

2020

## Mediation and Misconduct: A Better Way to Resolve Title IX Disputes

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### Recommended Citation

Adam Laytham, *Mediation and Misconduct: A Better Way to Resolve Title IX Disputes*, 2020 J. Disp. Resol.

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# Mediation and Misconduct: A Better Way to Resolve Title IX Disputes

*Adam Laytham*\*

## I. INTRODUCTION

Sexual misconduct and gender inequality are widespread problems in universities and society at large.<sup>1</sup> To address these problems, Title IX was introduced in 1971, and since then, its jurisprudence has expanded rapidly.<sup>2</sup> There are over ten times more Title IX complaints today than there were ten years ago, and because the cases have become more complex, resolution takes more than three times longer than it did in the past.<sup>3</sup> It is clear that more needs to be done to address both the rate at which the number of Title IX claims is growing and the amount of time it takes to resolve each complaint. Presently, however, legislators are focused on improving the resolution process itself, particularly the experience and outcomes for both victims and those accused.

A multitude of different bills and initiatives are being discussed at both the local and national level.<sup>4</sup> Inter alia, these bills have proposed altering Title IX procedures and shifting the burdens of proof.<sup>5</sup> However, one dispute resolution mechanism that could have a profound impact on Title IX administration has not yet been sufficiently discussed—mediation. Mediation would allow parties to come up with creative solutions to these complex problems while also giving victims of sexual harassment and other offenses more control over the Title IX process than they have under the current framework.<sup>6</sup>

Section II of this Comment discusses the history of Title IX and its implementation. Next, Section III outlines recent developments regarding Title IX administration, both local and national, including several proposed laws currently under debate. Section IV provides an overview of mediation as a form of alternative

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\* J.D. Candidate, University of Missouri School of Law, 2020. Thank you, Professor Wells, for being my advisor; I could not have written this article without your support and feedback. I would also like to thank everyone who took part in the editorial process for helping me make this article the best it could be.

1. See, e.g., Allie Bidwell, *College Sexual Violence Complaints Up 1,000 Percent in Five Years*, U.S. NEWS (May 5, 2015), <https://www.usnews.com/news/blogs/data-mine/2015/05/05/college-title-ix-sexual-violence-complaints-increase-more-than-1-000-percent-in-5-years>.

2. See, e.g., Paul M. Anderson, *Title IX at Forty: An Introduction and Historical Review of Forty Legal Developments That Shaped Gender Equality Law*, 22 MARQ. SPORTS L. REV. 325 (2012).

3. Bidwell, *supra* note 1.

4. See, e.g., *What Betsy DeVos's New Title IX Changes Get Right—And Wrong*, WASH. POST (Dec. 14, 2018), [https://www.washingtonpost.com/opinions/what-betsy-devoss-new-title-ix-changes-get-right-and-wrong/2018/12/14/a8d485e2-feca-11e8-ad40-cdf0e0dd65a\\_story.html?utm\\_term=.7f2084fe8c51](https://www.washingtonpost.com/opinions/what-betsy-devoss-new-title-ix-changes-get-right-and-wrong/2018/12/14/a8d485e2-feca-11e8-ad40-cdf0e0dd65a_story.html?utm_term=.7f2084fe8c51).

5. *Id.* (noting many other changes have been proposed, such as moving to a more formalized process or a restructuring of the investigation process).

6. See generally *An Overview of ADR Techniques—Common ADR Techniques—“Classic” Mediation*, CORP. COUNSEL GUIDE TO ALT. DISPUTE RESOLUTION TECHNIQUES § 1:4 (2018) [hereinafter *An Overview of ADR Techniques*].

dispute resolution (“ADR”) and discusses victim–offender mediation, a unique type of mediation that exemplifies the goals of restorative justice and can be applied in the Title IX dispute resolution context. Section V addresses the benefits and risks associated with mediating Title IX disputes. Finally, Section VI provides recommendations on how to effectively implement mediation procedures to resolve Title IX disputes. Altogether, this Comment posits that mediation is underutilized in the Title IX context and has the power to revolutionize the way that Title IX proceedings are handled.

## II. THE HISTORY OF TITLE IX LEGISLATION AND IMPLEMENTATION

Title IX was officially introduced in 1971 as a proposed amendment to the Education Amendments of 1971.<sup>7</sup> Title IX was then enacted on June 23, 1972 and codified in 20 U.S.C. §§ 1681–1688.<sup>8</sup> In 1975, the United States Department of Education implemented guiding regulations—34 C.F.R. § 106 and its subparts—to effectuate Title IX.<sup>9</sup> These statutes and regulations must be read in concert to completely grasp Title IX’s many goals and intentions.<sup>10</sup> The *primary* aim of Title IX is clearly laid out in the text of U.S.C. § 1681, which states:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.<sup>11</sup>

In other words, if a program receives federal assistance, the individuals participating in it are, in theory, protected from discrimination.

Judges or other administrative officials determine whether Title IX applies in any given situation by utilizing a three–part test.<sup>12</sup> Before applying the test, administrators must first determine if the program or activity in question receives federal funds.<sup>13</sup> The first prong of the three–part test requires that no one be excluded from participation in any education program or activity.<sup>14</sup> The second prong of the test states that no one can be denied the benefits of any education program or activity.<sup>15</sup> Finally, the third prong of the test—the part that receives the

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7. Anderson, *supra* note 2, at 326.

8. See 20 U.S.C. § 1681 (1972).

9. See 34 C.F.R. § 106.1 (1975).

10. *Id.*

11. 20 U.S.C. § 1681 (1972).

12. Anderson, *supra* note 2, at 328.

13. *Id.* (while this determination may appear to be straightforward, problems arose early on because the text did not clearly define what types of “program[s] or activit[ies]” were covered within the scope of the law).

14. *Id.*

15. *Id.*

most judicial review<sup>16</sup>—is that no one can be subjected to discrimination under any covered education program or activity.<sup>17</sup>

After the enactment of Title IX, the United States Department of Health, Education, and Welfare had to decide how to implement it.<sup>18</sup> At the time of its enactment, public attention focused mainly on the effect Title IX would have on varsity sports,<sup>19</sup> and for many years after its enactment, the bulk of Title IX litigation was centered on athletics.<sup>20</sup> Caspar Weinberger, the Secretary of Health under Presidents Nixon and Ford, stated that his vision of Title IX was one in which “male and female teachers would be paid equally and all students would be equally able to participate in sports with similar equipment, facilities, and coaches.”<sup>21</sup> Sadly, this vision has yet to be realized because there have been only a few major changes to the originally-enacted regulations since 1975.<sup>22</sup>

Over the past several decades, there have been increasingly more sexual harassment claims filed under Title IX.<sup>23</sup> According to the Department of Education, there are approximately 100 currently pending Title IX cases that deal primarily with athletic issues,<sup>24</sup> but over 500 pending cases that deal with claims of sexual violence, sexual harassment, or retaliation.<sup>25</sup> So, while Title IX was initially envisioned for use in an athletic setting, it is becoming apparent that its primary contemporary use is to address instances of unwanted sexual advances or contact.<sup>26</sup>

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16. See Paul Anderson & Barbara Osborne, *A Historical Review of Title IX Litigation*, 18 J. LEGAL ASPECTS SPORT 127, 161 (2008) (stating that “[t]he purpose of this study was to document the evolution of gender equity law as interpreted by the courts and federal agencies since the enactment of Title IX in 1972 by focusing on litigation and important developments related to this important federal law. Overall, although most scholars, attorneys and advocates focus on the three part accommodation test and its analysis of the numbers of participants and their interests and abilities, this study showed that this test has only been the focus of 20 out of the 190 cases found, or 10.5% of the claims brought before the courts. The reality is that more claims are brought dealing with employment issues (37 cases = 19%) and . . . sexual harassment issues . . . (42 cases = 22%). This does not demonstrate a lack of problems in the accommodation area; instead, it is evidence that perhaps we have only scratched the surface of this problem, especially at the high school level.”).

17. Anderson, *supra* note 2, at 328.

18. Margaret E. Juliano, *Forty Years of Title IX: History and New Applications*, 14 DEL. L. REV. 83, 85 (2013).

19. See *id.*

20. See Daniel J. Emam, *Manufacturing Equality: Title IX, Proportionality, & Natural Demand*, 105 GEO. L.J. 1107, 1111 (2017).

21. Juliano, *supra* note 18.

22. *Id.*

23. Juliano, *supra* note 18, at 90 (stating that “[i]t’s clear that these harassment claims . . . are on the rise. In 2009, the number of Title IX complaints based on athletics was 1,264. By way of contrast, in the same year, the number of racial harassment/sexual violence complaints was nearly identical at 1,137. The future of Title IX seems to now encompass both claims based on discrimination in athletics, with all of its potential life enriching aspects, as well as student-on-student harassment or bullying.”); R. Shep Melnick, *The Strange Evolution of Title IX*, NAT. AFFAIRS (2018), <https://www.nationalaffairs.com/publications/detail/the-strange-evolution-of-title-ix> (“Sexual harassment has been trickier to address. It took nearly a quarter-century for OCR to issue guidance on sexual harassment, and another two decades for enforcement to begin in earnest.”).

24. See *Pending Cases Currently Under Investigation at Elementary- & Post-Secondary Schools as of March 1, 2019 7:30am Search*, OFF. FOR C.R., <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/open-investigations/index.html> (last visited Nov. 17, 2019).

25. *Id.*

26. Compare John Gibeaut, *Shooting for Parity on the Playing Fields: Courts Seek Formula for Gender Equality in College Athletic Programs Under Title IX*, 83 A.B.A. J. 40 (1997) (explaining how the discussion of Title IX in the past focused primarily on the impact that the law has had on sports teams) with Gregory C. Sisk, *Holding the Federal Government Accountable for Sexual Assault*, 104

It is no question that the focus of Title IX has expanded beyond just the realm of sports, and the programs offered across college campuses are generally becoming more robust as time goes on. At the same time, the scope and number of disputes arising under Title IX has grown, necessitating local and national change.

The current Title IX regime has a few universal requirements, but schools have some discretion to implement programs as they see fit.<sup>27</sup> One requirement is that each school must “create, publish and widely distribute an anti-discrimination policy.”<sup>28</sup> Within this disseminated material, all schools must include clear definitions of basic terms necessary for understanding what Title IX covers.<sup>29</sup> Each school must also appoint a Title IX coordinator who must undergo training on how to implement these policies.<sup>30</sup> Furthermore, schools must publish and disseminate a clear grievance procedure to the student body.<sup>31</sup> Aside from these universal principles, Title IX procedures can vary fairly dramatically from one school system to the next.<sup>32</sup> Despite this, Title IX has proven to be a controversial topic, as politicians from across the political spectrum have drastically different views on how best to approach the problems Title IX seeks to address.<sup>33</sup>

### III. RECENT TITLE IX DEVELOPMENTS

Title IX has received much media attention recently, both nationally and at the state level.<sup>34</sup> Press coverage is largely centered on proposed changes to Title IX by the Department of Education and the merits of these proposed changes.<sup>35</sup> At the two ends of the political spectrum, there are concerns the Title IX process is too prejudicial to the accused or, alternatively, that the process has a chilling effect on victims.<sup>36</sup> One side argues that the current system is unfair to the accused because defendants are, as the system stands, being denied fundamental due process rights,<sup>37</sup> while the other side argues the most widely-suggested changes threaten the confidentiality of the current process and decrease the likelihood of victims coming forward.<sup>38</sup> These competing concerns—the rights of the victim versus the rights of the accused—are always at the forefront of the debate following any proposed change to Title IX.

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IOWA L. REV. 731 (2019) (addressing a more contemporary Title IX concern—sexual assault by government officials).

27. *Seven Questions About Title IX Answered*, AM. PROMISE ALL. (July 12, 2018), <https://www.americaspromise.org/news/seven-questions-about-title-ix-answered>.

28. *Id.*

29. *Id.* (for example, terms such as “consent” and “harassment” are defined).

30. *Id.*

31. *Id.*

32. *Id.*

33. *Seven Questions About Title IX Answered*, *supra* note 27.

34. See, e.g., Connor Friedersdorf, *Accused College Students Deserve the Presumption of Innocence*, THE ATL. (Feb. 20, 2019), <https://www.theatlantic.com/ideas/archive/2019/02/title-ix-ags/582673/>; *What Betsy DeVos’s New Title IX Changes Get Right—And Wrong*, *supra* note 4; Letter from Attorneys General to Betsy DeVos Commenting on Proposed Rule Regarding Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance (Jan. 30, 2019), <https://www.attorneygeneral.gov/wp-content/uploads/2019/01/2019-01-31-Title-IX-Comments-Final.pdf>.

35. See, e.g., *What Betsy DeVos’s New Title IX Changes Get Right—And Wrong*, *supra* note 4.

36. *Id.*

37. *Id.*

38. *Id.*

On a national level, there have been movements to make changes to Title IX proceedings so that they are more egalitarian.<sup>39</sup> For example, Secretary of State Betsy DeVos has stated that college students who are accused of sexual misconduct in Title IX cases deserve a presumption of innocence.<sup>40</sup> There has been significant pushback against this proposition; eighteen state Attorneys General have rejected it outright, arguing in a formal comment to Secretary DeVos that a presumption of non-responsibility “‘improperly tilts the process’ in favor of the accused.”<sup>41</sup> Professor Ken Pennington of the Columbus School of Law, on the other hand, defended the proposed change, explaining that a “[p]resumption of innocence is not a procedural matter[,] . . . it is a right that is due to every human being.”<sup>42</sup>

Along with the push for a presumption of innocence, Secretary DeVos has also proposed raising the standard of proof to require petitioners to substantiate their claims with clear and convincing evidence.<sup>43</sup> This proposed change was suggested largely because of the potentially grave consequences of a Title IX dispute for the accused.<sup>44</sup> The Attorneys General of eighteen states opposed this suggestion as well, explaining that the “clear and convincing” standard of proof, when paired with a presumption of non-responsibility, sets the bar too high for victims seeking to show that a violation occurred.<sup>45</sup> Under the administration of President Barack Obama, universities were allowed to choose between a “preponderance of the evidence” standard or a “clear and convincing evidence” standard.<sup>46</sup> The Department of Education’s newly proposed guidelines would let educational institutions retain the ability to choose which standard they want to adopt.<sup>47</sup>

On a local level, states have proposed their own legislation to guide Title IX claims. In Missouri, for example, Senator Gary Romine introduced proposed Senate Bill 259 (“SB 259”) earlier this year.<sup>48</sup> SB 259 would repeal Missouri Revised Statute § 537.110, which states that “[i]t is actionable to publish falsely and maliciously, in any manner whatsoever, that any person has been guilty of fornication or adultery.”<sup>49</sup> SB 259 would replace the old statute with twelve new ones intended to ensure that all Missourians “have the right to defend their character and the right to due process protections” under the Constitutions of Missouri and the United States.<sup>50</sup> As a practical matter, this proposed legislation means defendants in a Title IX suit would be entitled to legal counsel, have access to evidence, and have a mechanism for rejecting potentially biased decision makers.<sup>51</sup>

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39. *Id.*

40. Friedersdorf, *supra* note 34.

41. *Id.* (the states are: Pennsylvania, New Jersey, California, Delaware, Maine, Hawaii, Maryland, Illinois, Minnesota, Iowa, Nevada, Kentucky, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, and Washington, as well as Washington D.C.).

42. *Id.*

43. *Id.*

44. *Id.* (“Indeed, one court has held that in student disciplinary cases involving serious accusations like sexual assault where the consequences of a finding of responsibility would be significant, permanent, and far-reaching, a preponderance of the evidence standard is inadequate.”).

45. *Id.*

46. *What Betsy DeVos’s New Title IX Changes Get Right—And Wrong*, *supra* note 4.

47. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 FR 61462–01 (Proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106).

48. S.B. 259, 100th Gen. Ass. (Mo. 2019).

49. MO. REV. STAT § 537.110 (2005).

50. S.B. 259, 100th Gen. Ass. (Mo. 2019).

51. Natasha Vyhovsky, *University Officials Speak Out Against Proposed Title IX Process Changes*, COLUMBIA MISSOURIAN (Feb. 19, 2019), [https://www.columbiamissourian.com/news/higher\\_education](https://www.columbiamissourian.com/news/higher_education)

Possibly the most controversial aspect of SB 259 is that it would allow the accused to cross-examine *any* witnesses, including the alleged victim.<sup>52</sup>

Outside of Missouri's SB 259, other states have made various proposals for Title IX reform.<sup>53</sup> For example, New York's "Enough is Enough" law specifies that "a university can still investigate a Title IX complaint even if a victim decides to back out of the process."<sup>54</sup> Because of how damaging and emotionally charged Title IX proceedings can be, there are legitimate concerns on both sides of the political aisle. Proposed laws like those in Missouri and New York show that Title IX is and will likely remain a hotly contested issue in state legislatures. Only time will reveal how the states, including Missouri, will react and adapt to new applications of Title IX. In the meantime, states should explore opportunities to implement mediation and other ADR techniques—which can benefit both the victim and the accused—into their Title IX processes.

#### IV. MEDIATION AS A FORM OF ALTERNATIVE DISPUTE RESOLUTION

ADR mechanisms are versatile; they can be used in almost any field of law and are not limited to civil disputes.<sup>55</sup> Mediation, as with ADR mechanisms in general, has experienced a relatively recent surge in popularity.<sup>56</sup> In 1980, there were approximately 100 institutionalized ADR programs working to resolve disputes across the United States.<sup>57</sup> Within the subsequent ten years, more than 300 new programs emerged.<sup>58</sup> Again, ADR mechanisms, particularly mediation, can be utilized in a variety of contexts, including criminal cases, to find creative solutions for complicated disputes.<sup>59</sup>

##### A. An Overview of Mediation

Mediation is an ADR mechanism in which the parties to a dispute agree to negotiate within the presence of a third party neutral—the mediator.<sup>60</sup> Both parties

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/university-officials-speak-out-against-proposed-title-ix-process-changes/article\_53b3f898-34ac-11e9-8d8a-1f271869f99f.html.

52. *Id.*

53. See, e.g., Jeremy Bauer-Wolf, *A Direct Contradiction*, INSIDE HIGHER ED (Dec. 13, 2018), <https://www.insidehighered.com/news/2018/12/13/state-law-likely-conflicts-devoss-title-ix-proposal>.

54. *Id.*

55. See generally Gabriel Hallevy, *Therapeutic Victim-Offender Mediation Within the Criminal Justice Process—Sharpening the Evaluation of Personal Potential for Rehabilitation While Righting Wrongs Under the ADR Philosophy*, 16 HARV. NEGOT. L. REV. 65 (2011).

56. Gail M. Valentine-Rutledge, *Mediation as a Trial Alternative: Effective Use of the ADR Rules*, 57 AM. JUR. TRIALS 555, §1 (2019).

57. *Id.*

58. *Id.*

59. Hallevy, *supra* note 55, at 73–74 (“Victim-offender mediation is part of the wider concept of restorative justice. Restorative justice assumes that a deeper connection exists between the victim of the offense, the offender, and the community than is assumed by the formal criminal justice system. The victim and the offender are members of the community, and they have to resume their lives within that community. With this in mind, the concept of restorative justice emphasizes the social interactions among the victim, the offender, and the broader community. These social interactions include emotional, economic, and cultural aspects, among others.”).

60. 18A TIMOTHY J. TRYNIECKI, MISSOURI PRACTICE, REAL ESTATE LAW—TRANSACTIONS AND DISPUTES § 43:3 (3d ed. 2019).

must decide to be present and agree upon the appropriate remedy,<sup>61</sup> but available remedies are numerous and diverse because the parties are free to be creative in determining the outcome.<sup>62</sup> Beyond this, there are three notable aspects of mediation.<sup>63</sup> First, each party must bring a representative who has the authority to settle the relevant dispute.<sup>64</sup> Second, each party must agree to devote the necessary time to allow the mediation to work.<sup>65</sup> Lastly, each party has to make a good faith effort to achieve a settlement.<sup>66</sup> Furthermore, mediations are generally not binding on the parties, at least in theory.<sup>67</sup>

Mediation is most often a consensual process<sup>68</sup> in which both parties have to agree to participate.<sup>69</sup> There are, however, some exceptions to the general rule that mediation is a voluntary process.<sup>70</sup> Some states have provisions that mandate parties pursue ADR.<sup>71</sup> Similarly, many other states give courts the discretion to mandate that certain disputes be mediated before being heard by the trial court.<sup>72</sup> For example, in Missouri, Supreme Court Rule 17.03(a) enables a civil action “to be ordered to alternative dispute resolution upon the motion of any of the parties or by the court.”<sup>73</sup>

In addition to giving parties flexibility and control,<sup>74</sup> mediation allows parties to generate “win-win” outcomes that typically cannot be achieved through litigation or other dispute resolution mechanisms.<sup>75</sup> Mediation does more than facilitate settlements; it furthers justice by empowering the parties to generate their own solutions, minimizing power imbalances between them, and fostering mutual respect when possible.<sup>76</sup> While these goals can occasionally be accomplished through other means, mediation is best able to produce mutually beneficial solutions by allowing parties to select the remedies they think are most appropriate given their unique dispute.<sup>77</sup>

### *B. Mediation in Practice: Victim–Offender Mediation*

Mediation is under-utilized in disputes often considered to be non-negotiable, such as Title IX disputes and other criminal matters. However, mediation has been proven successful in the criminal context due, in part, to the movement towards “restorative justice.”<sup>78</sup> Restorative justice programs—like victim–offender mediation, for example, which places an emphasis on “righting wrongs”—look at

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61. Hallevey, *supra* note 55, at 29.

62. *Id.* at 30.

63. TRYNIECKI, *supra* note 60.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at § 45:1.

68. *Id.* at § 45:7.

69. TRYNIECKI, *supra* note 60, at § 45:7.

70. Valentine–Rutledge, *supra* note 56.

71. *Id.*

72. *Id.*

73. MO. SUP. CT. R. 17.03.

74. *Id.*

75. Deborah L. Levi, *The Role of Apology in Mediation*, 72 N.Y.U. L. REV. 1165, 1170 (1997).

76. *Id.*

77. Hallevey, *supra* note 55, at 74.

78. *Id.* at 73–74.



the effect of the offender on the victim and on society at large.<sup>79</sup> Although restorative justice programs have been around since the 1970s, they became significantly more prominent in the 1990s.<sup>80</sup> These programs consider the offender's social background, factors that led to the specific offense, the offender's present relation to the offense in question,<sup>81</sup> and whether the offender has the potential to be rehabilitated.<sup>82</sup> If rehabilitation seems feasible, then restorative justice processes can be initiated.<sup>83</sup>

Restorative justice programs incorporating mediation can be used in connection with many different types of offenses<sup>84</sup> and are not limited to minor disputes.<sup>85</sup> Mediation's utility and versatility is clear in victim-offender mediation.<sup>86</sup> While this particular restorative justice program is generally used for relatively minor offenses, victim-offender mediation has also been successfully utilized after more serious crimes, such as murder.<sup>87</sup> As with any mediation, however, the process must be consensual. If either party does not agree to go forward with the process at a particular time, or wishes to end the process altogether, he or she can terminate the mediation proceedings.<sup>88</sup>

The procedure, which is fairly standard,<sup>89</sup> includes a face-to-face session, during which "the victim talks about the crime and its effect, and is allowed to ask questions."<sup>90</sup> By giving the victim and the offender the opportunity to communicate with one another, victim-offender mediations provide offenders an opportunity to attempt to "right their wrongs"<sup>91</sup> and enable mediators and other interested parties to assess offenders' rehabilitation potential.<sup>92</sup> Open communication allows for a more just outcome for the "benefit of the offender, the victim, and the community"<sup>93</sup> and can lead to positive changes for both parties.<sup>94</sup>

For offenders, the optimal outcome would be for them to recognize the harm they have caused the other individual while also realizing their own potential for rehabilitation.<sup>95</sup> Victims often receive therapeutic benefits from righting wrongs

79. *Id.* at 74

80. See generally Henry J. Reske, *Victim-Offender Mediation Catching On*, 81 A.B.A. J. 14 (1995) (stating that "[v]ictim-offender mediation programs . . . have been around for about 20 years, but are just now receiving wide attention and use in the United States.").

81. *Id.*

82. Hallevy, *supra* note 55, at 72.

83. *Id.* at 74.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* (noting that in the case of murder, it is the relatives of the victim who get to participate in the victim-offender mediation).

88. See Anderson, *supra* note 2.

89. *Id.*

90. *Id.*

91. Hallevy, *supra* note 55, at 73.

92. *Id.* at 93 ("The victim-offender mediation process yields an accurate evaluation of the offender's personal rehabilitation potential, and also enables the parties to right the wrongs.").

93. *Id.*

94. *Id.* at 75 ("The personal and open communication between the parties creates a dynamic which encourages emotional, cognitive, and behavioral changes in both parties."). The victim may also get some degree of satisfaction out of the process, but the primary beneficiaries of these programs are typically the offender and the community. See Reske, *supra* note 79, at 14 (stating victim-offender mediation programs "benefit the offender more than the victim. Society certainly benefits when an offender realizes the gravity of the problem, what a traumatic event a burglary can be.").

95. Hallevy, *supra* note 55, at 75.

and confronting the accused directly in a safe environment.<sup>96</sup> Furthermore, this process may lead to apologies from one or both parties.<sup>97</sup> Sometimes all a wronged party wants to hear from the other side is a simple, “I’m sorry”<sup>98</sup> or a genuine answer to the questions, “Why me? What could I have done to avoid the crime?”<sup>99</sup> In fact, it is common for victims to request an apology.<sup>100</sup> In a trial setting, such dialogue is discouraged, and one party is strongly disincentivized from apologizing because an apology may be construed as an admission of fault.<sup>101</sup> Such a consequence is unfortunate because apologies can have psychological benefits for both parties<sup>102</sup> and even prevent further litigation between them.<sup>103</sup>

The success of mediation in the criminal context, as exemplified by victim–offender mediation, is evidence that the currently under–utilized process has merit in disputes that were once thought to be non–negotiable—disputes like those that arise under Title IX. Mediation, if informed by the underlying concepts of restorative justice, can have a valuable impact on dispute resolution in the Title IX context.

## V. UTILIZING MEDIATION IN TITLE IX DISPUTES

Mediation is an often–overlooked option for the resolution of Title IX disputes. While many universities allow mediation,<sup>104</sup> the practice is generally disfavored because it is perceived as likely to cause the victim of a Title IX offense greater harm than alternative processes.<sup>105</sup> There are, in reality, many individual, societal, and procedural benefits to utilizing mediation in Title IX, so long as both parties consent to the mediation process. Mediation, as a restorative justice mechanism, offers opportunities “for helping communities heal, helping educate offenders, and

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96. *Id.* at 91.

97. Douglas Landau, *Injury Lawyer, Speech for the American Association for Justice: How I Learned to Relax and Love Mediation* (2009).

98. *Id.*

99. See Valentine–Rutledge, *supra* note 56.

100. Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 294 n.379 (2003).

101. See generally FED. R. EVID. 801; see also Chandler Farmer, *Striking a Balance: A Proposed Amendment to the Federal Rules of Evidence Excluding Partial Apologies*, 2 BELMONT L. REV. 243, 249 (2015) (stating that “[u]nder the Federal Rules of Evidence (“FRE”) little, if any, evidentiary protection is provided to apologies. On the contrary, the rules provide that apologies are generally admissible to prove the liability of the apologizer.”).

102. See generally Levi, *supra* note 75.

103. See generally Alan M. Turkenheimer, *So Sorry! Mea Culpa!*, 88 WIS. LAW. 9 (2015) (laying out the benefits of apologizing as a litigation strategy).

104. UNITED STATES DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, Q&A ON CAMPUS SEXUAL MISCONDUCT 4 (2017), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf> (stating that “[i]f all parties voluntarily agree to participate in an informal resolution that does not involve a full investigation and adjudication after receiving a full disclosure of the allegations and their options for formal resolution and if a school determines that the particular Title IX complaint is appropriate for such a process, the school may facilitate an informal resolution, including mediation, to assist the parties in reaching a voluntary resolution.”).

105. See, e.g., Kristin Jones, *Barriers Curb Reporting on Campus Sexual Assault: Lack of Response Discourages Victims of Rape, Other Crimes*, CTR. FOR PUB. INTEGRITY (Dec. 2, 2009), <https://publicintegrity.org/education/sexual-assault-on-campus/barriers-curb-reporting-on-campus-sexual-assault/>.

reducing recidivism rates”<sup>106</sup>—if educational institutions are cognizant of the potential drawbacks.

### A. Individual Benefits

In Title IX disputes, the question of, “Why me?” likely weighs heavily on the mind of the victim, just like in a victim–offender mediation context,<sup>107</sup> but answers will generally not be shared in an adjudicatory setting.<sup>108</sup> Because mediation is more flexible and less formal than other dispute resolution procedures, the parties are able to control the procedure themselves, allowing information to flow more freely from one party to the other.<sup>109</sup> Thus, through mediation, a victim may receive a meaningful answer to his or her questions in a controlled environment. Similarly, while apologies generally have no place in litigation, there is room for them in mediation.<sup>110</sup> In victim–offender mediations, an apology is largely viewed as an affirmation of the victim’s “respect and dignity by the individual who misappropriated it.”<sup>111</sup> Such an affirmation can be an important starting point for victim healing and offender growth in the Title IX context.<sup>112</sup>

Survivors of sexual assault often develop unique psychological or emotional needs that victims of other offenses may not.<sup>113</sup> Forcing adjudication or other similar Title IX proceedings limits the options of victims, which is detrimental for victims with diverse needs.<sup>114</sup> On the other hand, giving survivors of sexual assault or harassment the option to mediate empowers them to choose the remedy that best suits their individual needs<sup>115</sup>—a hallmark of mediation. This flexibility makes mediation uniquely suited to empower victims of sexual misconduct.<sup>116</sup> Empowering victims to elect the remedy that is best for them, and potentially the community, should be encouraged, and mediation is one of the most flexible processes available for resolving disputes.<sup>117</sup>

An additional benefit of utilizing mediation in Title IX disputes is that mediation reduces the chance of secondary victimization.<sup>118</sup> If victims are unable to provide input in the dispute resolution process—as can happen in litigation—they may feel helpless and disenfranchised,<sup>119</sup> and the feeling of powerlessness can

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106. *Id.*

107. *Id.*

108. See, e.g., Farmer, *supra* note 101, at 249.

109. *An Overview of ADR Techniques*, *supra* note 6.

110. Farmer, *supra* note 101, at 250.

111. Luna, *supra* note 100, at 294.

112. Farmer, *supra* note 101, at 258.

113. 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, 73 (2018) (these needs include: the desire to have their stories told, to observe offender remorse for having harmed them, the need to have choice, and agency in charting the course of the resolution).

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 85.

118. See generally Jamie Balson, *Therapeutic Jurisprudence: Facilitating Healing in Crime Victims*, 6 PHOENIX L. REV. 1017, 1023 (2013).

119. *Id.* (stating that “[a]t least two experts who study the psychological effects of crime on a victim have observed that precluding a victim from participating in the system can produce feelings of inequality and can also increase the psychological harm the victim experiences.”).

cause significant harm above and beyond that caused by the initial offense.<sup>120</sup> Secondary victimization is generally considered in a criminal justice context and linked to prosecutorial conduct, but the same potential for additional harm is present in a Title IX setting.<sup>121</sup> In mediation, victims have the power to exit the process at any time, the power to elect their remedies, and the power to caucus as they see fit.<sup>122</sup> Therefore, utilizing mediation in Title IX disputes can give victims control over the process, thereby reducing levels of secondary victimization and producing better outcomes for both the victim and society.<sup>123</sup>

### *B. Societal Benefits*

In addition to benefiting victims themselves, providing more options to victims offers social utility.<sup>124</sup> While many people espouse the importance of retributive policies, such policies have very low social utility.<sup>125</sup> Not only do retributive policies contribute little to society,<sup>126</sup> they tend to do more harm than good.<sup>127</sup> By contrast, mediation encourages rehabilitation for offenders more than traditional adjudications or other traditional Title IX proceedings.<sup>128</sup> Proceedings that are solely punitive in nature will not have the same rehabilitative effect that a consensual process—in which both parties are able to provide their input and work toward a better outcome together—would have.<sup>129</sup> In mediation, unlike in other settings, parties are able to engage in a meaningful discussion of moral and legal issues<sup>130</sup> that can lead to individual growth on the part of the offender.<sup>131</sup> Generally, reforming offenders is beneficial for society because it allows offenders to become contributing members of that society.<sup>132</sup>

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120. *Id.*

121. *Id.*

122. *An Overview of ADR Techniques*, *supra* note 6.

123. *Id.*

124. *Id.*

125. Luna, *supra* note 100, at 219 (“[R]etributive punishment has been the recipient of harsh criticism. Opponents begin by questioning the practical ability of retribution to ‘do justice.’ The dominant form of retributive punishment—the deprivation of liberty through incarceration—fails to hold offenders accountable for their misdeeds in any meaningful sense. At best, retributive-based incarceration imposes ‘passive responsibility,’ serving one’s sentence, rather than ‘active responsibility,’ accepting the wrongfulness of an offense and seeking to make amends for the harm done. Moreover, critics claim that retributivism can be skewered with its own sword, as retribution, no less than utilitarian-based punishment, ‘uses’ the offender in violation of the Kantian imperative. After all, the practice of criminal justice is inevitably fallible; factually innocent individuals, as well as legally justified or excused defendants, will be subject to undeserved punishment as long as the criminal process is administered by imperfect beings lacking full information.”).

126. *See generally* Luna, *supra* note 100.

127. *Id.* at 220 (“Incarceration isolates and stigmatizes the offender, leaving little hope of reintegration. Whatever expression is intended by retribution, the message received by an inmate is exclusionary: You are evil and have no place in society. The stigmatic effect of retribution combined with the practical reality of prison life leads not to an appreciation of one’s wrongdoing but a closer affection for the criminal underworld.”).

128. Hallevy, *supra* note 55, at 90.

129. *Id.*

130. Levi, *supra* note 75, at 1171.

131. *See generally* Reske, *supra* note 80.

132. *See* Edward Rubin, *Just Say No to Retribution*, 7 *BUFF. CRIM. L. REV.* 17, 18–19 (2003) (“The substitution of retribution for rehabilitation is not only bad for the Code, but it is also bad for the country. Very few criminologists and criminal law scholars argue that the current addiction to incarceration represents effective public policy. Apart from its moral difficulties, it wastes human and

There are compelling reasons to focus on reforming an offender rather than punishing him or her.<sup>133</sup> First, an individual who sexually harasses another and fails to realize the impact of his or her actions on the victim may be more likely to harass another person.<sup>134</sup> Further, it is almost certain that an alleged perpetrator of sexual harassment or assault, especially a college student, will (re)join the work force at some point and pose a potential threat. Finally, an offender who is treated in a merely retributive manner may feel burned by the system and not contribute to society in any meaningful way moving forward.<sup>135</sup> Thus, to prevent future harm, it is in the best interest of society for the offender to be reformed.<sup>136</sup> Punishment can and should be on the table during the resolution of Title IX offenses, but mediations tend to lead to less retributive, more creative solutions to the benefit of both parties and the community.<sup>137</sup>

### C. Procedural Benefits

Mediating Title IX disputes carries procedural benefits as well.<sup>138</sup> Title IX mediations can be structured in a variety of different ways to meet the unique needs of each victim.<sup>139</sup> For example, during the process, the mediator or participating parties can call a meeting between the mediator and a single party—a caucus.<sup>140</sup> The caucusing process is critical to the effective mediation of any dispute,<sup>141</sup> but it is especially valuable in Title IX disputes because of the particularly sensitive and emotionally-charged matters involved.<sup>142</sup>

At some point in the process, the victim may no longer want to be in the same room as the offender.<sup>143</sup> For example, if the victim fears retaliation or physical assault or feels overwhelmed reliving the offense, it is possible the victim will want to leave the room to get away from the offender.<sup>144</sup> The ability to call a caucus and create physical and psychological barriers between the parties gives both the chance to speak their minds to the mediator, subsequently allowing the mediation to continue.<sup>145</sup> The ability to create barriers when needed gives victims a greater

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fiscal resources and produces only limited crime control benefits. Elected policymakers, most notably legislators and chief executives at the state and federal level, are generally expected to avoid such counterproductive policies, but in this case they have been intimidated by the level of public anger about crime. Administrators are subject to the same pressures, both directly and through the elected officials who supervise them. Courts can sometimes restrain or reverse policies that result from this sort of institutional pathology through Constitutional review, as they did, albeit belatedly, for American apartheid, but this has a limited reach, and does not extend to policy decisions like the choice of incarceration over less expensive, more effective alternatives.”)

133. *Id.*

134. *Id.*

135. *Id.* at 71–72.

136. *Id.* at 81.

137. Hallevy, *supra* note 55, at 74.

138. Cyphert, *supra* note 113, at 85.

139. *Id.*

140. *An Overview of ADR Techniques*, *supra* note 6.

141. *Id.*

142. Hallevy, *supra* note 55, at 74.

143. Cyphert, *supra* note 113, at 85.

144. *Id.* at 67.

145. *See, e.g., id.* at 73.

degree of control over the proceedings than they would have through other dispute resolution mechanisms.<sup>146</sup>

If the risk of secondary victimization is particularly high, the parties could engage in mediation entirely through caucuses to minimize the trauma the victim might suffer from being in contact with the offender while still allowing the parties to come up with creative solutions.<sup>147</sup> Other types of proceedings simply do not have the kind of flexibility mediation offers.<sup>148</sup>

#### *D. Potential Risks*

While mediation is well-suited to Title IX disputes and generally beneficial, it is impossible to ignore the associated risks.<sup>149</sup> The potential for an apology to do more harm than good, various procedural drawbacks, and use of a mediator unsuited for the dispute in question are, therefore, addressed below.

While mediation encourages apologies more than other dispute resolution mechanisms, apologies are not a panacea for all of the harms resulting from Title IX violations.<sup>150</sup> Apologies are “delicate interaction[s]” that can only be effective when “certain conditions are fulfilled.”<sup>151</sup> These interactions are even more delicate when sexual harassment or assault are involved.<sup>152</sup> A good apology must be “voluntary, appropriately timed, and sincere.”<sup>153</sup> To complicate matters, sometimes a “bad” or “partial” apology is worse than no apology at all,<sup>154</sup> and it might show a lack of good faith on the part of the apologizer. An insincere apology, for example, may make victims feel as if the mediation is not worth their time and cause them to withdraw from any meaningful discussion.<sup>155</sup>

Challenges can still arise even if all the required elements of an apology are present.<sup>156</sup> Apologizers must avoid inappropriate nonverbal cues and ensure that the overall context of the apology is fitting.<sup>157</sup> Because of the sensitive nature of Title IX disputes, even a sincere apology has the potential to be misconstrued or perceived as lacking one of the essential elements.<sup>158</sup> In short, while apologies can be a powerful tool for resolving disputes, a poor apology may sink a mediation before the process even gets underway.

There are also procedural risks associated with mediations that should not be ignored. One of the greatest strengths of mediation—the ability to generate creative solutions and elect the remedy—can sometimes do more harm than good.<sup>159</sup> Theoretically, a highly charismatic offender could overpower a victim and broker a

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146. *Id.*

147. *Id.*

148. *Id.* at 62.

149. Cyphert, *supra* note 113, at 66.

150. See generally Ilhyung Lee, *The Law and Culture of the Apology in Korean Dispute Settlement (With Japan and the United States in Mind)*, 27 MICH. J. INT’L L. 1, 11 (2006); Levi, *supra* note 75, at 1166.

151. Levi, *supra* note 75, at 1166.

152. See, e.g., Cyphert, *supra* note 113, at 69.

153. Lee, *supra* note 150, at 7.

154. *Id.* at 11.

155. Levi, *supra* note 75.

156. Lee, *supra* note 150.

157. *Id.*

158. Levi, *supra* note 75.

159. See generally TED DONNER & BRIAN CROWE, ATTORNEY’S GUIDE TO NEGOTIATIONS (2014).

deal that is not at all advantageous to the victim or society at large.<sup>160</sup> If the mediator does not step in to stop this from happening, the mediation may result in further harm, especially because a victim in a Title IX setting may feel more vulnerable than parties to less sensitive mediations. Therefore, it is important to use the “right” mediator with an approach appropriate to the type of dispute, and universities should engage in some form of screening to select mediators specifically suited to the subject matter.<sup>161</sup>

One way to distinguish between mediation styles is to put them into three categories: “trashers,” “bashers,” and “hashers.”<sup>162</sup> Trashers tend to tear apart the cases of both sides in an attempt to create a realistic settlement.<sup>163</sup> A trasher’s style is likely the least beneficial for a victim of sexual harassment or assault and is almost certain to create secondary victimization.<sup>164</sup> Bashers, on the other hand, encourage considerable communication between the two parties and try to get parties to “make a mad dash for the middle.”<sup>165</sup> In most contexts, encouraging quick settlement is not harmful. However, in Title IX disputes, such a level of directness may harm the victim or overlook crucial emotional issues that need to be addressed. The last type of mediator, the hasher, is the only type that may be appropriate for sensitive disputes.<sup>166</sup> Hashers are a good fit for Title IX mediations because of their flexibility and willingness to terminate a session as the need arises.<sup>167</sup> Most importantly, hashers generally let the parties and their counsel “own” the mediation process.<sup>168</sup> Whereas bashers and trashers can be destructive in a highly sensitive situation like a Title IX mediation, hashers are the most conducive to ensuring a productive Title IX mediation.<sup>169</sup>

A related procedural concern is the risk of wasted time and resources. The ability to elect remedies and terminate mediation at any time is both a cost and benefit for the parties involved.<sup>170</sup> There may be a situation in which one party wants to end the mediation prematurely, even sometimes very close to a meaningful settlement.<sup>171</sup> Premature termination would lead to significant wasted time, lost resources, and emotional exertion.<sup>172</sup> Additionally, a terminated mediation will likely be followed by another dispute resolution technique, most likely one that is more formal and less beneficial than mediation. All of the gains from the mediation would be lost, and the process would have to start over, leading to a great opportunity cost and an increased risk of secondary victimization.<sup>173</sup>

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160. Anderson, *supra* note 2.

161. *Id.*

162. James Alfini, *Trashing, Bashing and Hashing it Out: Is This the End of “Good Mediation?”*, 19 FLA. ST. U. L. REV. 47, 66–73 (1999).

163. DONNER & CROWE, *supra* note 159.

164. *Id.*; see also Balson, *supra* note 117, at 1022–23.

165. See DONNER & CROWE, *supra* note 159.

166. *Id.*

167. *Id.*; see generally Anderson, *supra* note 2.

168. See DONNER & CROWE, *supra* note 159.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. See Balson, *supra* note 117, at 1022–23.

## VI. BEST PRACTICES FOR MEDIATING TITLE IX DISPUTES

Mediation, particularly with a restorative justice focus, offers much for victims of sexual harassment and assault if they are willing to engage in the process,<sup>174</sup> but these benefits can only be realized if mediation programs are implemented appropriately. Sexual harassment and assault are “real [problems] and must be taken seriously and properly addressed.”<sup>175</sup> Because of how sensitive Title IX issues are, implementation is critical. Possibly the *most* critical aspects of any mediation program in a Title IX context are that the mediation be a truly voluntary process, just one of many options available, and facilitated by an appropriate mediator.<sup>176</sup>

If a victim of sexual harassment or assault does not want to pursue mediation, they should not be coerced into doing so, regardless of their reason(s) for declining.<sup>177</sup> If a victim does want to move forward with mediation, it is crucial that the mediator inform them that the process is completely voluntary and can be backed out of at any time and for any reason.<sup>178</sup> It is important to offer a “menu of choices”—such as mediation, arbitration, or adjudication—for survivors so that they can be certain that the process and remedy fit their needs.<sup>179</sup> A menu of choices does not, however, mean that Title IX coordinators, or comparable figures, have to be completely neutral regarding the dispute resolution method that should be utilized.

Title IX officers must take care to pick the right type of mediator. If the mediator is a basher or a trasher, then mediation may do more harm than good.<sup>180</sup> The mediator needs to be a hasher to minimize the risk of secondary victimization and maximize the chance of productive settlement.<sup>181</sup> Thus, universities need to be very cautious in their selection of mediators. Screening is necessary, as is some kind of training program to ensure that officials are picking mediators well-suited to handle such emotionally-charged matters.

## VII. CONCLUSION

The debate surrounding Title IX is heated and unlikely to end any time soon. Sexual harassment and assault are problems that need addressed, but because there exists such a wide range of views on the best way to address these issues, the argument continues and the number of unresolved complaints grows.<sup>182</sup> Adjusting the way that Title IX programs are implemented in universities is an excellent place to start with regard to making positive, society-wide changes on how sexual misconduct is viewed. If the United States, as a society, decides to take sexual

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174. *Id.*

175. See Cyphert, *supra* note 113, at 85.

176. *Id.*

177. *Id.*

178. *Id.* (stating that “[m]ost importantly, it must be a truly *voluntary* option for survivors, one that is part of a menu of choices, and one that they can change their mind about at any point.”)

179. *Id.* at 85.

180. See Alfini, *supra* note 162.

181. *Id.*

182. See, e.g., Friedersdorf, *supra* note 34; see also *What Betsy DeVos’s New Title IX Changes Get Right—And Wrong*, *supra* note 4.



misconduct seriously and empower victims with options, such as the utilization of restorative justice concepts and elements of victim–offender mediation, then we can collectively create better outcomes for individual victims and future generations.

While there may be some general skepticism of mediating such sensitive topics, it is critical to consider the pragmatic benefits of using mediation and other ADR techniques to resolve Title IX disputes. Reduced recidivism rates, the creation of uniquely tailored remedies, and positive outcomes for both victims and offenders are goals that can be reached through the use of mediation above other dispute resolution processes. As such, mediation is a viable option in Title IX disputes and a step in the right direction for addressing problems of sexual misconduct in our schools and communities.