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## **Restorative Justice Approaches To The Informal Resolution Of Student Sexual Misconduct**

Madison Orcutt B.A.

Patricia M. Petrowski J.D.

David R. Karp PhD

Jordan Draper Phd

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# RESTORATIVE JUSTICE APPROACHES TO THE INFORMAL RESOLUTION OF STUDENT SEXUAL MISCONDUCT<sup>1</sup>

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**Madison Orcutt**  
J.D. Candidate  
University of San Diego School of Law  
San Diego, CA  
maddieorcutt@sandiego.edu  
307-251-1824

**Patricia M. Petrowski, J.D.**  
Associate Vice President and Deputy General Counsel  
University of Michigan  
Ann Arbor, MI  
ppetrows@umich.edu  
734-764-0304

**David R. Karp, Ph.D.**  
Professor of Leadership Studies  
University of San Diego  
San Diego, CA  
dkarp@sandiego.edu  
619-260-4760

**Jordan Draper, Ph.D.**  
Assistant Vice President for Student Affairs and Dean of Students  
The College of New Jersey  
Ewing Township, NJ  
draperj@tcnj.edu  
609-771-3266

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## **Abstract**

This article reviews controversies about campus Title IX adjudication and the recent implementation of restorative justice (RJ) responses to campus sexual harm. The RJ approach focuses on who has been harmed, what their needs are, and how the person who harmed them can meet those needs. Instead of engaging in adjudication, RJ aims to get an individual who caused harm to understand the impact of and take responsibility for their actions. Section I introduces these controversies and the RJ approach. Section II defines the RJ approach, describes various practices, and details the preparation procedures necessary for a structured informal resolution process. Section III explains why RJ approaches have been limited to date for Title IX cases and outlines the Department of Education's evolving guidance in this realm. Section IV reviews legal considerations, including compliance requirements and the implications of the approach for concurrent or subsequent civil or criminal proceedings. Section V offers three case studies of implementation. Section VI summarizes evidence of effectiveness and Section VII concludes. By tracing these essential elements, this article moves beyond the philosophical underpinnings of RJ to offer tools and procedures to consider when adopting RJ for student-on-student sexual misconduct.

## I. Introduction

Restorative justice is a philosophical approach to wrongdoing that embraces the reparation of harm, healing of trauma, reconciliation of interpersonal conflict, reduction of social inequality, and reintegration of people who have been marginalized and outcast. Restorative justice responses have been used to address minor crimes and policy violations,<sup>2</sup> other offenses that affect community climate but do not violate conduct codes,<sup>3</sup> as well as serious criminal offenses<sup>4</sup> and human rights violations.<sup>5</sup> There is a rich history of the use of restorative justice practices to resolve harms caused by many different kinds of misconduct in the juvenile<sup>6</sup> and criminal justice<sup>7</sup> systems, as well as in schools and universities.<sup>8</sup>

In recent years, significant attention has been paid to the issue of student-on-student sexual misconduct. Such emphasis is the result of a complex cultural moment, including (but certainly not limited to) the attention of the Obama administration,<sup>9</sup> the efforts of student activists,<sup>10</sup> students' demand letters,<sup>11</sup> Time Magazine covers,<sup>12</sup> documentaries,<sup>13</sup> and controversial op-eds.<sup>14</sup> Throughout this increased national attention, commentators and jurists have sustained continued

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<sup>2</sup> See, e.g., Sarah Sun Beale, *Still Tough on Crime? Prospects for Restorative Justice in the United States*, 2003 UTAH L. REV. 413, 413 (2003).

<sup>3</sup> See, e.g., Anne Gregory et al., *The Promise of Restorative Practices to Transform Student-Teacher Relationships and Achieve Equity in School Discipline*, 26 J. EDUC. & PSYCHOL. CONSULTATION 4, 5 (2016).

<sup>4</sup> See, e.g., DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR 150-51 (2019) (describing the use of a circle process in the aftermath of a shooting).

<sup>5</sup> See, e.g., DESMOND TUTU, NO FUTURE WITHOUT FORGIVENESS 260 (Doubleday 1st ed. 1999) (“I told them that the cycle of reprisal and counterreprisal that had characterized their national history had to be broken and that the only way to do this was to go beyond retributive justice to restorative justice . . .”).

<sup>6</sup> See, e.g., FLA. STAT. § 985.155 (2014) (empowering state attorneys to refer non-violent, first-time juvenile offenders to Neighborhood Restorative Justice Centers).

<sup>7</sup> See, e.g., Mary P. Koss, *The RESTORE Program of Restorative Justice and Sexual Assault: Vision, Process, and Outcomes*, 29 J. INTERPERSONAL VIOLENCE 1623, 1624-25 (2014).

<sup>8</sup> See, e.g., David R. Karp & Casey Sacks, *Student Conduct, Restorative Justice, and Student Development: Findings from the STARR Project: A Student Accountability and Restorative Research Project*, 17 CONTEMP. JUST. REV. 154 (2014).

<sup>9</sup> See Press Release, White House Office of the Press Sec'y, Memorandum—Establishing a White House Task Force to Protect Students from Sexual Assault (Jan. 22, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/01/22/memorandum-establishing-white-house-task-force-protect-students-sexual-a>.

<sup>10</sup> See, e.g., *About KYIX*, KNOW YOUR IX, <http://knowyourix.org/about-ky9/> (last visited Oct. 19, 2019) (“Know Your IX is a survivor- and youth-led organization [established in 2013] that aims to empower students to end sexual and dating violence in their schools.”); *Frequently Asked Questions*, END RAPE ON CAMPUS, <https://endrapeoncampus.org/faq/> (last visited Oct. 19, 2019) (“EROC was founded by a group of students, survivors, and professors in the summer of 2013. The decision to form EROC resulted from the national need to formalize and centralize work around campus sexual assault.”).

<sup>11</sup> See, e.g., *A Call to End Sexual and Interpersonal Violence at Princeton*, PRINCETON IX NOW (Apr. 7, 2020, 10:01 AM), <https://princetonixnow.com/reforms> (citing a student demand at Princeton University including “[t]he establishment of an opt-in restorative justice track for survivors . . .”); *We Demand*, MASON FOR SURVIVORS (Apr. 7, 2020 10:09 AM), <https://www.mason4survivors.com/copy-of-we-demand> (citing a student demand at George Mason University including “[c]reat[ing] a committee of undergraduate students, graduate students and faculty to develop proposals for an opt-in restorative justice track for survivors . . .”); *Organizing for Survivors' Title IX Policy Change Demands*, SWARTHMORE VOICES (Apr. 7, 2020 10:14 AM), <https://swarthmorevoices.com/content-1/2018/3/19/organizing-for-survivors-title-ix-policy-change-demands> (citing a student demand at Swarthmore College noting that the institution “must formally take responsibility and admit to its wrongdoing in the name of restorative justice and accountability . . .”).

<sup>12</sup> *Rape: The Crisis in Higher Education*, TIME MAGAZINE, May 26, 2014.

<sup>13</sup> See, e.g., *THE HUNTING GROUND* (Chain Camera Pictures 2015) (a documentary on campus sexual assault that describes the rise of student-led activism).

<sup>14</sup> See, e.g., George F. Will, *George Will: Colleges Become the Victims of Progressivism*, WASHINGTON POST (June 6, 2014), [https://www.washingtonpost.com/opinions/george-will-college-become-the-victims-of-progressivism/2014/06/06/e90e73b4-eb50-11e3-9f5c-9075d5508f0a\\_story.html](https://www.washingtonpost.com/opinions/george-will-college-become-the-victims-of-progressivism/2014/06/06/e90e73b4-eb50-11e3-9f5c-9075d5508f0a_story.html); Mel Robbins, *George Will: You are so wrong about campus sexual assault*, CNN (July 2, 2014), <https://www.cnn.com/2014/06/21/opinion/robbins-campus-sexual-assaults/index.html>.

criticism against the investigative procedures present on most college campuses—that is, whether the processes can proceed under an investigative-only model, whether a hearing is required, and if so, whether the parties must be afforded the opportunity to cross examine one another and material witnesses. Most recently, a federal circuit split has emerged regarding the extent to which due process requires public universities to allow students accused of sexual misconduct (“respondents”) to cross-examine their accusers (“complainants”).<sup>15</sup> On the one hand, investigative-only campus sexual misconduct processes have been criticized for failing to meet the justice needs of many harmed parties.<sup>16</sup> On the other hand, such processes have been criticized for being biased against respondents<sup>17</sup> and for stigmatizing and excluding individuals who engage in sexual violence.<sup>18</sup>

By contrast, a restorative justice approach to incidents of campus sexual misconduct offers a framework that focuses on who has been harmed, what their needs are, and how the person who harmed them can meet those needs. Instead of engaging in adjudication, restorative justice aims to get an individual who caused harm to understand the harm that they caused and take responsibility for their actions.<sup>19</sup> The focus is often on the person accused of causing harm acknowledging what they have done and how they can repair it.<sup>20</sup> Although restorative justice approaches have been successful when resolving conflicts in many contexts, restorative approaches have rarely been used to resolve incidents of campus sexual misconduct.<sup>21</sup> This likely stems—at least in part— from the Department of Education’s 2011 guidance prohibiting

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<sup>15</sup> *Compare Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 69 (1st Cir. 2019) (“[W]e are simply not convinced that the person doing the confronting must be the accused student or that student's representative . . . [D]ue process in the university disciplinary setting requires “some opportunity for real-time cross-examination, even if only through a hearing panel.”) *with Doe v. Baum*, 903 F.3d 575, 582 (6th Cir. 2018) (holding that a student at a state institution accused of sexual misconduct is entitled to cross-examine his or her accuser, either directly or through an agent or representative, “when the university’s determination turns on the credibility of the accuser, the accused, or witnesses”).

<sup>16</sup> *See, e.g.*, Judith Lewis Herman, *Justice from the Victim’s Perspective*, 11 VIOLENCE AGAINST WOMEN 571, 597 (2005) (“[Survivors’] aims, however, were not primarily punitive. The main purpose of exposure was not to get even by inflicting pain. Rather, they sought vindication from the community as a rebuke to the offenders’ display of contempt for their rights and dignity.”); DAVID R. KARP ET AL., A REPORT ON PROMOTING RESTORATIVE INITIATIVES FOR SEXUAL MISCONDUCT ON COLLEGE CAMPUSES 2, 13 (2016), [https://www.sandiego.edu/soles/documents/center-restorative-justice/Campus\\_PRISM\\_Report\\_2016.pdf](https://www.sandiego.edu/soles/documents/center-restorative-justice/Campus_PRISM_Report_2016.pdf) (“[T]he goals of a campus adjudication process—utilizing fundamentally fair and unbiased approaches to determine what happened, whether what happened entailed a policy violation, and if so, what outcome should be assigned—can be incompatible with the needs of survivors.”).

<sup>17</sup> *See, e.g.*, Tyra Singleton, *Conflicting Definitions of Sexual Assault and Consent: The Ramifications of Title IX Male Gender Discrimination Claims Against College Campuses*, 20 HASTINGS WOMEN’S L.J. 155, 155 (2017) (“Male students accused of sexual assault argue the management of sexual assault charges against them by their respective schools was mishandled and biased because of their gender.”).

<sup>18</sup> DAVID R. KARP ET AL., A REPORT ON PROMOTING RESTORATIVE INITIATIVES FOR SEXUAL MISCONDUCT ON COLLEGE CAMPUSES 2, 13 (2016), [https://www.sandiego.edu/soles/documents/center-restorative-justice/Campus\\_PRISM\\_Report\\_2016.pdf](https://www.sandiego.edu/soles/documents/center-restorative-justice/Campus_PRISM_Report_2016.pdf) (“Individuals who engage in sexual violence are society’s modern-day pariahs. There are few, if any, communities in which people who engage in sexually inappropriate conduct are welcome, including colleges and universities . . . . Campuses that rely on expulsion as the default sanction for sexual and gender-based misconduct may recreate . . . stigmatizing and exclusionary practices that have been undertaken by the broader community, with similar issues and controversies . . . .”).

<sup>19</sup> Mary P. Koss et al., *Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance with Title IX Guidance*, 15 TRAUMA, VIOLENCE, & ABUSE 242, 246 (2014).

<sup>20</sup> Mary P. Koss et al., *Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance with Title IX Guidance*, 15 TRAUMA, VIOLENCE, & ABUSE 242, 246 (2014).

<sup>21</sup> Katherine Mangan, *Why More Colleges are Trying Restorative Justice in Sex Assault Cases*, CHRONICLE OF HIGHER EDUCATION (Sept. 17, 2018), <https://www.chronicle.com/article/Why-More-Colleges-Are-Trying/244542> (“The College of New Jersey is among a small but growing number of institutions that now offer alternatives to trial-like investigations . . .”).

mediation for sexual assault<sup>22</sup> and confusion regarding differences between mediation and restorative justice approaches.<sup>23</sup>

By tracing the essential elements of restorative approaches as well as evolving guidance from the Department of Education, this article moves beyond the philosophical underpinnings of restorative justice to offer college campuses tools and procedures to consider when adopting restorative approaches to student-on-student sexual misconduct. Our focus is to assess how restorative approaches can serve as a structured, informal resolution process. In Part II, we provide an overview of restorative justice responses to resolving conflict, including a working definition of restorative justice and an overview of the different types of restorative approaches that campuses might consider. In Part III, we discuss the reasons why restorative justice approaches have been sparingly used for incidents of campus sexual misconduct to date, paying particular attention to evolving guidance from the Department of Education. In Part IV, we map the confidentiality concerns and legal considerations that may arise in restorative approaches and offer a Memorandum of Understanding (MOU) aimed at protecting evidence obtained in a campus restorative process from later use in criminal proceedings. In Part V, we map the processes currently used by three institutions employing restorative approaches as a response to campus sexual misconduct—at The College of New Jersey, Rutgers University’s New Brunswick campus, and the University of Michigan. In Part VI, we offer evidence of effectiveness at the intersection of restorative justice and sexual misconduct. In Part VII, we conclude.

## **II. An Overview of Restorative Justice Responses to Resolving Conflict**

### **A. Restorative Justice Defined**

Restorative justice is a structured, collaborative decision-making process that typically includes harmed parties, people who caused harm, and sometimes other members of the community. The goal is for the participants to share their experience of what happened; understand the harm caused; and reach consensus on how to repair the harm, prevent its reoccurrence, and/or ensure safe communities. Fundamental principles of restorative justice include:

- Focusing on the harms of wrongdoing more than the rules that have been broken;
- Showing equal concern and commitment to harmed parties and people who caused harm, involving both in the process of justice;
- Working toward the restoration of harmed parties, empowering them and responding to their needs as they see them;
- Supporting people who caused harm while encouraging them to understand, accept and carry out their obligations;
- Recognizing that while obligations may be difficult for people who caused harm, they should not be intended as harms and they must be achievable;
- Providing opportunities for dialogue—direct (face-to-face) or indirect—between harmed parties and people who caused harm as appropriate;
- Involving and empowering the affected community through the justice process;
- Encouraging collaboration and, where appropriate, reintegration rather than coercion and isolation;

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<sup>22</sup> See Office for Civil Rights, *Dear Colleague Letter from Assistant Secretary for Civil Rights Russlynn Ali*, U.S. DEP’T EDUC. (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

<sup>23</sup> Mary P. Koss et al., *Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance with Title IX Guidance*, 15 TRAUMA, VIOLENCE, & ABUSE 242, 246-47 (2014).

- Giving attention to the unintended consequences of our actions and programs; and
- Demonstrating respect to all parties, including harmed parties, people who caused harm, and impacted community members.<sup>24</sup>

### **B. Different Types of Restorative Justice Practices**

There are a variety of restorative justice practices and each requires some form of meeting—but not always face-to-face—between the person(s) who has been harmed and the person(s) who caused the harm. The most common types of restorative justice practices include restorative conferencing, indirect facilitation, restorative circles, and surrogate circle participation. The use of a particular practice will depend upon the needs and desires of the person who has been harmed and the person who caused the harm, the areas of training and expertise developed by an institution, as well as the specific circumstances surrounding the harm. These practices need not occur in isolation, and indeed some cases may merit mixed-method approaches. Additionally, while the practices described below illustrate responses to student-on-student sexual harm, restorative justice practices may also exist in other contexts—such as in aiding in the reintegration of parties back into the campus community.<sup>25</sup>

**Restorative Conference or Facilitated Dialogue.** This model involves a structured and facilitated conversation between two or more individuals, most often the person who has been harmed and the person who caused the harm with associated support people, although it may also involve other community members who often represent community harms and concerns.<sup>26</sup> After a discussion of the harm, the parties (rather than a third party) agree what steps the person who caused the harm can take to repair the harm and rebuilt trust. These can include things such as apology, restitution, and community service to repair harm and an agreement to attend educational workshops/counseling, conduct research to gain deeper insight into the harm caused, develop mentoring relationships, or engage in prosocial activities that rebuilt trust and help reassure the harmed party and wider community that the student will be safe and responsible in the future.. Agreements may also include a voluntary leave (perhaps until the harmed party graduates) or action steps taken by others or the institution to support the process or to address larger policy issues or systemic injustices. A recent case study of a campus restorative justice process in response to a sexual assault provides an example of the agency of the participants, the active accountability of the student who caused harm, and the type of agreement that may emerged from a collaborative decision-making process that is focused on identifying and responding to sexual harm.<sup>27</sup> Trained facilitators guide the dialogue, often by a series of questions, such as:

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<sup>24</sup> DAVID R. KARP ET AL., A REPORT ON PROMOTING RESTORATIVE INITIATIVES FOR SEXUAL MISCONDUCT ON COLLEGE CAMPUSES 2, 23 (2016), [https://www.sandiego.edu/soles/documents/center-restorative-justice/Campus\\_PRISM\\_Report\\_2016.pdf](https://www.sandiego.edu/soles/documents/center-restorative-justice/Campus_PRISM_Report_2016.pdf).

<sup>25</sup> See, e.g., DAVID R. KARP AND KAAREN M. WILLIAMSEN, FIVE THINGS STUDENT AFFAIRS ADMINISTRATORS SHOULD KNOW ABOUT RESTORATIVE JUSTICE AND CAMPUS SEXUAL HARM 3, 7 (2020), <https://www.naspa.org/report/five-things-student-affairs-administrators-should-know-about-restorative-justice-and-campus-sexual-harm1> (noting that reintegrative approaches to restorative justice might involve providing previously-suspended respondents with support and accountability as they return to campus or assisting survivors as they rebuild connections with their peers).

<sup>26</sup> DAVID R. KARP ET AL., A REPORT ON PROMOTING RESTORATIVE INITIATIVES FOR SEXUAL MISCONDUCT ON COLLEGE CAMPUSES 2, 24 (2016), [https://www.sandiego.edu/soles/documents/center-restorative-justice/Campus\\_PRISM\\_Report\\_2016.pdf](https://www.sandiego.edu/soles/documents/center-restorative-justice/Campus_PRISM_Report_2016.pdf).

<sup>27</sup> See DAVID R. KARP, *RESTORATIVE JUSTICE AND RESPONSIVE REGULATION IN HIGHER EDUCATION: THE COMPLEX WEB OF CAMPUS SEXUAL ASSAULT POLICY IN THE UNITED STATES AND A RESTORATIVE ALTERNATIVE*, in *Restorative and Responsive Human Services*

Questions for Person Who Caused Harm	Questions for Harmed Party
What Happened?	What happened from your perspective?
At the time, what were you thinking?	What impact did the incident have on you?
What have you thought about since?	What has been the hardest thing about this?
Who has been affected and how? What needs to happen to make things right?	How can the harm be repaired, and trust be rebuilt? <sup>28</sup>

The conference process typically includes (1) intake and education regarding informal resolution, (2) pre-conferencing preparation, (3) conference(s), and (4) monitoring/mentoring.<sup>29</sup>

**Restorative Circles.** This model is similar to a restorative conference, but typically involves a larger number of people and more of a community approach to repairing the harm. It involves structured dialogue of turn-taking between the person who was harmed, the person who caused the harm, and other impacted persons. Restorative circles are often used for a variety of purposes beyond a direct dialogue between the harmed person and the person who caused the harm regarding how to repair the harm. Often, circles are used for community building or a discussion of difficult issues. For example, in the university context, if the harmed person and person who harmed lived on the same floor of a residence hall and other community members were involved or bystanders, a circle could be used to repair the harm caused to the whole residence hall floor. Circles have also been used to address harm caused to a group and broader concerns about campus climate and culture.<sup>30</sup> Additionally, group harms have been addressed through holding multiple, separate circles as well as employing mixed methods.<sup>31</sup>

**Surrogate Participation.** This model is a restorative circle or conference in which the harmed party does not want to participate in a restorative process but wants someone else—a surrogate—to help the person who harmed understand the impact of the harm. For example, in the university context, a sorority member who alleges to have been sexually assaulted by a fraternity member may ask the sorority president to participate on her behalf in a restorative circle.

**Indirect Facilitation.** In this model, the facilitator takes an active role by having individual conversations with the person who has been harmed, the person who caused the harm, and any other impacted individuals. The facilitator relays information and questions between the parties. Indirect facilitation does not require direct face-to-face interaction between the parties or the parties and other participants, but rather, a facilitator meets

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(Gale Burford, Valerie Braithwaite & John Braithwaite eds., 2019); STEPHANIE LEPP, A SURVIVOR AND HER PERPETRATOR FIND JUSTICE, Reckonings Podcast, December 3, 2018, <http://www.reckonings.show/episodes/21>.

<sup>28</sup> DAVID R. KARP, THE LITTLE BOOK OF RESTORATIVE JUSTICE FOR COLLEGES AND UNIVERSITIES, 84 (2019).

<sup>29</sup> DAVID R. KARP ET AL., A REPORT ON PROMOTING RESTORATIVE INITIATIVES FOR SEXUAL MISCONDUCT ON COLLEGE CAMPUSES 2, 25 (2016), [https://www.sandiego.edu/soles/documents/center-restorative-justice/Campus\\_PRISM\\_Report\\_2016.pdf](https://www.sandiego.edu/soles/documents/center-restorative-justice/Campus_PRISM_Report_2016.pdf).

<sup>30</sup> See JENNIFER J. LLEWELLYN, ET AL., REPORT FROM THE RESTORATIVE JUSTICE PROCESS AT THE DALHOUSIE UNIVERSITY FACULTY OF DENTISTRY 2, 29-30 (2015), <https://cdn.dal.ca/content/dam/dalhousie/pdf/cultureofrespect/RJ2015-Report.pdf> (recalling various uses of circle processes after female students in Dalhousie University’s Faculty of Dentistry became aware that some of their male colleagues had posted offensive material about them in a private Facebook group).

<sup>31</sup> See JENNIFER J. LLEWELLYN, ET AL., REPORT FROM THE RESTORATIVE JUSTICE PROCESS AT THE DALHOUSIE UNIVERSITY FACULTY OF DENTISTRY 2, 35 (2015), <https://cdn.dal.ca/content/dam/dalhousie/pdf/cultureofrespect/RJ2015-Report.pdf> (“The process included intake meetings, individual and group interviews, small and large group meetings, seminars/lectures, workshops, small and large group circles/conference processes involving participants from one or more parties, and information sessions.”).



independently with each party and participant and “shuttles” between meetings with the parties and participants. The preparation process for a restorative conference or circle almost always involves indirect facilitation. If that facilitation meets the needs of the parties and leads to an agreement, then the process may conclude successfully without a face-to-face dialogue.

**Other Restorative Approaches.** While the focus of this article is restorative responses to campus sexual misconduct, implementation of restorative practices in higher education extends to prevention and reintegration.<sup>32</sup> These might include community-building circles to create authentic group dialogue about sexual consent, climate circles to explore harmful cultural conditions (such as toxic masculinity in fraternities or sexual objectification in the media), and reintegration circles to support a student returning from suspension while also reassuring the community that the student will be held responsible for new violations.

### **C. Preparation for a Restorative Process**

Irrespective of the chosen approach, individual introductory meetings between a facilitator and each of the participants in a restorative justice approach is an essential part of the process to both prepare the parties for the process and to assess whether a restorative justice approach is appropriate. The preparation process allows the participants to learn about restorative justice and unpack the incident to develop a better understanding of what happened, how participants feel about it, and what participants want to do to make things better. Such meetings are also important so that the facilitators can ensure that participation is voluntary and that it is safe for the process to proceed if a process ends up involving a face-to-face meeting.

**Consultation and Intake:** After a report is made, the person who experienced the harm is presented with a set of options by the university regarding how they might proceed under applicable campus policies. This may include the harmed party requesting an investigative resolution, which likely will include an investigation and, if a part of the school’s procedures, a hearing; for conduct that might be criminal in nature, choosing to make a report to law enforcement for criminal investigation; both; neither (e.g., no action or just a request for safety measures and/or supports); and/or requesting informal resolution. If the person who experienced the harm chooses to utilize informal resolution—and the university agrees—then the person who caused the harm is asked to participate. It is the parties’ decision to participate in informal resolution. In alignment with Department of Education guidance and other law, the decision must be voluntary and made only after (1) the accused student has been put on notice of the allegations against them and (2) all parties are fully apprised of their various options.<sup>33</sup> As will be discussed in further detail below, the parties must also consent to participate in voluntary resolution in writing. Sample language outlining what parties’ consent in this regard might look like is included as Exhibit A.

The person who experienced the harm might also initially decide to proceed with an investigative resolution and then subsequently decide—either before or after the investigation is complete, but before the university has reached an outcome determination—to utilize informal

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<sup>32</sup> DAVID R. KARP, *RESTORATIVE JUSTICE AND RESPONSIVE REGULATION IN HIGHER EDUCATION: THE COMPLEX WEB OF CAMPUS SEXUAL ASSAULT POLICY IN THE UNITED STATES AND A RESTORATIVE ALTERNATIVE*, in *Restorative and Responsive Human Services* (Gale Burford, Valerie Braithwaite & John Braithwaite eds., 2019).

<sup>33</sup> 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. § 106.45(b)(6)).

resolution. At that point, the person who caused the harm will be asked to participate, and if both parties agree in writing, the informal resolution process will commence.

**Pre-Conference Preparation:** Restorative responses to sexual misconduct require significant preparation and the pre-conference preparation is typically the most time-consuming phase of the process. The restorative facilitator(s) will have individual meetings with both the person who experienced the harm and the person who caused the harm. Depending upon the complexity of the case, preparation can be as short as one or two meetings but may require more. Advisers and support persons are also prepared during this stage. The purpose of the meetings is for the participants to become well-informed about the process and decide what process best meets their needs. These meetings also provide coordinators with the opportunity to gain an understanding of what each party needs and wants, decide how best to facilitate the conference based upon the parties' needs and wants, help to maintain appropriate expectations by each party, and evaluate the parties for readiness. Readiness is determined by (a) the respondent's acknowledgement of harm, (b) assurance that the parties are participating voluntarily, (c) assessing whether it is safe to proceed and the risk of re-victimization is minimized, (d) addressing mental health concerns, and (e) establishing whether the parties are engaging in the process with a "restorative mindset," meaning that they are not using the process for ulterior motives. Ideally, there should not be any surprises among the participants or the facilitator once the conference begins.

Throughout pre-conference preparation, the facilitator works with the person who experienced the harm to help them prepare impact statements and to identify what they would like to see happen as an appropriate outcome of the process. Similarly, the facilitator works with the person who caused the harm to prepare statements and to discuss what they can do to address the harm caused. Facilitators closely assess whether the person who caused the harm is able to take responsibility for their misconduct. They may suspend the informal resolution process if they do not believe the parties are ready or that a resolution agreement can be reached. In addition, throughout the pre-conference preparation, the participants are reminded that the conference is voluntary and that they may choose not to participate at any time. The pre-conference preparation includes selection of the location, instructions about when and where the participants are to arrive to ensure they do not cross paths before the conference starts, seating arrangements, and making sure that supportive resources are on call.

**Conference or Facilitated Dialogue:** A primary goal of a conference or facilitated dialogue is to create a structured space in which participants can be open and honest. The first part of the discussion is focused on what happened, a sharing of the impact by the person who experienced the harm, an explanation of what happened by the person who caused the harm, and a summary of harms by the facilitator. The second part of the conference explores how the harm can be remedied or repaired. Finally, an agreement is written and executed that specifies tasks, a timeline for completion, and consequences for one or more parties failing to meet their agreed upon tasks. At the end of the conference process, the person who caused the harm will complete the agreed-upon actions to help demonstrate they have learned from the process and/or to mitigate future harm.

**Monitoring/Mentoring:** After the conference, the facilitator or other student conduct administrators will meet regularly with the person who caused the harm to support them in their efforts to take responsibility and to ensure compliance with the agreement. They may also keep the person who experienced the harm updated about the progress and make sure that they have adequate support going forward.

### III. The Reasons Restorative Justice Approaches Are Sparingly Used for Incidents of Campus Sexual Misconduct

Notwithstanding the success that restorative justice has had in resolving various types of harm within the juvenile and criminal justice system, as well as in schools and universities, the use of restorative justice to resolve sexual misconduct on college campuses has been exceedingly rare. Although the reasons behind its rare use are not known with certainty, it may stem at least in part from the fact that mediation, which the Department of Education prohibited for use in cases involving sexual assault until 2017, is often confused with restorative justice approaches.<sup>34</sup>

The rules governing sexual misconduct adjudication on college campuses have been evolving since the April 4, 2011 Dear Colleague Letter (“2011 DCL” or “2011 Guidance”).<sup>35</sup> The procedures set forth in the 2011 DCL and subsequent guidance during the Obama administration laid out the steps that universities should take to address sexual misconduct. Such directives, while allowing for informal resolution processes in some limited circumstances, largely focused on formal adjudication procedures involving an investigation and a hearing. Indeed, the 2011 DCL echoed the Department of Education’s view, dating back to the 2001 Revised Sexual Harassment Guidance (“2001 Guidance”),<sup>36</sup> that mediation was not appropriate even on a voluntary basis in cases of alleged sexual assault.<sup>37</sup> As a result, universities fearful of running afoul of the 2011 DCL either refused to allow *any* informal resolution, or did so under very limited circumstances, and almost certainly not in the cases involving sexual assault. Consequently, formal adjudication processes were often the only options available to students experiencing sexual misconduct. However, the goals of a formal adjudication process—utilizing fundamentally fair and unbiased approaches to determine what can be proven under a school’s evidentiary standard, whether a policy violation occurred, and if so, what outcome should be assigned—can be inconsistent with the needs and wants of the students they were in large part designed to protect: those experiencing sexual misconduct.<sup>38</sup> As a result, many students who have experienced sexual misconduct choose not to report, and many others who chose to report decline to participate in a campus adjudication process.<sup>39</sup>

In 2016, the American Bar Association’s Criminal Justice Section commissioned the Task Force on College Due Process Rights and Victim Protections.<sup>40</sup> The Task Force

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<sup>34</sup> U.S. Dep’t of Educ. Office for Civil Rights, *Q&A on Campus Sexual Misconduct* 4 (Sept. 2017), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>.

<sup>35</sup> See Office for Civil Rights, *Dear Colleague Letter from Assistant Secretary for Civil Rights Russlynn Ali*, U.S. DEP’T EDUC. (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

<sup>36</sup> See Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* 21, U.S. DEP’T EDUC. (Jan. 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> (“In some cases, such as alleged sexual assaults, mediation will not be appropriate even on a voluntary basis.”).

<sup>37</sup> See Office for Civil Rights, *Dear Colleague Letter from Assistant Secretary for Civil Rights Russlynn Ali*, U.S. DEP’T EDUC. (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> (“[I]n cases involving allegations of sexual assault, mediation is not appropriate even on a voluntary basis.”).

<sup>38</sup> See, e.g., Judith Lewis Herman, *Justice from the Victim’s Perspective*, 11 VIOLENCE AGAINST WOMEN 571, 597 (2005) (“[Survivors’] aims, however, were not primarily punitive. The main purpose of exposure was not to get even by inflicting pain. Rather, they sought vindication from the community as a rebuke to the offenders’ display of contempt for their rights and dignity.”).

<sup>39</sup> Kathryn J. Holland and Lilia M. Cortina, *It Happens to Girls All the Time’’: Examining Sexual Assault Survivors’ Reasons for Not Using Campus Supports*, 59 AMERICAN JOURNAL OF COMMUNITY PSYCHOLOGY (2017) DOI 10.1002/ajcp.12126

<sup>40</sup> ABA CRIMINAL JUSTICE SECTION TASK FORCE ON COLLEGE DUE PROCESS RIGHTS AND VICTIM PROTECTIONS: RECOMMENDATIONS FOR COLLEGES AND UNIVERSITIES IN RESOLVING ALLEGATIONS OF CAMPUS SEXUAL MISCONDUCT 1 (2017),

ultimately “encourage[d] schools to consider non-mediation alternatives to traditional adjudication such as restorative justice processes.”<sup>41</sup> The Department of Education’s 2017 Dear Colleague Letter significantly departed from the Department’s 2001 and 2011 Guidance<sup>42</sup> by permitting informal resolution,<sup>43</sup> a shift that was later reflected in the Department of Education’s 2018 Notice of Proposed Rulemaking on Title IX (“NPRM”).<sup>44</sup> Recognizing 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,” the NPRM permits informal resolution, such as mediation, any time prior to reaching a determination regarding responsibility.<sup>45</sup> The proposed regulations emphasize that the decision to pursue informal resolution by the parties must be voluntary and an institution must “obtain the parties’ voluntary, written consent to the informal resolution process.”<sup>46</sup> In addition, prior to utilizing informal resolution an institution must provide written notice to both parties disclosing (1) the allegations; (2) the requirements of the informal resolution process, including any circumstances under which it precludes the parties from resuming a formal complaint from the same allegations; and (3) consequences resulting from participation in the informal resolution process, such as what record will be maintained or could be shared.<sup>47</sup> In addition, as stated in the 2001 Guidance, the complainant must be notified of the right to end the informal process at any time and begin the investigative resolution process.<sup>48</sup> An effective and legally sound restorative justice process meticulously adheres to these notice requirements—not only to ensure compliance but also to ensure the parties fully understand their rights and options throughout the process.

#### **A. The Department of Education’s Office for Civil Rights’ Prohibition on Mediation in Sexual Assault Cases**

As far back as the 2001 Guidance, the Department of Education has made clear that “grievance procedures may include informal mechanisms for resolving sexual harassment complaints to be used if the parties agree to do so.”<sup>49</sup> However, the use of informal resolution in cases of sexual assault remained more limited:

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<https://www.americanbar.org/content/dam/aba/publications/criminaljustice/2017/ABA-Due-Process-Task-Force-Recommendations-and-Report.authcheckdam.pdf>.

<sup>41</sup> ABA CRIMINAL JUSTICE SECTION TASK FORCE ON COLLEGE DUE PROCESS RIGHTS AND VICTIM PROTECTIONS: RECOMMENDATIONS FOR COLLEGES AND UNIVERSITIES IN RESOLVING ALLEGATIONS OF CAMPUS SEXUAL MISCONDUCT 3 (2017), <https://www.americanbar.org/content/dam/aba/publications/criminaljustice/2017/ABA-Due-Process-Task-Force-Recommendations-and-Report.authcheckdam.pdf>.

<sup>42</sup> See Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, at 21 (January 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>; Office for Civil Rights, *Dear Colleague Letter from Assistant Secretary for Civil Rights Russlynn Ali*, U.S. DEP’T EDUC. (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

<sup>43</sup> U.S. Dep’t of Educ. Office for Civil Rights, *Q&A on Campus Sexual Misconduct* 4 (Sept. 2017), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>.

<sup>44</sup> See 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. § 106.45(b)(6)).

<sup>45</sup> Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462-01, 61470 (proposed Nov. 29, 2018) (to be codified as 34 C.F.R. § 106.45(b)(6)).

<sup>46</sup> Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462-01, 61470 (proposed Nov. 29, 2018) (to be codified as 34 C.F.R. § 106.45(b)(6)).

<sup>47</sup> Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462-01, 61470 (proposed Nov. 29, 2018) (to be codified as 34 C.F.R. § 106.45(b)(6)).

<sup>48</sup> Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, at 21 (January 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

<sup>49</sup> Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, at 21 (January 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

OCR has frequently advised schools, however, that it is not appropriate for a student who is complaining of harassment to be required to work out the problem directly with the individual alleged to be harassing him or her, and certainly not without appropriate involvement by the school (e.g., participation by a counselor, trained mediator, or, if appropriate, a teacher or administrator) . . . . In some cases, such as alleged sexual assaults, mediation will not be appropriate even on a voluntary basis.<sup>50</sup>

In addition, as stated in the 2001 Guidance, the complainant must be notified of the right to end the informal process at any time and begin the investigative resolution process.<sup>51</sup>

In the 2011 DCL, the Department reiterated that “informal mechanisms” are appropriate for resolving some types of sexual harassment complaints, but that “mediation is not appropriate” to resolve cases involving allegations of sexual assault.<sup>52</sup> The concern seemed to stem from fears that harmed parties “would be pressured to opt for mediation over a formal investigation” or that college campuses “would describe sexual violence as a mere ‘dispute between students’ and encourage survivors to ‘work it out’ with their rapists (not considering the further trauma such a meeting could cause).”<sup>53</sup> And in fact, an investigation by the Center for Public Integrity found that complainants were urged to “mediate” with the respondent using a process lacking rules and preparatory processes.<sup>54</sup>

### **B. How Restorative Justice Differs from Mediation**

Informal resolution includes conflict resolution processes and techniques that act as a means for disagreeing parties to come to agreement short of some type of judicial or quasi-judicial mechanism (whether it be a court of law or a hearing officer in a university proceeding). It is a collective term that refers to ways that parties can settle disputes with the help of a third-party.

Both restorative justice and mediation are types of informal resolution processes. Mediation is similar to restorative justice in that it makes use of trained facilitators, prioritizes stakeholder empowerment, and emphasizes collaborative decision-making. Both mediators and restorative justice facilitators often receive a minimum of 20-40 hours of training followed by a supervised apprenticeship. In addition, in both mediation and restorative justice approaches, participants work together to decide on what they believe to be the best course of action to resolve the conflict.<sup>55</sup>

Mediation and a restorative justice approach differ, however, in the presumption of responsibility by the person who caused harm, the preparation process, and strategies to mitigate potential harm.<sup>56</sup> Mediation does not presume a harm-causing party and a harmed party, and there is no requirement for any party to take responsibility for harm; instead, mediation is a conflict

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<sup>50</sup> Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, at 21 (January 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

<sup>51</sup> Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, at 21 (January 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

<sup>52</sup> See Office for Civil Rights, *Dear Colleague Letter from Assistant Secretary for Civil Rights Russlynn Ali*, U.S. DEP’T EDUC. (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

<sup>53</sup> Grace Watkins, *Sexual Assault Survivor to Betsy DeVos: Mediation Is Not a Viable Resolution*, TIME MAGAZINE (Oct. 2, 2017), <https://time.com/4957837/campus-sexual-assault-mediation/>.

<sup>54</sup> CENTER FOR PUBLIC INTEGRITY, *SEXUAL ASSAULT ON CAMPUS: A FRUSTRATING SEARCH FOR JUSTICE 19-20* (2010), <https://cloudfront-files-publicintegrity.org/documents/pdfs/Sexual%20Assault%20on%20Campus.pdf>.

<sup>55</sup> DAVID R. KARP, *CAMPUS PRISM BRIEF: DISTINGUISHING CAMPUS RESTORATIVE JUSTICE FROM MEDIATION* (2016), San Diego: University of San Diego Center for Restorative Justice.

<sup>56</sup> DAVID R. KARP, *CAMPUS PRISM BRIEF: DISTINGUISHING CAMPUS RESTORATIVE JUSTICE FROM MEDIATION* (2016), San Diego: University of San Diego Center for Restorative Justice.

management process that seeks a mutually agreeable solution to parties in dispute.<sup>57</sup> Mediation typically focuses on helping parties resolve arguments about facts or the law or both depending upon the negotiability of the issues. Often, mediation navigates disagreements about facts. By contrast, restorative justice focuses on the person who caused the harm acknowledging their wrongdoing and their obligation to make things right. The focus is not on evidence or facts, but on identifying harms, needs, and obligations. As one harmed party stated, “mediation perpetuates the myth that sexual assault is simply a misunderstanding between two people, rather than what it really is: a violent abuse of power.”<sup>58</sup> Someone has caused harm and someone has been harmed, and that fact is at the center of restorative justice approaches.

Because restorative processes begin with recognition of harm, extra efforts are made to prepare the participants for dialogue. Mediation typically does not include individual meetings with the facilitators prior to the dialogue, but restorative justice will often involve many. “To decide whether the case will go to a RJ dialogue, facilitators assess *risk of revictimization* and *ensure safety*, whether participants feel *pressure or coercion to participate* and if the participants’ *goals are in alignment* with RJ.”<sup>59</sup> This is one distinction that highlights how restorative approaches carefully attend to the risk of revictimization and potential power imbalances. In addition, restorative processes allow for multiple voices, including those of the institution, which may wish to ensure negotiated agreements minimize future risk to members of the campus community.<sup>60</sup>

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Notwithstanding the fact that mediation is only one type of informal resolution and that restorative approaches substantively differ from mediation, informal resolution for some cases of sexual misconduct never gained traction within higher education. To the contrary, the Department of Education’s restrictions on the use of mediation and its general enforcement posture following the 2011 DCL, combined with confusion about mediation and other types of informal resolution, meant that many college campuses avoided informal resolution altogether. As one researcher reported: “the college administrators with whom I spoke reported that university counsel have prevented the use of [restorative justice] out of fear of running afoul of the DCL rule.”<sup>61</sup> The same researcher found that “some universities prevent staff from facilitating *any* meeting that involves a potential complainant and a potential respondent outside of formal adjudication.”<sup>62</sup> For the same reasons, many schools that have policies that include informal resolution(s) have precluded the use of such processes for cases involving sexual assault.

Adjudicating incidents of sexual misconduct on college campuses is complex and difficult. Universities are trying to improve procedures by dedicating greater resources to complicated investigation and adjudication processes. However, the goals of a campus

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<sup>57</sup> DAVID R. KARP, CAMPUS PRISM BRIEF: DISTINGUISHING CAMPUS RESTORATIVE JUSTICE FROM MEDIATION (2016), San Diego: University of San Diego Center for Restorative Justice.

<sup>58</sup> Grace Watkins, *Sexual Assault Survivor to Betsy DeVos: Mediation Is Not a Viable Resolution*, TIME MAGAZINE (Oct. 2, 2017), <https://time.com/4957837/campus-sexual-assault-mediation/>.

<sup>59</sup> DAVID R. KARP, CAMPUS PRISM BRIEF: DISTINGUISHING CAMPUS RESTORATIVE JUSTICE FROM MEDIATION 3 (2016), San Diego: University of San Diego Center for Restorative Justice.

<sup>60</sup> DAVID R. KARP, CAMPUS PRISM BRIEF: DISTINGUISHING CAMPUS RESTORATIVE JUSTICE FROM MEDIATION (2016), San Diego: University of San Diego Center for Restorative Justice.

<sup>61</sup> Donna Coker, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 TEX. TECH. L. REV. 147, 201 (2016), [https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1287&context=fac\\_articles](https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1287&context=fac_articles).

<sup>62</sup> Donna Coker, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 TEX. TECH. L. REV. 147, 201 (2016), [https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1287&context=fac\\_articles](https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1287&context=fac_articles).

adjudication process—utilizing fundamentally fair and unbiased approaches to determine (1) what can be proven under the school’s evidentiary standard, (2) whether what happened entails a policy violation, and if so, (3) what outcome should be assigned—can be incompatible with the needs of harmed parties.<sup>63</sup> This is particularly true given that lengthy investigations sometimes require a harmed party to retell their story during multiple phases of a campus adjudication process, including on direct cross-examination.<sup>64</sup>

Research from the Department of Justice highlights that one reason college students do not report an incident is because they do not want the accused to get in trouble.<sup>65</sup> Campus climate sexual misconduct survey data from higher education institutions confirm this concern as a reason for underreporting.<sup>66</sup> To further complicate these cases, many harmed parties know the person who harmed them and have close social circles. Without informal resolution or restorative justice programs, universities are only offering an option that many harmed parties do not want; therefore, they select to either not report or not move forward with a process.<sup>67</sup>

Restorative justice approaches to informal resolution provide the parties an alternative to formal adjudication processes with the goal of identifying the incident that caused the harm and to whom, the needs of the person who was harmed, and how the person who caused the harm can repair it. Proponents see restorative justice approaches as a way to further the educational goals of universities,<sup>68</sup> more efficiently use staff time,<sup>69</sup> and provide avenues to discuss topics such as race and gender bias.<sup>70</sup> Critics worry that informal resolution does not offer a strong enough response to matters of sexual assault. Others express concern that students will feel pressured to bypass a formal resolution process and will regret it later if the accused is not appropriately held accountable. Moreover, asking a student to sit down with another student and work out an agreement is not only unrealistic, they argue, but possibly retraumatizing. However, a restorative justice approach to incidents of student sexual misconduct—including but not limited to sexual assault—provides the parties with an alternative to formal adjudication processes that may be more compatible with parties’ needs and may encourage more students to come forward.

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<sup>63</sup> See DAVID R. KARP ET AL., A REPORT ON PROMOTING RESTORATIVE INITIATIVES FOR SEXUAL MISCONDUCT ON COLLEGE CAMPUSES 2, 8 (2016), [https://www.sandiego.edu/soles/documents/center-restorative-justice/Campus\\_PRISM\\_Report\\_2016.pdf](https://www.sandiego.edu/soles/documents/center-restorative-justice/Campus_PRISM_Report_2016.pdf).

<sup>64</sup> See *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 69 (1st Cir. 2019) (“[D]ue process in the university disciplinary setting requires ‘some opportunity for real-time cross-examination, even if only through a hearing panel.’”); *Doe v. Baum*, 903 F.3d 575, 582 (6th Cir. 2018) (“[W]hen the university’s determination turns on the credibility of the accuser, the accused, or witnesses, that hearing must include an opportunity for cross-examination.”).

<sup>65</sup> U.S. DEP’T OF JUSTICE, RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE AGE FEMALES, 1995-2013 at 9 (2014), <https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf>.

<sup>66</sup> ASSOC. OF AM. UNIVS., REPORT ON THE AAU CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT, 110, 112 (Revised October 2017), <https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/AAU-Campus-Climate-Survey-FINAL-10-20-17.pdf>.

<sup>67</sup> Telephone Interview with Chelsea Jacoby, Title IX Coordinator, The College of New Jersey (Sept. 16, 2019) (nearly two-thirds of the harmed parties at TCNJ indicated that they would not have participated in a Title IX process were it not for the availability of the restorative justice approach).

<sup>68</sup> Mary P. Koss et al., *Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance with Title IX Guidance*, 15 TRAUMA, VIOLENCE, & ABUSE 242, 249 (2014).

<sup>69</sup> See, e.g., *Jordan Draper et al.*, Conference Presentation at June 2019 NACUA Annual Conference (June 23-26, 2019) (conference slides on file with authors) (finding that while administrative hearings in Title IX cases took an average of 76.5 hours of staff time per case, alternative resolution only took an average of 24.5 hours of staff time per case).

<sup>70</sup> See, e.g., Telephone Interview with Jackie Moran and Amy Miele, Director of Compliance/Title IX Coordinator and Assistant Director of Student Affairs Compliance/Title IX Investigator, Rutgers University (Oct. 21, 2019) (Rutgers University provides respondents with the opportunity to explore topics including identity and oppression).

#### **IV. Legal Considerations for Restorative Justice Responses to Campus Sexual Misconduct**

While restorative justice approaches to campus sexual misconduct can provide unique benefits, they also raise unique legal considerations. Frequent questions include whether informal resolution and restorative justice can be used for all forms of sexual misconduct, how to ensure that both parties voluntarily agree to a restorative approach, and the implications of potential or concurrent civil or criminal proceedings.

##### **A. Circumstances Under Which Restorative Justice Responses Can and Should be Available**

As previously explained above, there are legitimate concerns about the use of informal resolution, particularly mediation, to resolve instances of sexual assault among students. And even if a restorative justice approach is offered as an option in lieu of formal resolution, a harmed party could feel pressured by the administration or by the accused student to choose the restorative justice approach. Even if the student does not feel that way, the public may perceive the university's motivation to be that way. If handled poorly, the result could be inadequate consequences for the accused and an unsatisfactory outcome for the harmed party, both of which could expose the university to liability.

A threshold consideration in determining whether informal resolution is appropriate in a given matter is whether the decision to participate is voluntary. Voluntariness is key not only for compliance with the Department of Education's guidance (as discussed in more detail below), but also to ensure the success of the restorative justice process, given that restorative justice-based informal resolution depends on the willingness of the parties to reach a given outcome. There are *very* few reported cases challenging or analyzing an institution's use of informal resolution in response to conduct covered by Title IX, with all available cases predating NPRM guidance. Nevertheless, the available case law suggests that that institutions that don't ensure that informal resolution is engaged in voluntarily may be subject to liability (or at the least, costly litigation and potentially an OCR investigation).

For example, in *Takla v. Regents of the University of California*, a federal judge in the Central District of California denied the University's motion to dismiss a Title IX claim where the plaintiffs—PhD candidates alleging sexual harassment by their professor—asserted that the University acted with deliberate indifference in handling their Title IX complaint.<sup>71</sup> A central issue of the plaintiffs' complaint was the University's use of an "Early Resolution" process, a variation on informal resolution. In denying the motion, the court noted that the school "discouraged [the plaintiff] from filing a written request for a formal investigation by stating that [the respondent's] peers may well side with him and that Early Resolution would be faster and more efficient."<sup>72</sup>

Even if plaintiffs do not prevail against the institution in a lawsuit, a key complaint is that the University unilaterally made the decision to engage in informal resolution over the objection of the complainants, and/or failed to communicate with the complainants throughout the informal process. *Takla* also highlights a significant concern raised by harmed parties and advocates with respect to utilizing informal resolution—that institutions will use an informal process to *coerce* harmed parties into a less rigorous process that doesn't account for their needs. A restorative justice approach to informal resolution—at the very least—mitigates these concerns and—if implemented effectively—can provide a structured, rigorous process centered on the voices and needs of harmed parties.

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<sup>71</sup> 2015 WL 6755190 (N.D. Cal. 2015) (unreported op.).

<sup>72</sup> *Takla v. Regents of the Univ. of Cal.*, 2015 WL 6755190, at \*6 (N.D. Cal. Nov. 2, 2015) (unreported op.).



On the other hand, the available cases suggest that if informal resolution is presented as a potential option and the complainant appears ready and able to make a decision regarding the propriety of informal resolution, a court will not second-guess such a decision under a deliberate indifference theory.<sup>73</sup> In the 2019 case *Shank v. Carleton College*, a Minnesota district judge held that the College’s use of a “mediated conversation” to assist in the reintegration of a person found responsible for sexual assault did not amount to deliberate indifference under Title IX. The possibility of a “mediated conversation” did not originate with the plaintiff-complainant, instead originating with a college dean who presented such a conversation as “an option for closure” in the aftermath of a formal hearing where it was determined that the respondent had violated the college’s sexual misconduct policy.<sup>74</sup> The dean noted that the plaintiff “seemed like she was in a good place to be able to . . . make that determination to have that conversation.”<sup>75</sup> The court held that the use of “mediated conversation” in the Title IX process did not amount to deliberate indifference because the plaintiff “wasn’t required to participate in the meeting” and ultimately “chose to participate” in the process.<sup>76</sup> When granting summary judgment in favor of the college, the court cautioned, “[i]t is possible to hypothesize a different case where, for example, a meeting is not voluntary or a school knows or should know that a harmed party’s ability to make rational decisions is compromised, but neither [plaintiff-complainant] nor her experts argues that this is one of those cases.”<sup>77</sup>

Additionally, the fact that the parties have provided written consent to voluntarily participate in informal resolution, while significant, does not mean that every case is appropriate for informal resolution. College campuses should consider all of the known facts and circumstances in deciding whether informal resolution is appropriate, including whether an agreement to pursue informal resolution is truly voluntary, whether the parties are participating in good faith, the nature of the alleged offense, whether there is an ongoing threat of harm or safety to the campus community, the power dynamics between the parties, and whether the respondent is a repeat offender. For example, in meeting with the parties to discuss or prepare for the informal resolution process, the campus should make every effort to determine that a decision by the parties to engage in informal resolution truly is voluntary and not subject to coercion. In doing so, campus employees may want to meet with each of the parties separately and ask why they want to pursue informal resolution, what they hope to achieve from it, why they view it as preferable to formal resolution, and whether anyone encouraged or coerced them to engage in informal resolution. Similarly, the Title IX Coordinator should consider the totality of the known circumstances, nature of the offense, whether there is an ongoing safety threat to the community, the power dynamics between the parties, and whether there is a repeat offender or a pattern of behavior in deciding whether informal resolution is appropriate. Allegations of sexual assault alone may not disqualify the parties from participating in informal resolution, so long as the parties want to pursue informal resolution. However, repeat allegations of sexual assault by the same accused person involving a weapon or a power differential may preclude informal resolution. Ultimately, the Title IX Coordinator needs to balance the needs of the parties against the needs of the community.

#### **B. Compliance and other Legal Obligations when Engaging in Informal Resolution**

Before using informal resolution—including a restorative justice approach—a campus must provide both parties with their options for formal and informal resolution of the complaint

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<sup>73</sup> See, e.g., *Shank v. Carleton College*, 2019 WL 3974091 (D. Minn. Aug. 22, 2019) (slip op.).

<sup>74</sup> *Shank v. Carleton College*, 2019 WL 3974091 at \*6 (D. Minn. Aug. 22, 2019) (slip op.).

<sup>75</sup> *Shank v. Carleton College*, 2019 WL 3974091 at \*6 (D. Minn. Aug. 22, 2019) (slip op.).

<sup>76</sup> *Shank v. Carleton College*, 2019 WL 3974091 at \*13 (D. Minn. Aug. 22, 2019) (slip op.).

<sup>77</sup> *Shank v. Carleton College*, 2019 WL 3974091 at \*14 (D. Minn. Aug. 22, 2019) (slip op.).

after written notice of the allegations and obtain written consent stating that the parties' participation is voluntary and in good faith.<sup>78</sup> Under the Department of Education's proposed rules—which are not yet final—a campus's written notice of allegations to the accused must include:

- the identity of the parties involved in the incident (if known);
- the specific section of the campus's policy that has allegedly been violated;
- the conduct constituting sexual harassment;
- the date and location of the alleged incident, if known; and
- sufficient time for the respondent to prepare a response before any interview.<sup>79</sup>

In addition, pursuant to the NPRM, a campus must provide the parties information about the requirements of the informal resolution process, including the circumstances, if any, under which an informal resolution process might preclude the parties from resuming a formal complaint arising from the same allegations.<sup>80</sup> The campus must also explain any consequences resulting from participation in the informal resolution process, such as what records will be maintained or could be shared.<sup>81</sup>

As a practical matter, the information a campus provides about informal resolution might explain:

- What informal resolution is and the goal(s) of the process;
- That participation by all parties is voluntary and that the campus will not pressure or compel a party to participate in informal resolution;
- Whether and under what circumstances a party can terminate an informal resolution process (e.g., any time up to the point of an executed agreement);
- Whether information shared during informal resolution can subsequently be used to pursue a formal resolution process under a student sexual misconduct policy or any other campus policy;
- How informal resolution differs from formal resolution;
- Whether the process involves face-to-face interaction;
- Whether informal resolution can result in a transcript notation or disciplinary record; and
- Whether agreements reached and executed by the parties during informal resolution are binding and the consequences for failing to comply.

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<sup>78</sup> U.S. Dep't of Educ. Office for Civil Rights, *Q&A on Campus Sexual Misconduct* 4 (Sept. 2017), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>; Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, at vi-vii, <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>. See also Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462-01, 61470 (proposed Nov. 29, 2018) (to be codified as 34 C.F.R. § 106.45(b)(6)).

<sup>79</sup> Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462-01, 61470 (proposed Nov. 29, 2018) (to be codified as 34 C.F.R. § 106.45(b)(6)); U.S. Dep't of Educ. Office for Civil Rights, *Q&A on Campus Sexual Misconduct* 4 (Sept. 2017), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>.

<sup>80</sup> Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462-01, 61470 (proposed Nov. 29, 2018) (to be codified as 34 C.F.R. § 106.45(b)(6)); U.S. Dep't of Educ. Office for Civil Rights, *Q&A on Campus Sexual Misconduct* 4 (Sept. 2017), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>.

<sup>81</sup> Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462-01, 61470 (proposed Nov. 29, 2018) (to be codified as 34 C.F.R. § 106.45(b)(6)); U.S. Dep't of Educ. Office for Civil Rights, *Q&A on Campus Sexual Misconduct* 4 (Sept. 2017), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>.

A sample participation agreement covering many of these elements is attached as Exhibit A. In addition to providing notice about the allegations and information about informal and formal resolution processes, the campus must obtain written consent from the parties stating that their decision to pursue an informal resolution process is voluntary.<sup>82</sup> Rather than solely obtaining written consent, universities might consider obtaining a signed agreement from the parties to participate in informal resolution that clearly sets forth the campus's expectations and parties' agreement to key provisions. For example, if using a restorative justice approach, the campus should obtain the parties' agreement that successful completion of preparatory meetings as determined by the restorative justice coordinator is a prerequisite to participation in a restorative justice conference or other type of restorative justice approach. Similarly, a campus might want the parties' agreement that after executing an informal resolution agreement that is approved by the campus's Title IX Coordinator or other appropriate official, the parties are bound by the agreement's terms, cannot return to a formal resolution process, and are subject to the consequences included in the informal resolution agreement for failing to comply with its terms.

### **C. The Implications of Potential or Concurrent Civil or Criminal Legal Proceedings**

The fact that campus Title IX proceedings—whether utilizing a formal or informal approach—are separate from legal proceedings creates the possibility of concurrent or future civil or criminal legal proceedings.<sup>83</sup> Accordingly, individuals accused of sexual misconduct may have concerns about participating in restorative justice approaches—a goal of which is for the accused to accept responsibility for the harm they caused—when their statements could be used against them in subsequent civil or criminal legal proceedings.<sup>84</sup> Given the requirement that the respondent acknowledge the harm experienced by the complainant, the question of admissibility resulting from restorative approaches is particularly acute.<sup>85</sup> Similarly, survivors of sexual misconduct may want to know whether they can resolve a matter through restorative justice without fear of being pulled into a subsequent process operating outside of their control. While there is no answer that completely addresses these risks, universities can explore a number of potential options.

To begin, campus counsel could examine the potential applicability of any state statutes that privilege communications during alternative dispute resolution, such as mediation or restorative justice processes.<sup>86</sup> Similarly, there is an argument that documents and communications made in the context of an informal resolution may be covered by Federal Rule of Evidence 408 or its state analogs, which make “conduct or a statement made during compromise negotiations about the claim” “not admissible on behalf of any party either to prove or disprove the validity or amount

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<sup>82</sup> Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462-01, 61470 (proposed Nov. 29, 2018) (to be codified as 34 C.F.R. § 106.45(b)(6)).

<sup>83</sup> Amy B. Cyphert, *The Devil is in the Details: Exploring Restorative Justice as an Option for Campus Sexual Assault Responses Under Title IX*, 96 DENV. L. REV. 51, 74 (2018).

<sup>84</sup> See Mary P. Koss et al., *Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance with Title IX Guidance*, 15 TRAUMA, VIOLENCE, & ABUSE 242, 253 (2014).

<sup>85</sup> Donna Coker, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 TEX. TECH. L. REV. 147, 202 (2016), [https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1287&context=fac\\_articles](https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1287&context=fac_articles).

<sup>86</sup> Donna Coker, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 TEX. TECH. L. REV. 147, 202–03 (2016), [https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1287&context=fac\\_articles](https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1287&context=fac_articles) (“Evidence derived from a campus RJ process may be covered by state statutes that privilege communications in alternative dispute resolution processes, mediation, victim-offender mediation, community dispute resolution centers, and RJ. But in a number of states, these statutes define the process subject to privilege in a way that is not applicable to a campus RJ program, or they apply only to cases that are referred by a prosecutor or the court.”) (citing TEX. CIV. PRAC. & REM. CODE § 154.073, CAL. EVID. CODE § 1119 (2016), DEL. CODE tit. 11, § 9503 (2016), ALASKA STAT. § 47.12.450(e) (2016), ARK. CODE § 16-7-206(a) (2016), W. VA. CODE § 49-4-725(d) (2016); NEB. REV. STAT. § 43-247.03).

of a disputed claim or to impeach by a prior inconsistent statement or a contradiction.”<sup>87</sup> Unfortunately, the statutes and federal rules may not cover Title IX complaints or campus informal resolution processes, such as restorative justice approaches.<sup>88</sup>

Another option may be a waiver of the parties’ right to pursue a civil action against one another or an agreement that the parties will not share any of the information disclosed during the restorative justice process, provided the restorative justice process is successfully completed. Such a waiver might be a viable protection against having to share information in a civil proceeding.<sup>89</sup> However, a waiver of civil suits cannot eliminate the possibility of a criminal trial because the decision to pursue criminal charges is often at the discretion of the prosecutor’s office, not the harmed party. Moreover, an agreement not to share the information exchanged during a restorative justice approach would not prohibit the parties from complying with a lawful subpoena.

An alternative form of protection may be a memorandum of understanding (“MOU”) with the local prosecutor by which the prosecutor agrees not to use any evidence that is shared by the parties during the course of a restorative justice process in a subsequent criminal case.<sup>90</sup> MOUs of this sort<sup>91</sup> have been used to address sexual violence outside of the campus setting in both the Restorative Justice Project at Impact Justice—which has used restorative approaches to address child-on-child sexual abuse<sup>92</sup>—and at RESTORE, a four-year demonstration project that used restorative approaches to address sexual assault cases involving adults.<sup>93</sup> A Sample MOU adjusted to the campus context is attached as Exhibit B.

Ideally, an MOU would protect all evidence obtained as part of the restorative justice process, but an alternative, more limited approach, would protect those statements made by the accused.<sup>94</sup> An agreement of this nature does not bind the harmed party to continue a restorative justice process and would not discourage the harmed party from filing a criminal complaint.<sup>95</sup> Nor would it preclude a harmed party from terminating an informal process to pursue a criminal complaint.<sup>96</sup> Moreover, the MOU would not prevent the prosecutor from pursuing criminal charges against the accused, provided there was sufficient evidence to support the charges that was

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<sup>87</sup> FED. R. EVID. 408(a).

<sup>88</sup> See, e.g., DEL. CODE tit. 11, § 9504 (“An offender may not be admitted to [Victim-Offender Alternative Case Resolution] unless the Attorney General certifies that the offender is appropriate for the program”); NEB. REV. STAT. § 25-2914.01 (“No admission, confession, or incriminating information obtained from a juvenile in the course of any restorative justice program . . . shall be admitted into evidence against such juvenile, except as rebuttal or impeachment evidence, in any future adjudication hearing under the Nebraska Juvenile Code or in any criminal proceeding.”); see also Donna Coker, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 TEX. TECH. L. REV. 147, 202–03 (2016), [https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1287&context=fac\\_articles](https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1287&context=fac_articles).

<sup>89</sup> See Donna Coker, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 TEX. TECH. L. REV. 147, 202–03 (2016), [https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1287&context=fac\\_articles](https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1287&context=fac_articles).

<sup>90</sup> See Donna Coker, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 TEX. TECH. L. REV. 147, 202 (2016), [https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1287&context=fac\\_articles](https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1287&context=fac_articles).

<sup>91</sup> See, e.g., *Memorandum of Understanding: Restorative Community Conferencing Service Agreement*, INTERNATIONAL INSTITUTE FOR RESTORATIVE PRACTICES, [https://www.iirp.edu/images/pdf/Cutro\\_John\\_2014-Generic-MOU.pdf](https://www.iirp.edu/images/pdf/Cutro_John_2014-Generic-MOU.pdf).

<sup>92</sup> sujatha baliga, *A Different Path for Confronting Sexual Assault*, VOX (Oct. 10, 2018), <https://www.vox.com/first-person/2018/10/10/17953016/what-is-restorative-justice-definition-questions-circle>.

<sup>93</sup> See Donna Coker, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 TEX. TECH. L. REV. 147, 204 n. 402 (2016), [https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1287&context=fac\\_articles](https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1287&context=fac_articles).

<sup>94</sup> Donna Coker, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 TEX. TECH. L. REV. 147, 203-04 (2016), [https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1287&context=fac\\_articles](https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1287&context=fac_articles).

<sup>95</sup> Donna Coker, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 TEX. TECH. L. REV. 147, 203-04 (2016), [https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1287&context=fac\\_articles](https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1287&context=fac_articles).

<sup>96</sup> Donna Coker, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 TEX. TECH. L. REV. 147, 203-04 (2016), [https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1287&context=fac\\_articles](https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1287&context=fac_articles).

not obtained through a restorative justice approach.<sup>97</sup> Prosecutors may not easily enter into such MOUs out of fear that such an agreement is an encroachment on their ability to fully and effectively prosecute sexual violence.<sup>98</sup> However, prosecutors may be persuaded that precluding restorative approaches in campus communities would “decrease accountability in situations where the facts do not meet criminal standards (i.e., beyond a reasonable doubt) but would satisfy the lower preponderance of evidence standard utilized by most college campuses.”<sup>99</sup> Additionally, there is very little risk to prosecutors in some campus cases, such as in those cases involving non-criminal conduct.<sup>100</sup>

Universities could, therefore, try to limit the use of restorative justice approaches to violations of campus policy that are not criminal in nature. However, it is often difficult to discern whether campus prohibited conduct is also prohibited by law—especially without the use of formal investigative and adjudicative processes. Moreover, such an approach would preclude many harmed parties who want or need an alternative to the campus’s formal adjudication process from taking advantage of restorative justice, when both sides would otherwise voluntarily consent to participate. Campuses implementing restorative justice approaches must therefore seriously consider how to balance the needs of the parties and ensure that the parties fully understand the implications of proceeding with informal resolution processes.

## V. Restorative Justice & Campus Sexual Violence in Practice

For whatever the reason, while the 2011 DCL Guidance was in place, most campuses were hesitant to use informal resolution, including RJ practices, for sexual and gender-based misconduct.<sup>101</sup> Today, however, a small number of college campuses have begun implementing restorative approaches to student sexual misconduct. The processes and experiences of three such institutions are outlined below.

### A. The College of New Jersey<sup>102</sup>

The College of New Jersey (“TCNJ”), which has approximately 6,800 students, began implementing restorative justice approaches to campus sexual misconduct in October 2017. Since then, TCNJ has had twenty complainants interested in pursuing a RJ approach, which they term “Alternative Resolution.” Of those twenty cases where a complainant decided to pursue Alternative Resolution, thirteen cases (65%) fully completed the Alternative Resolution process. Three cases did not move forward with Alternative Resolution because they were denied by TCNJ—either the circumstances surrounding the respondent or the nature of the case itself precluded Alternative Resolution as an option. In two cases, the respondent refused to pursue Alternative Resolution. In two cases, the complainant changed their mind about pursuing Alternative Resolution.

As a threshold matter, certain cases may be ineligible for Alternative Resolution at TCNJ. Cases involving a weapon are ineligible for Alternative Resolution. Cases where the complainant

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<sup>97</sup> Donna Coker, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 TEX. TECH. L. REV. 147, 203-04 (2016), [https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1287&context=fac\\_articles](https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1287&context=fac_articles).

<sup>98</sup> Mary P. Koss et al., *Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance with Title IX Guidance*, 15 TRAUMA, VIOLENCE, & ABUSE 242, 246 (2014).

<sup>99</sup> Mary P. Koss et al., *Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance with Title IX Guidance*, 15 TRAUMA, VIOLENCE, & ABUSE 242, 254 (2014).

<sup>100</sup> Donna Coker, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 TEX. TECH. L. REV. 147, 204 (2016), [https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1287&context=fac\\_articles](https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1287&context=fac_articles).

<sup>101</sup> DAVID R. KARP ET AL., A REPORT ON PROMOTING RESTORATIVE INITIATIVES FOR SEXUAL MISCONDUCT ON COLLEGE CAMPUSES 2, 41 (2016), [https://www.sandiego.edu/soles/documents/center-restorative-justice/Campus\\_PRISM\\_Report\\_2016.pdf](https://www.sandiego.edu/soles/documents/center-restorative-justice/Campus_PRISM_Report_2016.pdf)

<sup>102</sup> Telephone Interview with Chelsea Jacoby, Title IX Coordinator, The College of New Jersey (Sept. 16, 2019).

sustained obvious signs of physical injury may also be ineligible. TCNJ is also hesitant to employ Alternative Resolution in cases involving students and employees and in cases involving repeat offenders who have had claims substantiated against them in the past. Finally, cases involving minors are ineligible for Alternative Resolution. Given that these preconditions are satisfied, TCNJ remains willing to pursue Alternative Resolution in any case under the umbrella of Title IX, including in sexual assault cases.

Assuming that both the complainant and the respondent agree to Alternative Resolution, the process at TCNJ typically operates as follows:

- The Title IX Coordinator or Title IX Investigator (referenced throughout this section now as “Title IX Staff”) receives an initial report and conducts outreach to the complainant.
- The Title IX Staff meets with the complainant and outlines all options potentially available to a complainant, including criminal charges, a traditional hearing process at the college, and Alternative Resolution. The Title IX Staff also asks the complainant what their ultimate outcomes and goals are in reporting and asks if the complainant needs any interim measures or accommodations as they weigh their options.
- If a complainant decides to pursue Alternative Resolution, the Title IX Staff and complainant meet again to draft an Alternative Resolution Contract that will guide the Alternative Resolution process. More information about TCNJ’s Alternative Resolution Contracts will be discussed below. The drafted Alternative Resolution Contract is then sent to the complainant for the complainant’s final approval.
- Once the Alternative Resolution Contract is finalized with the complainant, the Title IX Staff conducts outreach to the respondent and meets with the respondent.
- The Title IX Staff conducts a general intake meeting with the respondent (similar to the complainant) where information is shared about the alleged violation as well as resources and accommodations. Additionally, the Title IX representative presents the respondent with the complainant’s version of the Alternative Resolution Contract. The respondent is made aware that if Alternative Resolution is pursued and completed fully, nothing will be on the respondent’s record and no sanctions will be on the table. The respondent may opt to pursue Alternative Resolution and sign the complainant’s Alternative Resolution Contract. The respondent may also opt to pursue Alternative Resolution but suggest modifications or additions to the Alternative Resolution Contract, which the Title IX Staff would then share with the complainant. The process of arriving at a mutually agreeable Alternative Resolution Contract will be discussed in greater detail below. The respondent may also opt to forego Alternative Resolution and then the complainant is able to decide whether they would like to pursue a formal hearing, which is the default option at TCNJ if an agreement regarding Alternative Resolution is desired by one party but cannot be reached, or the complainant may choose to do nothing at that time.
- If satisfied with the terms of the Alternative Resolution Contract, the complainant, respondent, and Title IX representative sign the contract.
- It is then up to the respondent to complete all elements of the Alternative Resolution Contract in the timeframe specified.
- Once the respondent has completed every aspect of their Alternative Resolution Contract, the Title IX Staff conducts a summative meeting with the respondent to learn about their engagement with the Alternative Resolution process.
- The Title IX Staff then reaches out to the complainant to let the complainant know that the process has been completed and to provide a summary of how the process went.

- As a final measure, both the complainant and the respondent are sent a follow-up evaluation survey to gain insights regarding their engagement with the process.

The lodestar of TCNJ's Alternative Resolution process is the Alternative Resolution Contract. TCNJ's Alternative Resolution Contract begins with the following:

Alternative Resolution is a voluntary process within The College of New Jersey's Title IX Policy that allows a respondent in a Title IX investigation process to accept responsibility for their behavior and/or potential harm. By fully participating in this process the respondent will not be charged with a violation of College Policy.

Later on in the Alternative Resolution Contract, the parties are asked to initial a number of items, including that "[i]nformation documented during this process can be subpoenaed if a criminal investigation is initiated" and that "[p]articipation in this process does not constitute a responsible finding of a policy violation and therefore is not reflected on a student's disciplinary record . . . ."

While the Alternative Resolution process does not necessarily lead to an admission of behavior, the process does acknowledge the potential harm caused by the respondent. In addition to the contract specifying that Alternative Resolution does not constitute a finding of responsibility, TCNJ does not document specific details shared during the meetings with complainants or respondents. Finally, the process can only be used once and will not be considered if requested by a repeat respondent under the Title IX policy.

At times, the complainant and respondent may not agree about what an Alternative Resolution Contract's terms should entail. Although the Title IX Staff in such a situation may go back and forth between the complainant and respondent to see if a mutually agreeable contract can be reached, it is not the Title IX Staff's goal to have a protracted negotiation between the parties. In the event of a deadlock, TCNJ's formal hearing process involving an investigation remains the default option.

The Alternative Resolution Contract is quite flexible in its design out of the belief that there is not a one-size-fits-all response that meets the needs of all complainants and helps all respondents acknowledge the harm that they potentially caused. Consequently, there are a number of activities that could potentially be part of an Alternative Resolution Contract. For example, some respondents are required to attend an individualized alcohol education workshop. In one case, a complainant laughed in the aftermath of a sexual assault and was worried that the respondent read that laughter as enjoyment when the complainant was actually experiencing terror. That complainant created an Alternative Resolution Contract where the respondent had to watch the Department of Justice's webinar on the Neurobiology of Sexual Assault.<sup>103</sup> Oftentimes, respondents attend three-part, individualized workshops on effective consent with a preventive education specialist where students are asked open-ended questions about consent that help students put their lives and actions in context. Another possible option in the contract includes a victim impact statement, either written by the complainant or presented by the complainant through a surrogate. All Alternative Resolution Contracts end with a summative meeting between the respondent and the Title IX Staff. Although TCNJ remains open to holding direct processes as part of an Alternative Resolution process, TCNJ has not held one as part of an Alternative Resolution process to date. One complainant did request this option, but it was declined by the respondent.

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<sup>103</sup> Rebecca Campbell, Webinar for the National Institute of Justice (Dec. 3, 2012), <https://nij.ojp.gov/media/video/24056>.

## **B. Rutgers University, New Brunswick Campus<sup>104</sup>**

Rutgers University has over 50,000 undergraduate students and nearly 20,000 graduate students. Rutgers University's New Brunswick campus ("Rutgers") began implementing restorative justice approaches to campus sexual misconduct in the spring of 2019. Conflict resolution processes for Title IX at Rutgers broadly consist of two pathways, deemed the Investigation process and the Alternative Resolution process. Alternative Resolution contains two subtypes of resolution processes that work in tandem or independent of one another—as discussed in greater detail below, one subtype centers on educational programming while the other subtype is modeled after restorative justice practices. Rutgers has already had thirteen cases pursue Alternative Resolution. Nine of those cases have predominately centered on the educational programming pathway. Four of those cases have predominantly centered on the restorative justice pathway in cases spanning sexual assault with penetration, sexual assault without penetration, sexual harassment, and sexual exploitation.

As a preliminary matter, Rutgers does not categorically exclude certain types of cases from Alternative Resolution. But if a case raises matters such as community safety or repeat perpetration, the Title IX Coordinator may opt to take Alternative Resolution off of the table in a given case. Additionally, although restorative justice facilitators at Rutgers have been trained to address sexual misconduct, the school does not currently permit restorative justice approaches in cases of relationship violence pending further training in that area.

When any case comes in, the complainant first meets with a case coordinator and receives an explanation of the options and avenues available at Rutgers and beyond. It is during that initial meeting that the case coordinator begins to explore the complainant's goals and answers any questions that the complainant might have. For example, if a face-to-face meeting seems important to the complainant, the case coordinator might spend more time exploring a restorative justice conference. If the complainant seems interested in whether the university thinks that what happened to them is a policy violation, the case coordinator would likely begin to explore the investigation process in greater detail. A complainant who seems interested in the respondent receiving education might gravitate towards the educational programming available at Rutgers. In terms of the Alternative Resolution pathways at Rutgers, complainants who say that they want the respondent to be educated but who don't want to participate themselves tend to gravitate towards educational programming. Restorative justice conferences tend to appeal to complainants who want the respondent to experience growth and change but who also want to be directly involved in that process. Several students have started in one process and ended in another to better meet their needs. The restorative and educational pathways under the banner of Alternative Resolution are not mutually exclusive and a given case may very well involve aspects of both.

**Educational programming.** At Rutgers, the same office that provides victim advocacy also works with respondents on their education and prevention. There are a number of educational components offered at Rutgers that might be explored, including respondent-specific workshops on consent, workshops on building healthy relationships, and sessions on identity and oppression. Additionally, one option offered at Rutgers allows the complainant to write or record an impact statement detailing the effect that the incident had on them. The respondent then reads or watches the impact statement with staff at the University's Office for Violence Prevention and Victim Assistance and the respondent unpacks the impact statement with trained staff afterwards. Additionally, Rutgers offers educational opportunities centered on digital violence and the healthy

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<sup>104</sup> Telephone Interview with Jackie Moran and Amy Miele, Director of Compliance/Title IX Coordinator and Assistant Director of Student Affairs Compliance/Title IX Investigator, Rutgers University (Oct. 21, 2019).



use of social media. There is also the opportunity for respondents to participate in a behavior integrity program that takes place in a group setting. The options available on the educational programming pathway are selected to be responsive to the issues that arose in a given incident, the needs of the complainant, and the skills from which the respondent might most benefit from building.

The educational programming pathway has its own agreement—the Alternative Process Agreement. Among other things, the Alternative Process Agreement (1) notifies the parties that information documented during this process can be subpoenaed if a criminal or civil investigation is initiated, (2) indicates that participation in the process does not constitute a responsible finding, (3) notes that if the respondent is found responsible for any violations in the future under an adjudicatory model, the Alternative Process Agreement can only be used in the sanctioning phase, and (4) gives notice that this process is voluntary and can be stopped at any time by either party or the University. The terms outlined in the agreement must be agreed to by both responding and reporting parties and approved by the University.

**Restorative justice pathway.** Under this pathway, Rutgers offers both face-to-face conferencing as well as indirect facilitation. To date, out of the four cases that have gone down the restorative justice pathway at Rutgers, everyone has opted for face-to-face conferences over indirect facilitations. The conferencing process at Rutgers involves pre-conference preparation and the conference itself as discussed in Part II of this article.

Up to the point of signing an agreement detailing the particular process that is being agreed to, either the complainant or the respondent can elect to pursue an investigation process instead. Once the agreement is signed, however, neither party can choose to go through the investigation process. Staff members facilitating restorative processes don't retain case notes. Additionally, both parties are informed at the outset that information shared in the process might someday be subpoenaed.

The restorative justice pathway at Rutgers has its own unique agreement. Among other things, the Restorative Justice Agreement specifies that (1) any documentation resulting from the process can be subpoenaed if criminal or civil investigation is initiated, and (2) if the parties do not come to an agreement and sign the Restorative Justice Agreement, the case could go through the investigation process. The Restorative Justice Agreement further specifies that “participation in this process does not constitute a responsible finding of a policy violation. The Responding Party’s admission to any accountability and/or responsibility of harm done is not considered an admission of guilt.”

Respondents who fully comply with the Restorative Justice Agreement will not be charged with violating the sexual misconduct policy at Rutgers. Additionally, the complainant or respondent may be charged with Failure to Comply with University Officials for failure to meet the requirements laid out in an agreement.

### **C. The University of Michigan<sup>105</sup>**

The University of Michigan (“UM”) has over 60,000 undergraduate and graduate students spread across three campuses. UM has been using restorative justice for a wide array of non-academic, non-sexual misconduct since 2007. It began using restorative justice practices under its student sexual misconduct policy in 2013. At that time, it was known as “Informal Resolution” and was only permitted in cases of sexual harassment. Between 2013 and 2018 the name Informal Resolution changed to Alternative Resolution, and in 2018, the policy expanded Alternative

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<sup>105</sup> Telephone Interview with Erik Wessel and Carrie Landrum, Director of the Office of Student Conduct Resolution and Assistant Director for Adaptable Resolution, Training, and Strategic Partnership, The University of Michigan (Sept. 19, 2019).

Resolution to include some cases of sexual assault (non-penetrative). In 2019, UM revised its student sexual misconduct policy once again and eliminated any restrictions on the types of cases that could go through restorative practices to address student sexual misconduct. The 2019 policy also expanded and clarified the restorative options available to address student sexual misconduct, now called “Adaptable Resolution.”

Although UM’s current policy does not restrict the types of cases eligible to go through Adaptable Resolution, each request to proceed through Adaptable Resolution must be approved by the Title IX Coordinator, who must confirm that the use of the process was without pressure or compulsion from others, and approve that the case is of the type that would be appropriate for it. While there are no bright line rules set forth under UM’s policy to determine what types of cases are appropriate for Adaptable Resolution, the Title IX Coordinator considers the totality of the known circumstances, including the nature of the offense, whether a weapon was used, whether there is an ongoing threat to the community, the power dynamics between the parties, and whether the cases involves a repeat offender or a pattern of behavior. While the existence of any one of these issues does not necessarily preclude Adaptable Resolution, the Title IX Coordinator will weigh the request for Adaptable Resolution against these various factors to make a determination. The Adaptable Resolution Coordinator also has full discretion to determine at what point in the process an adaptable resolution process is not appropriate and may refer the matter back to the Title IX Coordinator for further action. In instances of campus sexual misconduct, the Office of Student Conflict Resolution (OSCR) is responsible for facilitating Adaptable Resolution and the University’s Office for Institutional Equity is responsible for conducting the investigation under an Investigative Resolution, and the University’s Title IX Coordinator is responsible for broadly ensuring compliance with Title IX. During early stages of a report, the Title IX and OSCR offices work in concert to help the parties identify the method of resolution that best suits their needs.

The University of Michigan’s Adaptable Resolution process is outlined as follows:

- Once a report is made, it is routed to the Office for Institutional Equity (OIE). OIE assesses whether the allegations, if true, would constitute a policy violation.
- UM staff in both OIE and OSCR proceed in a partnered approach. The complainant meets with a case manager (from OSCR) and investigator (from OIE) during an intake process and initial meeting. Both the Adaptable and Investigative Resolution processes are described to the complainant. The case manager and investigator work in concert to elicit the complainant’s needs and explore the complainant’s primary interests. If an investigation and hearing emerge as the preferred path, then the investigator and OIE facilitate an investigation. If Adaptable Resolution emerges as the preferred path, then the Adaptable Resolution Coordinator, a specially trained staff member in OSCR, facilitates an Adaptable Resolution. The Adaptable Resolution Coordinator also has full discretion to determine at any point in the process that an Adaptable Resolution approach is not appropriate, and may refer the matter back to the Title IX Coordinator for further action.
- A complainant interested in Adaptable Resolution then meets with the Adaptable Resolution Coordinator for an intake meeting to discuss potential process options under Adaptable Resolution and desired outcomes. There are four restorative processes available to complainants under the banner of Adaptable Resolution: “Facilitated Dialogue,”<sup>106</sup>

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<sup>106</sup> UM’s Title IX policy defines a facilitated dialogue as, “a structured and facilitated conversation between two or more individuals, most often the Claimant, the Respondent, and/or other community members. The focus is often on providing a space for voices to be heard and perspectives to be shared. Depending on stated interests, the participants may sometimes work towards the development of a shared agreement, although working towards an agreement is not always the intended outcome.”

“Restorative Circle or Conference process,” “Shuttle Negotiation” (indirect facilitation), and “Circle of Accountability”.<sup>107</sup> An Adaptable Resolution process could include one or more of the above processes, tailored to the parties per their agreement.

- Once the complainant decides to move forward with Adaptable Resolution and chooses what type(s) of restorative process to use, the respondent is invited to participate in the process. The Adaptable Resolution Coordinator then meets with an interested respondent for an intake meeting. If the respondent is also agreeable to Adaptable Resolution, the parties execute a written Agreement to Participate in Adaptable Resolution, under which they separately acknowledge that participation in the process is voluntary; that either party may choose to end the process at any time and pursue investigative resolution; that the parties must successfully complete preparatory meetings prior to participating in Adaptable Resolution; that information obtained and utilized during Adaptable Resolution will not be used in any other university process or legal proceeding (though information could be subpoenaed by law enforcement); that Adaptable Resolution does not result in formal disciplinary action against the respondent; and that if the parties enter into a resolution agreement, they waive their right to return to an Investigative Resolution.

Once the parties have entered into an Agreement to Participate in Adaptable Resolution, the Adaptable Resolution Coordinator works separately with the parties to identify the impact that the harms had, and what steps the respondent can take to repair the harms. Through these discussions the Adaptable Resolution Coordinator works with the parties to identify the processes and/or elements of a desired outcome that will repair the reported harm. Once those terms are identified and agreed upon by the parties, the Adaptable Resolution Coordinator facilitates the relevant processes, which conclude with an Adaptable Resolution Agreement.

Complainants often request that the respondent engage in educational programming that addresses the underlying contributing factors to the respondent’s behavior (e.g., education on consent, healthy relationships, sexual and gender-based harms, and alcohol or other drugs as contributing factors). The engagement in education that may prevent the respondent from causing future harm is restorative for many claimants who want to ensure that the respondent not cause similar harm in the future. Aside from education related to the harm, the most commonly requested agreement elements include an agreement or restriction on the academic, social, residential, or other physical spaces in which a respondent may be present where a complainant is also commonly present, as well as an agreement that the respondent will not communicate with the complainant. These assurances restore a sense of safety for the complainant that is important to be repaired. Resolution agreements may include additional elements to repair harm that are requested by the complainant, agreed to by the respondent, and approved by the Title IX Coordinator that are intended to eliminate the prohibited conduct, prevent its recurrence, and/or remedy its effects in a manner that meets the needs of the complainant while maintaining the safety of the campus community.

Once the Title IX Coordinator approves an agreement and both parties sign, the parties are bound by its terms and cannot return to Investigative Resolution. Thus far, every case that proceeded to Adaptable Resolution at UM has resulted in an Adaptable Resolution Agreement. Up to the point of an agreement, either party may discontinue the Adaptable Resolution process

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<sup>107</sup> UM’s Title IX policy defines a circle of accountability (“COA”) as “a facilitated interaction between the Respondent and University faculty and/or staff designed to provide accountability, structured support, and the development of a learning plan. The focus of a COA is to balance support and accountability for an individual who has acknowledged their obligation to repair harm and willingness to engage in an educational process. The COA model does not require participation from the Claimant, but as with other types of adaptable resolution, it must be voluntary for the Claimant and the Respondent.”

and request Investigative Resolution. Should the process revert to Investigative Resolution, information obtained through the Adaptable Resolution process may not be utilized in the Investigative Resolution.

UM acknowledges that its educational records in this realm could be subpoenaed. In terms of Adaptable Resolution, UM does not create long, lengthy, or narrative case notes. Moreover, UM does not require an admission of responsibility as a precondition to respondents' participation in Adaptable Resolution. Instead, Adaptable Resolution is generally designed to allow a respondent to acknowledge harm and accept responsibility for repairing harm (to the extent possible) experienced by the complainant and/or the university community. Therefore, signing an Adaptable Resolution Agreement does not necessarily amount to an admission of engagement in sexual misconduct. However, complainants may determine that an acknowledgement of responsibility is an important element of the process.

Out of the four approaches offered under the banner of Adaptable Resolution— facilitated dialogues, restorative circles or conference processes, indirect facilitations, and circles of accountability—indirect facilitations are the most commonly requested approach at UM. Many complainants have not requested an apology from a respondent, and there have even been cases where a respondent wants to apologize but the complainant was not interested. Since UM's newest policy went into effect in January 2019, about half of UM's student sexual misconduct cases have been addressed using Adaptable Resolution, with the other half of cases resulting in Investigative Resolution.

## **VI. Evidence of Effectiveness of Restorative Justice Approaches**

### **A. Effectiveness Generally**

Research demonstrates that the use of restorative justice practices in criminal cases, compared to court processes, has better reduced recidivism, reduced the post-traumatic stress symptoms of the person who experienced the harm, and increased all parties' satisfaction with the process.<sup>108</sup> The success of RJ in reducing, or at least not increasing, repeat offending is most consistent in tests on violent crime.<sup>109</sup> Broadly, a study of the effectiveness of college student misconduct cases comparing 165 restorative justice cases with 403 traditional conduct cases at 18 college campuses found similarly high levels of satisfaction among harmed parties and consistent improvement in student offender learning and development when compared with traditional approaches.<sup>110</sup>

Researchers have had few opportunities to see restorative justice applied to sexual assault. One exception was a project called RESTORE in Pima County, Arizona. Prosecutors screened cases—both misdemeanors and felonies—and allowed some harmed parties and those who caused sexual harm to opt in.<sup>111</sup> RESTORE took place between 2003 and 2007 and was studied by Mary Koss, a public health professor at the University of Arizona.<sup>112</sup> Out of the 22 cases in which both

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<sup>108</sup> LAWRENCE W. SHERMAN & HEATHER STRANG, *RESTORATIVE JUSTICE: THE EVIDENCE* 4 (The Smith Inst. ed., 2007).

<sup>109</sup> LAWRENCE W. SHERMAN & HEATHER STRANG, *RESTORATIVE JUSTICE: THE EVIDENCE* 68 (The Smith Inst. ed., 2007).

<sup>110</sup> David R. Karp & Casey Sacks, *Student Conduct, Restorative Justice, and Student Development: Findings from the STARR Project: A Student Accountability and Restorative Research Project*, 17 *CONTEMP. JUST. REV.* 154 (2014); DAVID R. KARP, *THE LITTLE BOOK OF RESTORATIVE JUSTICE FOR COLLEGES AND UNIVERSITIES*, 49 (2019).

<sup>111</sup> Donna Coker, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 *Tex. Tech. L. Rev.* 147, 193 (2016), [https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1287&context=fac\\_articles](https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1287&context=fac_articles) (citing Mary P. Koss, *The RESTORE Program of Restorative Justice and Sexual Assault: Vision, Process, and Outcomes*, 29 *J. INTERPERSONAL VIOLENCE* 1623 (2014)).

<sup>112</sup> Donna Coker, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 *Tex. Tech. L. Rev.* 147, 193 (2016), [https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1287&context=fac\\_articles](https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1287&context=fac_articles) (citing Mary P. Koss, *The RESTORE*

parties volunteered, 20 made it to the conferencing stage after extensive preparation.<sup>113</sup> Koss found that 80 percent of the people who caused harm completed the program and only one reoffended during the follow-up year.<sup>114</sup> Harmed parties felt safe and highly satisfied, although not all felt that justice had been done.<sup>115</sup>

### **B. Anecdotal Evidence from Campuses<sup>116</sup>**

TCNJ has been utilizing a restorative justice approach to incidents of sexual misconduct for over a year and has seen successful outcomes. Students in 20 cases indicated an interest in the alternative resolution process with 13 cases culminating in written agreements. Nearly two-thirds of the harmed parties indicated they would not have participated in a Title IX process were it not for the availability of the restorative justice approach.

At one TCNJ consent workshop, a respondent was able to realize that when he's in a relationship, he frequently has conversations regarding what his partner wants, but that he doesn't have those same conversations in casual sexual situations. Through the individualized consent workshop, the respondent was able to recognize that when he does not know someone and how they react, the situation likely demands more conversation, not less. Another respondent who went through a consent workshop demonstrated how the Alternative Resolution process has the potential for promoting growth and learning for the respondent and a friend. After one session of a consent workshop, the respondent discussed the workshop with a friend in his off-campus apartment. Later that same week, the respondent's friend took a woman home from a party. The friend soon realized that the woman was very intoxicated and the earlier conversation about the consent workshop caused the friend to think twice about her ability to provide consent. Rather than attempting to sleep with the woman, the respondent's friend got the woman an Uber and sent her back home. In the morning, she texted him and expressed her gratitude.

One complainant at TCNJ wrote the following in reflecting on her engagement with Alternative Resolution at TCNJ:

Alternative Resolution has allowed me to have a voice. It gave me the opportunity to make a direct impact statement to my abuser where I could express all those thoughts I wish I had said to him sooner after he hit me. It was definitely not easy, but I FINALLY got the closure I needed. It allowed me to feel EMPOWERED.

Similarly, after an agreement has been fully satisfied, staff at Rutgers collect feedback from both complainants and respondents. To date, the feedback received on the restorative process has been entirely positive. One complainant stated that the process "provided me with a sense of relief that effort will be made to better the situation." Another complainant stated that the restorative process

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*Program of Restorative Justice and Sexual Assault: Vision, Process, and Outcomes*, 29 J. INTERPERSONAL VIOLENCE 1623 (2014).

<sup>113</sup> Donna Coker, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 Tex. Tech. L. Rev. 147, 193 (2016), [https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1287&context=fac\\_articles](https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1287&context=fac_articles) (citing Mary P. Koss, *The RESTORE Program of Restorative Justice and Sexual Assault: Vision, Process, and Outcomes*, 29 J. INTERPERSONAL VIOLENCE 1623 (2014)).

<sup>114</sup> Donna Coker, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 Tex. Tech. L. Rev. 147, 193 (2016), [https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1287&context=fac\\_articles](https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1287&context=fac_articles) (citing Mary P. Koss, *The RESTORE Program of Restorative Justice and Sexual Assault: Vision, Process, and Outcomes*, 29 J. INTERPERSONAL VIOLENCE 1623 (2014)).

<sup>115</sup> Donna Coker, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 Tex. Tech. L. Rev. 147, 193 (2016), [https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1287&context=fac\\_articles](https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1287&context=fac_articles) (citing Mary P. Koss, *The RESTORE Program of Restorative Justice and Sexual Assault: Vision, Process, and Outcomes*, 29 J. INTERPERSONAL VIOLENCE 1623 (2014)).

<sup>116</sup> Telephone Interview with Chelsea Jacoby, Title IX Coordinator, The College of New Jersey (Sept. 16, 2019); Telephone Interview with Jackie Moran and Amy Miele, Director of Compliance/Title IX Coordinator and Assistant Director of Student Affairs Compliance/Title IX Investigator, Rutgers University (Oct. 21, 2019).

“allowed me to receive an insight on the situation & motive behind the actions made.” One respondent stated that “the explorations of mine and [Complainant’s] perspectives was done very well, I was shocked at times to hear things I had never even thought of.” Another respondent noted that “the agreement process was very well done, it showed me a game plan that I could follow to alleviate the harm done to [Complainant] and to better myself.”

## VII. Conclusion: Comparative Analysis and Tradeoffs

Under the 2011 DCL Guidance, campuses may have been hesitant to employ RJ practices for sexual and gender-based misconduct—whether RJ was permissible under OCR guidelines remained less than clear.<sup>117</sup> To the extent that the 2018 NPRM becomes an issued, final rule, that uncertainty has been lifted—the NPRM permits informal resolution any time prior to reaching a determination regarding responsibility.<sup>118</sup>

Experiences implementing restorative justice at The College of New Jersey, Rutgers University’s New Brunswick campus, and the University of Michigan reveal a series of decision points and trade-offs. For example, these institutions diverge in terms of how restorative justice is conceptualized relative to adjudicatory models and whether one model is considered a default option.

All three schools interviewed for this article—TCNJ, Rutgers, and the University of Michigan—expressed a commitment to making restorative justice accessible to students in a wide variety of cases, including cases of alleged sexual assault that include penetration. In their agreements with students, all three institutions make it clear that information gathered in restorative processes may be subpoenaed at any time. Yet if addressing harm caused leads a respondent to divulge underlying behavior, the threat of a subpoena may conflict with respondents’ abilities to fully explore their role in the incident at hand. As institutions move forward and as new institutions begin implementing restorative approaches to student sexual misconduct, it is worth exploring whether existing privileges in a given state provide any measure of protection to disclosures occurring within campus restorative processes.<sup>119</sup> Absent statutory safeguards, MOUs with local prosecutors—such as the MOU modeled in Exhibit B of this article—could prevent prosecutors from using information gained through the RJ process while nevertheless permitting discovery utilizing other means. Moving forward, it is also worth exploring the extent to which information gathered in a restorative proceeding could be used in civil proceedings<sup>120</sup> or in subsequent campus proceedings; confidentiality and the extent to which parties can discuss

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<sup>117</sup> See Office for Civil Rights, *Dear Colleague Letter from Assistant Secretary for Civil Rights Russlynn Ali*, U.S. DEP’T EDUC. (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>; Mary P. Koss et al., *Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance with Title IX Guidance*, 15 TRAUMA, VIOLENCE, & ABUSE 242, 246-47 (2014).

<sup>118</sup> Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462-01, 61470 (proposed Nov. 29, 2018) (to be codified as 34 C.F.R. § 106.45(b)(6)).

<sup>119</sup> Donna Coker, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 TEX. TECH. L. REV. 147, 202 (2016), [https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1287&context=fac\\_articles](https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1287&context=fac_articles) (“Evidence derived from a campus RJ process may be covered by state statutes that privilege communications in alternative dispute resolution processes, mediation, victim-offender mediation, community dispute resolution centers, and RJ. But in a number of states, these statutes define the process subject to privilege in a way that is not applicable to a campus RJ program, or they apply only to cases that are referred by a prosecutor or the court.”).

<sup>120</sup> See Donna Coker, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 Tex. Tech. L. Rev. 147, 204 (2016), [https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1287&context=fac\\_articles](https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1287&context=fac_articles).

what came up during a restorative process with others; and what might be done structurally to isolate investigatory processes from restorative processes.<sup>121</sup>

The NPRM and a number of recent court cases<sup>122</sup> have arguably heightened the adversarial nature of traditional, formal adjudication models.<sup>123</sup> The NPRM's proposed regulations require schools to allow the parties to cross-examine each other at an in-person hearing through a lawyer or other advisor.<sup>124</sup> Some fear that the new rules governing hearings will heighten the adversarial nature of hearing processes and chill reporting.<sup>125</sup> As explained in Part V of this article, the experiences of college campuses currently employing restorative justice in instances of student sexual misconduct have been quite the opposite—complainants have indicated that having options outside of adversarial models *motivated them to come forward*, with complainants at times opting to sit in the same room with respondents above other options.

At the same time, survivors of campus sexual misconduct have long reported such violence at low rates, even during the 2011 Dear Colleague Letter era. In this sense, restorative approaches are not just about providing an alternative to adjudicatory models in the NPRM era—broadly, restorative justice “supports rather than stigmatizes, engages rather than isolates, empowers rather than silences, and teaches that meaningful accountability can rebuild a fractured campus community.”<sup>126</sup> While the use of restorative justice in this way on campuses across the United States is rather new, restorative justice approaches seem to offer harmed parties something that they want and—in keeping with the educational goals of college campuses—encourage respondents’ growth and learning in the process.

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<sup>121</sup> Sites for ongoing investigation include (1) preventing the use of information gathered in a restorative process from use in a later, adversarial proceeding on campus should one become necessary and (2) navigating the disclosure obligations of responsible employees required to report campus sexual misconduct under the banner of Title IX.

<sup>122</sup> See, e.g., *Doe v. Baum*, 903 F.3d 575, 582 (6th Cir. 2018) (“[W]hen the university’s determination turns on the credibility of the accuser, the accused, or witnesses, that hearing must include an opportunity for cross-examination.”).

<sup>123</sup> See, e.g., Letter from Christina H. Paxton, President, Brown University, to Secretary Betsy DeVos, United States Secretary of Education, Department of Education (Jan. 29, 2019), <https://www.brown.edu/news/2019-01-29/titleix> (“In addition, a shift to a more adversarial “courtroom” environment may deter students from reporting sexual misconduct, undermining the ability of colleges and universities to create a safe and positive educational environment for all students.”); Letter from Bowdoin College, to Secretary Betsy DeVos, United States Secretary of Education, Department of Education (Jan. 14, 2019), <https://www.bowdoin.edu/president/pdf/bowdoin-nprm-final-jan-14.pdf> (“The College asks DOE to consider alternative approaches . . . to ensure a process that is fair and, as such, not intimidating and adversarial in ways that have the potential to significantly chill reporting.”).

<sup>124</sup> Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462-01, 61464 (proposed Nov. 29, 2018) (to be codified as 34 C.F.R. § 106.45(b)(6)).

<sup>125</sup> See, e.g., Letter from Christina H. Paxton, President, Brown University, to Secretary Betsy DeVos, United States Secretary of Education, Department of Education (Jan. 29, 2019), <https://www.brown.edu/news/2019-01-29/titleix> (“In addition, a shift to a more adversarial “courtroom” environment may deter students from reporting sexual misconduct, undermining the ability of colleges and universities to create a safe and positive educational environment for all students.”); Letter from Bowdoin College, to Secretary Betsy DeVos, United States Secretary of Education, Department of Education (Jan. 14, 2019), <https://www.bowdoin.edu/president/pdf/bowdoin-nprm-final-jan-14.pdf> (“The College asks DOE to consider alternative approaches . . . to ensure a process that is fair and, as such, not intimidating and adversarial in ways that have the potential to significantly chill reporting.”).

<sup>126</sup> David R. Karp & Olivia Frank, *Restorative justice and student development in higher education: Expanding “offender” horizons beyond punishment and rehabilitation to community engagement and personal growth*, in OFFENDERS NO MORE: AN INTERDISCIPLINARY RESTORATIVE JUSTICE DIALOGUE 160 (Theo Gavrielides, ed., 2016).

# **EXHIBIT A**



### **Agreement to Participate in Informal Resolution**

Pursuant to Section \_\_\_ of the University's [NAME OF TITLE IX OR SEXUAL MISCONDUCT POLICY] Policy, I, \_\_\_\_\_ (name), understand and agree to participate in informal resolution of the complaint filed on [DATE] by \_\_\_\_\_ (name(s) of complainant(s)) regarding the alleged conduct of \_\_\_\_\_ (name(s) of respondent(s)).

Informal resolution is a voluntary, remedies-based, alternative dispute resolution process under [INSERT UNIVERSITY POLICY] that allows the parties in a Title IX matter to agree to a resolution without formal disciplinary action against a respondent. Informal resolution is generally designed to facilitate a mutually agreeable outcome to alleged violations of [INSTITUTION] policy that centers on repairing the harm (to the extent possible) experienced by the complainant and/or the university community. Informal resolution is designed to eliminate the prohibited conduct, prevent its recurrence, and remedy its effects in a manner that meets the needs of the complainant while maintaining the safety of the campus community.

Informal resolution will only be used at the request and agreement of both the complainant and respondent and as deemed appropriate by the Title IX Coordinator, in their sole discretion. Before proceeding with an informal resolution, both parties must understand and agree to the necessary elements of the process.

By signing below, I acknowledge that I have read, understand, and agree to each of the following:

- Participation in this process is voluntary. Prior to signing a resolution agreement either the complainant or respondent can choose to end the process at any time and pursue investigative resolution; any other participant can also choose to end their participation at any time;
- Individuals who wish to participate in informal resolution must successfully complete preparatory meetings (as determined by [INSERT]) with an appropriate staff member prior to participating;
- Informal resolution does not result in formal disciplinary action against the respondent, and the respondent will not be found responsible for any policy violation;
- The Informal Resolution Coordinator has the sole discretion to determine at what point in the process an informal resolution process is not appropriate and must be referred back to the Title IX Coordinator for further action;
- I agree that to the extent permitted by law, I will not use information obtained and utilized during informal resolution in any other university process (including investigative resolution under the Policy if informal resolution does not result in an agreement) or legal proceeding. I understand that information documented and/or shared during informal resolution could be subpoenaed by law enforcement if a criminal investigation is initiated;
- Information shared during informal resolution will not result in separate or subsequent disciplinary investigation or actions by the University, unless there is a significant threat of harm or safety to self or others;
- By signing a resolution agreement, the parties are affirming that the terms of the agreement (along with any other supportive or interim measures in place) appropriately address the conduct at issue and remedy its effects;
- After the parties sign a resolution agreement, and the Title IX Coordinator or designee approves it, the parties are bound by its terms and cannot return to investigative resolution;

- If the parties enter into a resolution agreement, the parties waive the right for an investigative resolution and the respondent agrees to comply with the terms of the resolution agreement. I understand that failure to comply with a resolution agreement, once signed and approved, may result in the agreed-upon consequences in the resolution agreement, which may include the university placing an appropriate hold on the student’s account until the terms of the agreement are met;
- If the complainant and respondent do not reach a resolution agreement, the matter may be referred to the Title IX Coordinator for further action.

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*Printed Name*

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*Signature and Date*

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*Printed Name*

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*Signature and Date*

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*Title IX Staff Member Printed Name*

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*Signature and Date*

# **EXHIBIT B**

**Memorandum of Understanding:  
Restorative Justice Informal Resolution Agreement**

**THIS MEMORANDUM OF UNDERSTANDING (“MOU”)** is by and between the following: **[name and title of the District Attorney with authority to make a binding agreement for the Division]** and the **[insert University name] (“the University”)**.

**I. Introduction and Definitions**

The goal of this agreement is to ensure the confidentiality of information regarding alleged sexual misconduct shared by students during a University-run informal resolution process, known as Informal Resolution (“IR”). IR is a voluntary, remedies-based, structured interaction among affected parties that allows a student accused of misconduct (“the respondent”) to acknowledge his/her harm and accept responsibility for repairing the harm experienced by the victim (“the complainant”), the University community, and/or the public at large. The Informal Resolution system models the restorative justice method of conflict resolution. As such, IR is only undertaken when the respondent is prepared to assume responsibility for repairing harm (to the extent possible).

During an IR, the respondent and the complainant typically share their experiences of what happened, understand the harm caused, and reach consensus regarding how to repair the harm, prevent its reoccurrence, and/or ensure safe communities. Other impacted individuals and supporters of the parties may also be present. When the plan is completed, the University does not pursue other formal resolution processes, such as an investigation and a hearing to determine responsibility.

IR is not an investigative process. There are no procedures for determining guilt, such as the presentation and weighing of evidence. Instead, by creating spaces where students can make amends directly to the people they have harmed, IR helps participants understand the harm. The process also creates a space to listen and respond to the needs of the complainant; to encourage accountability through personal reflection and collaborative planning; to reduce the risk of re-offense by building positive social ties to the community; and to create caring climates that support healthy communities by eliminating harmful behavior.

This MOU sets forth expectations upon **[the District Attorney’s office and all organizations signing this document]** and the **[insert University name]**. This MOU will become effective upon the approval of the District Attorney (“DA”) and the University.

Throughout this document, the term “IR” refers to the initial outreach and intake of all parties, preparatory communications, meetings, and conferences, any follow-up communications and meetings that extend through plan completion and case closure, and all written and electronic documents and communications related to this process.

**II. District Attorney Agreements**

**A. Confidentiality**

*Generally.* The DA agrees that all information learned in the IR process (including pre-conference meetings) is confidential and will not be accessible. Should the DA gain access to any information via any aspect of the IR process, the DA agrees that such information will be treated as confidential (“Confidential Information”) and shall not be used against the respondent in any criminal proceeding or determination of probation violations. The DA agrees to not subpoena information or testimony from IR facilitators or other University staff or otherwise ask them to share Confidential Information learned in matters that involve individuals who participate in conference. The DA also agrees not to subpoena or otherwise interview/investigate

other IR participants (in either preparatory meetings or in the conference itself) to testify about any Confidential Information that is learned through the IR program. Finally, the DA agrees that an individual's agreement to participate in IR, or the failure of a case to successfully resolve through IR, will not be introduced into any criminal proceedings for any purpose including for impeachment purposes, or in furtherance of an immigration proceeding.

*Confidentiality and Immunity of Other Individuals/Participants.* If the respondent brings other individuals to IR or to preparatory sessions or discusses other individuals in the IR or preparatory sessions ("Third Parties"), the DA agrees that this information, including, but not limited to, the identities of those Third Parties, will be treated as Confidential Information and will not be used against any Third Parties in a criminal proceeding or in furtherance of an immigration proceeding, regardless of whether the information pertains to the case at hand. The DA will take appropriate measures and exercise reasonable care to maintain the confidentiality of all Third Parties.

*Confidentiality of Immigration Status.* The DA agrees that all information learned in the conferencing process (including pre-conference meetings) regarding the immigration or documentation status of any of the participants (including but not limited to the respondent, the respondent's families and caregivers, and others participating in or discussed in the IR process) will be confidential and shall not be accessible to law enforcement. Should the DA gain access to such information, the DA agrees that all information learned in the process (including pre-conference meetings) regarding the immigration or documentation status of the respondent, the respondent's family and/or caregivers, and others participating in or discussed in the IR program will be treated as Confidential Information. The DA agrees not to share such Confidential Information with any federal law enforcement or immigration agencies or authorities to the extent permitted by law. The DA will not honor any federal or other requests for information regarding the immigration status of any participant to the extent permitted by law. The DA agrees not to subpoena as witnesses or ask questions of IR facilitators or other [insert University name] staff about immigration facts learned in matters that involve the respondent, the respondent's family and/or the respondent's support persons, the other IR participants, or people discussed during the IR process. The DA also agrees not to call other IR participants (in either preparatory meetings or in the conference itself) to testify or to answer questions about any information regarding immigration status that is learned through the IR process.

**B. Prosecution of Cases Referred to IR.**

It is understood, however, that prosecution may proceed against respondents based on information gathered before, after, or otherwise outside the IR process.

If [insert University name] learns that the DA has initiated prosecution of a case referred to IR, [insert University name] will contact the DA to alert him/her to the ongoing IR. The DA agrees to engage in a good-faith discussion about the appropriateness of addressing the case solely through the IR process.

**III. District Attorney and [insert University name] Agreements:**

**A. Term and Termination.** This MOU shall commence on the effective date and shall continue until [insert termination date here], unless terminated earlier pursuant to this paragraph: Any party may terminate its obligations under this MOU prior to expiration upon 30-day notice of one to any other. Any signatory may terminate this MOU without affecting the remaining relationships governed under this MOU. Any IR process commenced under the terms of this agreement will be governed by the terms of this agreement, even if the MOU has been

terminated. Commencement is determined by the complainant and respondent's written agreement to initiate IR proceedings.

**B. Amendments.** If for any reason, alterations or changes are made, all changes will be mutually agreed upon by all parties in a separate agreement as an addendum to this agreement.

Approvals:

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**[Managing District Attorney  
or District Attorney of entire participating  
jurisdiction's District Attorney's Office]**

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Date

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**[University Authority]**

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Date