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By almost all accounts, sexual harassment continues to run rampant on college campuses.[1] Not only does this present a significant threat to the safety and well-being of the complainants, but it also poses a significant obstacle to their ability to fully access educational opportunities, thereby raising Title IX concerns.[2] Faced with this reality, universities have not stood idly by. Although perhaps spurred in part by external regulatory pressures, universities[3] have worked diligently over the last twenty-odd years to develop and implement dispute resolution procedures to address such claims in the university setting. But that is not the easy or straightforward process that it may seem at first glance. In designing procedures to resolve these potential Title IX claims, one must be mindful of the university setting, respectful of the rights of both the accuser and the accused, and also cognizant of the impact that process design may have on reporting in the first instance—especially as data suggests that alleged complainants are already hesitant to step forward with their claims.

Results to date have been decidedly mixed. Since 2011, universities' efforts to address student-on-student sexual harassment claims have prompted repeated litigation against universities.[4] And reflecting the process design difficulty, both alleged complainants and alleged perpetrators have sued, with each claiming that the university's Title IX grievance procedures are inadequate to protect their respective—and somewhat competing—rights.[5]

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1 David Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct*, ASS'N OF AM. UNIVS. xiii (Oct. 20, 2017), https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/AAU-Campus-Climate-Survey-FINAL-10-20-17.pdf [https://perma.cc/G93L-WXAF] (reporting on sexual misconduct and assault statistics around the country); *See also* Sharyn J. Potter et. al., *Sexual Assault Prevalence and Community College Students: Challenges and Promising Practices*, 47 HEALTH EDUC. & BEHAVIOR (2020) (noting that two-year community colleges have been shown to have similar rates of sexual assault despite the vast majority of their students living off-campus or commuting to campus).

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

3 The Regulations use the term "schools" throughout to refer to K-12 schools, as well as colleges and universities. In this article, I will refer to "universities" rather than to schools and/or colleges. *See generally*, 34 C.F.R. § 106 (2021).

4 *See generally*, UNITED EDUCATORS, *Confronting Campus Sexual Assault: An Examination of Higher Education Claims* (2015) http://www.ncdsv.org/ERS_Confronting-Campus-Sexual-Assault_2015.pdf [https://perma.cc/9M22-G7R6] [hereinafter *Confronting Campus Sexual Assault*]*; see, e.g.*, Doe v. Oberlin Coll., 963 F.3d 580 (6th Cir. 2020) (reversing decision to dismiss alleged perpetrator's claim that Oberlin's Title IX procedure, as applied to him, discriminated against him on the basis of sex); Doe v. Univ. of Cincinnati, 872 F.3d 393 (6th Cir. 2017) (finding that student facing suspension must be provided with the opportunity to be heard); Katie Vail, *The Failings of Title IX for Survivors of Sexual Violence: Utilizing Restorative Justice on College Campuses*, 94 WASH. L. REV. 2085 (2019) (describing the number of lawsuits arising out of the application of the DCL's approach to hearings).

5 A United Educators (UE is an insurance provider for universities) study found that students, both complainants and alleged perpetrators, challenged over twenty-five percent of more than 300 Title IX claims either by filing federal

For its part, the Department of Education (the "Department") has struggled in advising universities about best practices for Title IX grievance resolution systems. As a result, such advice has been a moving target, with frequent wholesale changes over the past twenty years. One of the most significant alterations in that advice occurred in 2011, when the Department issued a Dear Colleague Letter ("DCL") to universities.[6] The Department uses such letters to provide "informal" guidance, but the letters, not surprisingly, carry great weight with university administrators. And the DCL specifically discouraged use of informal dispute resolution process (e.g., mediation) for resolving Title IX sexual harassment complaints.[7] The DCL instead suggested that many of these cases required a formal hearing process, albeit one that did not mirror the typical due process protections available in court hearings.[8]

Based on the guidance the DCL provided, universities quickly implemented formal hearing processes, in which some combination of faculty, students, and administrators (depending on the university) acted as hearing officers.[9] Controversially, at some of the universities, hearing officer duties were assigned to the same person who was to act as the original investigator of the underlying claim.[10] The DCL guidance also included other process design features that some found

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lawsuits or complaints with the Department's Office for Civil Rights. *Confronting Campus Sexual Assault*, *supra* note 4.

6 OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE (April 4, 2011) [hereinafter DEAR COLLEAGUE LETTER].

7 *See id.*

8 *Id.* at 11–12 (outlining the requirements of a Title IX hearing including that parties cannot question nor cross-examine each other, the burden of proof for the complainant is preponderance of the evidence, and precluding the respondent from presenting character witnesses at the hearing).

9 *See, e.g.*, *Gender-Based Misconduct Policy and Procedure for Students,* COLUMBIA UNIV., 38 (Aug. 24, 2018) http://www.columbia.edu/cu/studentconduct/documents/GBMPolicyandProceduresforStudents2018-19.pdf [https://perma.cc/B9FY-3JJD] ("The Hearing Panel will generally have three members drawn from specially trained administrators within the University's Student Conduct and Community Standards office and/or the Equal Opportunity and Affirmative Action office, excluding the Investigative Team and other administrators responsible for the report. All panelists receive relevant training at least once a year. In addition to training on how the adjudicatory process works, the training will include specific instruction on how to evaluate evidence impartially and how to approach students about sensitive issues that may arise in the context of alleged gender-based misconduct. The Complainant and Respondent will be informed of the panel's membership before the hearing process begins and afforded an opportunity to raise any perceived conflicts of interest before the hearing."); *Title IX Policy Prohibiting Sexual Misconduct*, LOUISIANA ST. UNIV. PERMANENT MEMORANDUM 73, at 10, https://www.lsu.edu/administration/policies/pmfiles/pm-73.pdf [https://perma.cc/6M9Z-V38K] (noting three Louisiana State University employees staff the Hearing Panel).

10 A number of universities used a single investigator/resolver model where a person or team investigated the complaint and decided whether the respondent violated university policy. *See, e.g.*, *Title IX Sexual Harassment and Related Conduct Policy*, THE GEORGE WASHINGTON UNIV. (Aug. 14, 2020), https://compliance.gwu.edu/title-ix-sexual-harassment-and-related-conduct-policy [https://perma.cc/V2XP-QWYG]; *see generally* Doe v. Univ. of Michigan, 325 F. Supp. 3d 821 (E.D. Mich. 2018), *vacated and remanded sub nom.* Doe v. Bd. of Regents of Univ. of Mich., No. 18-1870, 2019 WL 3501814 (6th Cir. Apr. 10, 2019). Combining investigation and adjudication raised red flags for the Department, which eliminated the single investigator model in its 2020 Regulations. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,366–67 (codified at 34 C.F.R. § 106 and effective on August 14, 2020); *see also* Doe v. Univ. of Ark., Fayetteville, No. 5:18-CV-05182, 2019 WL 1493701, at *2, *8 (W.D. Ark. Apr. 3, 2019) (discussing

troubling—lowering the burden of proof on complainants filing sexual harassment claims, discouraging universities from allowing cross-examination of the complainant in connection with the hearing, and requiring pre-approval by the decisionmaker of all questions posed to witnesses.[11]

Perhaps at least in part as a response to the criticism—and lawsuits—that this guidance spawned, the Department began to take a new look at Title IX grievance process design issues. In 2017, the Department withdrew the DCL and announced that it would be undertaking notice and comment rulemaking on the issue. That process culminated with the issuance of regulations in 2020.[12] As relevant to this article, those regulations accomplished two things. First, as I have discussed in detail elsewhere, they emphasized that informal dispute resolution processes had a larger role to play, at least with regards to some kinds of Title IX sexual harassment claims (those not involving claims of physical violence).[13] Second, and more central to this article, to those claims that failed to resolve through informal means, the regulations required a more formal adjudicative process, and one with greater due process protections for the accused.[14]

To expand on that latter point just a bit, the new regulations sought to expressly identify the basic standards that a university's dispute resolution process must meet to satisfy what courts had identified (in earlier lawsuits challenging Title IX processes at various universities) as constitutional due process requirements.[15] So, for example, respondents must now receive pre-hearing notice of the specific claims against them, live hearings, and an opportunity to have an "advisor" cross-examine the complainant.[16]

While the regulations identified a "floor" on certain specific issues, more work remains to create a process that is fair and equitable to the parties, consistent with the universities' mission of providing equal educational opportunities to all, and Title IX compliant. And this is important work. Effective procedural frameworks are critical to ensuring that cases are handled fairly and with sensitivity to the issues involved. Equally important, they are also critical to achieving the underlying goal of reducing unwelcome or unwanted sexual contact.

Lessons from the world of arbitration can assist process designers in achieving these goals. For many years, arbitration has been used successfully in adjudicating a wide variety of disputes, including the types of sexual harassment or discrimination claims that are frequently at issue in

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University of Arkansas's single investigator/resolver model); Doe v. Miami Univ., 882 F.3d 579, 601 (6th Cir. 2018) (finding a procedural due process problem with investigator who also served as a member of the hearing panel).

11 *See* DEAR COLLEAGUE LETTER, *supra* note 6, at 15–18.

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

13 *See id.* at 30,094–97.

14 *See id.* at 30,048; *see also* 34 C.F.R. § 106.45 (2020).

15 *See id.* at 30,048–54; *see also* 34 C.F.R. § 106.45 (2020).

16 34 C.F.R. § 106.45 (2020).

the Title IX setting.[17] Those who study arbitration have spent significant time and energy exploring the promise and pitfalls that arbitral processes offer in such a setting.[18]

This article explores three such issues—(1) identifying and selecting decisionmakers, (2) decisionmaker training, and (3) decision-making and opinion writing. As to the first, one of the ways in which arbitration differs from judicial processes is with regard to decisionmaker selection. In the litigation system, judges, who are required in most instances to have a law degree, are pre-selected by some process (typically either by voting or by merit selection) to an assigned term of full-time service, and then cases are randomly assigned among the sitting judges with no disputant involvement in that process.[19] In arbitration, by contrast, the arbitral providers typically undertake the task of creating large pools of pre-screened potential arbitrators, and the parties themselves then play a central role in selecting the specific arbitrator or arbitrators for a given matter.[20] Thus, in arbitration, consideration of appropriate decisionmaker characteristics can be more intentional and more specific. In that regard, both academics and providers have considered the extent to which attributes such as impartiality, temperament, experience, and expertise should play a role in creating the pool.

The Title IX system is somewhat of a hybrid between the two. While the parties play no role in selection (as they would in arbitration), the university at some level acts as the provider—creating not only the pool of potential hearing officers, but also specifying the one or more who will be assigned to a given case.[21] But, muddying the water, universities are not merely providers, but also stakeholders in the process to some extent. Thus, universities should pay particular attention to concerns regarding bias or perceived bias in decisionmaker selection. Beyond that, universities must also consider the same issues as any other provider: to what extent should they screen for temperament, experience, and expertise?

How such decisionmakers are trained raises related concerns. Frequently, Title IX hearing officers are not lawyers, and they may have little experience with formal hearing processes, rules of evidence, presumptions of innocence, or the many other aspects that inform notions of due process in the judicial setting.[22] Compounding the problem, at most universities, very few claims

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17 *See Arbitrators and Arbitration Services*, JAMS, https://www.jamsadr.com/arbitration (last visited June 18, 2021) [https://perma.cc/X8SY-775J].

18 "Victims of sexual harassment may find that the inherent confidentiality, speed, affordability, and lack of discovery of arbitration are actually well-suited to their needs." Kathryn Meyer, *Why Victims Deserve the Right to Choose How to Resolve Their Sexual Harassment Claims*, 10 ARB. L. REV. 164, 170 (2018) (articulating the advantages and drawbacks of arbitrating claims of sexual harassment).

19 *See FAQs: Filing a Case*, U.S. CTS, https://www.uscourts.gov/faqs-filing-case (last visited June 18, 2021) [https://perma.cc/B96A-327C].

20 *See Arbitrator Selection*, AM. ARB. ASS'N, https://www.adr.org/ArbitratorSelection (last visited June 18, 2021) [https://perma.cc/5XQN-LJZG].

21 *See* 34 C.F.R. § 106.45(b)(1) (2020).

22 According to a pre-2014 study, Title IX decisionmakers received an average of 16 hours a year of training despite that few have a "law school education and are not adequately trained in the complexities of evidentiary rulings and procedures." Lauren Bizier, *Maintaining the Delicate Balance Between Due Process and Protecting Reporting Students from Re-Traumatization During Cross-Examination: Title IX Investigations in the Wake of the Trump Administration's Proposed Regulations*, 25 ROGER WILLIAMS U. L. REV. 242, 253–254 (2020); *see also* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,

actually make it to the formal hearing setting,[23] meaning any training a hearing officer once received may lose efficacy over time.

This article suggests that one way in which universities could address such issues is by outsourcing the hearing officer function to non-university personnel. Doing so would allow universities to leverage existing resources (i.e., existing arbitral providers), alleviate appearances of bias, reduce the need for cumbersome internal training programs, and ensure that the hearing officers selected have ongoing experience with addressing these kinds of disputes. One could perhaps argue that "strangers" to the university may reach results that are not consistent with a given university's ethos. But any such fears may be overblown, as universities are unlikely to vary dramatically in connection with their desires to root out harassment and provide an educational environment that respects all students.

The article proceeds as follows. In Part I, the article describes the evolution of Title IX with a particular focus on the shifting advice as to dispute resolution processes. In Part II, the article discusses the problems that arise with regard to decisionmaker selection and training in the Title IX setting. The article then considers how arbitral providers in the private sector have approached such issues. Based on the lessons learned there, in Part IV, the article proposes principles to guide universities in selecting, screening, and training decisionmakers, particularly

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85 Fed. Reg. 30,026, 30,560 (May 19, 2020) (noting that the Department called for doubling the existing four hour training requirement to eight hours for all Title IX staff; however many commentators speculated that figure to still be grossly insufficient); *The University of Chicago Policy on Title IX Sexual Harassment*, UNIV. OF CHICAGO (eff. Aug. 14, 2020) https://studentmanual.uchicago.edu/university-policies/the-university-of-chicago-policy-on-title-ix-sexual-harassment/ [https://perma.cc/SF8H-67BK] (The University of Chicago requires all Title IX staff to participate in eight to ten hours of training annually).
To demonstrate the inadequacy of the Title IX training requirements set forth under the 2020 Guidance, consider the following training requirements for law students wanting to participate in their respective school's clinical mediation program. *Compare Mediation Clinic*, HAR. L. SCH., https://hls.harvard.edu/dept/clinical/mediation-clinic/ [https://perma.cc/5S89-HWGE] (last visited June 18, 2021) (noting Harvard requires thirty-two hours of training), *and Mediation Clinic*, N.Y.U. SCHOOL OF LAW, https://www.law.nyu.edu/academics/clinics/semester/mediation [https://perma.cc/SW2R-XCF9] (last visited June 18, 2021) (noting NYU requires an intensive two-day training), *and Domestic Relations Mediation Clinic*, MICH. L., https://www.law.umich.edu/clinical/Pages/domesticmediation.aspx [https://perma.cc/94ZF-5JPR] (last visited June 18, 2021) (noting Michigan requires forty-eight hours of training for their Domestic Relations Mediation Clinic), *and Small Claims Mediation Clinic*, MARQ. UNIV. L. SCH., https://law.marquette.edu/programs-degrees/small-claims-mediation-clinic [https://perma.cc/NN6P-NJHP] (last visited June 18, 2021) (noting Marquette requires an intensive weekend training program), *and Mediation Apprenticeship Clinic*, ALB. L. SCH., https://www.albanylaw.edu/centers/the-justice-center/our-clinics/apprenticeship/mediation-apprenticeship-clinic [https://perma.cc/6AKN-ZWHN] (last visited June 18, 2021) (noting Albany requires thirty hours of training), *and Frequently Asked Questions – Civil Mediation*, LA. STATE UNIV. L., https://www.law.lsu.edu/experiential/clinics/civil-mediation/faq/ [https://perma.cc/3RH9-YWNY] (last visited June 18, 2021) (noting LSU requires three to four hours training), *and Lodestar Mediation Clinic*, ARIZ. STATE UNIV., https://law.asu.edu/experiences/clinics/lodestar-mediation [https://perma.cc/S2QP-447V] (last visited June 18, 2021) (noting that Arizona State requires three days of intensive training), *and Mediation Clinic*, UNIV. OF HOUS. L. CTR., http://www.law.uh.edu/clinic/mediate.asp [https://perma.cc/45T7-J7L3] (noting the University of Houston requires forty hours of training), *with* UNIV. OF ARK. WILLIAM H. BOWEN SCHOOL OF LAW, https://ualr.edu/law/course/mediation-clinic/ [https://perma.cc/UH3Q-YUH5] (last visited June 18, 2021) (noting the University of Arkansas requires a three-and-a-half day training).

23 *See 2019–20 Title IX/Sexual Harassment Annual Report*, STANFORD UNIV. at 12 (Nov. 17, 2020) (on file with the author) (noting that at Stanford, between 2019 and 2020, only two student-on-student Title IX disputes prompted formal, complete investigations).

with respect to deliberation and opinion-writing, and also discusses the possibility that universities may be well served to out-source some or all of these functions.

I. The Evolution of Title IX and the Formal Hearing Process

The formal process for resolving sexual misconduct complaints has evolved considerably since Title IX was enacted in 1972. Passed initially as part of the United States Education Amendments of 1972, which were enacted to improve equality in college admissions, the statute quickly became known as a vehicle for promoting gender equity in opportunities within the educational environment.[24] As a result of Supreme Court decisions extending Title IX's reach to student-on-student sexual harassment issues, however, both the nature and quantity of disputes brought pursuant to the statute changed dramatically.[25] And, to meet the mandate under Title IX of assuring a university setting free from the effects of sexual discrimination, universities have been tasked with the unenviable job of resolving these disputes. The Department has provided some assistance, issuing multiple guidance documents over the last twenty-three years—in 1997, 2001, 2011, and 2020.[26] Each of these documents offered direction to universities, with ever increasing formality, regarding how best to structure their dispute resolution processes. Perhaps reflecting that the student-to-student matters seemed analogous to disputes traditionally assigned to adjudicatory processes, the guidance documents, and eventually the 2020 Regulations, now appear similar in many respects to a bench trial or, at least, an administrative agency proceeding.[27] Increasing the formality of the proceedings, however, led to conflict, particularly after the Department issued its DCL in 2011.[28] The DCL, unlike the guidance documents that came before, wrought changes to the formal hearing process that prompted many respondents, and complainants, to sue on the grounds that their rights to a fair hearing were jeopardized by the university's processes.[29] At least in part as a response to the problems that ensued, the 2020 Regulations reconsidered hearing design, attempting to conform the formal hearing process to the

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24 *See* 34 C.F.R. § 106 (2020); Rachel Dunham, *Title IX Beyond School Lines: The Proposed Regulations that will Limit Colleges and Universities' Jurisdictional Scope of Responsibility*, 25 ROGER WILLIAMS U. L. REV. 265, 268–69 (2020) (reviewing Title IX origin as gender equity law).

25 *See* Franklin v. Gwinnett Cty. Pub. Sch., 503 U.S. 60, 62–63 (1992).

26 *Policy Guidance Portal*, DEP'T. OF EDUC., https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/index.html [https://perma.cc/7RJM-DXSL].

27 *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. at 30,331 n.1287 (May 19, 2020); *see also* 34 C.F.R. § 106 (2020).

28 *See* Jake New, *Must vs. Should*, INSIDE HIGHER Ed (Feb. 25, 2016), https://www.insidehighered.com/news/2016/02/25/colleges-frustrated-lack-clarification-title-ix-guidance [https://perma.cc/B3P2-DTJZ]; Amanda Orlando, Mariko Cool, Nancy Chi Cantalupo & Tiffany Buffkin, *Widely Welcomed and Supported by the Public: A Report on the Title IX-Related Comments in the U.S. Department of Education's Executive Order 13777 Comment Call*, CAL. L. REV. ONLINE (2019), https://www.californialawreview.org/widely-welcomed-and-supported-by-the-public/ [https://perma.cc/KVA6-E4PR].

29 *See* Kathryn Joyce, *The Takedown of Title IX*, N.Y. TIMES (Dec. 5, 2017), https://www.nytimes.com/2017/12/05/magazine/the-takedown-of-title-ix.html [https://perma.cc/2RQM-QQPR].

requirements of constitutional due process and, for private universities, to create a more equitable approach to Title IX claims.[30]

A. The Evolution of Title IX – 1997 and 2001 OCR Guidance Documents

Title IX states that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[31] The statute applies to all schools receiving federal funding including institutions of higher education—colleges and universities.[32] Because federal financial assistance is essential to many students' ability to participate in post-secondary study, compliance with Title IX is critical to all post-secondary institutions.

Initially, Title IX required schools to create procedures that students could follow to register complaints about alleged discrimination.[33] Over time, the Office of Civil Rights ("OCR"), in its communications with the public, and the courts, through a series of decisions in the late 1990s, recognized that Title IX's coverage extended to include sexual harassment claims.[34]

In 1997, the OCR issued guidance to assist universities in developing an approach to investigating and resolving sexual harassment disputes,[35] which had become increasingly common on college campuses.[36] At the time the guidance was issued, however, courts had not uniformly interpreted Title IX to include student-on-student harassment. Even so, the 1997 Guidance provided information about the structure and timing of Title IX complaint resolution for harassment claims.[37] The 1997 Guidance did not require universities to create a separate grievance procedure but permitted them to use a general student disciplinary procedure to resolve Title IX

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30 *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. at 30, 311–31 (May 19, 2020).

31 Initially, Title IX's focus was ensuring women students equity in college admissions and athletic participation, as well as funding. *See* 20 U.S.C. §§ 1681–1688 (2018).

32 *See id.*

33 *See* 34 C.F.R. § 106.8 (2020).

34 *See* Franklin v. Gwinnett Cty. Pub. Sch., 503 U.S. 60, 78 n.3 (1992) (finding that Title IX coverage encompasses sexual harassment claims).

35 Student-on-student sexual harassment claims range from inappropriate remarks with a sexual overtone to rape. A number of potential acts of sexual violence, both contact and non-contact, may support a Title IX claim. Noncontact acts include sexually-related teasing or staring, sending sexually-related materials, or showing another person pornography. To expand on this description, *see* Mary P. Koss, Jay K. Wilgus, & Kaaren M. Williamsen, *Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance with Title IX Guidance,* 15(3) TRAUMA, VIOLENCE & ABUSE 242, 244 (2014) (identifying multiple types of gender harassment and sexual hostility that do not involve contact that would be actionable under Title IX).

36 34 C.F.R. § 106.8(b). The 1997 Guidance stated that OCR has "long recognized that sexual harassment of students engaged in by . . . other students . . . is covered by Title IX." *Sexual Harassment Guidance*, 62 Fed. Reg. 12,034 (Mar. 13, 1997).

37 62 Fed. Reg. at 12,042–43.

claims.[38] At Brown University in 1997, for example, the University Disciplinary Committee ("UDC") heard both sexual misconduct and other misconduct cases.[39] The UDC was comprised of two faculty or deans, two students, and one chair.[40] At least one member of the UDC had to be a faculty member.[41] Both parties were entitled to attend the disciplinary hearing and to receive assistance from an advisor.[42] As is still the case today, the hearing began with the investigator's report followed by the parties' opening statements.[43] The parties could ask questions, but only through the UDC, which had the sole power to ask questions of the hearing participants.[44] The parties were also entitled to give closing statements, after which the UDC would submit the case for consideration and decision.

In 1999, the Supreme Court decided *Davis v. Monroe County Board of Education*,[45] interpreting Title IX to apply to student-on-student sexual harassment. Now that Title IX applied to all sexual harassment claims, the Department's OCR drafted its 2001 Guidance.[46] The 2001 Guidance offered more structured direction to schools to ensure proper enforcement of Title IX. OCR defined "sexual harassment"[47] as "unwelcome conduct of a sexual nature" that can "deny or

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38 The 1997 Guidance provided little direction on grievance processes, stating only that schools were required to "adopt and publish a policy against sex discrimination and grievance procedures providing for prompt and equitable resolution of complaints of discrimination on the basis of sex." *Id*. at 12,044. The procedures do not have to be tailored to sexual harassment claims but must be effective as a mechanism to respond to sexual harassment claims. *Id*.

39 *News from Brown*, BROWN UNIV. NEWS BUREAU (Sep. 2, 1997), https://www.brown.edu/Administration/News_Bureau/1997-98/97-012.html [https://perma.cc/RFJ5-2HUA].

40 *See id.*

41 *See id*. *See also* Robin S. Wilson, *Executive Memorandum 93-009, Guidelines for Faculty/Student Relationships*, CAL. ST. UNIV. CHICO (May 19, 1993), https://www.csuchico.edu/pres/em/1993/93-009.shtml [https://perma.cc/ZS82-VJWR].

42 *News from Brown, supra* note 39.

43 *See id.*

44 *See id*.

45 Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 633 (1999) (holding that student-on-student sexual harassment, if sufficiently severe, can be actionable under Title IX). The 2001 Guidance also responded to *Gebser v. Lago Vista Independent School District*. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998) (holding that a student complainant alleging sexual harassment by another student can succeed only if she establishes that the institution had actual notice but acted with deliberate indifference).

46 According to the 2001 Guidance, the Department revised the 1997 Guidance to reflect Supreme Court cases decided between 1997 and 2001 relating to sexual harassment in schools. *See* Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 66 Fed. Reg. 5,512 at 1 (Jan. 19, 2001). The Department identified two cases to which it needed to respond: *Gebser* and *Davis v. Monroe County Board of Education*. *Id.* Both cases addressed the issue of school district liability for a K-12 school when the school becomes aware of alleged sexual harassment. Justice O'Connor, in her opinion in *Davis*, stated that the recognition of student-to-student sexual harassment as actionable under Title IX was a codification of the 1997 Guidance, issued when Bill Clinton was the President. *Davis*, 526 U.S. at 646–48 (1999).

47 Sexual harassment was not mentioned in the original statute and was not the focus of Title IX until the end of the twentieth century when *Davis* and *Gebser* were decided. *See* 20 U.S.C. §1681–1688 (stating Title IX's original language, "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the

limit, on the basis of sex, the student's ability to participate in or to receive benefits, services, or opportunities in the school's program."[48] The Guidance instructed colleges and universities to adopt policies prohibiting sexual harassment and put into place guidelines to ensure the "prompt and equitable resolution" of sexual harassment complaints.[49]

For student-to-student sexual harassment, OCR advised universities to address instances in which a student's misconduct is so severe and/or pervasive that it creates a hostile environment that "denies or limits [another] student's ability to participate in or benefit from the program based on sex."[50] If the university determines that the student's conduct created such a hostile environment, it must take "prompt and effective action to stop the harassment and prevent its recurrence" as well as remedy the effects of harassment on the impacted student.[51]

According to this 2001 Guidance, institutions must act when they have actual or constructive knowledge of the harassment, requiring universities to exercise "reasonable care" in making a "reasonably diligent inquiry" into reports of harassment.[52] Universities must investigate claims of harassment, even if the student chooses not to file a formal complaint.[53] Finally, universities are required to respond in a "timely" manner, while acknowledging that the circumstances surrounding an individual case may impact the timeline for response.[54]

The 2001 Guidance suggested that institutions utilize both informal and formal methods for resolving sexual harassment complaints.[55] Informal resolution mechanisms, like mediation, could be used to resolve sexual harassment claims if both parties consented.[56] For formal processes, the Guidance emphasized that the parties' due process rights should be protected but, despite

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benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance," which was initially interpreted as a means of establishing equitable treatment in the classroom and in athletics).

48 Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 66 Fed. Reg. 5,512 at 2 (Jan. 19, 2001), (noting that in the Guidance, OCR stated that the definition it uses for sexual harassment is consistent with the Supreme Court's definition of sexual harassment from the *Davis* case).

49 *Id.* The 2001 Guidance also required schools to appoint a Title IX Coordinator and publish a notice of non-discrimination. *Id.*

50 *Id.* at 5. Students may not be held liable for quid pro quo harassment. *Id.* at 4.

51 *Id.* at 8.

52 *Id.* at 13.

53 Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 66 Fed. Reg. 5,512 at 15 (Jan. 19, 2001).

54 *Id*. at 20.

55 *Id.* at 21.

56 *Id.* According to the DCL, "Grievance procedures may include informal mechanisms for resolving sexual harassment complaints to be used if the parties agree to do so." DEAR COLLEAGUE LETTER, *supra* note 6, at 21.

acknowledging the importance of parties' procedural rights, failed to provide a standard approach to adjudication for student-on-student sexual misconduct.[57]

B. Dear Colleague Letter and a Reluctance to Embrace Informal Processes

OCR's efforts to confront the issue of sexual harassment on campus were modest and largely unnoticed, at least in part because, at the time, the issue of sexual harassment on campus, particularly between students, had yet to receive much attention.[58] But that changed as studies—finding that sexual violence on campuses was widespread and underreported—led to a call to action for OCR in 2011.[59] In response, OCR issued the DCL detailing requirements for higher education institutions in handling claims of sexual harassment and sexual violence.[60]

More than previous efforts, the DCL formalized disciplinary responses to sexual violence with a focus on protecting complainant's rights during proceedings. While continuing to define sexual harassment as "unwelcome conduct of a sexual nature,"[61] the DCL included "sexual violence" within the purview of "sexual harassment," and defined "sexual violence" as "physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent," including the "rape, sexual assault, sexual battery, and sexual coercion," as examples of such acts.[62]

The DCL also extended Title IX protections more broadly, indicating that it was to apply in "all the academic, education, extracurricular, athletic, and other programs of the school" regardless of where those programs take place.[63] Moreover, the DCL stated that off-campus

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57 Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 66 Fed. Reg. 5,512 (Jan. 19, 2001).

58 R. Shep Melnick, *The Strange Evolution of Title IX*, NAT'L AFFS (Summer 2018), https://www.nationalaffairs.com/publications/detail/the-strange-evolution-of-title-ix [https://perma.cc/22Z3-XR4J].

59 Assistant Secretary for Civil Rights and head of OCR, Russlynn Ali, stated in 2010 that "the statistics on sexual violence are both deeply troubling and a call to action for the nation." She went on to say that "[w]e will use all of the tools at our disposal . . . to ensure that women are free from sexual violence." *See* Joseph Shapiro, *College Justice Falls Short for Rape Victims*, NPR (Feb. 26, 2010), https://www.npr.org/templates/story/story.php?storyId=124111931 [https://perma.cc/GR9K-R9LC]. The OCR may have been prompted to act at least in part by several studies and articles emphasizing the widespread sexual violence on college campuses, including one by the Center for Public Integrity, *Sexual Assault on Campus: A Frustrating Search for Justice, Center for Public Integrity* (2010), which received considerable attention. Public Integrity, *Sexual Assault on Campus: A Frustrating Search for Justice*, which received considerable attention. *See Sexual Assault on Campus: A Frustrating Search for Justice*, CTR. FOR PUB. INTEGRITY (Feb. 24, 2010), https://cloudfront-files-1.publicintegrity.org/documents/pdfs/Sexual%20Assault%20on%20Campus.pdf [https://perma.cc/C46W-E5YC].Note also the January 22, 2014 Presidential memorandum calling for renewed attention to increased rates of campus sexual assaults on women. Memorandum—Establishing a White House Task Force To Protect Students From Sexual Assault, 79 Fed. Reg. 4385 (Jan. 22, 2014). .

60 *See* DEAR COLLEAGUE LETTER, *supra* note 6, at 1–19.

61 *See id*. at 3. The definition of sexual harassment included "unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature." *Id.* at 19.

62 *Id.* at 1–2.

63 *Id.* at 3.

conduct should be considered in "evaluating whether there is a hostile environment on campus."[64] Thus, the DCL acknowledged that unwelcome sexual conduct occurring off-campus may create a hostile environment on-campus, and that universities must consider such acts when investigating hostile environment harassment.[65]

OCR reemphasized the importance of confidentiality in the DCL. Reiterating that universities must respect the complainant's request for confidentiality, the DCL exhorted universities to take "all reasonable steps to investigate and respond to the complaint."[66] One of the most significant changes OCR implemented was the new requirement for universities to utilize the preponderance of the evidence standard in Title IX cases, stating that universities that use the higher, "clear and convincing" standard are "inconsistent with the standard of proof established for violations of the civil rights laws, and are thus not equitable under Title IX."[67]

The DCL all but prohibited the use of informal resolution mechanisms, like mediation, as part of a university's grievance procedures for sexual harassment complaints.[68] After expanding the definition of sexual assault to include sexual violence, but otherwise not defining the term, OCR stated that, in cases of sexual assault (i.e. sexual violence, minimally), universities should state in their grievance procedures that "mediation will not be used."[69] The DCL also cautioned universities against requiring complainants to work out problems directly with respondents. As a result, following the DCL, few Title IX cases were mediated.[70]

In formal procedures, universities were "strongly discourage[d] . . . from allowing the parties personally to question or cross-examine each other."[71] The rationale underlying this change was that cross-examination could be traumatic or intimidating for complainants, and that such an

64 *Id.* at 4.

65 DEAR COLLEAGUE LETTER, *supra* note 6, at 4.

66 *Id.* at 5. The DCL elaborated on the 2001 Guidance, outlining specific factors to consider in weighing a request for confidentiality against the responsibility to provide a safe environment for students and urged schools to inform complainants that confidentiality cannot be ensured.

67 *Id.* at 11.

68 *Id.*at 8. In prior Obama-era guidance from the Department's OCR, the resolution of sexual misconduct or assault allegations by mediation was not encouraged and, in some situations, was prohibited. Michael W. Hawkins, *Title IX and Resolution of Complaints by Mediation*, LEXOLOGY (Oct. 24, 2017), https://www.lexology.com/library/detail.aspx?g=e5c10cc2-8f8c-4d4c-a67f-878267278d4d [https://perma.cc/GP2B-LA44].

69 DEAR COLLEAGUE LETTER, *supra* note 6, at 8. The DCL noted that "[a] number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, and sexual coercion." *Id.* at 1–2. The DCL described sexual violence as a subset of sexual harassment and stated that both are forms of sexual discrimination prohibited by Title IX. *Id.* at 2, n.5, 13–14, n.34, 38.

70 *See* Tiffany Buffkin et al., *Widely Welcomed and Supported by the Public: A Report on the Title IX-Related Comments in the U.S. Department of Education's Executive Order 13,777 Comment Call*, 9 CAL. L. REV. ONLINE 71, 99 (2019) (reviewing comments to Department's Executive Order 13,777) (noting that the prohibition on mediation "needlessly deprives victims of options that may benefit them in the pursuit of equal educational opportunity.").

71 DEAR COLLEAGUE LETTER, *supra* note 6, at 12.

interaction could heighten the hostility of the environment.[72] And, while due process rights must be protected, universities should also ensure that the steps taken to protect due process rights "do not restrict or unnecessarily delay the Title IX protections for the complainant."[73] These changes, together with the lower burden of proof for complainants, led to significant litigation following the adoption of the DCL.[74]

OCR's changes, including the lower burden of proof and the soft ban on respondents cross-examining complainants, were based on a desire to reduce sexual violence on campus, encourage complainants to come forward, and protect them from harm during the resolution process. OCR believed that the formal hearing process, albeit denuded of one of the major features of trial – cross-examination – would provide an effective means of accomplishing its goals.

C. The 2020 Regulatory Approach

The increase in litigation claiming violations of parties' due process rights,[75] together with a change in the executive, led the Department to reconsider its approach to Title IX disputes in

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72 *Id.*

73 *Id.*

74 "In the twenty-one months following the April 4, 2011 Dear Colleague letter, only seven federal lawsuits were filed, and 2013 brought just seven more complaints. That figure jumped to twenty-five lawsuits in 2014; forty-five in 2015; forty-seven in 2016; and seventy-eight in 2017. The 2018 calendar year featured an additional seventy-eight complaints; through August 16, 2019, fifty-eight federal complaints have been filed." Samantha Harris & KC Johnson, *Campus Courts in Court: The Rise in Judicial Involvement in Campus Sexual Misconduct Adjudications*, 22 N.Y.U. J. LEGIS. & PUB. POL'Y 49, 66 (2019). Harris reported that, since 2011, students accused of Title IX violations brought over 400 lawsuits alleging denial of due process protections during campus sexual misconduct adjudications. Samantha Harris, *Court Exclusion of Evidence, Biased Training, Lack of Cross-Examination, Low Evidentiary Standard May Have Violated Students Due Process Rights*, THE FIRE (Jan. 17, 2019), https://www.thefire.org/court-exclusion-of-evidence-biased-training-lack-of-cross-examination-low-evidentiary-standard-may-have-violated-students-due-process-rights/ [https://perma.cc/ZH4J-WQ7D]. Cases alleging lack of due process have found some success. *See, e.g.*, Doe v. Baum, 903 F.3d 575 (6th Cir. 2018) (holding that "if a public university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder."); Norris v. Univ. of Colo., Boulder, 362 F. Supp. 3d 1001, 1020 (D. Colo. 2019) ("[W]ith the credibility of the parties in the investigation at issue, the lack of a full hearing with cross-examination provides evidence supporting a claim for a violation of his due process rights."); Oliver v. Univ. of Tex. Sw. Med. Sch., No. 3:18-cv-1549-B, 2019 WL 536376, at *12 (N.D. Tex. Feb. 11, 2019) ("[I]n cases, such as this one, where there are significant factual disputes over whether the alleged misconduct occurred, additional procedural safeguards may be required such as presentation of the actual incriminating evidence, confrontation by adverse witnesses, and perhaps cross-examination of those witnesses."); Doe v. Univ. of Miss., 361 F. Supp. 3d 597, 613 (S.D. Miss. 2019) (allowing due process claim to proceed because "[i]t is at least plausible in this he said/she said case, that giving Doe an opportunity to cross-examine Roe could have added some value to the hearing").

75 *See* Samantha Harris & KC Johnson, *supra* note 74, at 66; *see also* Marie-Rose Sheinerman, *Student Suing U. Over Expulsion for the Alleged Title IX Violation Will Not be Reinstated to Finish the Academic Year*, DAILY PRINCETONIAN (Apr. 26, 2020 5:52 pm), http://dailyprincetonian.com/article/2020/04/title-ix-lawsuit-doe-v-princeton [https://perma.cc/3H94-LKYD] (reporting that Princeton University has faced three Title IX suits in the last year alone and that those students join the ranks of hundreds of other students who filed recent Title IX suits against their universities, including those involved in a large class action against Michigan State University); TITLE IX FOR ALL, https://www.titleixforall.com/ [https://perma.cc/87VC-AEAC] reporting that over 640 Title IX lawsuits have been filed against universities since 2013); Elizabeth Bartholet et al., *Rethink Harvard's Sexual Harassment Policy*, BOS.

colleges and universities.[76] In 2017, Secretary of Education Betsy DeVos announced that the OCR would withdraw the DCL, replacing it with an interim Question and Answer document[77] that remained in place until the spring of 2020, when the new regulations, after an extensive notice and comment period, were finalized.[78] The new regulations focused on articulating the basic standards that a school must meet, although they do not preclude a school from providing more process than the regulations mandate.[79]

Response to the new regulations was mixed, with some groups suing immediately to overturn the regulations and President Biden announcing that the Department would examine the new regulations with an eye toward significant reform or recission.[80] Perhaps surprisingly, then,

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GLOBE (Oct. 14, 2014), www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html [https://perma.cc/CKG2-62D4].

76 Men's rights groups met with the Department's employees following the election of Donald Trump to lobby for changes to Title IX. *See* Hélène Barthélemy, *How Men's Rights Groups Helped Rewrite Regulations on Campus Rape* THE NATION (Aug. 14, 2020), https://www.thenation.com/article/politics/betsy-devos-title-ix-mens-rights/ [https://perma.cc/TY8T-FUBA].

77 The 2017 Q&A indicated that, rather than issue Guidance documents, as had been the practice, the Department would engage in rulemaking regarding Title IX. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., Q&A ON CAMPUS SEXUAL MISCONDUCT at 1 (2017), https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf [https://perma.cc/S4PY-VHB8]. While Guidances can be withdrawn and replaced easily, regulations promulgated after notice and comment can only be changed if a law or Presidential Directive requires a formal review process or the public initiates a petition requesting review. The agency itself may also engage in a review process but can only amend or revoke a rule using the notice and comment process again.

78 Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106);; *See Department of Education Issues New Interim Guidance on Campus Sexual Misconduct*, U.S. DEP'T OF EDUC. (Sep. 22, 2017), https://www.ed.gov/news/press-releases/department-education-issues-new-interim-guidance-campus-sexual-misconduct [https://perma.cc/B9LW-3ZMM].

79 Harvard Title IX coordinator, Nicole Merhill recently stated, "The work that we do at Harvard in this space goes well beyond the federal legal requirements." Jessica Lee & Christina T. Pham, *Biden Administration Expected to Reverse DeVos's Title IX Regulations, Legal Experts Say*, THE HARV. CRIMSON (Jan 20, 2021), https://www.thecrimson.com/article/2021/1/20/experts-on-title-ix-under-biden/ [https://perma.cc/UA8M-LLT4]. Thus, she opined that even if the regulations changed, Harvard would be unlikely to need to change its Title IX approach. *Id.*

80 *See* Joseph R. Biden Jr., *Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity*, THE WHITE HOUSE (Mar. 8, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/03/08/executive-order-on-guaranteeing-an-educational-environment-free-from-discrimination-on-the-basis-of-sex-including-sexual-orientation-or-gender-identity/ [https://perma.cc/XWE4-SGDE]; Michelle J. Anderson, *Do the Proposed Title IX Regulations Protect or Undermine Due Process?*, 88 FORDHAM L. REV. ONLINE 3, 8 (2020) [hereinafter *Title IX Due Process*] (stating that the volume of new regulations governing grievance process is "overwhelming" and often does "little to nothing to enhance fairness or due process" but do add complexity and cost "making compliance practically impossible . . . .") In addition, shortly after President Biden's election, 100 civil rights groups signed a letter asking him to reinstate the DCL. *See Gender-Based Misconduct Policy and Procedure for Students*, s*upra* note 9 and accompanying text. The new regulations cannot be changed quickly, however, because the regulations went through the formal notice and comment procedures required by the Administrative Procedures Act ("APA"). To amend or repeal an existing legislative rule, an agency generally must comply with the same notice and comment rulemaking procedures, outlined in 5 U.S.C. § 553 of the APA, that governed the original promulgation of the rule.

the general reception of the regulations has been considerably more positive than might have been anticipated. This positive reception has persisted, in large part, because the regulations regarding the formal process for a hearing on Title IX claims appear to provide a floor for due process that should survive judicial scrutiny.[81] Concern that the lack of process for respondents could result in expulsions and reputational harm was one of the driving forces behind the rule changes.

For purposes of this article, the most important rule change is the modification of the formal hearing process.[82] The revised formal hearing process deviated considerably from previous iterations.[83] The DeVos Education Department claimed that the new procedures were necessary to respond to the numerous claims of due process violations that arose after 2011.[84] Critics assert that the increased formalism of the Title IX hearing process, including the respondent's right to have a live hearing as well as an advisor to cross-examine the complainant, may have swung the pendulum too far in favor of respondents.[85] Still others contend that the formality and structure of the hearing

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81 The Due Process Clause requires, at minimum, notice, an opportunity to be heard and respond to allegations, and a neutral decisionmaker. *See* Doe v. Univ. of Cincinnati, 872 F.3d 393, 399–400 (6th Cir. 2017) (noting that "a student facing suspension is entitled to 'the opportunity to be "heard at a meaningful time and in a meaningful manner'"). Several news reports emphasized that the changes to Title IX procedures, designed to address legal rulings finding that the school processes were not consistent with due process, include allowing each side to bring an adviser or attorney to the formal hearing and permitting cross-examination of witnesses. Susan D. Friedfel & Crystal L. Tyler, *Department of Education Amended Title IX Regulations*, NAT'L L. REV. (June 11, 2020), https://www.natlawreview.com/article/department-education-amended-title-ix-regulations [https://perma.cc/9LBV-KJ33]. Critics suggest that the thought of cross-examination may be enough to discourage complainants from reporting an incident. Lauren Camera, *New Title IX Rules Bolster the Rights of Those Accused of Sexual Assault,* U.S. NEWS (May 6, 2020 3:42 pm), https://www.usnews.com/news/education-news/articles/2020-05-06/trump-administration-publishes-final-title-ix-campus-sexual-assault-regulations [https://perma.cc/9MJA-ERWF] (reporting on survivor advocacy groups' reaction to the new regulations – "these changes unnecessarily burden victims of sexual assault, and can deepen trauma for students by increasing the chances of victims being exposed to their accused assailants"); Greta Anderson, *U.S. Publishes New Regulations on Campus Sexual Assault*, INSIDE HIGHER ED. (May 7, 2020) [hereinafter *U.S. Publishes*], https://www.insidehighered.com/news/2020/05/07/education-department-releases-final-title-ix-regulations [https://perma.cc/U383-245W] (last visited on May 15, 2020) (reporting survivors could be cross-examined by anyone the accused chooses).

82 Other major changes of note include effectively changing the burden of proof for complainants from preponderance of the evidence to clear and convincing evidence, limiting investigations to misconduct that occurs only during educational activities and permitting universities to limit the number of employees who are designated as mandatory reporters. 34 C.F.R. §106.45 (2020). In addition, the regulations make clear that the parties need not be in the same room, or even the same location, for the hearing. *Id.* Critics contend that the formal hearing requirements frighten potential complainants into silence. Anderson, *supra* note 80, at 6–8 (commenting that the complexity of the new formal hearing rules makes it "practically impossible" to comply, especially for under-resourced institutions).

83 Michelle J. Anderson, President of Brooklyn College, believes that the new regulations "strongly favor the accused over the accuser." Anderson, *supra* note 80, at 5. Professor Anderson pointed to the following changes to support this conclusion: narrowing the sexual harassment definition, limiting the scope of actionable behavior to exclude behavior that occurs outside a schools' "education program or activity," and the limitation on institutional liability through the change to the knowledge requirement. *Id.* at 5–6. She noted that some of the changes, such as the prohibition on conflict of interest and the training of decision makers and others involved, were appropriate but criticized the increased formality of the grievance procedure, describing it as "prohibitively complex and burdensome." *Id.* at 7.

84 While these changes, such as creating a right for each party to cross-examine the other through an advisor, are important to due process, this section focuses on changes to decisionmaker training and selection.

85 Some critics attack the new hearing process because it is not "trauma-informed." Anderson, *supra* note 83. Others worry that it will deter the filing of complaints, because the idea of cross-examination may be enough to dissuade

process was borne out of a desire to discourage complainants from pursuing a formal process.[86] Regardless of the motivation underlying the formalization of the hearing process, the structure will be in place for some period of time.[87] Therefore, from a university's perspective, it is important to both understand the structure and, then, adopt procedures to comply with it.

The formal grievance procedure does not begin until a complainant files a formal complaint. While this obligation sounds onerous, a formal complaint is simply a document filed by a claimant or signed by the Title IX Coordinator that alleges sexual harassment against a respondent and requests that the recipient institution investigate the allegation of sexual harassment.[88] A complaint may be filed with the Title IX Coordinator in person, by mail, or by e-mail.

Once a complaint is filed, the university's Title IX office sends written notice to the parties explaining both that the respondent is presumed not responsible for the alleged conduct and that a determination on this front will be made at the end of the grievance process. The notice further informs the parties that they may have an advisor of their choice who can participate in the grievance proceeding, although the university may limit the advisor's participation in some ways.[89]

The regulations also changed the decisionmaker selection process, abandoning the single investigator model, which empowered a single individual to investigate and adjudicate a complaint. Different individuals must now receive the report of misconduct; investigate the facts; and serve as the decisionmaker as to sanctions and remedies.[90] The decisionmaker, or panel of

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prospective complainants from reporting an incident. Teresa Watanabe, *Students Accused of Sexual Misconduct get Stronger Protections Under New Federal Rules*, LA TIMES (updated May 6, 2020, 1:25 pm), https://www.latimes.com/california/story/2020-05-06/students-accused-of-sexual-misconduct-get-stronger-protections-under-new-federal-rules [https://perma.cc/2JDK-MA7V]; Camera, *supra* note 81. Anderson, *supra* note 80, at 7 (noting that Michelle Anderson believes that the proposed, and now final, regulations create grievance procedures that are too complex and administratively burdensome).

86 Anderson, *supra* note 80*,* at 13 (predicting that the regulations allowance for direct cross-examination would "deter victims of sexual harassment from lodging formal complaints"); Suzanne Goldberg, *Keep Cross-Examination Out of College Sexual Assault Cases*, THE CHRONICLE OF HIGHER EDUC. (Jan. 10, 2019), https://www.chronicle.com/article/keep-cross-examination-out-of-college-sexual-assault-cases/ [https://perma.cc/KBC6-NAVZ]. In this op-ed, Professor Goldberg, now the Acting Assistant Secretary for the OCR who is responsible for reviewing the 2020 Regulation on behalf of the Biden Administration, stated that cross-examination by third party advocates "could be trauma-inducing for students who were sexually assaulted." *Id.*

87 On April 6, 2021, the OCR, in response to prompting by the Biden Administration, outlined plans to seek the public's input on the 2020 regulations, "ultimately leading to possible revisions through a notice of proposed rulemaking." *Letter to Students, Educators, and other Stakeholders re Executive Order 14021 Notice of Language Assistance*, DEP'T OF EDUC. (Apr. 6, 2021), https://www2.ed.gov/about/offices/list/ocr/correspondence/stakeholders/20210406-titleix-eo-14021.pdf [https://perma.cc/LA7M-LAWV]. If OCR follows through with its plan, it may take several years for revisions to be enacted, as the notice and comment process is time-consuming.

88 A formal complaint is a document that the complainant files or the Title IX coordinator signs, that alleges "sexual harassment against a respondent and request[s] that the recipient investigate the allegation of sexual harassment." 34 C.F.R. § 106.30(a) (2020).

89 Although the university has the power to restrict the advisor's participation generally, it cannot restrict the advisor from conducting the cross-examination of the other party and the witnesses. 34 C.F.R. § 106.45(b)(6) (2020).

90 Liability extends to off campus activities including buildings "owned or controlled by a student organization that is officially recognized by postsecondary institutions" such as a sorority or fraternity house and, perhaps, additional

decisionmakers, designated by the Title IX Coordinator, must ensure that they do not have a conflict of interest or bias in favor of complainants or respondents generally or the particular complainant and respondent in the assigned case.[91] Designated decisionmakers must receive training on Title IX's definition of sexual harassment, the scope of the university's program or activity, as well as how to conduct a grievance process.[92] In addition, decisionmakers are required to learn to "serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias."[93] At the hearing, the decisionmakers must permit a party's advisor to ask the other party and any witnesses all relevant questions. Cross-examination is permitted and must be "conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally."[94] Before a party or a witness may answer a question, the decisionmaker must first determine that the question is relevant and explain why it is excluding the question if it determines that it is not relevant.[95] In addition, the regulations inform the complainant that the examination may occur online or in a separate room from the respondent.

Ultimately, the new regulations create an adjudicatory proceeding that resembles an arbitration hearing. Unquestionably, the new process is quite formal and complex, requiring expertise in administering a hearing, determining relevance of questions, avoiding drawing inappropriate inferences and, eventually, decision-making. The remaining sections of the article will consider the various options for identifying and selecting decisionmaker(s), recommend an approach to selecting unbiased decisionmakers, and then address how universities can best approach the Title IX decision-making and opinion writing process.

II. Problems and Potential Solutions for Title IX Decisionmaker Selection and Training

Universities use a variety of approaches to identify, select, and train decisionmakers. This section of the Article discusses the problems associated with each approach, whether decision-making panels are staffed by internal faculty, staff and students, external non-professional

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off-campus housing. 34 C.F.R. § 106.44(a) (2020). Yet institutions will not be liable for misconduct occurring on study abroad trips. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,356 (May 19, 2020). The regulations also permit the institution to require a complainant to meet his or her burden of proof by satisfying either the preponderance of the evidence or the clear and convincing standard. *Id.* at 30,374. Under the DCL, OCR had required the use of the lower burden of proof, preponderance of the evidence. DEAR COLLEAGUE LETTER, *supra* note 6, at 11.

91 34 C.F.R. § 106.45(b)(1)(iii) (2020).

92 The regulations also require that decisionmakers receive training on technology that will be used at the hearing as well. *See id.*

93 Many Title IX offices contract with companies to provide this kind of training to decisionmakers. *See id.*

94 Although the university has the power to restrict the advisor's participation generally, it cannot restrict the advisor from conducting the cross-examination of the other party and the witnesses. 34 C.F.R. § 106.45(b)(6) (2020).

95 In addition, the regulations provide guidance about determining relevance and instructs the decisionmaker that if a party or witness does not submit to cross-examination during the hearing, that the decisionmaker cannot rely on that party's or witness's testimony in reaching its determination about responsibility. *Id.* at § 106.45(b)(6)(i). In addition, the regulations make clear that the parties need not be in the same room or even the same location and that witnesses and other participants can appear virtually. *Id.*

decisionmakers, or external professional decisionmakers. Once the scope of the problem is outlined, the article discusses how arbitral providers handle these issues and then applies that understanding to provide guidance to those charged with designing Title IX decisionmaker selection and training processes.

A. Issues with Current Approaches to Selection and Training

Prior to the implementation of the new regulations, universities utilized one of several approaches to designating decisionmakers and guarding against decisionmaker bias and conflicts of interest. Some universities used a single person, typically the Title IX Coordinator, to investigate and, if necessary, adjudicate a Title IX complaint.[96] Other schools separated the investigation and decision-making functions, often using a three or five-person panel to conduct the hearing.[97] Still others used external, non-professional decisionmakers. For example, Harvard Law School created a panel of at least twelve non-Harvard affiliated persons who must be trained and have "relevant expertise and experience, be impartial, unbiased, and independent of the community (i.e., not current students, faculty, administrators, or staff of Harvard University)."[98] Finally, some universities used external professional decisionmakers, like arbitrators.[99]

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96 *Compare The University of Michigan Policy and Procedures on Student Sexual and Gender-Based Misconduct and Other Forms of Interpersonal Violence*, UNIV. OF MICH. 28 (Feb. 7, 2018), https://hr.umich.edu/sites/default/files/um-policy-and-procedures-on-student-sexual-misconduct-and-other-forms-of-interpersonal-violence.pdf [https://perma.cc/4P8X-Z6H5], *with Student Disciplinary Procedures*, ARIZ. ST. UNIV. 3 (Sep. 2008), https://deanofstudents.arizona.edu/sites/default/files/5-403StudentDisciplinaryProcedures.pdf [https://perma.cc/3NHG-84ZM], *and Procedures for Handling Complaints Involving Students Pursuant to the Sexual and Gender-Based Harassment Policy*, HARV. UNIV. 6 (Apr. 5, 2017), https://titleix.harvard.edu/files/titleix/files/harvard_student_sexual_harassment_procedures.pdf [https://perma.cc/6B7J-WP52] (using single investigator/resolution model where sanctions imposed by school if investigator makes a responsibility finding). The single-investigator model may, in and of itself, violate respondent's due process rights. *See generally* Doe v. Allee, 30 Cal. App. 5th 1036, 1070, (Ct. App. 2019) (holding that when a single person holds the roles of investigator, prosecutor, factfinder and sentencer, due process is likely to be denied).

97 According to ATIXA, a provider of Title IX Consulting Services to many higher education institutions, for incidents in which a student is the respondent, the decisionmaker is typically an individual or group from the Dean of Students or Student Conduct Office. *R3 Resources: Who's Who on the Title IX Team – Higher Education Edition* at 15. ATIXA (May 13, 2020) (on file with author).

98 *HLS Resources and Procedures for Title IX Complaints Against HLS Students*, HARV. LAW SCH. 7 (revised Sep. 10, 2020), https://hls.harvard.edu/content/uploads/2020/08/HLS-Title-IX-Procedure-Student-Respondents-Revisions-Approved-8.14.20.pdf [https://perma.cc/9NXK-BVH4]. The University of Virginia confers discretion on the Title IX coordinator to use internal or external decisionmakers, the latter of whom have experience in adjudicating Title IX disputes. *Grievance Process for Investigating and Resolving Reports of Title IX Prohibited Conduct Under the Policy on Sexual and Gender-Based Harassment and Other Forms of Interpersonal Violence ("Grievance Process")*, UNIV. OF VA. 27, https://eocr.virginia.edu/sites/eop.virginia.edu/files/Appendix A Title IX Grievance Process - Student and Employee.pdf [https://perma.cc/T6EM-BU6L]. Another approach, although not yet adopted by a university, would be to form a consortium with nearby colleges to establish a group of persons familiar with higher education or that have relevant legal experience, to serve on panels.

99 Jeremy Bauer-Wolf, *Outsourcing Rape Investigations*, INSIDE HIGHER ED (Oct. 9, 2017), https://www.insidehighered.com/news/2017/10/09/some-colleges-opt-outsource-title-ix-investigations-hearings [https://perma.cc/F35V-4ZTV] (citing numerous schools including Harvard University, Vassar College, Brandeis, Amherst College, Eastern Nazarene College, Mount Holyoke College and Wheelock College, among others, that have employed the use of external investigators or decisionmakers for Title IX claims); *Oberlin College Title IX Sexual*

An unavoidable risk associated with using internal decisionmakers, whether faculty, staff, or students, is the perception that persons associated with a university are incapable of objectivity because university employees (and, perhaps, current students)[100] share the university's interest in protecting the university's reputation and avoiding harm to the university's financial interests.[101]

Harassment Policy, OBERLIN COLLEGE (eff. Aug. 14, 2020), https://www.oberlin.edu/sites/default/files/content/office/equity-diversity-inclusion/documents/policies/title_ix_sexual_harassment_policy.pdf [https://perma.cc/GC8E-9XSQ]. Several arbitrators report that they serve as external adjudicators for Title IX disputes. *See Independent Title IX Hearing Officers*, TITLE IX SOLUTIONS, https://titleixsolutions.com/decision-makers-and-hearing-officers/ [https://perma.cc/6C2N-HAVC] (stating that Title IX solutions offers external adjudicative services); *Trends in Managing and Resolving Title IX Cases*, CONRAD O'BRIEN, https://conradobrien.com/uploads/attachments/cjmhvjtow0tbjwoiwdr1keaiw-virtual-roundtable-trends-in-managing-and-resolving-title-ix-cases-sept-2018.pdf [https://perma.cc/69NE-PW6V] (discussing ongoing use of external adjudicators for Title IX disputes). In 2018, Judicial Arbitration and Mediation Services ("JAMS"), one of the major arbitration services providers, created a Higher Education and Title IX practice group that provides investigative and adjudicative services, together with informal resolution services, to universities. *JAMS Solutions for Higher Education*, JAMS, http://www.jamsadr.com/solutions [https://perma.cc/L7RF-8DZ4]. Ohio State University uses Resolutions Officers who can *either* be a single university administrator or an external adjudicator. *Investigative Resolution Standards*, THE OHIO STATE UNIV., OFF. OF INST. EQUITY 8 (Sep. 30, 2020), https://equity.osu.edu/sites/default/files/investigative_resolution_standards.pdf [https://perma.cc/JP6U-FGPT].

100 Students frequently serve as members of Title IX hearing panels. *Compare* Casey Ferrante*, Georgetown Puts Planned Changes to Title IX Regulations Into Effec*t, THE HOYA (Aug. 24, 2020), https://thehoya.com/title-ix-changes/ [https://perma.cc/Q7L3-VJ56] (Georgetown University maintains a three-person panel, one member of whom can be a student, however, the student may be replaced by faculty or staff at the written request of both parties), *UWC Procedures*, YALE UNIV. (eff. Oct. 26, 2015), http://provost.yale.edu/sites/default/files/files/UWC Procedures.pdf [https://perma.cc/Y5ME-22S8] (noting at Yale, both graduate and undergraduate students are eligible to serve as panel members), *Stanford Student Title IX Investigation & Hearing Process ("Student Title IX Process")*, STANFORD UNIV. at 18 (modified Sep. 2018), https://stanford.app.box.com/v/student-title-ix-process [https://perma.cc/Q2VN-479U] (noting Stanford requires a three-person panel, which can include up to two graduate students), *and Title IX Personnel Foundational Training*, UNIV. OF CHICAGO 32 (2020), https://cpb-us-w2.wpmucdn.com/voices.uchicago.edu/dist/6/480/files/2016/12/2020-Title-IX-Training-clean-1.pdf [https://perma.cc/X2VA-FXUW] (noting at the University of Chicago, one member of the five-person hearing panel can be a student), *with EOAA Policies & Procedures*, COLUM. UNIV. (Aug. 14, 2020), https://eoaa.columbia.edu/sites/default/files/content/docs/EOAA-Policies-and-Procedures-081420-Final.pdf [https://perma.cc/TK89-EN9K] (noting Columbia does not allow students to serve on hearing panels)*, Wesley College Title IX Policy*, *and* WESLEY COLL., at 26 (Feb. 2019), https://wesley.edu/wp-content/uploads/2019/02/Title-IX-Policy-Revised-February-2019.pdf [https://perma.cc/CML5-Y5QP] (noting that at Wesley College students and prohibited from serving on hearing panels), and *Prohibited Discrimination, Harassment, and Retaliation Policy*, *and* HARVEY MUDD COLL. (revised Oct. 30, 2019), https://www.hmc.edu/human-resources/policies-procedures-and-guidelines/prohibited-discrimination-harassment-and-retaliation/ [https://perma.cc/L78C-FDUL] (noting Harvey Mudd College only permits employees or those designated as a qualified independent third-party to serve as investigating officers, a role much akin to that of a hearing panelist at other schools).

Students can bring valuable perspective regarding responsibility and sanctions and universities may view including students in serious matters as part of their educational mission. On the other hand, students, particularly younger students, may lack the maturity to fully understand both parties' interests and the importance of maintaining confidentiality. In addition, students may struggle to remain impartial in a setting that evokes strong views and passion.

101 The respondent in *Doe v. Miami Univ*. asserted this claim, together with other claims, and avoided a motion to dismiss. "John also asserts that Miami University faced external pressure from the federal government and lawsuits brought by private parties that caused it to discriminate against men. Specifically, he argues that pressure from the government to combat vigorously sexual assault on college campuses and the severe potential punishment—loss of

Interestingly, some commenters to the 2020 Regulations believed these incentives favored complainants, while others believed they favored respondents.[102] An additional bias or conflict of interest concern, particularly at a small university or college, is that those who serve as decisionmakers might have knowledge of the parties and/or the events that led to the filing of the Title IX complaint, making it difficult for them to approach the issue from a neutral perspective.[103]

Other risks plagued universities whether they adopted the internal decisionmaker or external non-professional decisionmaker approach, at least when they utilized the typical method of asking prospective panel members to screen themselves for conflicts of interest and bias.[104] One risk was that those who volunteered to serve in this capacity, but did not properly screen themselves, might have made comments, either in their scholarship or on social media, creating an appearance that they might not approach the case in an even-handed manner.[105] For example, in *Gomes v. University of Maine System*, a respondent objected to an adverse outcome because the hearing committee chair was a member of a rape-response service board.[106] Similarly, in *Doe v. Miami University*, the Sixth Circuit emphasized the importance of decisionmaker impartiality when it refused to dismiss a respondent's case where one member of a three-person decision-making panel appeared to have pre-judged the facts and determined that the respondent was guilty before the hearing.[107] The Sixth Circuit stated that "school officials responsible for deciding whether to exclude a student from school must be impartial."[108] These cases suggest that the self-

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all federal funds—if it failed to comply, led Miami University to discriminate against men in its sexual-assault adjudication process." Doe v. Miami Univ., 882 F.3d 579, 594 (6th Cir. 2018).

102 Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. at 30,250 (May 19, 2020) (noting recipient's employees' interest in protecting the university's interests causes them to treat complainants unfairly); Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 50–51 (2013) (asserting that the panel's incentive, due to concerns about university finances, is to find in favor of complainants).

103 *See* Bauer-Wolf, *supra* note 99.

104 Columbia University's Gender-Based Misconduct Policy and Procedures for Students requires any panel member in the Title IX disciplinary process to disclose any potential or actual conflict of interest and permits the parties to file a written objection regarding the inclusion of a person on the panel within two days on the ground that the person has a conflict of interest. *Gender-Based Misconduct Policy and Procedures for Students*, *supra* note 9, at 24. Yale requires panel members to "withdraw from the proceedings if their relationship to the [parties] . . . lead them to believe they cannot judge the matter fairly." *UWC Procedures*, *supra* note 100.

105 Greta Anderson, *More Title IX Lawsuits by Accusers and Accused*, INSIDE HIGHER ED (Oct. 3, 2019), https://www.insidehighered.com/news/2019/10/03/students-look-federal-courts-challenge-title-ix-proceedings [https://perma.cc/P38G-M86N] (noting numerous lawsuits filed by students who allege receiving an "'erroneous outcome' in their hearing because a disciplinary panel was allegedly biased against them").

106 *See* Gomes v. Univ. of Me. Sys., 365 F. Supp. 2d 6, 31–31 (D. Me. 2005).

107 *See* Doe, 882 F.3d at 584 (6th Cir. 2018).

108 *Id.* at 601 (an investigator also serving as panel member appeared, from behavior at hearing, to have decided in advance of the hearing that respondent had engaged in sexual misconduct); *see also* Doe v. Wash. & Lee Univ., No. 6:14–CV–00052, 2015 WL 4647996, at *10 (W.D. Va. Aug. 5, 2015) (court did not dismiss respondent's claim of bias, finding that he had sufficiently alleged a connection between gender bias and his expulsion because of procedural flaws, including that one of the panel members had written articles suggesting bias in favor of sexual assault victims);

screening process is not always effective.[109] An additional concern is that most universities do not provide parties an opportunity to challenge a decisionmaker's appointment, increasing the likelihood that bias or conflicts of interest may remain after the panel is constituted.[110]

Universities implementing training programs for their internal or external non-professional decisionmakers also faced challenges based on assertions that the training was biased in favor of complainants. For example, in *Doe v. The Ohio State University*,[111] the respondent contended that the decisionmakers were unfairly biased against him because they had been informed during training that a "[v]ictim centered approach can lead to safer campus communities," and that "[s]ex offenders are overwhelmingly white males."[112] In *Doe v. University of Mississippi*, the court

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Doe v. Coastal Carolina Univ., 359 F. Supp. 3d 367, 377 (S.D. Cal. 2019) (denying motion to dismiss male respondent's claim alleging gender discrimination based on anti-male bias and presumption of guilt based on gender).

109 Although I ultimately recommend using external professional decisionmakers in part because of the institutionalized screening methods used to root out conflicts and bias, effectively training prospective internal decisionmakers to screen themselves for conflicts or bias, or adopting an in-house process to screen prospective decisionmakers, may reduce or eliminate the most obvious and problematic conflicts.

110 A recent FIRE survey revealed that parties have the right to challenge decisionmakers for bias or partiality at only forty percent of the "top 53" universities in the United States. According to the report, an additional ten institutions (18.9%) indicate that decisionmakers should be impartial but do not provide a mechanism by which parties could challenge a decisionmaker's participation on a panel. *Spotlight on Due Process 2019–2020*, THEFIRE.ORG, https://www.thefire.org/resources/spotlight/due-process-reports/due-process-report-2019-2020/ [https://perma.cc/TL3Y-YW46]. *Compare* Messeri v. Univ. of Colo., Civil Action No. 18-cv-2658-WJM-SKC, 2019 WL 4597875, at *18 (D. Colo. Sep. 23, 2019) (finding that the plaintiff lacked sufficient conclusive evidence to support his allegations that his right to an impartial investigation was compromised by the bias of the investigators and standing Review Committee*) and* Doe v. Univ. of Denver, Civil Action No. 17-cv-01962-PAB-KMT, 2019 WL 3943858, at *4 (D. Colo. Aug. 20, 2019) (finding that the plaintiff "failed to present evidence that the defendants' actions were motivated by sex-based discrimination or a bias against male students"), *with* Doe v. Colum. Univ., 831 F.3d 46, 58 (2d Cir. 2016) (concluding that while an investigator may not be the decisionmaker, that individual may still exert "significant influence, perhaps even determinative influence" on the ultimate decision).

111 *See* Doe v. The Ohio St. Univ., No. 2:15-cv-2830, 2016 WL 692547, at *3, 9 (S.D. Ohio Apr. 20, 2016) (finding evidence "from which it could be inferred that the training materials used to train these panel members are biased against males who are accused of sexual assault" including common stereotypes about those who might commit campus sexual assaults"), *report and recommendation adopted*, No. 2:15-CV-2830, 2016 WL 1578750 (S.D. Ohio Apr. 20, 2016); *see* Schaumleffel v. Muskingum Univ., No. 2:17-CV-463, 2018 WL 1173043, at *16 (S.D. Ohio Mar. 6, 2018) (finding plaintiff's allegations about biased training materials, together with other claims, enough for court to deny motion to dismiss gender-bias claim); Doe v. Univ. of Miss., 361 F. Supp. 3d 597, 609–10 (S.D. Miss. 2019) (denying motion to dismiss because plaintiff had a plausible claim of gender bias based partly on training materials that tended to assume an assault had occurred).

Commenters to the 2020 Proposed Regulations asserted that, as of 2014, Harvard Law School's disciplinary board training materials promoted bias because they contained slides that were "100% aimed to convince [adjudicators] to believe complainants precisely when they seem unreliable and incoherent." Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. at 30,249 (May 19, 2020) (citing Emily Yoffe, *The Bad Science Behind Campus Response to Sexual Assault*, THE ATLANTIC (Sep. 8, 2017) https://www.theatlantic.com/education/archive/2017/09/the-bad-science-behind-campus-response-to-sexual-assault/539211/ [https://perma.cc/54KA-DZCH]).

112 Doe v. The Ohio St. Univ., No. 2:15-cv-2830, 2016 WL 692547, at *3 (S.D. Ohio Apr. 20, 2016); *see also* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. at 30,249.

criticized the university training materials, which taught prospective decisionmakers that in a two person sexual assault case, the assumption should be that an assault occurred.[113] Because biased materials were used, the court said, "there is a question whether the panel was trained to ignore some of the alleged deficiencies in the investigation and official report the panel considered."[114] Similarly, in *Doe v. Trustees of the University of Pennsylvania*, the court held that "the Complaint's allegations regarding training materials and possible pro-complainant bias on the part of University officials set forth sufficient circumstances suggesting inherent and impermissible gender bias to support a plausible claim" that the university discriminated against the accused student on the basis of sex.[115]

B. Looking to Arbitration for Guidance on Decisionmaker Selection, Screening, and Training

The previous discussion strongly suggests that disputing parties expect that the decisionmaker responsible for adjudicating their dispute will be impartial.[116] A decisionmaker is considered impartial when they are able to approach a dispute in a fair-minded and even-handed way.[117] Sometimes a decisionmaker's views, like "victims of sexual assault should be believed," create an appearance of partiality even if the decisionmaker is confident that they can set those views aside and act in an impartial manner when deciding the case.[118] Partiality, or the appearance of partiality, may also become a concern when the decisionmaker has a conflict of interest, whether financial, familial or for some other reason, such as substantial prior involvement with one or more of the parties.[119] In the university context, parties frequently perceive the existence of "financial"

113 Doe v. Univ. of Miss., 361 F. Supp. 3d 597, 602, 610 (S.D. Miss. 2019).

114 Doe v. Univ of Miss., No. 3:18CV-63-DPJ-FKB, 2018 WL 3570229, at *11 (S.D. Miss. July 24, 2018).

115 Doe v. Trs. of the Univ. of Pa., 270 F. Supp. 3d 799, 805, 808 (E.D. Pa. 2017) (the three-person panel presiding over the case were faculty members who "were among the small subset of professors professionally affiliated with the University's Gender, Sexuality and Women's Studies Program and all of whom had a relationship with [the Complainant's] advisor." The panel was trained using materials that "predispose panel members to believe the female accuser." In addition, the materials did not instruct panel members to decide each case on its own merits.") *Id.*

116 The American Law Institute's (ALI) proposed *Principles of the Law: Student Sexual Misconduct: Procedural Frameworks for Colleges and Universities* identifies impartiality in decisionmakers as one of its core principles. *See See* THE AM. LAW INST., PRINCIPLES OF THE LAW, STUDENT SEXUAL MISCONDUCT: PROCEDURAL FRAMEWORKS FOR COLLEGES AND UNIVERSITIES, COUNCIL DRAFT NO. 4, § 6.3 (Sep. 22, 2020) [hereinafter COUNCIL DRAFT NO. 4].. The ALI defines an impartial decisionmaker as "one who approaches hearing and deciding facts in a fair and evenhanded way." *Id.*

117 *Id.* at 13 (defining impartial decisionmakers after indicating that impartial decisionmakers are essential to satisfying the requirements of the Due Process Clause).

118 *See* Norris v. Univ. of Colo., 362 F. Supp. 3d 1001, 1013 (D. Colo. 2019). *See generally* Elizabeth A. Braverman & Jessica K. Philemond, *Title IX Decision Making & Drafting Reports*, ATIXA (July 24, 2020), https://www.mresc.org/wp-content/uploads/2020/07/Decision-Maker-Training-Website-2020.pdf [https://perma.cc/YU88-MRMX] (noting an ATIXA training on how to choose impartial decisionmakers).

119 *See* Doe v. Colgate Univ., No. 5:15-CV-1069 (LEK/DEP), 2017 WL 4990629, at *16 (N.D.N.Y. Oct. 31, 2017).

conflicts of interest when a university employee, whether faculty, staff, or a student, acts as a decisionmaker, because the parties believe that they might care about the university's financial position (or its reputation) and thus be more inclined to rule in favor of a complainant or respondent.[120] Other potential sources of bias might be prior involvement in or knowledge of the situation at issue in the complaint.[121] These kinds of involvements may create the appearance of or actual bias.[122]

Arbitral providers identify decisionmaker impartiality as an essential attribute of arbitration.[123] The American Arbitration Association ("AAA") states that decisionmakers must have "freedom from bias and prejudice[,]" "commitment to impartiality and objectivity[,]" and the "ability to evaluate and apply legal, business, or trade principles."[124] To ensure impartiality among decisionmakers, then, arbitral providers like AAA focus on qualities that may serve as hallmarks or evidence of the ability to be impartial.[125] Then, when an arbitrator is eventually selected by the parties or appointed by the provider to hear a case, the provider requires that the chosen arbitrator follow a systematic approach designed to identify any conflicts of interest with or bias towards the disputing parties.[126] Only when the arbitrator has addressed potential conflicts of interest questions, will the provider appoint that arbitrator to hear the case.[127]

AAA, and other arbitral providers, look for additional indicia to ensure decisionmaker impartiality.[128] For example, AAA identifies experience as a neutral, whether as an arbitrator or

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120 *Title IX Sexual Harassment Training: Serving Impartially & Avoiding Conflicts of Interest and Bias*, MARICOPA CMTY COLLS (prepared by Quarles & Brady LLP), 10 (Aug. 2020), https://centralaz.edu/wp-content/uploads/2020/08/Impartiality-Avoid-Conflicts-of-Interest-Bias-Training.2020.pdf [https://perma.cc/9AYM-7UA9]. *See generally Level 2 Higher Education Title IX Decisionmaker Training*, UNIV. OF TOL. (prepared by Bricker & Eckler) (Feb. 2021), https://www.utoledo.edu/title-ix/docs/2021%20February-%20Bricker-and-eckler-title-ix-training-level-2-title-ix-decision-maker-training.pdf [https://perma.cc/W2T4-MDXD] (questioning the impartiality of a decisionmaker with a perceived financial interest).

121 *See Doe* Doe v. Colgate Univ., No. 5:15-CV-1069 (LEK/DEP), 2017 WL 4990629, at *16.

122 *See id.*

123 *See Arbitrators Ethics Guidelines*, JAMS, https://www.jamsadr.com/arbitrators-ethics/ [https://perma.cc/FF88-SMV9]. AAA also seeks arbitrators who have "judicial capacity," which it defines as the ability to manage the hearing process and thoroughly and impartially evaluate testimony and other evidence. *See Qualification Criteria and Responsibilities for Members of the AAA Panel of Employment Arbitrators*, AM. ARB. ASS'N, https://adr.org/sites/default/files/document_repository/Employment Arbitrators Qualification Criteria.pdf [https://perma.cc/X4TZ-L45S] [hereinafter *Qualification Criteria*]. For employment arbitrators, who would likely be the type of arbitrator AAA would assign to sexual misconduct cases, additional qualifications include 10 years or more of experience as a lawyer in employment matters. *Id. See generally* Elizabeth A. Murphy, *Standards of Arbitrator Impartiality: How Impartial Must They Be? – Lifecare International, Inc. v. CD Medical, Inc.*, 1996 J. DIS. RESOL. 463 (1996) (noting "one of the most crucial aspects of the arbitrator's role is neutrality").

124 *Qualification Criteria*, *supra* note 123.

125 *Id.*

126 *See, e.g.*, *Arbitrators Ethics Guidelines*, *supra* note 123.

127 *Id.*

128 *See, e.g.*, *Qualification Criteria, supra* note 123.

judge, multiple years in legal practice or other professional business enterprise, and recommendations from other professionals, as indicators essential to its assessment of whether a decisionmaker can serve impartially.[129] Arbitral provider organizations, like AAA, place a heavy emphasis on previous service in a judicial or arbitral capacity when deciding who to roster, both to ensure that its decisionmakers are capable of decision-making, but also to ensure that the decisionmakers have the capacity to serve impartially and be perceived as impartial by the parties over whom they preside.[130] Relatedly, AAA identifies judicial temperament as another important quality it seeks in prospective decisionmakers.[131] Judicial temperament includes the ability to avoid prejudging the case based on existing personal biases as well as the ability to remain neutral throughout a dispute.[132] Those who satisfy these requirements may ultimately find a place for themselves on one of the arbitral provider's rosters.

Then, in *every* case, once the parties have selected a particular arbitrator, or the provider has identified one, the provider requires the selected arbitrator to undertake a conflicts of interest check and disclose any information requested on the form to the parties.[133] The parties review these disclosures and determine whether they still wish the arbitrator to serve as the decisionmaker

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129 Other attributes are also important. AAA requires those arbitrators who will be appointed to the employment discrimination roster to be lawyers with at least ten years of experience in employment law. *Id.*

130 *Id.*

131 Before AAA will accept an arbitrator on its roster, it must be satisfied that the arbitrator has an appropriate temperament. When applying to the roster, an applicant must identify recommenders who might speak to this issue. *Id.*

132 *See id.*

133 A typical approach to arbitrator selection focuses on weeding out biased or conflicted arbitrators. For example, under AAA's Employment Arbitration Rule 12(c), AAA sends simultaneously to each party a letter containing an identical list of ten names chosen from the Employment Dispute Resolution Roster. AAA encourages the parties to select a mutually acceptable arbitrator from the list as their arbitrator. If they fail to do so, "each party to the dispute shall have 15 days from the transmittal date in which to strike names objected to, number the remaining names in order of preference, and return the list to the AAA." *Number, Qualifications and Appointment of Neutral Arbitrators*, AM. ARB. ASS'N, EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES R-12(c) (2009), https://www.adr.org/sites/default/files/EmploymentRules_Web_2.pdf [https://perma.cc/MSV5-M7Y8]. AAA's Labor Arbitration Rules (R-10 through R-12) and their Commercial Arbitration Rules (R-12c) follow the same pattern. *Compare Labor Arbitration Rules*, AM. ARB. ASS'N https://www.adr.org/sites/default/files/Labor_Arbitration_Rules_3.pdf [https://perma.cc/4N8W-6LNK], *with Commercial Arbitration Rules and Mediation Procedures*, AM. ARB. ASS'N (2013), https://www.adr.org/sites/default/files/CommercialRules_Web-Final.pdf [https://perma.cc/TAR8-GPJB] [hereinafter *Commercial Arbitration Rules*].

JAMS, another leading arbitration service provider formerly known as Judicial Arbitration and Mediation Services, Inc., uses a similar approach but does not send as long a list to the parties: JAMS Comprehensive Arbitration Rules & Procedures, Rule 15(b) specifies that JAMS will send the parties a list of at least five arbitrator candidates in cases that require a sole arbitrator and ten arbitrator candidates in cases that require a tripartite panel. *JAMS Comprehensive Arbitration Rules & Procedures*, JAMS (July 1, 2014), https://www.jamsadr.com/rules-comprehensive-arbitration/ [https://perma.cc/5R S3-XXTE]. JAMS also provides each party with a brief description of the background and experience of each arbitrator candidate. *Id.* The parties have seven days to strike up to two names if they are selecting a sole arbitrator and three names if they are using a tripartite panel. *Id.* Following these strikes, each party must rank the remaining candidates in order of preference. *Id*.

in their dispute.[134] As part of the disclosure, the arbitrator must indicate whether the arbitrator has had any professional or social relationship with counsel, a party, or a witness or any relative of anyone who is a party, witness or party counsel.[135] The list continues for fifteen questions and inquires, among many other questions, whether the arbitrator is a member of any organization that is not listed on the arbitrator's panel biography that may be relevant to the arbitration.[136]

If, after disclosure, the parties still wish the arbitrator to serve, the arbitrator's appointment is confirmed.[137] Of course, before, during, and after this disclosure process, an arbitrator is expected to comply with arbitrator ethics rules, which requires that all arbitrators be "neutral," "independent," and "impartial."[138] Arbitrators are further required to turn down an appointment if the arbitrator concludes that they cannot be impartial. They must disclose any conflict of interest that creates an appearance of partiality, and make decisions independently.[139] The obligation to remain impartial and independent remains throughout the proceeding.[140] Arbitrators typically are also mindful that one of the only bases for overturning an arbitration award is that the arbitrators acted in a biased manner during the proceedings.[141]

Training for arbitrators, which each provider requires, also emphasizes the importance of decisionmaker impartiality.[142] Many arbitrators affiliated with the major arbitral providers are former judges or have arbitrated in other settings.[143] As a result, it is likely that they may have participated in training programs for judges or arbitrators, which also focus on impartiality.[144] The

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134 *See Arbitrators Ethics Guidelines*, *supra* note 123.

135 AM. ARB. ASS'N, *AAA General Arbitrator Oath Form* (on file with author).

136 *See id.*

137 *Arbitrators Ethics Guidelines*, *supra* note 123.

138 *The Code of Ethics for Arbitrators in Commercial Disputes, Canons I–III*, AM. ARB. ASS'N at 2 (eff. Mar. 1, 2004), https://adr.org/sites/default/files/document_repository/Commercial_Code_of_Ethics_for_Arbitrators_2010_10_14.pdf [https://perma.cc/R8LM-W6CM].

139 *Id.*

140 *Commercial Arbitration Rules*, *supra* note 133 (describing rule seventeen, which states that arbitrators must disclose "any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence").

141 A classic example of problematic bias occurs when the arbitrator engages in ex parte contacts with one party or the other. *See, e.g.*, Maaso v. Signer, 136 Cal. Rptr. 3d 853, 856 (2012) (affirming the trial court's vacation of an arbitration award due to *ex parte* communication between a party arbitrator and a neutral arbitrator, which was found to have undermined the fairness and integrity of the arbitration process).

142 *See* FINRA *FINRA Dispute Resolution Basic Arbitrator Training*, (Sep. 2015), https://www.finra.org/sites/default/files/basic-arbitrator-training-sept-2015.pdf [https://perma.cc/KG5V-RBD7].

143 *See AAA Judicial Panel*, AM. ARB. ASS'N, https://go.adr.org/Judicial_Panel.html [https://perma.cc/D3H3-QZKV] (noting for arbitrations between January 2018 and December 2020 AAA reports there were 6,789 Judicial Panel appointments).

144 *See id.* (emphasizing that former judges may also have a deep understanding of alternative dispute resolution methods).

majority of arbitrators are lawyers and, in some kinds of disputes, like employment discrimination, must be lawyers in order to be rostered.[145] While lawyers do not have to be neutral, they are trained to identify conflicts of interest and must screen for those conflicts each time they accept work with a new client.[146] Finally, parties to an arbitration are, in most cases, actively involved in selecting the arbitrator to hear their case thus allowing them to have a say in whether the proposed arbitrator(s) are too biased to serve.[147]

Arbitrator identification and selection approaches are designed to ensure that the parties have the time and opportunity to vet prospective arbitrators and rank low or strike those arbitrators who the party believes are biased or insufficiently experienced to serve.[148] Subsequent conflict of interest checks offer further protection to parties, as the arbitrator themselves will scrutinize their memory and records for any potential bias or conflicts of interest issues.[149] The ongoing screening obligations, together with the arbitrator ethics codes, provide additional insurance against the risk that biased arbitrators will decide a case.

C. Importing the Lessons from Arbitration

The new Title IX regulations mandate that decisionmakers be free from conflicts of interest or bias for or against either party and receive training on how to serve impartially, including avoiding prejudgment of the facts, identifying conflicts of interest, and bias.[150] This mandate acknowledges the importance of decisionmaker impartiality to the integrity of a dispute resolution process.[151] Unfortunately, the Department's decision to shift to the universities the responsibility to decide how to implement conflict of interest and bias limitations[152] is unhelpful, given the burden Title IX offices already shoulder, especially during a pandemic, to implement the new regulations.

Applying the principles arbitral providers have adopted for identifying, selecting, screening, and training arbitrators to the various university approaches to Title IX adjudication highlights deficiencies in existing university approaches. As noted earlier, in Title IX adjudication, universities typically rely on internal faculty, staff, and students to volunteer to serve on a decision-

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145 See generally AM. ARB. ASS'N, *Employment Arbitration Rules and Mediation Procedures* (NOV. 1, 2009), https://www.adr.org/sites/default/files/EmploymentRules_Web_2.pdf [https://perma.cc/93CB-HZTQ] (requiring neutral arbitrators to be experienced in the field of employment law to be qualified).

146 *See id.* at 15.

147 *See, e.g.*, *id.* at 16.

148 *See* Alan M. Wolper*, All's Fair When it Comes to Arbitrator Ranking,* LEXOLOGY (Oct. 30, 2018), https://www.lexology.com/library/detail.aspx?g=9a6651d8-1c5f-4e2e-8631-7d0495ac2c2e [https://perma.cc/P6EF-H4CV].

149 *See Gender-Based Misconduct Policy and Procedures for Students*, *supra* note 9.

150 34 C.F.R. § 106.45(b)(1)(iii) (2020).

151 Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,053 (May 19, 2020).

152 *Id.* at 30,098.

making panel and screen themselves for conflicts of interest and bias.[153] Yet this screening approach is problematic both because of the inherent conflict of interest that all members of the university share with regard to the university itself and because the screening process has resulted in biased decision-making panels.

Given the university community members' inherent conflict of interest, it may be impossible to assure parties that a panel comprised of university community members is impartial. If a university selects this approach, minimally, it should adopt an extensive screening process, like those the arbitral provider organizations offer.[154] In addition, the university should institutionalize a peremptory challenge process. While some universities have adopted such a process, rarely is a party given more than a couple of days to challenge the placement of a prospective decisionmaker on a panel.[155] Parties must be provided more time, together with more information about prospective panel members, to allow them an adequate opportunity to challenge members who they perceive to be partial.[156]

Effective screening to ensure decisionmaker impartiality seems more likely if a university utilizes external non-professional decisionmakers. Yet screening may not be a panacea there, either. Outside community members or faculty and staff from nearby universities are less likely to have financial conflicts of interest or knowledge of the dispute. Yet the issues that arise when decisionmakers screen themselves for bias, together with the impact the parties' inability to use peremptory challenges may have on panel composition, remain. And one possible additional issue may arise. External, non-professional decisionmakers may not understand or appreciate the nuances of the higher education environment. This may prove problematic as the case proceeds.

And as with internal university members, the question of biased views, i.e., a complainant or respondent-favoring viewpoint, remains as the external non-professional adjudicators are told to screen themselves for bias and conflict of interests. Thus, if a university is committed to using external non-professional decisionmakers on their panels, they should also commit to creating a method for determining whether, for example, a prospective panel member's public comments on Title IX or their scholarship, create bias or an appearance of bias that should disqualify them from serving on a decision-making panel.[157] Among other options, here, too, it may help to adopt a

153 See *supra* note 97 and accompanying text for more information about universities employing internally staffed decision-making panels for resolving Title IX disputes.

154 *See, e.g.*, David McLean, *US Arbitral Institutions and Their Rules,* LATHAM & WATKINS LLP (produced for LEXISNEXIS) https://www.lw.com/thoughtLeadership/us-arbitral-institutions-and-their-rules [https://perma.cc/W24D-C29Z] (summarizing the rules of arbitral providers including AAA, CPR, and JAMS).

155 *See, e.g.*, *Title IX*, MOUNT ST. JOSEPH UNIV. (last updated Aug. 4, 2020), https://www.msj.edu/about/title-ix/index.html [https://perma.cc/JLR6-568K] (noting that Mount St. Joseph University provides complainants and respondents with up to seven days to provide a written complaint to any member's inclusion on their respective Title IX Team); *Prohibition of Sexual Assault Interpersonal Violence, Stalking, Sexual Harassment, and Sex Discrimination*, THE UNIV. OF TEX (last reviewed Aug. 12, 2020) [hereinafter *Prohibition of Sexual Assault*], https://policies.utexas.edu/policies/prohibition-sex-discrimination-sexual-harassment-sexual-assault-sexual-misconduct [https://perma.cc/9WRH-BKE4].

156 It is common for arbitrators to have thirty days following an arbitration hearing to draft a reasoned opinion. *See* EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES*, supra* note 133, Rule 39a.

157 In *Doe v. Purdue University*, the court reversed dismissal of plaintiff's Title IX case "because he plausibly alleged the school's adjudicators credited the female accuser over him based on sex. The accuser provided neither written nor oral account. Her story was summarized through a letter crafted by the director of a campus victim

selection process that provides the parties greater opportunity to weigh in on whether they are comfortable with the appointed panelists.

If a university selected one of the methods described above, it would also have to employ a trainer to teach panel members, who are not typically lawyers nor experienced decisionmakers, about sexual harassment, among other topics, as well as how to run a hearing. In addition, it would need to formulate a process to provide more effective support to prospective panel members (internal employees/students or external people who are not trained as neutrals) to identify and address conflicts of interest and bias issues. Currently, universities turn toward outside training companies, like law firms and professional organizations that provide training,[158] to teach prospective decisionmakers about the legal issues common in a Title IX case, how to run a hearing and write a decision.[159] The training companies also attempt to teach decisionmakers how to screen themselves for conflicts or bias.[160]

Professional organizations' training for Title IX decisionmakers is insufficient. In fairness to the companies offering training, it would be unrealistic to expect university employees, or outside non-professional decisionmakers, to devote more than a few hours of their time to participate in training on sexual harassment law, identifying conflicts of interest and bias, evaluating evidence, and writing a decision, particularly given the low probability that any trainees will ever hear a case.[161]

Husch Blackwell, a law firm that contracts with universities to conduct Title IX training, provides an example of the kind of training universities purchase for their prospective decisionmakers.[162] In its power point presentation, Husch Blackwell explained conflicts of interest to prospective decisionmakers in the following way:

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support center—the same organization that, within a month of plaintiff's discipline, promoted a Washington Post article titled, 'Alcohol isn't the cause of campus sexual assault. Men are.'" *See* Doe v. Purdue Univ., 928 F.3d 652, 669–70 (7th Cir. 2019)*; but see* Johnson v. Marian Univ., 829 F. App'x 731, 733 (7th Cir. 2020) (finding that despite the Dean of Students having posted on social media calling Dr. Christine Blasey Ford a "hero" for accusing now-Justice Brett Kavanaugh of sexual misconduct, the Dean's posts "did not call into question [her] ability to review Roe's allegations objectively").

158 *See Trainings*, UNIV. OF MO. OFF. FOR C.R., https://civilrights.missouri.edu/training/ [https://perma.cc/3H3Z-EZA5]; *Title IX Regulations Training*, THE OHIO ST. UNIV., https://titleix.osu.edu/navigation/policy/title-ix-regulations-training.html [https://perma.cc/WXZ5-3UYC]; *Title IX & Sexual Harassment Response*, HUSCH BLACKWELL (Aug. 4, 2020), https://insights.huschblackwell.com/30/598/uploads/title-ix-powerpoint-presentation.pdf [https://perma.cc/HU7Z-Z7J7]; *Title IX and Sexual Assault*, HARVEY MUDD COLL. (Updated Feb. 2021), https://www.hmc.edu/student-life/title-ix-sexual-misconduct/ [https://perma.cc/6XAK-5WWB].

159 *See, e.g.*, ATIXA, www.atixa.org [https://perma.cc/GV84-U6WP] (maintains sample agendas for a two-day course training prospective decision-makers on all topics covered by the new regulations (sample agenda on file with author)); s*ee also* The NAPSA (student affairs administrators in higher education), which offers a training program for Title IX decisionmakers, three hours of which are devoted to the grievance process. *Title IX Certificate Program*, NASPA, https://www.naspa.org/events/title-ix-certificate-program [https://perma.cc/97EF-M22E].

160 *See Arbitrators Ethics Guidelines*, *supra* note 123.

161 The new regulations also require training on the scope of the university's education program, how to conduct a grievance process, including hearings, how to serve impartially, and how to evaluate relevance of questions and evidence, including issues about prior sexual behavior. 34 C.F.R. § 106.45(b)(1)(iii) (2020).

162 *See Trainings*, *supra* note 158; *Title IX Regulations Training, supra* note 158.

> What is a conflict of interest? When an individual has a material connection to a dispute, or the parties involved, such that a reasonable person would question the individual's ability to be impartial. [A conflict] [m]ay be based on prior or existing relationships, professional interest, financial interest, prior involvement, and/or nature of position. Example of bias: Institutional employee chosen to serve on a hearing panel chairs the board of a local non-profit dedicated to sexual assault advocacy. During a speech at the non-profit's annual gala, the employee states: "The presumption of innocence is wrong in cases of sexual assault. I firmly believe a person accused of sexual assault must prove their innocence."[163]

While helpful as an introduction to identifying and addressing conflicts of interest, realistically, providing a definition and one or two examples of conflicts of interest is unlikely to provide a decisionmaker sufficient guidance on the topic to ensure an unbiased decision-making panel. As lawyers know, understanding and applying conflicts of interest rules is complicated, and typically covered in a required law school course on Professional Responsibility, and then tested on the MPRE.[164]

If the goal were to eliminate the risks of conflicts of interest or bias (or perception of bias) in the decision-making process, the optimal approach to partiality issues would be to hire an external professional arbitrator, either independently or through an administrator, to adjudicate the dispute. AAA, CPR, and JAMS, the three major arbitrator providers, contract with arbitrators who specialize in sexual harassment, higher education, and Title IX disputes.[165] In addition, the major providers have institutional mechanisms in place to screen for conflicts of interest and bias.[166] And, of course, prospective arbitrators are typically former judges or experienced lawyers who have been trained that one of the most important qualities a decisionmaker must possess and demonstrate is impartiality. In addition to receiving training that emphasizes the need to avoid conflicts of interest and bias and to maintain impartiality, arbitrators also comply with ethics codes designed to govern arbitrator behavior.[167] These codes specify that arbitrators must be neutral, independent, and impartial.[168] Arbitral providers also encourage parties to review arbitrators after

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163 *See Title IX & Sexual Harassment Response*, *supra* note 158; *see also ATIXA Title IX Decision-Maker Training and Certification Course*. The Sample Agenda includes six hours focused on understanding of substantive and procedural due process, questioning skills and techniques, managing cross-examination, analysis and decision-making and deliberation, rationales and record-keeping (and a few other points as well) (on file with author). See ATIXA, *supra* note 159.

164 Jonathan Coughlan & Don Scheetz, *Professional Responsibility – Spring 2021*, THE OHIO ST. UNIV. MORITZ COLL. OF LAW (2021) (on file with author).

165 *See JAMS*, *supra* note 99. *See generally How we Lead,* CPR https://www.cpradr.org [https://www.cpradr.org] (noting that CPR stands for the International Institute for Conflict Prevention & Resolution).

166 *See Arbitrators Ethics Guidelines*, *supra* note 123.

167 *See id.*

168 As my former student, Ben Hachten, stated, arbitrator ethics codes are "a profession's most visible expression of its professional norms, so one would expect that ethics codes for arbitrators help foster professional norms in favor of impartiality and independent decision-making." Ben Hachten, *Process is Due: Why Universities Should Outsource Student-on-Student Sexual Misconduct Adjudication Under Title IX to Third-Party Arbitration Providers*, OHIO ST. J.

they have heard a case and eliminate arbitrators from rosters if they engage in partial practices like engaging in *ex parte* contacts or other behavior that suggests that an arbitrator favors one party or the other.[169] Finally, the parties play a role in selecting and appointing decisionmakers. Even if universities continue to appoint decisionmakers, adopting an arbitral provider organization's approach to vetting prospective decisionmakers would likely reduce the potential for post-award challenges grounded in claims of bias or conflicts of interest.

As noted above, the training approach arbitration providers utilize, together with the considerable experience in arbitrating or judging that external professional decisionmakers routinely bring to the process, make this approach preferable to the internal staffing or external non-professional staffing models.

It would seem, then, that the most effective means to avoid conflicts of interest and bias issues in decision-making panels would be to contract with an outside provider to staff cases with trained, experienced decisionmakers when decisionmakers are needed.[170] Using outside providers would have costs, such as the administrative fee the provider typically charges as well as the arbitrator's fee, but has the potential to be less expensive than using internal decisionmakers because so few Title IX cases go to hearing (so costs would be minimal).[171] In addition, a university

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OF DISP. RES. ONLINE (2021), on file with author and at http://live-moritz-college-of-law.pantheonsite.io/osjdr-online [https://perma.cc/8C24-BERB].

169 *See Arbitrators Ethics Guidelines*, *supra* note 123.

170 In addition, this approach would avoid wasting unmonetized resources like volunteers' time participating in training and, in many cases, re-training prior to a hearing. *See* Greta Anderson, *New Requirements, More Costs*, INSIDE HIGHER ED (June 10, 2020), https://www.insidehighered.com/news/2020/06/10/community-colleges-burdened-new-title-ix-regulations [https://perma.cc/YQ6Y-3Z6J]; *2019–20 Title IX/Sexual Harassment Annual Report*, *supra* note 23. *See generally Case Western Reserve University 2018-2019 Annual Title IX Report*, CASE W. RSRV. UNIV. https://case.edu/equity/sites/case.edu.title-ix/files/2020-08/Case%20Western%20Reserve%20University%20Title%20IX%20Annual%20Report%202018-2019.pdf [https://perma.cc/6ZDX-L5ZK] (noting of 100 cases filed between 2018 and 2019, only four were resolved via formal resolution); Victoria Gomes-Boronat, *Despite #Metoo Era, Most Top Colleges Share Little About Sexual Assaults*, CAPITAL NEWS SERVICE (Aug. 13, 2019), https://cnsmaryland.org/2019/08/13/despite-metoo-era-most-top-colleges-share-little-about-sexual-assaults/ [https://perma.cc/MDB7-RZ62] (noting that Maryland, Michigan, UC-Santa Barbara, UC-Davis and UC-Berkeley collectively received an average of 222 reports each academic year, but only investigated a low percentage of the student complaints filed).

171 Due to the small case load, many volunteers will never hear a case but must still be trained to be ready should a case arise. *See, e.g.*, *Sexual Misconduct Procedures*, WILLIAMS COLL. 12 (Jan. 2021), https://titleix.williams.edu/files/2021/01/Sexual-Misconduct-Title-IX-Sexual-Harassment-Adjudication-Process.pdf [https://perma.cc/7MK7-5PF6] (noting that at Williams College, two-thirds of the Title IX hearing panel is drawn from a pool of volunteer Williams College staff members, who must all remain up to date on the federally mandated training requirements). When discussing the rising cost of Title IX programs at the university-level, Brett Sokolow, President of ATIXA, estimated that "that the cost of lawyers, counselors, information campaigns and training to fight sexual misconduct ranges from $25,000 a year at a small college to $500,000 and up at larger or wealthier institutions." *See* Anemona Hartocollis*, Colleges Spending Millions to Deal with Sexual Misconduct Complaints*, N.Y. TIMES (Mar. 3, 2016), https://www.nytimes.com/2016/03/30/us/colleges-beef-up-bureaucracies-to-deal-with-sexual-misconduct.html [https://perma.cc/B9NM-QERU] (also noting that in 2016, Yale University employed nearly thirty faculty or staff members to staff their Title IX office either part- or full-time, in addition to the nearly sixty faculty, staff members , and student volunteers who served as advisors and committee members). *Title IX Training 2021 – March 9th,* HUSCH BLACKWELL (Mar. 9, 2021), https://www.huschblackwell.com/newsandinsights/title-ix-training-march-9th [https://perma.cc/W64T-2GB5] (noting Husch Blackwell offers Title IX trainings for $400 per person per virtual session). *See generally* Sarah Brown, *Would the Education Dept.'s New Title IX Rules Really Save Colleges Money?* THE CHRON. OF HIGHER EDUC. (Sep. 11, 2018), https://www.chronicle.com/article/would-the-education-

using external professional decisionmakers would no longer have the obligation to train volunteer decisionmakers. If this were the case, adopting the external professional decisionmaker model could save resources currently expended on training as well as the unquantified value of volunteer decisionmakers' time. The costs associated with training, together with the greater risk of bias and conflicts of interest, makes it unlikely, even under the new, more specific, regulations, that decision-making panels staffed by internal decisionmakers will function as fairly and effectively as would external professional decisionmakers.

III. Effective Drafting to Ensure the Integrity of the Title IX Hearing Process

The 2020 Regulations provide limited guidance to hearing panels about determination drafting.[172] The regulations require only that the panel's determination be in writing,[173] identify the parties' sexual harassment allegations, the procedural steps followed prior to the hearing, and the panel's findings of fact and conclusions about whether the alleged events violated the university's code of conduct.[174] Then, the panel's determination must offer a rationale for the resolution of each allegation, including assessing responsibility and articulating any disciplinary sanctions the university will impose on the respondent. The determination must also indicate whether the university will provide any additional remedies to the complainant, with this latter effort designed to address any diminution in the complainant's access to university programs or activities.

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dept-s-new-title-ix-rules-really-save-colleges-money/ [https://perma.cc/XXD2-9VW6] (positing whether the 2020 Guidance might reduce some of Title IX's burdensome costs to universities).

172 "*Determination regarding responsibility.* (i) The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. To reach this determination, the recipient must apply the standard of evidence described in paragraph (b)(1)(vii) of this section. (ii) The written determination must include—(A) Identification of the allegations potentially constituting sexual harassment as defined in § 106.30; (B) A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held; (C) Findings of fact supporting the determination; (D) Conclusions regarding the application of the recipient's code of conduct to the facts; (E) A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant; and (F) The recipient's procedures and permissible bases for the complainant and respondent to appeal." 34 C.F.R. § 106.45(b)(7).

173 The DCL also required that the determination be in writing but offered little guidance about what the determination should include, other than the outcome: "Both parties must be notified, in writing, about the outcome of both the complaint and any appeal, *i.e.*, whether harassment was found to have occurred. DEAR COLLEAGUE LETTER, *supra* note 6. OCR recommends that schools provide the written determination of the final outcome to the complainant and the alleged perpetrator concurrently. *See id.* Title IX does not require the school to notify the alleged perpetrator of the outcome before it notifies the complainant." *See id.* Unlike decisionmaker selection though, parties have rarely challenged results alleging lack of rationale supporting the decision. Maeve Walsh & Sarah Szilagy, *(Un)Silenced: The Hearing*, THE LANTERN, (last visited OCT. 2, 2021) https://www.thelantern.com/projects/project/unsilenced-the-hearing/ [https://perma.cc/36Q5-UY2K]. That does not mean that the process could not be improved, however. Anecdotally, parties have shared concerns about the lack of detail in decisions. *Id.*

174 *See* 34 C.F.R. § 106.45(b)(7)(ii).

The constitutional obligation to provide due process does not require more on the opinion writing front than Title IX already demands.[175] Commenters to the 2020 Regulations supported the requirement of a written determination containing findings of fact and reasoning.[176] They asserted that written decisions tend to reduce confusion, protect the parties' due process rights, provide a record for appellate review, and prevent schools from making biased decisions.[177] One commenter emphasized that requiring decisionmakers to provide reasons to undergird their decisions would likely result in more thorough decisions and would prompt decisionmakers "to engage in self-critical thinking."[178] Another commenter suggested that the requirement that the panel provide reasons for their decision may reduce the likelihood that decisionmakers will be unjustifiably overconfident about their decision-making andencourage them to engage in independent thought that will, hopefully, lead to more comprehensive and accurate decisions.[179] Some commenters believed the rule did not go far enough, exhorting the Department to require that the written determination "include or describe contradictory facts, exculpatory evidence, all evidence presented at the hearing, and/or credibility assessments."[180]

The Department ultimately settled on a compromise – requiring a written determination supported by reasons, perhaps with the view that such a requirement would ensure that both sides understand the outcome of a grievance hearing and incentivize the decisionmakers to make an unbiased and independent determination.[181] The ambiguity in the final rule may, however, impede prospective determination writers when they are developing a template for their written decisions. How should a group of three or more university community members who have never written a well-reasoned decision resolving a dispute operationalize an instruction to write a determination that includes facts that support their conclusions, together with a conclusion that demonstrates how the university's code of conduct applies to the facts and a statement and explanation of each allegation and how it was resolved? If a first-year law student were instructed to write a decision

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175 The Due Process Clause likely does not require written findings, particularly because the decisionmaker is not an adjudicative body but, rather a college or university. COUNCIL DRAFT NO. 4, *supra* note 116, § 6.10; While the Constitution may not require that a public university require a written determination following a Title IX hearing, a written determination may prompt "more thoughtful decision making, provide a meaningful record for appellate review, and simplifyy the burdens on colleges and universities of defending their decisions if challenged." *Id.* Case law has not required that universities provide the respondent with an explanation of the decision. *see, e.g.*, Flaim v. Med. Coll. of Ohio, 418 F.3d 629, 636 (6th Cir. 2005) (stating that the university need not provide a statement explaining its decision "at least where the reasons for the decision are obvious). A 2016 Report by the American Association of University Professors contends that "both the university response and the criminal justice system serve "neither survivors nor alleged perpetrators with any notable degree of fairness." *The History, Uses, and Abuses of Title IX*, AM. ASS'N. OF UNIV. PROFESSORS (June 2016), https://www.aaup.org/file/TitleIXreport.pdf [perma.cc] (indicating that lack of a hearing, among other omissions, violated a core principle of due process).

176 *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,054 (May 19, 2020).

177 *See id.* at 30,037.

178 *Id.* at 30,388.

179 *See id.*

180 *Id.* at 30,389.

181 *See id.* at 30,389.

in a case on the first day of class, without first having read any opinions, what would that look like?[182]

Working against a backdrop of likely inexperienced decisionmakers,[183] universities—in designing a dispute resolution system for handling Title IX claims—might again look to arbitration for guidance to understand the value of a well-reasoned determination to assuring the integrity of the underlying dispute resolution process, both to ensure confidence in the outcome and to encourage thoughtful and careful decision-making throughout the process. To do this, the article first identifies the elements that comprise an effective written determination and then explores the benefits to hearing participants and to process integrity from engaging in this more comprehensive approach to decision-making. Then the article will discuss how these elements might be integrated into the university Title IX process and conclude by discussing the benefits and drawbacks of this approach.

A. What Should Be Included in an Effective Well-Reasoned Written Determination?

To appreciate the myriad benefits a thoughtful and well-reasoned determination may generate, it is helpful to understand what is meant by a "well-reasoned determination." A well-reasoned determination should contain the following four elements. First, the decisionmaker should identify the issues in dispute. In doing so, the decisionmaker should include relevant facts as well as the principles the panel intends to apply to the facts.[184] The goal underlying this requirement is that the parties reviewing the opinion will know that the panel understood the evidence presented at the hearing and was aware of the code of conduct and any other relevant rules that were applied to resolve the dispute. Second, the panel should use the investigative report, together with the evidence presented at the hearing, to identify and articulate the parties' contentions. This section of the opinion demonstrates the panel listened to the parties and understood their arguments. Next, the panel must include a decision. In this part of the opinion, the panel clarifies the scope of the decision, interprets the evidence, resolves questions of fact, applies principles from the code of conduct and the statute, evaluates credibility if necessary, and explains why it accepted or rejected the parties' theories. A final section articulates what the sanction is, if there is one, and what the consequences of the decision are for each party.[185]

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182 As Lauren Bizier noted, according to a pre-2014 study, Title IX decisionmakers received an average of 16 hours a year of training despite that few have a "law school education and are not adequately trained in the complexities of evidentiary rulings and procedures." Lauren Bizier, *Maintaining the Delicate Balance Between Due Process and Protecting Reporting Students from Re-Traumatization During Cross-Examination: Title IX Investigations in the Wake of the Trump Administration's Proposed Regulations*, 25 ROGER WILLIAMS U. L. REV. 242, 253–254 (2020).

183 Tovia Smith, *Biden Begins Process to Undo Trump Administration's Title IX Rules*, NPR ALL THINGS CONSIDERED (Mar. 10, 2021) https://www.npr.org/2021/03/10/975645192/biden-begins-process-to-undo-trump-administrations-title-ix-rules [https://perma.cc/EGD2-REWW] (quoting Terry Hartel, Senior Vice President, Government Relations and Public Affairs for the American Council on Education, a trade group of colleges and universities, said the regulations are not workable for campuses—not judicial bodies—"campus officials, [are] not trained to navigate these quasi-legal disputes").

184 Roger I. Abrams, *The Nature of the Arbitral Process: Substantive Decision-Making in Labor Arbitration,* 14 U.C. DAVIS L. REV. 551, 586 (1991).

185 Professor Strong cited a Pennsylvania statute that defines a reasoned ruling as one that includes "findings of fact and conclusions of law based upon the evidence as a whole . . .[that] clearly and concisely states and explains the

B. How a Well-Reasoned Determination Benefits the Parties and the Process

Parties benefit in multiple ways from receiving a well-reasoned determination following a hearing. Clear decision-making provides greater transparency to the parties, thus, hopefully, legitimizing the process in their eyes.[186] A well-reasoned determination may also increase parties' confidence in the hearing panel's decision-making ability because they can see that their stories were heard and, hopefully, understood.[187] Well-reasoned opinions help parties understand why they have won or lost[188] and, also, may help the losing party accept an adverse award.[189]

In addition, a well-reasoned determination enhances process integrity by encouraging the hearing panel to deliberate, potentially improving the quality of the decision.[190] Writing the decision helps the hearing panel think through issues, avoid arbitrary decisions, reduce the impact of bias and prejudice, and offer more fulsome explanations than an oral or limited written decision would.

Behavioral economic analysis further supports the theory that a well-reasoned determination will encourage deeper thinking during the decision-making process. Behavioral economists

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rationale for the decisions so that all can determine why and how a particular result was reached." S.I. Strong, *The Reasons Behind Reasoned Arbitration Awards*, 34 ALTS TO THE HIGH COST OF LIT. 81, 84 (2016) (citing 77 PA. CONS. STAT. ANN. § 834 (West 2013)).

186 Professors Black and Gross also identified the need for transparency in decision-making as a justification for the institution of an explained decision requirement in securities arbitration. Interestingly, the arbitration parties themselves, the customers, also stated that they would be more satisfied with securities arbitration outcomes if they had an explanation of the award. *See* Jill I. Gross & Barbara Black, *When Perception Changes Reality: An Empirical Study of Investors' Views of the Fairness of Securities Arbitration*, 2008 J. DISP. RESOL. 350, 386 (2008), (noting fifty-five percent of customers stated that they would be more satisfied with the outcome of their arbitration had they received an explanation of the award).

187 Strong, *supra* note 185, at 87 ("[R]easoned awards . . . enhance the legitimacy of the arbitral process in the eyes of the arbitrators, the parties and the public by demonstrating the seriousness and integrity of the arbitral endeavor").

188 Professor Strong offers this justification for the well-reasoned award: "a well-written and fully reasoned award may persuade the losing party that a decision is well-supported, even if the outcome is negative." *Id.* "For disputants, reasoned decisions provide an explanation that can be used to guide future conduct and a sense, perhaps especially important to the losing party, that the adjudicatory process was a deliberate and fair one." W. Mark C. Weidemaier, *Toward a Theory of Precedent in Arbitration*, 51 WM. & MARY L. REV. 1895, 1917 (2010).

189 Professor Kaczmarek states that "[a]ll sides generally agree that a sound opinion contributes to the acceptance of an award by persuading the parties that the arbitrator thoughtfully considered the claim and came to a well-reasoned decision." Christopher B. Kaczmarek, *Public Law Deserves Public Justice: Why Public Law Arbitrators Should Be Required to Issue Written, Publishable Opinions*, 4 EMP. RTS. & EMP. POL'Y J. 285, 297 (2000).

190 Deliberation enhances decision-making. As Richard Posner opined, "[r]easoning that seemed sound when 'in the head' may seem half-baked when written down, especially since the written form of an argument encourages some degree of critical detachment in the writer, who in reading what he [or she] has written will be wondering how an audience would react." Richard A. Posner, *Judges' Writing Styles (And Do They Matter?*), 62 U. CHI. L. REV. 1421, 1447–48 (1995). Another author explained that in the process of writing an opinion, a decisionmaker will "clarify his thoughts as he reduces them to paper." It is through the "process of reducing one's ideas to writing" that enables a decisionmaker to assess whether or not his reasoning is sound. Mary Kate Kearney, *The Propriety of Poetry in Judicial Opinions*, 12 WIDENER L. J. 597, 599 (2003).

focused on decision-making encourage decisionmakers to become aware of their use of heuristics, or mental shortcuts, in decision-making.[191] Using shortcuts to make decisions is referred to as "System 1 Thinking."[192] Encouraging decisionmakers to acknowledge explicitly their tendency to use shortcuts in decision-making helps them to correct the errors that arise from their use and may also incentivize decisionmakers to adopt an approach to decision-making where they engage in more careful and deliberate decision-making, sometimes described as "System 2 Thinking."[193]

System 2 Thinking is more likely to occur if a decisionmaker is required to engage in the process of well-reasoned determination writing.[194] To draft a well-reasoned decision, an author must "show their work," fully explaining the process leading to the ultimate decision.[195] As Professor Elizabeth Thornburg stated, "[t]he capstone of a more slow and conscious process would be the practice of writing opinions that go into some detail about the reasons for the decision."[196] The process is further enhanced by requiring the writer to identify and articulate not only the arguments that support their conclusion, but also to address counterarguments.[197] One might expect that the use of multiple decisionmakers will also encourage System 2 Thinking because a panel of three or more decisionmakers will naturally engage in discussion and collaboration, hallmarks of System 2 Thinking.

C. Applying Arbitral Principles to Title IX Decision-making

If well-reasoned written opinions help ensure the integrity of the arbitration process and party acceptance of the result, it seems likely that similar benefits could be achieved if Title IX hearing panels were required to write well-reasoned opinions. As Mark Weidemaier observed about arbitration awards, a well-reasoned award conveys that the decisionmaker acted with diligence, impartiality, and expertise.[198] A central feature of well-reasoned arbitral awards is that they serve to legitimize both the decisionmaker (in general) and the hearing process (in particular)

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191 *See* Chris Desmond, Kathryn A. Brubaker, & Andrew L. Ellner, *Decision-Making Strategies: Ignored to the Detriment of Healthcare Training and Delivery?* 1 HEALTH PSYCHOL. & BEHAV. MED. 59, 59 (2013), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4164239/ [https://perma.cc/9WMJ-62P4].

192 *See* Crawford Hollingworth & Liz Barker, *System 1 and System 2 Thinking*, THE MKTG SOC'Y https://www.marketingsociety.com/think-piece/system-1-and-system-2-thinking [https://perma.cc/BEV6-27DS].

193 *See id.*

194 *See id.* (noting System 2 Thinking is more-often activated).

195 *See* Elizabeth Thornburg, *(Un)conscious Judging*, 76 WASH. & LEE L. REV. 1567, 1648 (2019), (citing Jeffrey J. Rachlinski & Andrew J. Wistrich, *Implicit Bias in Judicial Decision Making: How it Affects Judgment and What Judges Can Do About It,* ENHANCING JUSTICE: REDUCING BIAS 87, 116 (Sarah E. Redfield ed., 2017)).

196 *See id.* (suggesting that a jurisdiction interested in encouraging System 2 thinking could require opinion writing through statute or procedural rules).

197 *Id*. (considering both arguments and counterarguments is also beneficial because it will likely provide greater clarity about the decision to the ultimate reader).

198 Weidemaier, *supra* note 188, at 1912.

in the eyes of several important constituencies: the disputants and the "community."[199] One would expect a similar impact in the context of Title IX decisionmakers and decision-making processes. In addition, if the panel's written determination revealed bias or lack of care, administrators could avoid using those panel members in the future. Well-reasoned written determinations might also provide useful information to parties and the university community (if it is shared with the community – if not, at least for the administrators responsible for overseeing and executing the Title IX Hearing Process) about the Title IX hearing process, together with information about the panel's abilities.

In light of an increased emphasis on the inclusion of reasoning underlying the decision, universities might also consider including within their Title IX hearing guidance a provision mandating a longer time frame for the panel to consult, draft, and finalize a decision. At several universities, the average time from hearing to decision is a mere five days.[200] Given the gravity of the decision for both parties, and the importance of ensuring that the parties feel heard and understood, a longer period of time, perhaps three weeks or 30 days, would be more appropriate.[201] While speed is important to the parties, so, too, is having confidence that the hearing panel deliberated carefully over the facts and evidence the parties presented.[202] A five-day turnaround

199 *Id.* at 1919. Professor Stephen Hayford agreed: "in most cases . . . the only indicia of . . .arbitrator competencies are the manner in which the neutral conducts the hearing and the perceived correctness of the result reached." *See* Stephen Hayford, *Commercial Arbitration in Evolution: An Assessment and Call for Dialogue*, 10 OHIO ST. J. ON DISP. RESOL. 343, 403 (1995); *see also* Llewellyn Joseph Gibbons, *Private Law, Public "Justice": Another Look at Privacy, Arbitration, and Global E-Commerce*, 15 OHIO ST. J. ON DISP. RESOL. 769, 772–773 (2000) (stating that well-reasoned opinions help to combat the ability of institutional repeat players to "arbitrator-shop" at the expense of a one-time consumer grievant).

200 The University of Virginia reported a four-day Review Panel Hearing/Meeting to transmission of the Final Outcome Letter in 2017–18 and a five-day gap between the hearing and letter in 2018–19. *See 2017-2018 and 2018-2019 Report on Response to Sexual and Gender-Based Harassment and Other Forms of Interpersonal Violence*, UNIV. OF. VIRGINIA, https://eocr.virginia.edu/sites/eop.virginia.edu/files/TITLEIXANNUALREPORT.pdf [https://perma.cc/9R88-97QX].

Stanford University reported only five hearings (out of 279 reports) during the 2018–19 academic year. It did not report the time from hearing to letter; *2018–19 Title IX/Sexual Harassment Annual Report*, STANFORD UNIV. (Dec. 2, 2019), https://stanford.app.box.com/s/5ek7upbyfn378n6sktdft1gba9p2uo4k (on file with the author).

Penn State University states that a hearing panel "typically" submits its written determination within five days of the hearing. *AD85 Title IX Sexual Harassment*, PENN ST. UNIV. (Aug. 14, 2020), https://policy.psu.edu/policies/ad85#WRITTEN%20NOTICE%20OF%20OUTCOME%20AND%20SANCTIONS [https://perma.cc/9NQJ-V62N];

The University of Texas requires Title IX decisionmakers to provide their determinations within ten days of the hearing. *Prohibition of Sexual Assault*, *supra* note 155.

Arizona State University's timeline is a "factual determination" to be drafted within five days following the conclusion of a Title IX hearing. *Interim Grievance Process for Formal Complaints of Title IX Sexual Harassment,* ARIZ. ST. UNIV. (Aug. 14, 2020), https://provost.asu.edu/policies/procedures/p20a [https://perma.cc/B5UN-69D6].

201 Thornburg, *supra* note 195, at 1649. Thornburg noted that the law mandating the disclosure twice a year of each federal judge's pending cases and motions, a public type of shaming, may change how a judge rules and undermine the deliberative process a judge should engage in prior to deciding. *Id*. (describing the "Six Month List" and explaining that this forced deadline designed to decrease delay, may harm judicial decision-making processes).

may appear rushed and is unlikely to provide confidence in the decision-making process, even if the panel was careful in their deliberations.

As with conflicts of interest and bias issues, external professional decisionmakers, like arbitrators, are the best option for universities because they are capable of engaging in deliberative decision-making and could write effective well-reasoned determinations without additional training. Unfortunately, the same is unlikely to be true for internal or external non-professional decisionmakers. Currently, universities cannot afford or do not have the will to spend time training prospective decisionmakers on decision-making or opinion writing.[203] If a university engages a Title IX training entity to conduct training on making decisions and writing determinations, the training will address the topics of deliberation and decision-writing, but only briefly. For example, in its sample training agenda for Title IX Decision-Maker Training, the Association of Title IX Administrators ("ATIXA") allocates one and one-half hours to "deliberation, rationales and record-keeping."[204] This limited training seems unlikely to result in well-reasoned written determinations.

Despite all the benefits of well-reasoned opinion writing and deliberation, the new regulations offer little guidance to universities hoping to develop methods to ensure decisionmakers have the ability to engage in these tasks. Given the risk that an untrained decisionmaker will rely on biases and decision-making shortcuts in deliberation and provide a less than well-reasoned determination to the parties, the new regulations should be revised to either require considerably more training on this topic or mandate the use of external, professional decisionmakers, like arbitrators with expertise in higher education issues.

IV. Conclusion

University Title IX offices face the daunting task of investigating and adjudicating student-to-student sexual misconduct cases. While critics decry the formalization of the hearing process

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202 *See, e.g.*, Jenny Tie, *Survey: Student Trust in Title IX Process Drops*, KENYON COLLEGIAN (Oct. 12, 2017), https://kenyoncollegian.com/news/2017/10/survey-student-trust-title-ix-process-drops/ [https://perma.cc/TZF2-H9JP] (noting a 2017 survey from Kenyon College and other small peer institutions that indicates students' faith in their schools' Title IX process has dropped noticeably since 2015).

203 Brown University, for example, offers an in-depth training for adjudicators on their duties, concepts critical to their decision-making, and more, but it fails to cover how hearing panelists should ultimately draft their decisions. *See Adjudicator Training for Hearing Panelist, Hearing Officers, and Chair of the Title IX Council*, BROWN UNIV., https://www.brown.edu/about/administration/title-ix/sites/brown.edu.about.administration.title-ix/files/uploads/Title%20IX%20Retreat_Fall_for%20web.pdf [https://perma.cc/9LC5-MPF9].

Massachusetts Institute of Technology has opted not to provide specific training on how to draft the determinations, but instead offers decisionmakers specific drafting guidelines for their written decisions. *COD Rules*, MASS. INST. OF TECH., https://cod.mit.edu/rules/section16 [https://perma.cc/P3FK-3YQN];

The materials the University of Missourit has used since 2018 to train its Title IX coordinators, investigators, and decisionmakers neglects to include any training for decisionmakers on drafting their written determinations following a hearing. *Trainings*, *supra* note 158.

204 If a university engages a commercial provider of training, like ATIXA, the university must, pursuant to the new regulations, post any training materials it utilizes to train staff on the university website. Training presentations posted on websites are typically PowerPoint slides used during training, but not the accompanying recorded presentation. *See Title IX Regulations Training*, *supra* note 158 (providing Husch Blackwell Title IX training PowerPoint slides).

under the new regulations, the lack of due process inherent in many universities' approaches to Title IX adjudication required significant change. Unfortunately, most universities are not equipped to handle the administration of formal hearing processes. University dispute systems designers would do well to examine successful adjudicatory systems and either model their systems on existing, workable processes or, if unable to adequately replicate these processes, should give serious consideration to outsourcing the formal hearing process. To do so, for most universities, would be to enhance the integrity of the Title IX formal hearing processes by reducing the potential for decisionmaker bias and conflicts of interest that undermines the integrity of the adjudicatory process. For most universities, the decision to outsource to external professional decisionmakers increases the likelihood that the Title IX adjudicatory process will be accepted by the university's most important constituents – its students.