resolution process; and (3) any consequences resulting from participating in the informal process.¹⁵⁵

While advocates continue to debate the efficacy of informal resolution practices, if the proposed 2018 guidance becomes official, universities will have the opportunity to implement practices such as restorative justice on their campuses. In contrast to the code of conduct system, restorative justice allows for survivors to heal and allows for students accused of sexual violence to focus on identifying and repairing the harm that they have created.¹⁵⁶

II. RESTORATIVE JUSTICE

Restorative justice is a collaborative approach that can be used to address sexual violence on college campuses instead of using the student code of conduct process.¹⁵⁷ Restorative justice brings survivors, offenders,

151. *Id.* at 61,479 (to be codified at 34 C.F.R. § 106.45(b)(6)).

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. Smith, *All Things Considered*, *supra* note 21.

157. See *About Restorative Justice*, CARLETON U. (July 9, 2019), <https://apps.carleton.edu/campus/justice/about/> [<https://perma.cc/YM7X-8NWK>]; *About Restorative Justice*, SKIDMORE C., <https://www.skidmore.edu/campusrj/aboutrestorativejustice.php>

and harmed community members together to understand and address the harm caused by the offender.¹⁵⁸ Further, restorative justice offers support to survivors, while holding offenders accountable for their actions.¹⁵⁹ While some universities are fearful to use restorative justice due to the 2011 DCL, other universities have already implemented or have begun to implement restorative justice practices as an alternative for survivors who do not want to pursue the student code of conduct process.¹⁶⁰

A. Principles of Restorative Justice

While there is no set definition for restorative justice,¹⁶¹ in practice, restorative justice is a collaborative process wherein the harmed party and the offender participate in a dialogue to find ways to repair harm, educate the offender, and heal the relationship between the parties.¹⁶² There are a variety of restorative justice practices, including: restorative justice discipline circles, family group conferencing, and community conferencing.¹⁶³ Restorative conferencing was designed particularly in response to cases of sexual and gender-based misconduct.¹⁶⁴

There are four basic principles of restorative justice.¹⁶⁵ First, the process must provide a space for inclusive decisionmaking.¹⁶⁶ Inclusive decision-making invites offenders, survivors, and community members to

[<https://perma.cc/88JR-9MCL>]; *Defining Restorative*, INT'L INST. FOR RESTORATIVE PRAC., <https://www.iirp.edu/defining-restorative/history> [<https://perma.cc/3G9D-FL6M>]; KARP ET AL., *supra* note 15, at 3; *Restorative Justice*, U. CAL. IRVINE OFF. ACAD. INTEGRITY & STUDENT CONDUCT, <https://aisc.uci.edu/restorative-justice.php> [<https://perma.cc/AT8E-PSVV>] [hereinafter U. CAL. IRVINE OFF. ACAD. INTEGRITY & STUDENT CONDUCT].

158. KARP ET AL., *supra* note 15, at 3; Mary Koss & Mary Achilles, *Restorative Justice Responses to Sexual Assault*, NAT'L ONLINE RESOURCE CTR. ON VIOLENCE AGAINST WOMEN, 1 (Feb. 2008), https://pdfs.semanticscholar.org/4dd0/82fbeb20665eacf2f8e9447678974a09ae.pdf?_ga=2.194269101.1608864003.1570505227-1025705949.1570505227 [<https://perma.cc/5V2G-MPTN>].

159. KARP ET AL., *supra* note 15, at 2–3, 13; Koss & Achilles, *supra* note 158, at 1–2.

160. See Mangan, *supra* note 19, at 6; *Restorative Justice Project*, UNIV. WIS.-MADISON L. SCH., <https://law.wisc.edu/fjr/rjp> [<https://perma.cc/ZXQ8-CK4W>]; *Restorative Responses to SVSH*, *supra* note 20.

161. Zvi D. Gabbay, *Exploring the Limits of the Restorative Justice Paradigm: Restorative Justice and White-Collar Crime*, 8 CARDOZO J. CONFLICT RESOL. 421, 424 (2007).

162. HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 37 (2002); KARP, *supra* note 18, at 4; Jennifer J. Llewellyn & Robert Howse, *Restorative Justice—A Conceptual Framework*, L. COMMISSION CAN. 1, 56 (1998); John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 17 (1999).

163. See KARP, *supra* note 18, at 25; Koss & Achilles, *supra* note 158, at 6–8, 15.

164. KARP ET AL., *supra* note 15, at 24.

165. KARP, *supra* note 18, at 9–15.

166. *Id.* at 10–11.

“articulate the harms they experienced and what needs they have.”¹⁶⁷ Inclusive decision-making attempts to correct the passive approach that occurs in courtrooms and in student disciplinary proceedings, under which offenders are able to act as observers listening to the allegations made against them.¹⁶⁸ Further, it attempts to give both the survivor and offender a voice, by allowing both parties to discuss their experiences, so that the offender can repair the harm.¹⁶⁹

Second, there must be active accountability: the offender must take responsibility and make amends for the actions they took.¹⁷⁰ Restorative justice’s use of storytelling allows the offender to actively listen and participate in discussion about the harms they created.¹⁷¹ This differs from the criminal legal system and student conduct proceedings, which do not require that the offender take active responsibility for their actions, and thus enable offenders to distance themselves from the impact of their actions.¹⁷²

Third, the offender must repair the harm they created.¹⁷³ In order to repair the harm, the offender is asked, “[h]ow can the [survivor] and the community be restored?” rather than “[h]ow should the offender be punished?”¹⁷⁴ The goal of repairing the harm is not to make the offender suffer.¹⁷⁵ Instead, it is to repair the damage that has occurred and restore the survivor and the community to a state of wellbeing.¹⁷⁶

Fourth, restorative justice focuses on rebuilding trust and creating an environment in which the harmed parties can be safe again.¹⁷⁷ Restorative justice recognizes that rebuilding relationships is necessary for the wellbeing of the survivor and of the community.¹⁷⁸ This means that it is the offender’s duty to renew trust and to ask what they must do in order to build trust again.¹⁷⁹

167. *Id.* at 10.

168. *Id.* at 10-11.

169. *Id.*; Braithwaite, *supra* note 162, at 62.

170. KARP, *supra* note 18, at 11-12.; U. CAL. IRVINE OFF. ACAD. INTEGRITY & STUDENT CONDUCT, *supra* note 157.

171. KARP, *supra* note 18, at 11-12.

172. *Id.*

173. *Id.* at 12-14; Koss & Achilles, *supra* note 158, at 1.

174. KARP, *supra* note 18, at 12-13.

175. *Id.* at 13.

176. *Id.*

177. *Id.* at 14-15.

178. *Id.* at 14.

179. *Id.*

B. Restorative Justice's Impact on Survivors

In his book *The Little Book of Restorative Justice for Colleges and Universities*, David Karp, the director of the Project on Restorative Justice at Skidmore College, highlights how restorative justice can be used.¹⁸⁰ In the small town of Saratoga Springs, New York, the Saratoga County Arts Council launched a project decorating the city with fiberglass horses created by local artists.¹⁸¹ One of the horses, named Spirit Horse, had two glowing eyes that lit up at night.¹⁸² One night, a Skidmore student was coming home from local bars and decided that he wanted to take the Spirit Horse statue for himself.¹⁸³ The student was caught trying to haul the horse up the stairs to his second-story apartment.¹⁸⁴

Karp was able to hold a restorative justice dialogue with the key stakeholders who were affected, including an artist, an antique shop owner, and an arts council director.¹⁸⁵ Through this dialogue, each party was able to tell their story. For example, the artist expressed that they were upset because of the damage that occurred to their statue and the student shared his motive for taking the horse.¹⁸⁶ After the stakeholders shared their experiences, the group created a solution that could repair the damage and restore trust.¹⁸⁷ In this case, the group decided, among other things, that the student would pay the costs associated with the statue, take part in community service at the Saratoga County Arts Council, and organize an alcohol-free social event on campus.¹⁸⁸ By having the community come together to hold the Skidmore student responsible, the community was able to rehabilitate the student through education, reparations, and integration.¹⁸⁹ This resolution contrasts with the goals of the criminal justice system or the student conduct system, where the focus is on retribution, deterrence, and incapacitation.¹⁹⁰

180. *Id.* at 6–8.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* at 3–4.

185. *Id.* at 4–6.

186. *Id.* at 5.

187. *Id.* at 5–6.

188. *Id.*

189. *Id.*

190. Braithwaite, *supra* note 162, at 2, 60 (“[R]estorative justice is a virtuous circle, retributive justice a vicious circle.”); Donald H.J. Hermann, *Restorative Justice and Retributive Justice: An Opportunity for Cooperation or an Occasion for Conflict in the Search for Justice*, 16 SEATTLE J. SOC. JUST. 71, 72 (2017).

Many campuses have used restorative justice in cases similar to the Skidmore students'. Some universities use restorative justice forums to handle cases of underage drinking, vandalism, and loud music.¹⁹¹ However, many universities have chosen not to use restorative justice in cases involving sexual violence due to fear of violating federal guidelines.¹⁹² In addition, universities have expressed concern that student survivors would be traumatized or feel pressured to take part in restorative justice proceedings.¹⁹³ While these concerns are legitimate, restorative justice practices have built-in protections that can address these concerns.

First, schools that utilize restorative justice do not push students to partake in restorative justice practices. After a survivor meets with the Title IX coordinator or investigator, the survivor is presented with a set of options, in accordance with campus policies.¹⁹⁴ This includes the option to pursue a claim on-campus or criminally, to drop the complaint, or to request a restorative justice resolution.¹⁹⁵ If the survivor elects to take part in a restorative justice process, the consent of the student accused of sexual violence is also required for the process to take place.¹⁹⁶ Restorative justice conferences generally include (1) referral and intake; (2) preparation; (3) conference; and (4) monitoring and reintegration.¹⁹⁷ Thus, at any time, the survivor can choose not to participate in the conference if they feel it is not in their best interest.

Second, restorative justice practices do not allow for the student accused of sexual violence to sit back and evade accountability. In order for a restorative justice conference to proceed and be successful, the offending student must admit responsibility for their actions.¹⁹⁸ The student must also prepare for the conference by creating a statement, meeting with facilitators, and brainstorming how they can address the harm they created and rebuild trust.¹⁹⁹ After this preparation, the student accused of sexual violence must participate in a dialogue where they

191. Mangan, *supra* note 19; *see, e.g.*, KARP, *supra* note 18, at 33 (listing underage drinking as an example of conduct addressed by a restorative justice board).

192. Mangan, *supra* note 19, at 3; KARP ET AL., *supra* note 15, at 28. Because mediation was prohibited under the 2011 Dear Colleague Letter, many universities were afraid to use restorative justice practices; they feared it was a type of mediation. *See supra* note 139 and accompanying text.

193. Mangan, *supra* note 19; Smith, *All Things Considered*, *supra* note 21.

194. KARP ET AL., *supra* note 15, at 25.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* at 26.

explain their conduct and work with the survivor and community members to create appropriate reparations.²⁰⁰ After the conference, conduct administrators meet regularly with the student to ensure compliance with the conference agreement.²⁰¹

Examples from campuses that have implemented restorative justice practices in cases of sexual violence have shown positive results.²⁰² Not only can restorative justice support the survivor and give them the opportunity to heal from the trauma they endured, it also can create an opportunity for offenders to be accountable for their actions, and to take steps to reeducate and lessen their risk of reoffending.²⁰³ Further, these steps can be used to target “rape culture” and better educate other students.²⁰⁴

One successful account of restorative justice involved a college freshman who was assaulted at a small school in the Pacific Northwest.²⁰⁵ The survivor noted that the typical campus adjudication process “wouldn’t have really fixed anything” and “wouldn’t have healed any hurt.”²⁰⁶ She said that a disciplinary hearing would have retraumatized her.²⁰⁷ Because the school only offered a process through the student code of conduct, the survivor began working with an advisor on a restorative justice approach to the case.²⁰⁸ The survivor wanted the offender to “step up to the plate and take responsibility, and to be active in teaching others about this experience.”²⁰⁹

Ultimately, the offender offered an apology and created a video with the survivor in which both of them described the assault.²¹⁰ They then showed the video to others, to teach them about the experience.²¹¹ The survivor said that this approach helped her healing process, especially because it enabled her to understand that the offender’s intent was not malicious, but instead was misguided.²¹² Further, the offender felt that this

200. *Id.*

201. *Id.*

202. KARP, *supra* note 18, at 48–49.

203. *See* KARP ET AL., *supra* note 15, at 6.

204. Stephanie Lepp, *Episode 21: A Survivor and Her Perpetrator Find Justice*, RECKONINGS (Dec. 3, 2018), <https://beta.prx.org/series/35429> [<https://perma.cc/32GX-LTMZ>].

205. *See* Smith, *All Things Considered*, *supra* note 21.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

process was more productive than the typical campus adjudication process because it enabled him to help the survivor heal and help others learn about these issues.²¹³

In one case at the College of New Jersey, a woman who was sexually assaulted chose to use a restorative justice forum rather than the school's code of conduct process.²¹⁴ The college's Title IX coordinator in this case met with the survivor and offender separately and helped the parties agree on a set of stipulations.²¹⁵ For the survivor, it was important to help the offender realize the harm that he had caused her.²¹⁶ Further, she wanted the offender to know how people's bodies can react to alcohol and how it can affect their ability to consent.²¹⁷ Both parties agreed that the offender would attend a workshop on consent, attend alcohol-education classes, and review an online seminar about the neurobiology of sexual assault.²¹⁸

At another university, a survivor was sexually assaulted during her freshman year and had to constantly interact with the offender thereafter.²¹⁹ During her senior year, she decided to take part in a restorative justice forum because she wanted the offender to take responsibility for his actions, learn, grow, and help prevent other men from inflicting that same pain.²²⁰ Both the survivor and the offender went through the three typical phases of a restorative justice proceeding.²²¹ First, they each met separately with the facilitator.²²² This allowed for the survivor to write her story in her own words, and convey to the offender what she needed from the process.²²³ By reading her story, the offender was able to understand the harm that he caused and find ways to repair that harm.²²⁴ Second, both the survivor and the offender met in person to discuss the harm.²²⁵ At the conference, the survivor was able to ask the offender questions and hear how the offender planned to repair the

213. *Id.*

214. *See* Mangan, *supra* note 19.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *See* Lepp, *supra* note 204.

220. *Id.* at 27:30–29:19.

221. *Id.* at 36:45–52:00.

222. *Id.* at 36:53–37:04; 29:32–30:02; 30:06–35:40.

223. *Id.* at 30:02–36:35.

224. *Id.* at 30:20–35:40.

225. *Id.* at 37:03–13:00.

harm.²²⁶ In this situation, the offender wrote an article for the university magazine,²²⁷ created a training specifically aimed at Greek organizations²²⁸ for Green Dot,²²⁹ a program that trains active bystanders, and taught young men about consent.²³⁰ Lastly, the facilitator checked in with the offender and the survivor periodically to make sure that the offender was fulfilling his promises.²³¹

These stories illustrate how restorative justice can be used on campuses to help survivors heal and hold offenders accountable. By utilizing restorative justice on university campuses, it is possible for administrators to address campus sexual violence in a manner that actually brings about change.

III. THE IMPACTS OF DEAR COLLEAGUE LETTERS AND THE NEED FOR A SOLUTION

While DCLs are intended to address the systemic issues faced by survivors of sexual violence, in reality they have bred instability, inconsistency, and fear of using the system. While these issues need to be addressed, there also needs to be a stable, reliable system for survivors to use if they choose not to go through the student code of conduct process.

An alternate system that should be available to survivors is restorative justice. While restorative justice has generally only been used on college campuses in less-severe proceedings, it is a versatile tool that could also be implemented in cases of sexual violence. It has been shown to work in both community settings and in universities.

A. *Changing Dear Colleague Letter Guidance Creates Inconsistent Results on College Campuses*

Between the last two presidential administrations, DCL guidance has changed drastically.²³² These changes will result in universities facing

226. *Id.* at 37:20–38:00.

227. *Id.* at 37:49–51:00.

228. *Id.* at 37:53–56:00.

229. "Green Dot Bystander Training" teaches students about "different types of power-based personal violence," helps students recognize situations of potential violence, and helps students take actions that reduce the risk of violence. See *Bystander Trainings*, MACALESTER C., <https://www.macalester.edu/greendot/getinvolved/> [<https://perma.cc/S8AL-U6TE>]; *What is Green Dot?*, MACALESTER C., <https://www.macalester.edu/greendot/about> [<https://perma.cc/976N-CXFA>]; *Green Dot: Program Summary*, RAINN, <https://preventionnavigator.rainn.org/program/greendot/overview/> [<https://perma.cc/WMU7-69U5>].

230. *Id.* at 37:57–38:00.

231. *Id.* at 38:00–38:14.

232. See *supra* section II.C.

three major issues. First, the 2018 DCL guidance will take time to implement on campuses. If DeVos's proposed DCL is accepted, it will take time for universities to review their codes of conduct to ensure that they are in compliance with Title IX. This will include having to adapt their code of conduct proceedings, re-train investigators and officers, and re-educate the student body about their rights. These are not changes that will happen overnight. For example, before re-written code of conduct procedures go into effect, they must go through review to be approved.²³³ This process could potentially take years for schools to accomplish—especially schools with large student bodies.²³⁴ Further, even if universities are able to quickly alter their procedures, universities may not be able to initially comply with DCL guidance, because they may need to wait for the new academic year to begin.²³⁵

Second, there will be inconsistencies among campuses due the discretion that DCL guidance allows. For example, as described above, universities will have the choice to implement either a preponderance of the evidence or clear and convincing standard under the new guidance.²³⁶ If universities choose to implement the clear and convincing standard, it will allow for them to forgo providing a remedy, even though it is more likely than not that the student accused of sexual violence harassed or assaulted the survivor.²³⁷ These inconsistencies will result in variability between campuses and will affect some survivors' abilities to remain at their institutions.²³⁸

233. See *Major Revamping of Student Conduct Process Moves Closer to Completion*, WASH. ST. U. (Sept. 27, 2018), <https://news.wsu.edu/2018/09/27/major-revamping-student-conduct-process-moves-closer-completion/> [<https://perma.cc/LMT7-NFMG>]; *Public Comment: Proposed Changes to Student Handbook*, WAKE FOREST U., <https://studentconduct.wfu.edu/public-comment-student-handbook/> [<https://perma.cc/C34V-Z5K8>]; *Recent Code Updates: Updates to the Code for 2019–2020*, SEATTLE U. (Aug. 1, 2019), <https://www.seattleu.edu/deanofstudents/policies/code-of-student-conduct/recent-code-updates/> [<https://perma.cc/HD32-3QAR>] (“These revisions were based on a comprehensive two-year review process . . .”).

234. See Sarah Brown, *What Does the End of Obama's Title IX Guidance Mean for Colleges?*, CHRON. HIGHER EDUC. (Sept. 22, 2017), <https://www.chronicle.com/article/What-Does-the-End-of-Obama-s/241281> [<https://perma.cc/JQ9M-WAVK>] (noting that it took colleges years to comply with the 2011 guidance after it passed).

235. *Id.* Some administrators have voiced their concerns that they think it would be unfair to change the system on students midway through their year.

236. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462, 61,477 (Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106).

237. Connor Friedersdorf, *The ACLU Moves to Embrace Due Process on Title IX*, ATLANTIC (Feb. 8, 2009), <https://www.theatlantic.com/ideas/archive/2019/02/aclu-title-ix/582118/> [<https://perma.cc/LJ42-72UA>].

238. See WOMEN'S LAW PROJECT, *supra* note 138.

Third, it is likely that fewer students will report incidents of sexual violence to their institutions.²³⁹ Under the proposed 2018 DCL, OCR narrowed what types of incidents of sexual violence institutions must respond to.²⁴⁰ This will inevitably lead to an increased number of unreported cases, because students will likely perceive Title IX as useless.²⁴¹

The 2011 DCL under the Obama Administration and the proposed 2018 DCL under the Trump Administration each has its own imperfections. However, what *is* clear is that without stability in DCL guidance, Title IX in educational institutions will continue to be volatile, confusing, and uncondusive to rectifying the systematic issue of sexual violence on campus. In order to have stability, political administrations must create a model that both survivors and students accused of sexual violence can trust. This means that political administrations cannot change guidance drastically to favor one party over the other, solely depending on what they believe is best for students. Instead, political administrations need to create a system that is favorable and just to *both* parties, while holding students accused of sexual violence accountable for their actions. Because this “perfect balance” is not likely to be available soon, this Comment recommends that universities use restorative justice as an alternative model, because, unlike changing guidance, restorative justice provides stability, helps survivors find healing, and addresses offender’s actions and beliefs.

B. Restorative Justice Should Be Used on Campuses to Solve the Inconsistences of Dear Colleague Letter Guidance

Restorative justice focuses on the rehabilitation of offenders through reconciliation with survivors and the community.²⁴² Through this process, parties can address harm and rebuild trust.²⁴³ By utilizing restorative justice, schools have the opportunity to help address the failings of the student conduct system, where survivors feel that they did not find “justice” or that the offender did not acknowledge, apologize, or try to fix the harm that they inflicted.²⁴⁴

239. *Id.* at 2.

240. *Id.*

241. *Id.*

242. KARP, *supra* note 18, at 4.

243. *See id.*

244. Smith, *All Things Considered*, *supra* note 21.

Restorative justice has already been formally adopted by several campuses across the nation.²⁴⁵ Still, some campuses have been reluctant to implement a restorative justice approach out of fear of violating federal guidelines, since the 2011 DCL barred mediation of sexual assault cases.²⁴⁶

Restorative justice for Title IX offenses could help address some of the systematic issues survivors face. For example, many survivors choose not to go through proceedings because they do not want to be re-traumatized and be cross-examined about their experiences.²⁴⁷ Additionally, survivors want to feel heard and feel safe on their college campuses. After experiencing sexual violence, many survivors end up leaving their universities because they feel unsafe.²⁴⁸

Some survivors are beginning to see restorative justice as a more effective way to get offenders to take responsibility for their actions. In contrast to the traditional adversarial process which often “only makes accused students dig in their heels, and deny all wrongdoing,”²⁴⁹ restorative justice allows for the offender to learn from their actions and to make amends that can positively impact the survivor and the larger community that was affected by the violence.

While restorative justice has been shown to be a more thoughtful way of healing, it does have its limits. For example, restorative justice methods are used only if both the survivor and the offender consent to the process.²⁵⁰ Additionally, restorative justice only works in situations where the offender is willing to admit to what they did.²⁵¹ If the offender does not want to admit to what they did or believes that they did not commit the alleged crime, then

245. See *Office of Community Standards: Restorative Justice*, STAN. U., <https://communitystandards.stanford.edu/student-accountability-process/restorative-justice> [<https://perma.cc/2ZRX-PFJG>] [*Office of Community Standards: Restorative Justice*, STAN. U.]; *Student Code of Conduct*, BUFF. ST. UNIV., <https://studentconduct.buffalostate.edu/sites/studentconduct.buffalostate.edu/files/uploads/Documents/Code%20of%20Conduct%20For%20Web.pdf> [<https://perma.cc/4AZ9-QG2A>]; *Student Conduct & Conflict Resolution: Restorative Justice*, UNIV. COLO. BOULDER, <https://www.colorado.edu/sccr/restorative-justice-0> [<https://perma.cc/9WC6-NJ87>].

246. See KARP ET AL., *supra* note 15, at 28; Ali, *supra* note 11, at 8.

247. KARP ET AL., *supra* note 15, at 12; Mangan, *supra* note 19; Smith, *All Things Considered*, *supra* note 21.

248. CECILIA MENGO & BEVERLY M. BLACK, VIOLENCE VICTIMIZATION ON A COLLEGE CAMPUS: IMPACT ON GPA AND SCHOOL DROPOUT, J.C. STUDENT RETENTION: RES., THEORY & PRAC. 1, 4-5 (2016).

249. Smith, *All Things Considered*, *supra* note 21.

250. See, e.g., KARP ET AL., *supra* note 15, at 25 (stating that participants must voluntarily enter into an RJ process); UNIVERSITY OF MICHIGAN, *supra* note 77, at 42 (same); *Office of Community Standards: Restorative Justice*, STAN. U., *supra* note 245 (same); *Restorative Responses to SVSH*, *supra* note 22 (same).

251. KARP ET AL., *supra* note 15, at 25.

restorative justice is an unsuitable approach.²⁵² Restorative justice also may not be suitable for situations involving repeat offenders.²⁵³

In addition to the above limitations, there are concerns over whether restorative justice should be used on campuses at all. For example, some opponents worry whether school officials will have proper training.²⁵⁴ However, with access to individuals who have worked as facilitators in restorative justice forums, or access to community groups, such as sexual assault and domestic violence groups, university administration members could receive appropriate training that would equip them to facilitate restorative justice forums.²⁵⁵ It is also possible for universities to hire outside groups to help lead these conversations. These groups include those who have helped to lead restorative justice conversations related to domestic violence and sexual assault in the community.²⁵⁶

Others have expressed concern that survivors may feel pressured into pursuing a restorative justice option over a disciplinary one.²⁵⁷ In addition, accused students might be putting themselves in legal jeopardy if what they say during the restorative justice process can be used against them later in court.²⁵⁸ However, with proper protections and training, both of these issues can be mitigated. For example, the Department of Education could issue future guidance regarding restorative justice and on when it is appropriate to use. Further, the Department could create protections for students who agree to use restorative justice, like those that take part in settlement agreements.²⁵⁹

Restorative justice will not fix all of the systemic issues extant within DCL guidance and the student conduct system. Still, it remains a viable option for students who do not want to have a formal proceeding, go through a formal report, and go through an adjudicatory process. Restorative justice accounts for, and likely would serve the needs of, students who choose not to report due to not wanting to make an official report or get the other person into trouble, or who are simply looking for

252. *Id.* at 25.

253. See Smith, *All Things Considered*, *supra* note 21.

254. See KARP ET AL., *supra* note 15, at 40–41; Smith, *All Things Considered*, *supra* note 21.

255. See KARP ET AL., *supra* note 15, at 40–41.

256. See Jennifer Luxton, *Restorative Justice Works for Perpetrators—And Victims*, SEATTLE TIMES (May 16, 2018), <https://www.seattletimes.com/opinion/restorative-justice-works-for-perpetrators-and-victims/> [<https://perma.cc/4UYJ-DFES>].

257. Mangan, *supra* note 19; Watkins, *supra* note 138.

258. Tina S. Ikpa, *Balancing Restorative Justice Principles and Due Process Rights in Order to Reform the Criminal Justice System*, 24 WASH. U. J.L. & POL'Y 301, 316 (2007).

259. FED. R. EVID. 408 (“Evidence of the following is not admissible – on behalf of any party – either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction . . .”).

a different kind of resolution that they do not feel is possible through the criminal justice system or student code of conduct process.

CONCLUSION

Restorative justice could help survivors at universities find healing and justice. Like prior Dear Colleague Letters, Secretary of Education DeVos's proposed guidelines create unreliable systems of adjudication. However, under the proposed guidelines, there is an opportunity for universities to implement informal resolution practices, like restorative justice. While the nation waits to see when DeVos's proposed guidelines will take effect, universities should be proactive and allow for restorative justice practices. Because campus sexual violence is a nationwide problem, it is important for universities to find ways to not only help survivors, but also teach offenders that sexual violence has a long-lasting impact.