

Designing Informal Mechanisms for Claims of Campus Sexual Misconduct

BRIAN PAPPAS, JENNIFER REYNOLDS, AND ART HINSHAW*

- I. INTRODUCTION
- II. BRIEF BACKGROUND ON TITLE IX
- III. OVERVIEW OF DISPUTE SYSTEMS DESIGN
- IV. TEN GUIDELINES FOR DESIGNING INFORMAL MECHANISMS UNDER TITLE IX
 - A. *Guideline 1: Develop an institutional commitment, driven and established from the top.*
 - B. *Guideline 2: Assess the current situation.*
 - C. *Guideline 3: Understand and manage competing goals.*
 - D. *Guideline 4: Create a collaborative network of expertise.*
 - E. *Guideline 5: Design informal processes, keeping in mind context and goals.*
 1. *DESIGNING THE PROCESS*
 2. *FITTING THE PROCESS INTO THE SYSTEM*
 - F. *Guideline 6: Keep the formal and informal processes separate.*
 - G. *Guideline 7: Consider confidentiality carefully.*
 - H. *Guideline 8: Be thoughtful about using external providers.*
 - I. *Guideline 9: Make dedicated educational efforts, training, and culture-change activities 50% of the work.*
 - J. *Guideline 10: Align other institutional processes and procedures and create systems for continuous improvement.*
- V. CONCLUSION

*Brian Pappas is Assistant Vice President of Academic Affairs at Eastern Michigan University. Jennifer Reynolds is Associate Professor and Associate Dean of Faculty Research and Programs at the University of Oregon School of Law. Art Hinshaw is the John J. Bouma Fellow in Alternative Dispute Resolution and Clinical Professor of Law. The authors benefited tremendously from talking through this paper with participants at the symposium, "A Conversation on the Role of ADR In Resolving Issues of Gender-Based Violence," and they are grateful for the assistance of the wonderful student editors of the Ohio State Journal on Dispute Resolution.

I. INTRODUCTION

Sexual misconduct is an enduring problem on U.S. college campuses. In 2019, the Association of American Universities reported that one-third of undergraduate female seniors say they have experienced non-consensual sexual contact at least once during college, but less than 30% of serious incidents are reported.¹ The problem of reporting sexual misconduct is widespread as the U.S. Department of Justice reported that only 40% of all sexual assaults were reported to police in 2017.² Given these staggering statistics, universities across the country are searching for ways to encourage more reporting and provide workable, fair methods of dealing with reports. Universities are also attempting to reduce and prevent sexual harassment and violence on campus.

Multiple and varied reasons account for the low reporting rates. First, survivors often know the accused, and a survivor may be afraid of reprisal or may not want to get anyone into trouble.³ Second, the process of recounting a traumatic experience to the police, prosecutors, and other health workers multiple times is traumatic in and of itself and has been described as another assault or “second rape.”⁴ Third, fears of victim-blaming or being sanctioned for underage drinking or drug use keep victims from reporting.⁵ Finally, the taxing and time-consuming structures of the university’s formal resolution process may result in no apparent discipline of alleged perpetrators or meaningful closure for survivors.⁶ In short, with no desirable or feasible options to choose between, harmed students may not report or—even if they do make an initial report—may fail to move forward with the process.⁷

¹ See DAVID CANTOR ET AL., ASSOC. AM. UNIVS., REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND MISCONDUCT (2020) A7-14, A7-27, [https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/Revised%20Aggregate%20report%20%20and%20appendices%201-7_\(01-16-2020_FINAL\).pdf](https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/Revised%20Aggregate%20report%20%20and%20appendices%201-7_(01-16-2020_FINAL).pdf) (noting the tables on pages A7-14 and A7-27).

² RACHEL E. MORGAN & JENNIFER L. TRUMAN, U.S. DEP’T JUST., CRIMINAL VICTIMIZATION, 2017 1 (2018), <https://www.bjs.gov/content/pub/pdf/cv17.pdf>.

³ SOFI SINOZICH & LYNN LANGTON, U.S. DEP’T JUST., RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE AGE FEMALES, 1995–2013 9 (2014), <https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf>.

⁴ See generally LEE MADIGAN & NANCY C. GAMBLE, THE SECOND RAPE: SOCIETY’S CONTINUED BETRAYAL OF THE VICTIM (1991); KAREN A. HOLMES & JOYCE E. WILLIAMS, THE SECOND ASSAULT: RAPE AND PUBLIC ATTITUDES (1981).

⁵ See generally Jenelle Bitker, *Does UC Davis Have a Rape Problem?*, SACRAMENTO NEWS & REV. (Oct. 16, 2014), <https://www.newsreview.com/sacramento/content/does-uc-davis-have-a-rape-problem/15220467/>.

⁶ *Id.*

⁷ See Brian A. Pappas, *Sexual Misconduct on Campus: Setting a Course for Handling Cases Properly—and Changing the Culture*, 25 DISP. RESOL. MAG. 21 (2019) [hereinafter

DESIGNING INFORMAL MECHANISMS

Recently, federal guidance for handling these cases transitioned from a purely investigative and punishment model to include the use of informal resolution mechanisms, such as mediation, facilitated conversations, and restorative justice. In 2017, the U.S. Department of Education's Office for Civil Rights (OCR) released the 2017 Questions & Answers guidance document allowing the use of mediation for handling instances of sexual assault,⁸ and an American Bar Association Task Force encouraged schools to consider restorative justice and other non-mediation alternatives to traditional adjudication.⁹ The very next year, the Notice of Proposed Rulemaking permitted the informal resolution of a Title IX complaint at any point prior to reaching a responsibility determination.¹⁰ In taking this action, the Department of Education declared that it is "important to take into account the needs of the parties involved in each case, some of whom may prefer not to go through a formal complaint process."¹¹ The use of informal resolution is allowed and further prescribed under the final rule.¹²

These developments represent a sea change in campus approaches to Title IX claims. In the past, university counsel often stopped the use of informal mechanisms out of fear of violating federal guidance, preventing staff from facilitating any meeting between a complainant and respondent outside of a formal hearing.¹³ It is true that informal mechanisms can have negative repercussions, such as: hurting the transparency of how complaints are handled, lessening the consequences of committing misconduct, and influencing administrators concerned about liability to pressure survivors and alleged perpetrators to bypass formal processes.¹⁴ For example, a 2010 Center

Setting a Course]; Madison Orcutt et al., *Restorative Justice Approaches to the Informal Resolution of Student Sexual Misconduct*, 45 J. COLL. & UNIV. L. 1, 204 (2020); Brian A. Pappas, *Out from the Shadows: Title IX, University Ombuds, and the Reporting of Campus Sexual Misconduct*, 94 DENVER L. REV. 71 (2016) [hereinafter *Out from the Shadows*].

⁸ U.S. DEP'T EDUC., OFF. FOR C.R., Q&A ON CAMPUS SEXUAL MISCONDUCT 4 (Sept. 2017), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>.

⁹ See Debra Cassens Weiss, *A.B.A. Task Force Recommends Due Process Protections in Campus Sexual Assault Investigations*, A.B.A. J. (June 27, 2017), https://www.abajournal.com/news/article/aba_task_force_recommends_due_process_protections_in_campus_sexual_assault (referencing the A.B.A. report).

¹⁰ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462, 61,479 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. § 106) [hereinafter NPRM].

¹¹ *Id.*

¹² U.S. DEP'T EDUC., OFF. FOR C.R., SUMMARY OF MAJOR PROVISIONS OF THE DEPARTMENT OF EDUCATION'S TITLE IX FINAL RULE, 4-5 (2018), <https://www2.ed.gov/about/offices/list/ocr/docs/titleix-summary.pdf>.

¹³ Donna Coker, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 TEX. TECH. L. REV. 147, 201 (2016).

¹⁴ *Setting a Course*, *supra* note 7, at 22; *Out from the Shadows*, *supra* note 7, at 144.

for Public Integrity report on campus complaints of sexual assault described how some students were “pressure[d]” to “mediate.”¹⁵ At the same time, informal processes may provide more humane options for survivors, offer restorative possibilities for perpetrators and community members,¹⁶ and save money and time in reduced investigations and shortened proceedings.¹⁷ In any event, given that no one-size-fits-all approach will work for every complaint, universities need multiple avenues for reporting and handling complaints.¹⁸ It is worth considering how to capture the benefits of informal resolution processes in Title IX contexts, while mitigating the downsides and risks that such processes may present.

With the new Biden administration, more changes may be coming and the current guidance around formal informal processes may change. In the meantime, universities would do well to evaluate their existing approach to Title IX claims and consider the possible benefits of informal resolution. This article provides ten guidelines for developing informal mechanisms for sexual misconduct claims using a “dispute systems design” (DSD) analytical framework: an interest-based design process that includes the expected users of the system as a means to ensure the system meets the needs of those who will be using it.¹⁹ Before getting to the proposed guidelines, some brief background on Title IX and DSD are in order.

II. BRIEF BACKGROUND ON TITLE IX

Title IX of the Educational Amendments of 1972 bars discrimination “on the basis of sex” in “any education program or activity receiving federal financial assistance.”²⁰ In 2011, the OCR, which oversees compliance with Title IX, wrote a “Dear Colleague Letter” (DCL) reminding educational institutions that failing to respond to allegations of sexual violence could

¹⁵ CTR. FOR PUB. INTEGRITY, SEXUAL ASSAULT ON CAMPUS: A FRUSTRATING SEARCH FOR JUSTICE 20 (2010), [https://cloudfront-files-1-publicintegrity.org/documents/pdfs/Sexual Assault on Campus.pdf](https://cloudfront-files-1-publicintegrity.org/documents/pdfs/Sexual_Assault_on_Campus.pdf) (describing “mediation” as meeting “with both students separately to resolve a complaint”).

¹⁶ See *Setting a Course*, *supra* note 7, at 22; see also David R. Karp & Kaaren M. Williamsen, *Five Things Student Affairs Administrators Should Know About Restorative Justice and Campus Sexual Harm*, NASPA (Mar. 12, 2020), <https://www.naspa.org/report/five-things-student-affairs-administrators-should-know-about-restorative-justice-and-campus-sexual-harm>.

¹⁷ See *Setting a Course*, *supra* note 7.

¹⁸ See *Out from the Shadows*, *supra* note 7, at 81, 108.

¹⁹ See, e.g., Janet K. Martinez, *Designing Online Dispute Resolution*, 2020 J. DISP. RESOL. 135, 140–44 (2020); Cathy Constantino, *Using Interest-Based Techniques to Design Conflict Management Systems*, 12 NEGOT. J. 207, 207–08 (1996).

²⁰ 20 U.S.C. § 1681.

DESIGNING INFORMAL MECHANISMS

violate Title IX.²¹ Furthermore, the DCL was part of an increase in Title IX enforcement that encouraged universities to handle student-to-student sexual misconduct through the use of formal legalistic processes utilizing a preponderance of the evidence standard.²² The 2011 DCL Letter continued an earlier prohibition on the use of mediation for sexual assault, despite the fact that at one time OCR had allowed “informal mechanisms for resolving sexual assault complaints . . . if the parties agree to do so.”²³

These measures led to intense public scrutiny, an increase in complaints, and general uncertainty regarding how to effectuate the letter’s requirements. In the wake of the 2011 DCL, universities revised their formal procedures and policies, conducted climate surveys, and required sexual harassment training for all students, faculty, and staff. Through these initiatives, universities were seeking to reach sound decisions in campus adjudications, but due to a variety of factors—including the lack of ability to compel testimony or subpoena evidence—universities were not equipped to do so.²⁴ OCR released a Questions & Answers document in 2014 attempting to provide some clarity around persistent Title IX problems universities were facing. Yet the result was more confusion as universities responded inconsistently, from non-enforcement to over-enforcement, leading to even more complaints by both victims and alleged perpetrators.²⁵

In 2017, Trump Administration policies swung the compliance pendulum in the opposite direction. The 2017 DCL rescinded the 2011 DCL

²¹ U.S. DEP’T EDUC., OFF. FOR C.R., *Dear Colleague Letter* 3–4, 11 (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [hereinafter *DCL 2011*]; see also Karen M. Tani, *An Administrative Right to be Free from Sexual Violence? Title IX Enforcement in Historical and Institutional Perspective*, 66 DUKE L. J. 1847, 1850–52 (2017) (describing the Department of Education’s emphasis on the issue of campus sexual assault).

²² *DCL 2011*, *supra* note 21, at 3–4, 11; see also WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, NOT ALONE (Apr. 2014), <https://www.justice.gov/archives/ovw/page/file/905942/download>.

²³ *DCL 2011*, *supra* note 21, at 8 (“Grievance procedures generally may include voluntary informal mechanisms (e.g., mediation) for resolving some types of sexual harassment complaints [I]n cases involving allegations of sexual assault, mediation is not appropriate even on a voluntary basis.”); U.S. DEP’T EDUC., OFF. FOR C.R., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (2001), <https://www2.ed.gov/offices/OCR/archives/pdf/shguide.pdf>.

²⁴ See Samantha Harris & KC Johnson, *Campus Courts in Court: The Rise in Judicial Involvement in Campus Sexual Misconduct Adjudications*, 22 N.Y.U. J. LEGIS. & PUB. POL’Y 49, 62 (2019).

²⁵ See Brian A. Pappas, *Dear Colleague: Title IX Coordinators and Inconsistent Compliance with the Laws Governing Campus Sexual Misconduct*, 52 TULSA L. REV. 121, 129–30 (2016).

and the 2014 Question & Answers guidance document, stating “those documents have led to the deprivation of rights—both accused students denied fair process and victims denied an adequate resolution of their complaints.”²⁶ That same year, OCR released the 2017 Questions & Answers guidance document expressed approval of “informal means of resolution” for Title IX claims, thereby reversing prior policy banning its use.²⁷ On November 15, 2018, the administration released a Notice of Proposed Rulemaking, which stated that it is “important to take into account the needs of the parties involved in each case, some of whom may prefer not to go through a formal complaint process.”²⁸ On May 19, 2020, the rulemaking process resulted in an administrative rule allowing informal means of resolution for Title IX claims.²⁹

III. OVERVIEW OF DISPUTE SYSTEMS DESIGN

Given these changes, universities have been working through the challenge of determining how to revise their formal complaint handling procedures to comply with the new rules. They must decide whether they should design and integrate informal resolution mechanisms. Tackling this challenge means dealing with procedural complexities, substantive concerns and values, resource constraints, legal guidance and requirements, and the diverse views of stakeholders on and off campus.

The field of dispute system design (DSD), which uses dispute resolution components to help organizations, individuals, institutions, or states manage conflict, may provide a roadmap for assisting universities as they navigate OCR guidance to create new processes for Title IX complaints.³⁰ DSD is used in a variety of settings and for many different purposes, including organizational complaints and grievance processes, international investment

²⁶ See U.S. DEP’T EDUC., OFF. FOR C.R., *Dear Colleague Letter*, *supra* note 21, at 1–2, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf> [hereinafter *DCL 2017*].

²⁷ See U.S. DEP’T EDUC., OFF. FOR C.R., *supra* note 8, at 4.

²⁸ See NPRM, *supra* note 10, at 61,479.

²⁹ *Id.* See also Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026 (May 19, 2020) (to be codified at 34 C.F.R. § 106) [hereinafter *Final Rule*].

³⁰ See, e.g., sources cited *supra* note 19.

DESIGNING INFORMAL MECHANISMS

treaties,³¹ community health care planning,³² addressing and repairing national conflicts,³³ and child sexual abuse prevention strategies.³⁴ In these contexts, DSD provides a systematic approach for managing both *sui generis* conflict events (such as potential claims arising in the wake of a catastrophe) and classes of disputes that would benefit from a thoughtfully designed process.³⁵

Designers of dispute systems develop goal-driven processes built on a series of assessments of the following elements: goals, stakeholders, context and culture, processes and structure, and success and accountability.³⁶ First, designers are advised to examine the goals for the disputing system from the perspective of the decision-makers who engaged the designer, as well as to prioritize them to assist with making tradeoffs among goals down the line.³⁷ Next is the identification of stakeholders, the people and organizations who own, use, and will be impacted by changes to or creation of the new disputing system.³⁸ In cooperation with the decision-makers, the designer reviews the available resources, both financial and human, that may be brought to bear in a new design and implementation of a system. At this point, the designer begins investigating the organizational culture, which includes examining communication norms, how members deal with internal conflict, and how cultural norms and expectations may have an impact on the viability and success of any new system.³⁹ The designer also explores any existing

³¹ See Mariana Hernandez Crespo, *From Paper to People: Building Conflict Resolution Capacity and Frameworks for Sustainable Implementation of IIAs to Increase Investor-State Satisfaction*, in *INVESTOR-STATE DISPUTES: PREVENTION AND ALTERNATIVE TO ARBITRATION II*, at 55–62 (Susan D. Franck & Anna Joubin-Bret eds., 2011).

³² See generally Jacqueline N. Font-Guzmán, *Closing the Gap: Embedding Advance Care Planning in a Latino Community by Using a Culturally Sensitive Dispute Systems Design Approach*, 13 U. ST. THOMAS L. J. 192 (2017).

³³ See, e.g., Jacqueline Nolan-Haley, *Designing Systems for Achieving Justice After a Peace Agreement: Northern Ireland's Struggle With the Past*, 13 U. ST. THOMAS L. J. 315 (2017).

³⁴ See generally Lisa Blomgren Amsler, *The Dispute Resolver's Role Within a Dispute System Design: Justice, Accountability, and Impact*, 13 U. ST. THOMAS L. J. 168, 188 (2017); Timothy Hedeem, *Ombuds as Nomads? The Intersections of Dispute System Design and Identity*, 13 U. ST. THOMAS L. J. 233 (2017); Maureen A. Weston, *Tackling Abuse in Sport through Dispute System Design*, 13 U. ST. THOMAS L. J. 434 (2017).

³⁵ See, e.g., Jennifer W. Reynolds, *The Activist Plus: Dispute Systems Design and Social Activism*, 13 U. ST. THOMAS L. J. 334, 340–41 (2017) (“Whenever someone attempts to systematize, at any level of formality and permanence, a process for managing conflicts, preventing or dealing with disputes, or making decisions, that person is engaged in DSD.”).

³⁶ See Martinez, *supra* note 19, at 140–45.

³⁷ *Id.* at 140.

³⁸ *Id.* at 141.

³⁹ *Id.* at 142.

processes, both formal and informal, for handling the types of disputes at issue.⁴⁰ This exploration encompasses the incentives and disincentives for using existing formal or new informal processes.⁴¹ Once the designer knows what already exists, the designer works through possible designs for new systems and processes, keeping in mind resource considerations and the interests of stakeholders and decision-makers.⁴² The designer also develops strategies for implementation, including outreach and communication efforts, with an eye toward change management.⁴³ Finally, the designer considers the system's transparency, along with how to evaluate its success and provide for continuous improvement going forward.⁴⁴

Of primary importance in DSD is identifying and working with stakeholders for the system.⁴⁵ Working with stakeholders provides an invaluable opportunity to discover problems in the current situation, potential future solutions, and it can prove the system's value to skeptics and others who may resist change.⁴⁶ Although it is certainly possible to design and implement a system that takes no stakeholder feedback into account, other than that of the final decision-maker, the final product is likely to be flawed in several ways. For example, designers can focus on wrong or incomplete issues and questions, fail to address key concerns of the community, and ignore significant resource constraints.⁴⁷ Furthermore, if stakeholders are not consulted broadly and kept within the loop as design and implementation progress, decision-makers are likely to experience a number of implementation difficulties around user education and training, communication and outreach, and process delays.⁴⁸ Finally, systems created without stakeholder input are often met with resistance from those who administer and use the new system.⁴⁹ With this in mind, successful DSD practitioners seek as much input as possible from affected constituent groups, both as a matter of developing the right system and promoting the value of the system going forward.⁵⁰

⁴⁰ *Id.*

⁴¹ *Id.* at 140–44.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ See Art Hinshaw & Timothy Burr, *Foreclosure Mediation in Arizona*, 45 ARIZ. ST. L. J. 749, 757 (2013) (describing the benefits of meeting with stakeholders in designing a foreclosure mediation program).

⁴⁷ See Martinez, *supra* note 19, at 141.

⁴⁸ *Id.* at 141, 143.

⁴⁹ See, e.g., Constantino, *supra* note 19, at 207–08.

⁵⁰ See Hinshaw & Burr, *supra* note 46.

DESIGNING INFORMAL MECHANISMS

IV. TEN GUIDELINES FOR DESIGNING INFORMAL MECHANISMS UNDER TITLE IX

What follows are ten proposed guidelines for using a DSD framework to design informal mechanisms for claims of campus sexual misconduct. But before designing a system for informal processes in the Title IX context, the university first must have in place formal processes with clearly defined goals and parameters. Ideally, the existence of these processes would signal the university's meaningful institutional commitment to comply with Title IX. Only after formal processes are established can the university sensibly design informal processes intended to bolster the formal structures and to support campus community members who may be working through some of the most difficult and challenging experiences of their lives.

A. Guideline 1: Develop an institutional commitment, driven and established from the top.

As will be described in Guideline 3, universities have numerous and often competing goals. Avoiding liability and negative publicity, for instance, sometimes may conflict with maintaining transparency and preventing harm. As an example, in a situation involving a high-profile faculty member, an informal process might shield the institution from liability and negative publicity, but the circumstances of the case could suggest that a formal process might be needed to meet the institution's goals of complying with Title IX.

The Title IX officials who must navigate these difficult situations around competing goals needs institutional support and political cover within the university. As a practical matter, this means securing the buy-in and consistent support of the university's highest office, such as the President or Chancellor. This support must be publicly known and demonstrated financially to ensure the entire system's success. Without buy-in and support from the President/Chancellor, it is much more difficult to secure the needed resources and power necessary to create and administer the system. As Martinez notes, "[a] system's success will be substantially determined by the financial and human resources available at the design stage."⁵¹

To engage in a productive DSD process, sponsorship and support must be carefully secured and maintained. A top-down commitment can be cultivated in many ways. First, university leadership must be engaged in multiple conversations about goals in order to determine what the system's decision-makers want to accomplish.⁵² For example, creating a formal charge and grant of authority to a DSD committee is an important means for

⁵¹ See Martinez, *supra* note 19, at 143.

⁵² *Id.*

communicating broadly to the campus community about the importance of the effort. The charge can take the form of a memorandum describing the goals of both the overarching system and the process for its creation. Top-down support is also evidenced by allocating resources, including money, staff time, and designated positions. Finally, the President or Chancellor can signal support by reiterating support for the effort multiple times through various media. Designers should schedule meetings between the committee and the university's leadership to provide an update on progress, which then can be reported more broadly to the campus community. Such regular meetings can help communicate the university's commitment to the initiative and can help identify and correct potential problems or misunderstandings as soon as possible.

B. Guideline 2: Assess the current situation.

After securing institutional commitment for informal Title IX processes, the designer next must assess the university's current situation, with special focus on existing formal measures provided by the university for sexual assault and misconduct. How do harmed students find out about what resources and support are available? Does the institution administer a climate assessment and pay attention to what it says? Are there feedback mechanisms built into the existing procedures to determine satisfaction rates and gather information for improvement? Campus climate surveys, structured interviews with departments and individuals, and other feedback instrument that provides data for evaluating the current status of the formal system will help determine: whether people know which processes and support mechanisms exist; whether potential users are hesitant to come forward and use the formal procedures; how usable and helpful the formal procedures are and are perceived to be; and what aspects potential users would like to see incorporated into future formal and/or informal processes. It may be helpful to compare the results with other campus climate surveys to gauge the assessed system with national norms.⁵³

⁵³ See ASS'N OF AM. UNIVS., CAMPUS CLIMATE SURVEY: 2019 REPORT EXECUTIVE SUMMARY (Jan. 7, 2020), <https://www.aau.edu/key-issues/campus-climate-and-safety/aau-campus-climate-survey-2019>. In 2015 the survey was administered at 27 institutions of Higher Education (IHE), which increased to 55 IHE in 2017 and then to 33 IHE in 2019. See BUREAU JUST. STATS., DRAFT INSTRUMENT FOR MEASURING CAMPUS CLIMATE RELATED TO SEXUAL ASSAULT (2014), https://www.knowyourix.org/wp-content/uploads/2017/01/RevisedInstrumentModules_1_21_16_cleanCombined_psg.pdf; see WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, CLIMATE SURVEYS: USEFUL TOOLS TO HELP COLLEGES AND UNIVERSITIES IN THEIR EFFORTS TO REDUCE AND PREVENT SEXUAL ASSAULT (Apr. 2014), <https://www.knowyourix.org/wp-content/uploads/2017/01/ovw-climate-survey.508.pdf>; SEE BEA HANSON, OFF. ON VIOLENCE AGAINST WOMEN, BEST PRACTICES: CAMPUS CLIMATE SURVEYS (Oct. 14, 2016), <https://www.justice.gov/archives/ovw/blog/best-practices-campus-climate->

DESIGNING INFORMAL MECHANISMS

In addition to providing useful information about institutional culture, climate surveys and structured interviews give important context to the data reported by the Title IX office. High incidence rates, for example, may be evidence of serious problems within the community and/or they may be evidence of greater openness and success in reporting. Similarly, low incidence rates could be evidence of a functional, healthy community or of widespread process confusion or institutionalized fear. Without climate surveys, it is impossible to know which conclusion is correct. If survey results determine that many believe that reports may not be taken seriously,⁵⁴ the university must work hard to change that view to encourage people to make reports. Furthermore, the survey may help determine how perceived bias, whether implicit, explicit, or based in race or sexual identity, has an impact on the risk of sexual assault or of receiving biased treatment by administrators.⁵⁵

Understanding how the formal system is being used or not used can provide clues as what improvements are needed in the formal processes as well as what is needed in an informal system. If the survey suggests that many students are reluctant to use the formal processes because it is adversarial or may lead to suspension or expulsion, designers can be thoughtful about looking for informal measures that could encourage less confrontational conversations and more restorative measures.

Note that assessing the current system and the university culture through surveys and other information-gathering methods is helpful not only at the beginning of the design process, but throughout and after implementation. Key to DSD practice is examining the success, accountability, and learning of the system.⁵⁶ Climate surveys and other feedback mechanisms provide an essential baseline for monitoring progress and evaluating whether the system has delivered on its goals. As one expert notes:

Evaluation, including independent monitoring and deliberate learning, is critical to the credibility and accountability of [the newly designed system]. Success can be

surveys. In 2014, the Office on Violence Against Women issued best practices for campus climate surveys, which included: 1) Maintaining respondent confidentiality and anonymity; 2) Using the data to create a long-term action plan; 3) Allowing the survey to be completed in an average of 15 minutes using multiple devices; 4) Providing incentives of \$20-25 to complete the survey in order to boost response rates; and 5) Collecting data about the specific nature of what individuals experienced and the context in which it occurred.

⁵⁴ See *Setting a Course*, *supra* note 7, at 22.

⁵⁵ *Id.* (explaining that universities are unable to remedy problems they do not know about, and multiple reporting options are needed so survivors, students, faculty, and staff can all make informed reporting decisions); see also Coker, *supra* note 13, at 167–68.

⁵⁶ See Martinez, *supra* note 19, at 144.

defined not only by whether the system achieves its intended goals, but also by whether it achieves broader societal goals, including fairness and justice.⁵⁷

Starting with a robust campus climate survey and other information-gathering strategies can identify problems and provide a platform for openly and honestly determining where improvements need to be made and, after implementation of the new system, whether those improvements have happened.

C. Guideline 3: Understand and manage competing goals.

Common to all Title IX systems are competing and sometimes incompatible goals. The primary function of universities is education, which can be in tension with their Title IX responsibilities around investigation and punishment. This tension may lead to other conflicts around collecting and reporting data. As Nancy Chi Cantelupo argued:

[S]chools that ignore the problem have fewer reports and look more safe, whereas the schools that encourage victim reporting have more reports and look less safe.... [I]nstitutions must decide whether to seek to end the violence by encouraging victim reporting and by otherwise openly acknowledging the problem, thereby risking developing a reputation as a dangerous campus, or to ignore the problem, thus discouraging victim reporting either passively or actively and appearing to be less dangerous.⁵⁸

From a university's perspective there are multiple competing Title IX goals,⁵⁹ including:

- Providing a fair and just process
- Determining the truth
- Punishing misconduct
- Protecting against liability
- Maintaining confidentiality
- Educating the participants and the community
- Ensuring a positive educational and social environment

⁵⁷ *Id.*

⁵⁸ See Nancy Chi Cantelupo, "Decriminalizing" Campus Institutional Responses to Peer Sexual Violence, 38 J.C. & U.L. 481, 520 (2012).

⁵⁹ See, e.g., Brian Pappas, *Rules versus relationships and campus sexual misconduct*, 22 INT'L J. ORG. THEORY & BEHAV. 3, 226–41 (2019).

DESIGNING INFORMAL MECHANISMS

- Articulating shared values (which may themselves be in tension)
- Reassuring parents, alumni, donors, and other external community members
- Doing all of the above without revictimizing or victimizing participants

These often-interrelated goals push and pull against each other, resulting in complex tradeoffs for university administrators. And, of course, informal processes have their own set of goals, such as the following:

- Voice and Procedural Justice
- Process control and choice
- Self-determination regarding the outcome
- Healing and restorative justice
- Reintegration into the community

Adding these to the Title IX mix is no easy task. The tension between individual, organizational, and community interests complicates the operationalization of formal and informal goals in complementary systems. To make intelligent design decisions, the university community must understand three main areas where goals are commonly in conflict.

First, from a university perspective, designers must determine whether the primary goal is to prevent and address misconduct or to protect against liability.⁶⁰ Ideally the system would do both, but universities may emphasize these goals differently.⁶¹ Systems with strong focus on protection against

⁶⁰ See e.g., Catharine A. MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 YALE L. J. 2038, 2067–85 (2016) (discussing Title IX’s legal liability standard in practice); Erin E. Buzuvis, *Title IX and Official Policy Liability: Maximizing the Law’s Potential to Hold Education Institutions Accountable for their Responses to Sexual Misconduct*, 73 OKLA. L. REV. 35, 38–46 (2020) (discussing legal standards for institutional civil liability); A.J. Bolan, *Deliberate Indifference: Why Universities Must Do More to Protect Students from Sexual Assault*, 86 GEO. WASH. L. REV. 804, 826–37 (2018) (proposing legislation to decrease peer sexual harassment on university campuses).

⁶¹ See Erin Collins, *The Criminalization of Title IX*, 13 OHIO ST. J. CRIM. L. 365, 375–76 (2016) (noting the dual motivations of student safety and civil liability); Zoe Ridolfi-Starr, *Transformation Requires Transparency: Critical Policy Reforms to Advance Campus Sexual Violence Response*, 125 YALE L. J. 2156, 2162 n. 17 (2016) (describing the juxtaposition of Columbia University’s stated zero tolerance policy for gender violence and “demonstrated departures from those commitments.”); Emma Ellman-Golan, *Saving Title IX: Designing More Equitable and Efficient Investigation Procedures*, 116 MICH. L. REV. 155, 175 (2017) (noting different views of Title IX cases – civil disputes or quasi-criminal proceedings); Sarah Rudolph Cole, *Mediate Your Response: Reconciling the*

liability, for example, may focus more on well-developed formal processes and communications that demonstrate the university's zero-tolerance stance when it comes to reported cases.⁶² Systems that are more geared to preventing and addressing misconduct, by contrast, may focus more on training and outreach, with an emphasis on reporting and providing multiple avenues (formal and informal) for dealing with Title IX cases.⁶³ Although these sets of goals are not mutually exclusive, of course, they may lead to differences in how universities choose to invest in design and implementation of Title IX systems.

Second, the university must balance prioritizing survivor self-determination and the university's interest in confidentiality with the community's need for transparency and trustworthy procedures. Ensuring survivor confidentiality and providing control over what happens with the complaint both encourage reporting.⁶⁴ Additionally, ensuring confidentiality often meets the institution's goal of avoiding the negative publicity that can result from difficult formal processes, especially in cases that end up in litigation.⁶⁵ Universities have an interest in setting clear norms, deterring future misconduct, and holding perpetrators accountable through investigation, hearing, and discipline.⁶⁶ Well-executed formal procedures provide a clear message to the university community that misconduct will not be tolerated.⁶⁷ Confidentiality, however, can also create an incentive for universities to pressure survivors both implicitly and explicitly to use informal mechanisms that will minimize reputational harm while meeting a survivor's need for privacy. This pressure may be unhelpful or even harmful depending on the situation, and certainly cuts against goals around survivor autonomy and choice. Moreover, confidentiality may make it harder for members of the campus community to have crucial information about campus safety.

Benefits and Drawbacks of the New Title IX Regulations 36 OHIO ST. J. DISP. RES. 5 (forthcoming Sept. 2021).

⁶² See Collins, *supra* note 61, at 378 (discussing the emphasis on adjudicatory mechanisms in Title IX hearings).

⁶³ See Jeannie Suk Gersen, *How Concerning Are the Trump Administration's New Title IX Regulations?*, THE NEW YORKER (May 16, 2020), www.newyorker.com/news/our-columnists/how-concerning-are-the-trump-administrations-new-title-ix-regulations (stating that "[M]any victims who might not report sexual misconduct, owing to a reluctance to unleash a lengthy investigation or a harsh penalty, may be more willing to seek the school's help because of the availability of an informal option. And many accused students, who might fight the acceptance of responsibility in an adversarial or punitive framework, may be more willing to give a desired apology and make amends.")

⁶⁴ See *Out of the Shadows*, *supra* note 7, at 96–97.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

DESIGNING INFORMAL MECHANISMS

Third, there is a tension between prioritizing Title IX rights for survivors and affording procedural due process rights for those accused during the disciplinary process.⁶⁸ Law-like procedures, such as providing access to counsel, allowing direct cross-examination, and utilizing a clear and convincing evidentiary standard confer legitimacy, prevent liability, and protect individual rights. However, these procedures also present the risk of revictimizing survivors, discouraging reporting, increasing OCR complaints, and leading to negative publicity for the university.⁶⁹ Further, using law-like methods like evidentiary standards and direct confrontation of witnesses transforms educational institutions into judicial bodies even though they are not well equipped to mimic the processes and procedures of judicial bodies.⁷⁰ A university is an educative and non-adversarial community, and imposing mandatory adversarial processes is in conflict with the educational goals of the institution.⁷¹ Mimicking courtrooms and formalizing dispute structures discourage students from making reports and using the system, even as those same safeguards help protect the parties.⁷² Developing a system that successfully addresses the needs of both survivors and alleged perpetrators has proven an incredibly difficult challenge for higher education.

In addition to managing these three tensions, universities must make the preliminary decision around whether they want to focus only on cases that rise to the level of offenses under the law or if they want to take a more holistic approach to dealing with the multilayered problem of sexual misconduct, assault, and violence on campus. In making that determination, as in managing all decisions around competing goals, universities must think through which goals have the highest priority and how tradeoffs will be made among those goals is challenging.

D. *Guideline 4: Create a collaborative network of expertise.*

Similar to competing goals at the university, administrative professionals sometimes may find themselves at odds as they exert expertise and domain over their areas of specialization. In an uncertain environment, professionals often prevent rival occupations from operating in their area of authority.⁷³ Title IX Coordinators, for example, often hold multiple

⁶⁸ See generally Naomi M. Mann, *Taming Title IX Tensions*, 20 U. PA. J. CONST. L. 631, 635 (2018).

⁶⁹ See *Out of the Shadows*, *supra* note 7 at 96–97; see Harris & Johnson, *supra* note 24, at 62; see also Stephen A. Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49 (2013).

⁷⁰ See Mann, *supra* note 68, at 663.

⁷¹ *Id.*

⁷² See Mann, *supra* note 68, at 665.

⁷³ See generally Frank Dobbin & Erin L. Kelly, *How to Stop Harassment: Professional Construction of Legal Compliance in Organizations*, 112 AM. J. SOC. 1203

organizational roles (in human resources, student affairs, or compliance) with significant responsibilities, even though they usually lack financial and human resources and typically have fewer than three years of experience.⁷⁴ As a result, Title IX Coordinators often do not have the institutional influence necessary to play their roles to the fullest, leading to competition from lawyers and human resources professionals. Unfortunately, this competition may end up undermining the collective effort to achieve compliance.⁷⁵ To build the institutional influence necessary for effectuating compliance and to avoid inefficient competition among professionals, Title IX administrators must build collaborative organizational teams.⁷⁶

Once a charge is developed and communicated with support from the university leadership, administrators may begin staffing the DSD committee with a broad group of campus experts.⁷⁷ The committee should model inclusivity while it seeks to understand the institution's Title IX context.⁷⁸ Representatives of a variety of university units—Human Resources, Title IX, Diversity, Equal Opportunity, General Counsel, and Student Affairs, for example—should be involved, as they are essential for handling complaints. Any individuals who commonly first receive reports, like faculty, staff, graduate students, and on-campus health care providers, should also be represented.⁷⁹ Students also must be represented, and drawing on groups like residential life staff and student government can be a productive way to get students involved. As Martinez states, “The more stakeholders, including

(2007) (describing how human resources professions, in determining the definition of Title VII, exerted jurisdiction over lawyers by presenting and winning approval of managerial solutions to address questions of liability and enforcement).

⁷⁴ Brian Pappas, *Competition and Collaboration: Title IX Coordinators and the barriers to achieving educational equity*, 21 INT'L J. DISCRIM. & THE LAW 94, 103–05 (2021).

⁷⁵ *Id.*, p. 9.

⁷⁶ See generally Melissa A. Valentine & Amy C. Edmonson, *Team Scaffolds: How Meso-Level Structures Enable Role-Based Coordination in Temporary Groups*, 26 ORG. SCI. 405 (2015); see Gerardo A. Okhuysen & Beth A. Bechky, *Coordination in Organizations: An Integrative Perspective*, 3 ACAD. MGMT. ANNALS 463 (2009); see generally Christopher Wright, *Reinventing Human Resource Management: Business Partners, Internal Consultants, and the Limits to Professionalization*, 61 HUM. REL. 1063 (2008).

⁷⁷ See *Title IX and Gender Equity: Title IX Oversight and Advisory Board*, BROWN UNIV., <https://www.brown.edu/about/administration/title-ix/charge> (last visited Sept. 3, 2021) (describing the creation of university Title IX committee with various members of the campus community with different areas of expertise). Frequently ombuds and student conduct officers have specific expertise in conflict management and the use of restorative justice. *Id.*

⁷⁸ See Amsler, *supra* note 34, at 168.

⁷⁹ See *Setting a Course*, *supra* note 7, at 23.

DESIGNING INFORMAL MECHANISMS

users, are involved in the dispute system's design and continuous improvement, the more likely the system is to be sustainable in the long term."⁸⁰ Finally, individuals with expertise in conflict management, restorative justice, and trauma-informed procedures should be included.

The resulting committee should first analyze their respective interests, relationships, relative power, and how they are represented.⁸¹ The group should also decide on the procedures being used for decision-making, whether it be by majority-rule or by consensus. By setting clear expectations, convening a broad group of stakeholders, and conducting the necessary conversations about decision-making, the group is well positioned to both assess the current situation and manage the demands of competing goals.

E. Guideline 5: Design informal processes, keeping in mind context and goals.

Informal resolution processes are any method or combination of methods that are outside conventional formal procedures like grievances, student conduct hearings, or litigation. Parties engaged in informal processes work through issues together in an attempt to reach mutually satisfactory resolutions. Generally speaking, informal processes are characterized by three elements:

- informed consent, in that all participants should participate willingly and without compulsion;
- impartiality, in that any process guides involved in the work are not biased toward or against any participants; and
- self-determination, in that the participants exercise autonomy in deciding what resolution requires.⁸²

Informal processes are useful in many dispute and decision-making contexts, because they empower participants to address their concerns in a manner that is responsive to their preferences and values.⁸³

In the Title IX context, informal processes may be helpful in the following situations:

⁸⁰ See Martinez, *supra* note 19, at 141.

⁸¹ *Id.*

⁸² American Arbitration Association et. al., *Model Standards of Conduct for Mediators* (Standards II and V), A.B.A. (Sept. 2005), https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/dispute_resolution/model_standards_conduct_april2007.pdf.

⁸³ See e.g., Carrie Menkel Meadow, *Institutionalizing ADR: Clashing Values in DISCUSSIONS IN DISPUTE RESOLUTION: THE FOUNDATIONAL ARTICLES 392* (Art Hinshaw et al. eds., 2021); Robert A. Baruch Bush, "What Do We Need a Mediator For?": *Mediation's "Value-Added" for Negotiators*, 12 OHIO ST. J. DISP. RES. 1, 29–33 (1996) (discussing party empowerment).

- The complainant does not want an investigation,
- The complainant is not seeking discipline,
- A formal investigation would not result in a satisfactory solution (for example, when the reports of the misconduct are made anonymously),
- The situation itself does not represent a violation of policy or law but if left unaddressed could lead to future violations,
- The situation itself does not represent a violation of policy or law but is causing the complainant or others grief, or
- The situation would benefit from more cooperative or educational approaches.

Deciding on how informal and formal processes intersect within the larger Title IX system requires careful consideration of two different operating contexts: the process itself and the larger system that the process fits into.

1. *DESIGNING THE PROCESS*

Designing informal processes requires thinking through a host of policy concerns for decision-makers and stakeholders alike. After all, inherent in the decision to allow informal procedures in Title IX cases is the idea that not all complaints are five-alarm fires that require formal processes and that the current or prevalent reporting/processing systems have negative consequences on participants. Thus, at least some complaints can take an off-ramp to procedures designed to provide self-determination and control to survivors. But who decides which cases should take the off-ramp? Should every complaint be subject to informal procedures if that is what the victim wants? What if the victim has a change of mind mid-stream? Is opting back into a formal process an option? Can the university create a system where an official reviews the complaint first to determine if mediation should be an option? Could that individual divert claims based on the available remedies for the complained about conduct?⁸⁴ Each of these questions must be answered in order to design an informal system.⁸⁵

When designing informal resolution options, the Title IX Coordinator should take into account recommendations from campus experts and potential system users on all aspects of informal process design. These aspects include issues of timing, location, the role of advisors/companions, the role and responsibilities of third-party neutrals, default ground rules, confidentiality, as

⁸⁴ See Mann, *supra* note 68, at 668–69.

⁸⁵ See discussion of Guideline Six, *infra* Section IV.F.

DESIGNING INFORMAL MECHANISMS

well as expectations around documentation,⁸⁶ and updates from the Title IX office.⁸⁷ Policies should be created to advise participants that the informal process is voluntary and can be ended by either party (or perhaps even the Title IX Coordinator or the third-party neutral) at any time.

What kinds of informal process components might universities use in the Title IX context? Many alternative dispute resolution (ADR) mechanisms exist that might be useful in informal resolution processes.⁸⁸ Mediation, for example, is a confidential process in which a third-party neutral guides disputing parties through a discussion in an attempt to reach an agreement or resolution.⁸⁹ Although mediation offers an opportunity for an honest conversation between the parties, mediation does not have to occur with both parties present as the mediator can hold either a caucus-only mediation or a mediation solely on zoom where the two sides never meet.⁹⁰ Mediators can also caucus privately with either side when things become emotionally charged or if the survivor no longer wants to be in the same room with the offender.⁹¹

Restorative Justice (RJ) is another ADR mechanism that may be applicable in informal Title IX processes. RJ processes focus on individual harm and responsibility while creating a space for addressing larger systemic causes and community means of repair.⁹² RJ practices include peace circles, victim-offender dialogue, victim impact panels, and restorative conferences,⁹³ all of which contain principles of inclusive decision making, active

⁸⁶ Possible documentation includes the initial request for informal resolution; the determination by the Title IX Coordinator that informal process is appropriate given the circumstances of the case; any communications or notices to the parties; written plan; and any follow-up or monitoring provisions agreed upon by the parties. For an example, see *Informal Resolution of Complaints Involving Student Respondents*, Fresno Pacific University: University Handbooks, <https://handbook.fresno.edu/title-ix/policy-procedures/table-contents/informal-resolution-complaints-involving-student> (last visited Sept. 3, 2021).

⁸⁷ For example, if the Title IX Coordinator needs to approve any agreement coming out of the informal process, this needs to be built into the process and conveyed to the participants.

⁸⁸ See Adam Laytham, *Mediation and Misconduct: A Better Way to Resolve Title IX Disputes*, 2020 J. DISP. RESOL. 191, 197 (2020).

⁸⁹ See generally DWIGHT GOLANN, *MEDIATING LEGAL DISPUTES: EFFECTIVE TECHNIQUES TO RESOLVE CASES* (2d ed. 2021).

⁹⁰ *Id.*; see also DWIGHT GOLANN, *I Sometimes Catch Myself Looking Angry or Tired ...': The Impact of Mediating by Zoom*, 39 ALTS. TO HIGH COST LITIG. 73 (2021).

⁹¹ See, e.g., Charles B. Craver, *Using Mediation to Resolve Community Disputes*, 48 WASH. U. J. L. POL'Y 231, 235–36 (2015).

⁹² See Coker, *supra* note 13, at 187–89; see generally HOWARD ZEHR, *CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE* (3d ed. 2005).

⁹³ See Coker, *supra* note 13, at 190.

accountability, repair of harm, and rebuilding trust and safety.⁹⁴ If a restorative process is successful, a reparative plan is created that can include compensation and rehabilitative measures directed at both the individuals and the broader community context.⁹⁵ RJ conferencing has been used successfully in sexual misconduct cases, and many RJ models now include victim-protective measures.⁹⁶ Mediation and RJ are just two examples of informal process mechanisms that may be useful in the Title IX context. Table 1 contains a number of examples of informal process components that may be used alone or in combination.

Table 1. Examples of Informal Process Components.⁹⁷

Process	Description	Features
Dialogue	Parties meet and talk through issues of concern (e.g., getting a coffee and talking about what happened, how it affected them, and what they can do going forward).	Private, local, informal. Probably more suited for people of same or close rank. May prevent Respondent from

⁹⁴ See Katie Vail, Comment, *The Failings of Title IX for Survivors of Sexual Violence: Utilizing Restorative Justice on College Campuses*, 94 WASH. L. REV. 2085, 2107–08 (2019); 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/campusrj/documents/Campus_PRISM_Report_2016.pdf [<https://perma.cc/YWF5-STWF>] at page 9–15.

⁹⁵ See Coker, *supra* note 13, at 190–93.

⁹⁶ *Id.* Many universities now choose to use RJ in their disciplinary processes and RJ conferencing can be designed in response to gender-based misconduct. See Amy Sillanpa, *About Restorative Justice*, CARLETON U. (July 9, 2019), <https://apps.carleton.edu/campus/justice/about/> [<https://perma.cc/YM7X-8NWK>]; *About Restorative Justice*, SKIDMORE COLLEGE, <https://www.skidmore.edu/campusrj/aboutrestorativejustice.php> [<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 & Williamsen, *supra* note 16, 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]; Katherine Mangan, *Why More Colleges are Trying Restorative Justice in Sex-Assault Cases*, CHRON. HIGHER EDUC. (Sept. 17, 2018), <https://www.skidmore.edu/campusrj/karp-vitae-files/media/Why-More-Colleges-Are-Trying-Restorative-Justice-in-Sex-Assault-Cases.pdf> [<https://perma.cc/4LZG-XB37>]; Vail, *supra* note 94, at 2107.

⁹⁷ Jen Reynolds developed this table when serving as the interim ombudsperson at the University of Oregon in 2016.

DESIGNING INFORMAL MECHANISMS

		<p>becoming as defensive. To work well, both parties must have some level of maturity and willingness to listen to the other.</p>
Coached dialogue	<p>Same as dialogue, but each party meets with a neutral third-party (such as the Ombudsperson) in advance to talk through purposes and goals of the meeting, and to ventilate any unhelpful emotions. The coach can also help the person practice ways to say certain difficult things or to respond to difficult comments.</p>	<p>Private, local, informal. Again, suited for people who are the same or close to same rank.</p> <p>Another advantage of one-on-one dialogue is that it empowers parties to resolve their issues on their own, without resorting to institutional machinery.</p>
Facilitated dialogue	<p>Parties meet and talk through issues of concern with a third-party neutral guiding the conversation. Third-party neutral will meet in advance with each party individually to help think through goals, purposes, and any concerns about the meeting.</p>	<p>Private, local, informal, but the presence of the neutral necessarily reduces the overall autonomy of the parties. However, the neutral can also help reframe the exchange in constructive ways, thus modeling better communication and making it easier for the parties to reach resolution. Good fit if either party doesn't feel comfortable alone in the dialogue.</p>

Collaborative dialogue	<p>Parties and their advisors (who are not necessarily their friends – more likely they will be appointed advisors) meet and talk through issues of concern. This approach is based on collaborative law, in which the lawyers model cooperative behavior for their clients. The advisors help the parties talk through the issues, acknowledge harms, and generate options. No third-party neutral is necessary, but it’s an option if facilitation would be helpful.</p>	<p>Local and informal; still private (but obviously the more people that get involved, the less private things are, especially if these advisors are strangers). This is a good option for people who aren’t able to advocate for themselves. The group setting creates more dynamism and possibilities for positive change, but you need excellent advisors to make this option work well.</p>
Mediation	<p>Parties meet and talk through issues of concern with a third-party neutral present. This is functionally the same thing as facilitated dialogue except that mediation has additional confidentiality protections that people may desire. And some people may want something that sounds more formal than facilitated dialogue.</p> <p>One permutation is allowing advisors (appointed by Coordinator or requested by parties) to attend also. This adds some complexity because the role of the advisors needs to be negotiated before the mediation starts. But it could be helpful to parties who are not skilled self-advocates.</p>	<p>Same as facilitated dialogue: private, local, informal, but the presence of the neutral necessarily reduces the overall autonomy of the parties. However, the neutral can also help reframe the exchange in constructive ways, thus modeling better communication and making it easier for the parties to reach resolution. Good fit if either party doesn’t feel comfortable alone in the dialogue.</p>

DESIGNING INFORMAL MECHANISMS

Restorative justice	Set of practices (drawing on the processes listed above) designed to allow people to talk specifically about how and why they were harmed (or harmed someone), and then jointly come up with an appropriate remedy or restitution. Often used in a multi-party context (in which the harm is felt by others).	Restorative justice is very much like dialogue, mediation, etc., but because of the community dimension may not be as private. It's not a set of all-new practices, however. That said, the restorative justice frame may resonate with the parties, and so could be used for that reason.
---------------------	---	--

Note that one benefit of informal processes is that they can offer more diverse choices and process possibilities, which can improve reporting and resolution. With this in mind, universities should develop a menu of informal options that focuses on the diverse goals of the stakeholders and the community's needs.⁹⁸

2. FITTING THE PROCESS INTO THE SYSTEM

Regarding the larger context, the Title IX Coordinator must think through how to position the informal process within and/or alongside the formal process. Here the designer must consider three important elements: intake, assessment, and exit points. Intake refers to the way parties decide on whether to use an informal process and which one. How do they find out about the process, and how will the Title IX Coordinator ensure that everyone agrees to participate willingly and with full information? Informal processes are most effective when participants engage wholeheartedly and in good faith, and the intake stage is the opportunity to ensure that everyone involved has full information before proceeding. While the parties are deciding whether to undertake an informal resolution process, the Title IX Coordinator must assess whether the process is appropriate for the case. Not every situation is suited for informal resolution, and coming up with factors to aid in assessment is a key aspect of process design.⁹⁹ And finally, system designers must think about

⁹⁸ See Martinez, *supra* note 19, at 142–43. See also Laytham, *supra* note 88, at 197, 204; Deborah Tuerkheimer, *Beyond #METOO*, 94 N.Y.U. L. REV. 1146, 1152–53 (2019); Carrie Menkel-Meadow, *Process Pluralism in Restorative/Transitional Justice*, 3 INT'L J. CONFLICT ENGAGEMENT & RESOL. 1 (2015).

⁹⁹ Title IX Coordinators must consult with their colleagues and the law to determine what kinds of cases they believe are appropriate for informal processes. Cases of sexual

exit points, ways to discontinue the informal process if it becomes ineffective or harmful. Who can call off the process and under what circumstances?¹⁰⁰ What happens when an informal process is discontinued? In some cases, the parties may go their separate ways; in others, the formal process may be activated. Putting together a flowchart of these system-level decisions will be helpful in figuring out how to implement the institution's goals when designing informal processes for Title IX cases.

F. *Guideline 6: Keep the formal and informal processes separate.*

To avoid a one-size-fits-all approach to responding to and preventing sexual misconduct, keeping formal and informal processes distinct is crucial.¹⁰¹ Keeping professional and process separation between the formal and informal processes promotes clarity in terms of user choice and system operations and balances the tensions inherent in having two distinct systems. Each process must be designed to do what is intended and do it well. Without separation, each system provides less distinct and lower quality services due to inherent tradeoffs between the formal and informal.

Why do the systems not work properly unless distinct? One problem is “procedural convergence,” a phenomenon where each system borrows from one another, typically to cure each other's perceived failings.¹⁰² When procedural convergence occurs, informal process administrators seek to enforce the formal rules and the formal process administrators informalize their processes in order to meet individuals' preferences.¹⁰³ For example, the formal system might violate its confidentiality norms in order to encourage greater reporting. Or the informal system might seek to enforce the formal system's documentation requirements, which could discourage reporters from coming forward. Informal procedures should be designed to provide self-determination and control, not to avoid formal procedures or to provide a different means for investigating allegations.¹⁰⁴

assault or sexual violence are typically not considered appropriate for informal resolution. In addition, informal processes should not be used to coerce or threaten and may be inadvisable in situations involving substantial imbalance of power between the parties.

¹⁰⁰ See discussion of Guideline Six, *infra* Section IV.F.

¹⁰¹ See generally Kevin Swartout & Andra Teten Tharp, *Rethinking Serial Perpetration of Sexual Violence: Implications for Prevention*, PREVENTCONNECT (Sept. 15, 2015), http://www.preventconnect.org/wp-content/uploads/2015/08/Serial-Perpetrator-9-14-15_KS.compressed.pdf.

¹⁰² See Brian A. Pappas, *Procedural Convergence*, 55 L. & SOC. REV. 381 (2021).

¹⁰³ *Id.*

¹⁰⁴ See *Setting a Course*, *supra* note 7, at 22. See also Mann, *supra* note 68, at 668–69 (“the system should be calibrated to the remedies. It should provide enough process such

DESIGNING INFORMAL MECHANISMS

To maintain process separation, the systems must be designed with specific checkpoints to ensure coordination. As a starting place, the new Title IX rules authorize informal systems and provide guidelines for how the systems should interrelate. For example, informal resolution may not be offered unless a formal complaint is filed.¹⁰⁵ There is good reason for this requirement – the Title IX Coordinator should review each situation to make sure it is appropriate for informal resolution. Additionally, a formal complaint ensures institutions are not pressuring parties to use the informal process in order to reduce the number of formal complaints.

Universities have discretion to offer informal resolution options as long as “both parties give voluntary, informed, written consent to attempt informal resolution” and the person facilitating the informal resolution “must be well trained.”¹⁰⁶ No school may require a waiver of the right to investigation and adjudication as a condition of enrollment, employment, or any other right,¹⁰⁷ and no school may require participation in informal resolution.¹⁰⁸ If informal resolution is attempted, either side may withdraw and resume the formal grievance process at any time prior to reaching a resolution.¹⁰⁹ And informal resolution is not possible for allegations of employee sexual harassment against a student.¹¹⁰

These guidelines should assist in keeping the unique and distinct roles of each system. Fighting against procedural convergence is a constant struggle, and maintaining vigilance on the issue is critical for maximizing the entire system’s effectiveness and quality.

G. *Guideline 7: Consider confidentiality carefully.*

Confidentiality is a key feature of some informal processes, particularly mediation, with state statutes and court rules declaring the utmost confidentiality as a means to encourage open communication without fear of reprisal in subsequent proceedings.¹¹¹ Likewise, confidentiality is an essential

that those involved are fairly heard, but not so much formality that it alters the underlying educational context or impairs the institution’s ability to focus on its core functions.”).

¹⁰⁵ See SUMMARY OF MAJOR PROVISIONS, *supra* note 12, at 8.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ See, e.g., National Conference of Commissioners on Uniform State Laws, Uniform Mediation Act (UMA) (2003). From Prefatory Note 1: “Candor during mediation is encouraged by maintaining the parties’ and mediators’ expectations regarding confidentiality of mediation communications...Virtually all state legislatures have recognized the necessity of protecting mediation confidentiality to encourage the effective use of mediation to resolve disputes.”

aspect of Title IX, yet there are distinct differences in confidentiality's contours when compared to typical mediation proceedings. As a result, it is important for universities to consider confidentiality carefully.

In general, the Department of Education requires universities to disclose the confidentiality consequences of an informal process, including what records will be maintained, what information will be or may not be shared, and any confidentiality requirements of entering a final agreement.¹¹² Universities also must provide both parties with information about what records could be created in the informal process that could be shared in a subsequent formal process should one go forward.¹¹³ For example, participants will want to know whether any resolution reached will be included in a disciplinary record or on an individual's transcript, as well as the consequences of failing to comply with an agreement.¹¹⁴ And the DSD Committee should consult with the university's general counsel to ensure compliance with all relevant laws and policies around confidentiality.

A different aspect of confidentiality arises when considering the reporting of Title IX violations. Both confidential and non-confidential reporting mechanisms are necessary in order to encourage complaints. Providing survivors with promises of confidentiality encourages survivors to make a formal report - it satisfies a desire for privacy, protects against a fear of being forced to participate in a formal procedure. Additionally, confidentiality encourages reporting when there are concerns about potential retaliation.¹¹⁵

Mandatory reporting is the primary non-confidential system for encouraging reporting. Mandatory reporting makes the reporting of Title IX violations a condition of continued employment at the university.¹¹⁶ Mandatory reporting has drawbacks as it can limit where and to whom a survivor may turn for advice or support.¹¹⁷ When all employees are mandatory reporters, it weakens survivors' autonomy, undermining their sense of

¹¹² See Final Rule, *supra* note 29, at 30404, 30578.

¹¹³ *Id.* at 30402.

¹¹⁴ See Orcutt et. al., *supra* note 7, at 34–35.

¹¹⁵ See Annaleigh E. Curtis, *Ignorance, Intent, and Ideology: Retaliation in Title IX*, 40 HARV. J. L. & GENDER 333 (2017) (demonstrating the ways retaliation can occur and not be punished).

¹¹⁶ See *Setting a Course*, *supra* note 7, at 22; see also *Out of the Shadows*, *supra* note 7, at 144. In a study of 150 campuses in 2017, 69% of universities designated all employees as mandatory reporters and another 19% designated nearly all employees but exempted only a few as confidential). Kathryn J. Holland et al., *Compelled Disclosure of College Sexual Assault*, AM. PSYCH. 10 (2017), at <http://dynamic.uoregon.edu/jjf/articles/hcfaccepted2017.pdf>.

¹¹⁷ See *Setting a Course*, *supra* note 7, at 22; see also *Out of the Shadows*, *supra* note 7, at 144.

DESIGNING INFORMAL MECHANISMS

institutional support and perpetuating further psychological and physical harm.¹¹⁸ It also deters some survivors from using university processes and from seeking the help they need.¹¹⁹ A well-functioning informal disputing system is essential in a mandatory reporting environment as it returns some self-determination to survivors by providing an option beyond the singular feature of a formal, adversarial hearing.

To provide confidential reporting mechanisms, universities and DSD Committees should explore the use of an organizational ombuds who can serve as a reporting “safety net.” An ombuds is a confidential resource who can explain the processes and procedures involved and allow individuals to have an open conversation about options without being required to make an official report.¹²⁰ Ombuds sit outside the formal administrative structure and are an impartial, independent, and confidential resource.¹²¹ As a result, ombuds should be exempt from mandatory reporting requirements in order to help their visitors make informed and self-determined choices.¹²² This exemption should appear expressly in the charter or other organizing documents for the ombuds office. So long as anonymity can be maintained, ombuds can aggregate individuals’ complaints and share common issues. This allows for system-level improvements like additional trainings or changes to processes and procedures. Ombuds can also obtain clarifications regarding the Title IX processes from the Title IX Coordinator without the survivor identifying themselves and losing the ability to decide whether or not to report.¹²³

Another wrinkle to confidentiality considerations are the university’s reporting requirements to the Department of Education. Promises of confidentiality must be balanced with the need for aggregated information about the types and numbers of incidents and how they are being resolved.¹²⁴ In many instances, the university cannot promise absolute confidentiality in Title IX issues, a fact that must be acknowledged up front.

Confidentiality is an important consideration for both formal and informal dispute systems. By thinking through the issue carefully, and thoughtfully integrating how and when information is shared by the two

¹¹⁸ See, e.g., Merle H. Weiner, *A Principled and Legal Approach to Title IX Reporting*, 85 TENN. L. REV. 71, 72 (2017). Universities may consider adding the additional category of “student-directed” reporting employee. See, e.g., Univ. Or. Investigations and C.R. Compliance, *Student-Directed Employee*, <https://investigations.uoregon.edu/student-directed-employee>.

¹¹⁹ See Weiner, *supra* note 118, at 73.

¹²⁰ See *Setting a Course*, *supra* note 7, at 23; see also *Out of the Shadows*, *supra* note 7, at 144.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ See Final Rule, *supra* note 29, at 30404, 30578.

systems, a university can promote effective user choice and minimize barriers to reporting.

H. *Guideline 8: Be thoughtful about using external providers.*

Staffing an informal resolution process is a crucial part of system design. In formal Title IX systems, universities usually use one or two models for investigating sexual misconduct. Either a panel of investigators questions party-called witnesses and administrators who gathered information; or a single-investigator conducts in-person interviews, reviews evidence, and prepares a report that considers the factual determination.¹²⁵ The former has more of the conventional protections of traditional hearings, but is cumbersome and intrusive. The latter can be completed more quickly and helps the investigator develop expertise and experience, but may be problematic as a matter of due process since it places the decision in the hands of the same person who investigated the case.¹²⁶ To avoid this problem, universities may create disciplinary panels to adjudicate student code violations and hear Title IX complaints, but these panels are unlikely to be prepared to avoid re-traumatizing victims.¹²⁷ In 2018, Wiersma-Mosley and DiLoreto found that only 61% of Title IX Coordinators were confident in either their schools' investigators or training, and 26% were not confident in their hearing panels' training and competence.¹²⁸

As such, in the formal Title IX context, many have argued for outsourcing aspects of the adjudicatory process. For example, the use of regional investigation centers may provide independent investigation services similar to regional child advocacy centers that use trained counselors, psychological staff, and social workers to investigate child sexual abuse.¹²⁹ The model allows for expert assistance in making fact-finding determinations and recommendations to a panel that would make the ultimate determination regarding responsibility or sanctions.¹³⁰ Further, many campuses have hired retired judges to adjudicate claims or outside parties to conduct the

¹²⁵ See Emma Ellman-Golan, *Saving Title IX: Designing More Equitable and Efficient Investigation Procedures*, 116 MICH. L. REV. 155, 179–80 (2017).

¹²⁶ *Id.* at 180–81.

¹²⁷ See Erica Coray, *Victim Protection or Revictimization: Should College Disciplinary Boards Handle Sexual Assault Claims*, 36 B.C. J. L. & SOC. JUST. 59, 90 (2016).

¹²⁸ See Jacquelyn D. Wiersma-Mosley & James DiLoreto, *The Role of Title IX Coordinators on College and University Campuses*, BEHAV. SCI 1, 1, 7 (Apr. 2018).

¹²⁹ See Ellman-Golan, *supra* note 125, at 181–82.

¹³⁰ *Id.* at 182.

DESIGNING INFORMAL MECHANISMS

investigations or hearings.¹³¹ Employing outside neutrals for hearings, like retired judges, is thought to support a more unbiased proceeding.¹³²

These staffing experiences should inform the design of informal processes. Within the university, community members who may be able to serve as mediators, facilitators, or leaders of restorative justice processes include the Title IX Coordinator or other staff members from the Title IX Office, the university ombudsperson, trained volunteers from the ranks of faculty and staff,¹³³ and new hires specifically tasked with this function. In addition, the university may decide to task an existing department with providing staff as needed.

There are benefits to using internal people for informal Title IX processes. Generally speaking, internal staffing is appealing because they are (or appear to be) more available when needed, they are (or appear to be) less expensive in the eyes of decision-makers, and presumably they are invested in and know the institution and its culture. As the Title IX Coordinator refines processes or develops new policies, university-based service providers will have easier access to these changes and any attendant resources. And parties opting for informal processes may feel more comfortable and trusting in service providers who are affiliated with the university.

But there also are downsides to using university staff members in informal Title IX processes. For those working in the Title IX Office already, taking on the additional responsibility of serving as third-party neutrals in informal process could lead to role confusion and overextended employees. Many Title IX offices are already overwhelmed with work, and adding more to their plates would require an investment in their training and a rethinking of institutional priorities. Time and training may be an issue for volunteers as well, and using volunteers may create the impression that the university is taking Title IX reports and processes less seriously than it should. Campus ombuds officers may alleviate these concerns, but relying on the ombuds also brings up other issues. Depending on the success or popularity of the informal resolution program, for example, demand could outstrip the often shoestring resources allocated to the ombuds office. Low demand is another possibility,

¹³¹ See Jeremy Bauer-Wolf, *Outsourcing Rape Investigations*, INSIDE HIGHER ED (Oct. 9, 2017), <https://www.insidehighered.com/news/2017/10/09/some-colleges-opt-ousource-title-ix-investigations-hearings>; see also Douglas Belkin, *Colleges, Buffeted by Courts and Washington, Navigate Sexual Assault*, WALL ST. J. (Sept. 22, 2018, 7:00 AM), <https://www.wsj.com/articles/colleges-buffed-by-courts-washington-navigate-sexual-assault-1537614000>.

¹³² See Rachael A. Goldman, *When is Due Process Due?: The Impact of Title IX Sexual Assault Adjudication on the Rights of University Students*, 47 PEPP. L. REV. 185, 215 (2020).

¹³³ See Vail, *supra* note 94, at 2117; see also KARP, *supra* note 94, at 40–41.

so universities that dedicate a staff member, department, or function within a department to serve as informal process guides may find it difficult to steward resources effectively. In addition, depending on the relationship between the ombuds office and other university departments, community members may draw conclusions around the independence and commitment of the unit or function.¹³⁴ Using internal people is not out of the question, but poses some difficulties in designing an effective informal resolution system.

Using external providers may seem like the better approach in response to these concerns, as is often done in formal processes. But simply outsourcing these tasks to dispute resolution providers carries its own set of problems. First, using outside providers will not develop internal capabilities that can be helpful in enabling broader cultural change. Creating internal trainings and capabilities will develop institutional knowledge that can be useful in a variety of informal conflicts, not just those involving sexual misconduct. Second, outside providers may use evaluative styles and methods that are better designed to resolve legal disputes and avoid litigation which re-traumatize victims rather than increase mutual understanding in a voluntary setting. While using former judges to mediate cases of sexual misconduct may make the system appear more legitimate, using judges may “legalize” what is supposed to be an informal process and thereby lead to less trust in the informal system.

Furthermore, even if a single outside provider is used, the university will still need to develop the internal capacity to handle logistics such as scheduling, intake, and follow-through. The complexity of these intake and follow-through processes will increase as additional external providers are added to the roster. And finally, confidentiality considerations as well as how the informal system interact with subsequent processes may be better handled in an integrated, in-house system. External providers can be costly and while building a system using external providers may be less costly in the short-run, continued engagement of external providers will prolong these costs over the long-term. If the numbers of cases engaging the system increase, an unanticipated result of using external providers is that the increased costs will create a financial disincentive of addressing more cases. That said, if the university decides to use external providers, groups of universities in a state or region would be wise to collaborate and engage a pool of trusted hearing panel members, mediators, restorative justice facilitators, and trainers to promote quality, transparency, and reliability. Neutrals should be well-trained in trauma-informed practices and should not pressure participants to

¹³⁴ *IOA Standards of Practice*, INT’L OMBUDSMAN ASS’N., https://www.ombudsassociation.org/assets/docs/IOA_Standards_of_Practice_Oct09.pdf (last visited Mar. 13, 2020).

DESIGNING INFORMAL MECHANISMS

reach an agreement.¹³⁵ Partnering with community mediation centers can be a cost-effective way to build internal capacity by utilizing trainings, accessing external mediators, and maintaining a community focus. Local, state, and national bar associations may have additional resources.¹³⁶

Accordingly, when thinking through how to staff informal processes, universities should develop a strategy for creating an internal-external provision model that draws on local expertise while building internal capacity and skills. Using mediators or RJ facilitators trained from the university and external community can strengthen the perception of impartiality and provide for more choices than what the campus resources themselves can offer.¹³⁷

I. *Guideline 9: Make dedicated educational efforts, training, and culture-change activities 50% of the work.*

It can be difficult for people to appreciate the value of informal processes like mediation or restorative justice, and this is especially true in the Title IX context. As mentioned above, federal guidance around Title IX procedures specifically forbade mediation for many years, and the institutional culture that has grown up around Title IX procedures is predominantly formal, investigative, adjudicative, and regulatory. No school wants to look like it is sweeping charges under the rug by promoting “informal” measures that might understate harms or silence survivors. Moreover, the current divisive political climate may make alternative or informal approaches seem less aligned with the ends of justice than more punitive formal methods.¹³⁸ Those who seek to add informal processes to their Title IX procedures, therefore, must consider messaging and outreach strategies carefully.

The experience of many campus ombuds offices is instructive here. For many new and existing university ombuds officers, explaining to decisionmakers and community members how the office works and why it is valuable is a persistent challenge. Because the ombudsperson’s work is confidential and informal, in the sense that ombuds do not participate in formal processes such as grievance matters, ombuds must engage in frequent communications and outreach to explain why confidential, informal approaches are essential in managing conflict and fostering a functional

¹³⁵ See *Setting a Course*, *supra* note 7, at 24.

¹³⁶ *Id.* at 23–24.

¹³⁷ *Id.* at 23.

¹³⁸ See, e.g., Jennifer W. Reynolds, *Does ADR Feel like Justice?*, 88 *FORDHAM L. REV.* 2357, 2360 (2020) (“How people feel about alternative practices and processes will have an impact on whether they avail themselves of those methods in their own disputes. In other words, even if we had widely available, high-quality, and free ADR services available to everyone, we might still have an access to justice problem because those services would not be seen as providing justice.”)

community. The ombudsperson does not argue that confidential and informal processes are the only way forward; indeed, many ombuds provide resources and support to visitors who want to pursue formal approaches. Many ombuds give presentations at periodic events, like new employee orientation or the student services fair, to raise awareness with community members. In addition, many ombuds offices offer regular trainings and resources designed to educate students, faculty, and staff about conflict management, including ways in which they can address their own campus disputes.¹³⁹

Likewise, a Title IX office that offers both formal and informal procedures will need to be able to easily explain why having multiple process options provides crucial support to survivors and others. The office will need to make clear that having informal processes available does not mean that the university is dispensing with its formal processes or undervaluing the harm of sexual misconduct. And like campus ombuds, the designers of the informal Title IX processes must consider carefully how to evaluate and communicate out the success of those processes. This can be tricky, considering that not coming to agreement in the informal context does not necessarily mean that the process failed. Sometimes parties want to start with more informal processes, later deciding that they would prefer formal adjudication—but without the option to start more informally, they may not have ever reported the incident in the first place. With this in mind, designers should consider developing metrics that provide comparison points between reporting rates before and after the informal processes were announced.

In terms of messaging and change management, designers may want to consider engaging the campus community in their work at an early stage. It can be difficult to manage the design challenges of putting together formal and informal processes, but it is work that is well worth the effort. Communicating the reasons for creating informal processes along with updating their progress by way of campus networks (student newspaper, campus newsletters, department meetings, etc.) is key for establishing awareness and acceptance, especially if these communications offer the possibility of learning more and providing feedback. After implementing the informal processes, the Title IX office must provide accessible explanations of whether and how to elect these processes on the website and through regular trainings and educational outreach.

Note that this kind of awareness-raising may be uncomfortable for some stakeholders, particularly decisionmakers who may be uneasy about any

¹³⁹ See *What Does the Ombuds Program do?*, U. OR., <https://ombuds.uoregon.edu/what-does-ombuds-program-do> (last visited Mar. 13, 2020).

DESIGNING INFORMAL MECHANISMS

additional focus on sexual misconduct at the university.¹⁴⁰ That said, sexual misconduct occurs on campus and must be discussed to protect community members and promote positive cultural change.¹⁴¹ It stands to reason that a visible campus educational program will help encourage reporting, because survivors who see the institution cares may be more likely to come forward. Moreover, during educational programming, students are more likely to approach the trainer or university administrator with potential complaints. Finally, outreach around informal processes represents an opportunity to imagine more pro-social and functional norms in campus classrooms, workplaces, and social spaces. Recent efforts to combat sexual misconduct have focused more on individual culpability than on collective accountability, often neglecting the social determinants of behavior that create and foster sexual misconduct.¹⁴² Providing for training and outreach intended to prevent sexual misconduct and change campus attitudes, accordingly, is just as important as providing for training and outreach around using the new informal Title IX processes.

¹⁴⁰ See Pappas, *supra* note 25, at 160 (detailing a coordinator who suggested doing mandatory sexual harassment training for everyone and was told you “would get more sexual harassment complaints. Why on earth would [you] want to do that?”).

¹⁴¹ See Michelle J. Harnik, *University Title IX Compliance: A Work in Progress in the Wake of Reform*, 19 NEV. L. J. 647, 682 (2018).

¹⁴² See Coker, *supra* note 13, at 180–87 (citing Caroline Lippy & Sarah DeGue, *Exploring Alcohol Policy Approaches to Prevent Sexual Violence Perpetration*, 17 TRAUMA, VIOLENCE & ABUSE 26, 27 (2016)). See also Antonia Abbey, *Alcohol's Role in Sexual Violence Perpetration: Theoretical Explanations, Existing Evidence and Future Directions*, 30 DRUG ALCOHOL REV. 481, 486 (2011); Leah E. Adams-Curtis & Gordon B. Forbes, *College Women's Experiences of Sexual Coercion: A Review of Cultural, Perpetrator, Victim, and Situational Variables*, 5 TRAUMA, VIOLENCE, & ABUSE 91, 104, 107–108 (2004); Neil M. Malamuth & Nancy Wilmsen Thornhill, *Hostile Masculinity, Sexual Aggression, and Gender-Biased Domineeringness in Conversations*, 20 AGGRESSIVE BEHAV. 185, 186 (1994). One of the most common types of prevention education aims to change participants' attitudes toward sexual violence, specifically focusing on rape myth acceptance. Michele Landis Dauber & Meghan O. Warner, *Legal and Political Responses to Campus Sexual Assault*, 15 ANN. REV. L. & SOC. SCI. 311, 324 (2019) (citing Patricia M. Fabiano et al., *Engaging Men as Social Justice Allies in Ending Violence Against Women: Evidence for a Social Norms Approach*, 52 J. AM. COLL. HEALTH 105 (2003)). See also Sarah DeGue et al., *A Systematic Review of Primary Prevention Strategies for Sexual Violence Perpetration*, 19 AGGRESSION & VIOLENT BEHAV. 346 (2014); Catherine J. Vladutiu et al., *College- or University-Based Sexual Assault Prevention Programs: A Review of Program Outcomes, Characteristics, and Recommendations*, 12 TRAUMA, VIOLENCE, & ABUSE 67 (2011); Kimberly Hanson Breitenbecher, *Sexual Assault on College Campuses: Is an Ounce of Prevention Enough?*, 9 APPLIED & PREVENTIVE PSYCH. 23 (2000).

J. *Guideline 10: Align other institutional processes and procedures and create systems for continuous improvement.*

Having a fully functional and efficient system requires the thoughtful alignment of institutional processes. Universities are large and complex organizations, and student conduct codes and faculty disciplinary processes can tie into Title IX procedures in expected and unexpected ways. Any changes to the system will impact these existing relationships and may create process (and possibly messaging) confusion if overlooked. For example, are statements made in restorative justice processes admissible in a later adjudicatory hearing? Can retired judges serve both as mediators and as panel chairs? Can they do so for the same case? Will survivors who resolve their complaint through an informal process be required to participate in a subsequent process?¹⁴³ What happens if a survivor and alleged perpetrator come up with a resolution that the Title IX Coordinator deems insufficient or infeasible? How will the institution resolve unforeseen process inconsistencies that emerge in a particular case and need immediate attention? These kinds of questions require clearly articulated boundaries and information so that survivors and alleged perpetrators can make the best decisions about whether to participate.

Additionally, and as mentioned above, all new systems require feedback mechanisms that allow university officials to evaluate progress and help the system continuously improve. It is essential to develop measurable outcomes that can be used to assess the system's goals and to monitor the system. In doing so, avoiding confusing strategies with outcomes is key. For example, if the goal is to increase awareness regarding the informal system, a valuable metric would be the percentage of individuals aware of and knowledgeable about the informal resolution processes. Providing trainings is one strategy to accomplish the goal of raising awareness, but the number of trainings offered or completed may not necessarily mean the goal of increasing knowledge and awareness has been accomplished. Universities therefore should think carefully about the goals and attendant metrics that will demonstrate goal achievement, keeping separate the strategies for reaching these goals.

In terms of gathering feedback from participants, surveys are a common way to measure participant satisfaction. Survey questions should include whether the person felt safe and secure, whether the person had the opportunity to be heard, and whether participants were able to express themselves. In addition, the survey should attempt to capture the participant's

¹⁴³ See Orcutt et al., *supra* note 7, at 39; see also Brian A. Pappas, *Med-Arb and the Legalization of Alternative Dispute Resolution*, 20 HARV. NEGOT. L. REV. 157 (2015).

DESIGNING INFORMAL MECHANISMS

overall satisfaction with the process and any resolution. Such surveys should be given to the parties and any third parties participating in the process, such as a mediator. Separate from participant surveys, the Title IX office may want to examine the usage rates of the system, the satisfaction with the systems, and any rate of recidivism or noncompliance with agreements. These metrics help system designers determine more generally if the system itself is successful. Finally, the Title IX office will want to evaluate the transparency of their work to the greater community, both in terms of what processes are offered and how they are performing on these evaluations.¹⁴⁴ The office should provide campus community members with periodic, regular reports and updates.

Keep in mind that rolling out a system is not the same as finishing working on the system. Indeed, “continuous improvement” means making changes to the system based on evaluation going forward. The Title IX Coordinator therefore must create space for evaluating, revisiting, and revising the system on an ongoing basis. Additionally, as resources allow, the system’s outcomes could be made available to independent evaluators to study, assess, critique and recommend improvements to formal and/or informal Title IX processes.¹⁴⁵ Using independent evaluators promotes transparency and provides useful objective assessment.¹⁴⁶

V. CONCLUSION

Designing informal Title IX resolution processes—and then integrating these processes into existing formal structures in the Title IX office and throughout the university—is not an easy task. Informal resolution processes require investment of time and treasure, which institutions are not always known to have in abundance or are willing to give easily. Furthermore, they do not substitute for broken formal processes or act as panaceas for a toxic campus culture.

Properly designed and executed, an informal system can strengthen formal processes by providing complementary means for healing, which in turn can encourage complaints.¹⁴⁷ However, being able to provide multiple informal processes may be difficult for many institutions. Strained resources, for example, represent a significant challenge to designing and implementing informal processes. Title IX offices routinely lack adequate funding, staff, and training, and adding informal processes—even if the processes themselves

¹⁴⁴ See Amsler, *supra* note 34, at 182–83.

¹⁴⁵ See generally CATHY A. CONSTANTINO & CHRISTINA SICKLES MERCHANT, DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS 142–49 (1996).

¹⁴⁶ See Amsler, *supra* note 34, at 169.

¹⁴⁷ See *Setting a Course*, *supra* note 7, at 24.

will improve outcomes for community members.¹⁴⁸ In addition, institutions must remember that an informal resolution system cannot fix the formal system's problems. Inadequate due process protections or issues with decision-maker bias, for example, are not corrected through funneling complaints through informal processes. For example, the fact that police tend to dismiss claims of sexual assault made by men and young women¹⁴⁹ and the fact that prosecutors are often skeptical of allegations of misconduct,¹⁵⁰ are not good reasons to set up an informal system. Doing so avoids correcting existing problems and sets up the informal system for failure.

That said, as professionals who have proposed, designed, and/or managed informal dispute processes at major universities,¹⁵¹ we firmly believe a properly designed and executed informal system can strengthen existing formal processes by providing complementary means for healing. Moreover, we have seen how informal disputing systems promote more empathetic dialogue and models of restorative practice that may help campus stakeholders work toward a safer university community. We firmly believe that well-designed Title IX informal systems will have such results.

¹⁴⁸ See Brian K. Payne, *Challenges Responding to Sexual Violence: Differences Between College Campuses and Communities*, 36 J. CRIM. JUST. 224 (2008); see generally Pappas, *supra* note 74.

¹⁴⁹ See Julie Goldscheid et al., *Responses from the Field: Sexual Assault, Domestic Violence, and Policing*, CUNY ACAD. WORKS 12–15 (2015), http://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1075&context=cl_pubs.

¹⁵⁰ See Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 29–30 (2017); see also Tuerkheimer, *supra* note 98, at 1158.

¹⁵¹ Boise State University, Eastern Michigan University, Michigan State University, the University of Missouri, and the University of Oregon.