



HUSCH BLACKWELL

Informal Resolution & Restorative Justice

July 21, 2020



Perspective

- ✓ Deep, almost universal dissatisfaction with the investigation/adjudication model for dealing with student misconduct
- ✓ No appetite for return to mishmash of informal practices which reigned pre-2011 DCL
- ✓ Is there an alternative to the investigation/adjudication model which is rigorous and more in line with educational role of colleges and universities?
- ✓ Much discussion about restorative justice but little understanding of how to implement a thoughtful program

Compliance Requirements





34 C.F.R. § 106.45(b)(9)

Informal Resolution

“[A]t **any time prior to reaching a determination** regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the recipient . . .”

- (i) Provides to the parties a **written notice** disclosing: the **allegations**, the **requirements of the informal resolution process** including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations,
 - provided, however, that **at any time prior to agreeing to a resolution**, any party has the **right to withdraw** from the informal resolution process and resume the grievance process with respect to the formal complaint, and
 - any **consequences** resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;
 - ❖ **See TX Transcript Notation and Information sharing Requirements**
- (ii) Obtains the parties’ **voluntary, written consent** to the informal resolution process; and
- (iii) Does **not** offer or facilitate an informal resolution process to resolve allegations that an **employee sexually harassed a student**.



Written Notice of Allegations

- Identity of parties involved (if known)
- Specific section of university's policies that have allegedly been violated
- Alleged conduct constituting misconduct
- Date and location of alleged incident
- Sufficient time for Respondent to prepare a response prior to any formal interviews or process
- Background information regarding informal resolution process



34 C.F.R. § 106.45(b)(1)(iii)

Conflict of Interest, Bias, & Training

- **Conflict of Interest/Bias:** Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, **or any person designated by a recipient to facilitate an informal resolution process**, **not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.**
- **Training:** A recipient must ensure that Title IX Coordinators, investigators, decision-makers, **and any person who facilitates an informal resolution process**, **receive training** on the **definition of sexual harassment** in § 106.30, the **scope of the recipient's education program or activity**, how to conduct an **investigation and grievance process** **including** hearings, appeals, and **informal resolution processes**, as applicable, and **how to serve impartially**, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. . . .
- Any **materials** used to train Title IX Coordinators, investigators, decision-makers, **and any person who facilitates an informal resolution process**, **must not rely on sex stereotypes** and must promote impartial investigations and adjudications of formal complaints of sexual harassment;



34 C.F.R. § 106.45(b)(1)(v) Grievance Process Requirements

Include **reasonably prompt time frames** for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals **and informal resolution processes** if the recipient offers informal resolution processes, and a process that allows for the temporary delay of the grievance process or the limited extension of time frames for **good cause** with written notice to the complainant and the respondent of the delay or extension and the reasons for the action.

Good cause may include considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities;





34 C.F.R. § 106.45(b)(2)(9) Voluntary Participation

“A recipient **may not** require **as a condition** of

- enrollment or continuing enrollment,
- or employment or continuing employment,
- or enjoyment of any other right,

waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with this section.

Similarly, a recipient **may not** require the parties to participate in an informal resolution process under this section and **may not** offer an informal resolution process **unless a formal complaint is filed.**”



How Do We Ensure Participation is Voluntary?

- Educate the parties and the community about informal resolution options
- Provide Notice of Rights & Options, such as:
 - Whether and when the process can be terminated
 - Whether information shared can be used in subsequent conduct matters
 - How RJ differs from formal investigation and adjudication
 - Whether the process involves face-to-face interaction
- Participation contingent on successful completion of preparatory meetings
- Require parties to sign a Participation Agreement
- Frequent check-ins and monitoring



Final Informal Resolution Agreement

Potential elements of final resolution agreement include:

- Procedural Background
- Sanctions and/or other remediation measures
- Confidentiality agreement/limitations
- Consequences for breach



Informal Resolution is Not for All Cases.

Factors to consider:

- The nature of the alleged offense
- Whether there is an ongoing threat of harm or safety to the campus community (e.g., use of a weapon)
- Whether alleged respondent is a repeat offender
- Whether the person alleged to have caused the harm is participating in good faith

Remember: Traditional investigative/adjudicative processes should be used when an accused student *denies* responsibility.



Legal Issues

- Very few reported cases analyzing informal resolution practices.
- Courts have been resistant to allowing deliberate indifference claims based on an institution's use of an informal resolution process in general.
- Key issue is **voluntariness**.
- If the institution follows (or makes a good-faith attempt to follow) its policies and procedures, courts appear to be reluctant to second-guess the decision or outcome.



Takla v. Regents of the University of California (C.D. Cal. 2015)

1. “UCLA handled Takla’s report through what appears to be a **truncated process** called ‘Early Resolution,’ rather than a formal hearing . . . even though [the administrator] learned through her investigation that [Respondent] had previously harassed another graduate student and two junior professors. **This was in violation of UCLA’s own Title IX policy, which prohibits the use of Early Resolution in cases that involve multiple complaints of sexual misconduct.**”
2. Administrator “**discouraged** Takla from filing a written request for a formal investigation, stating that [Respondent’s] peers may well side with him and that Early Resolution would be faster and more efficient.”



Takla – cont'd

3. “Takla requested a formal investigative report after the conclusion of Early Resolution, but was told that **no formal documentation or report existed** because the matter was handled through Early Resolution. This too was **in violation of UCLA’s own policy**, which states that Early Resolution efforts should be documented.”
4. “UCLA took **nine months** to investigate Takla’s report but did not make any findings at the conclusion of its investigation, **again in violation of UCLA’s policy**.”
5. “UCLA **did not inform Takla of the outcome** of Early Resolution or whether Piterberg was sanctioned for his conduct.”

Court denied UCLA’s MTD



Karasek v. Regents of the Univ. of California (N.D. Cal. 2016)

“In arguing that she has made a sufficient showing of deliberate indifference, Karasek asserts that the University improperly used an informal resolution process to address her complaint”

- “[A]t no time during the entire pendency of the early resolution process was [she] allowed to participate in any investigatory or disciplinary process.”
- “During the entire pendency of the investigatory and disciplinary process, Respondent was ‘allowed to remain on campus, unrestricted, creating a sexually hostile environment’”
- Karasek was not contacted during the entire pendency of the informal resolution process and was not given an opportunity either to present her claim at a disciplinary hearing or to appeal the University’s disciplinary decision.”

Court granted UC’S MTD:
“[E]ven assuming that a school’s violation of its own sexual harassment policy is relevant to the deliberate indifference analysis, **Karasek identifies no way in which the University’s use of an early resolution process to address her complaint was in violation of University policy.**”

Karasek (9th Cir. 2020)

- “We might have handled the situation differently, but the Supreme Court has instructed us to ‘refrain from second guessing the disciplinary decisions made by school administrators’ unless those decisions were ‘clearly unreasonable’”
- “[T]he decision to resolve Commins’s complaint informally without allowing Commins to testify or present evidence is troubling, given the context and nature of her assault. . . . Despite these shortcomings, however, UC’s response did not exhibit deliberate indifference. After Commins reported her assault, UC moved quickly to suspend her assailant, and UC imposed fairly stringent sanctions upon resolution of Commins’s complaint. We may disagree with UC’s handling of Commins’s complaint, but that does not suffice for Title IX liability.”

956 F.3d 1093, 1108–10 (9th Cir. 2020) (citing *Davis*, 526 U.S. at 648).

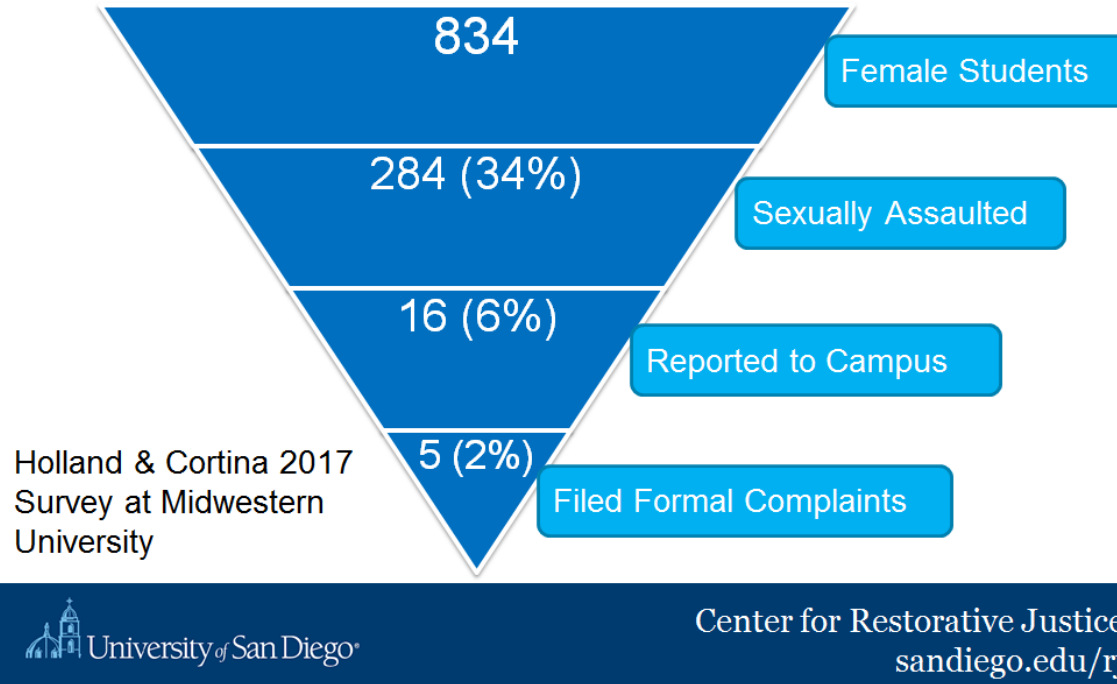


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Restorative Justice as a Response to Campus Sexual Misconduct



The Need for More Options





How Does RJ Differ from Traditional Investigative/Adjudicative Processes?

Traditional Conduct Process:

What rule was violated?

How will we investigate/adjudicate?

Is there enough evidence to support a finding of responsibility?

How should we punish the offender?



Restorative Justice Process:

What is the harm?

Who is responsible?

How can they accept responsibility?

What can they do to repair the harm?

How can we rebuild trust?

Mediation v. Restorative Justice





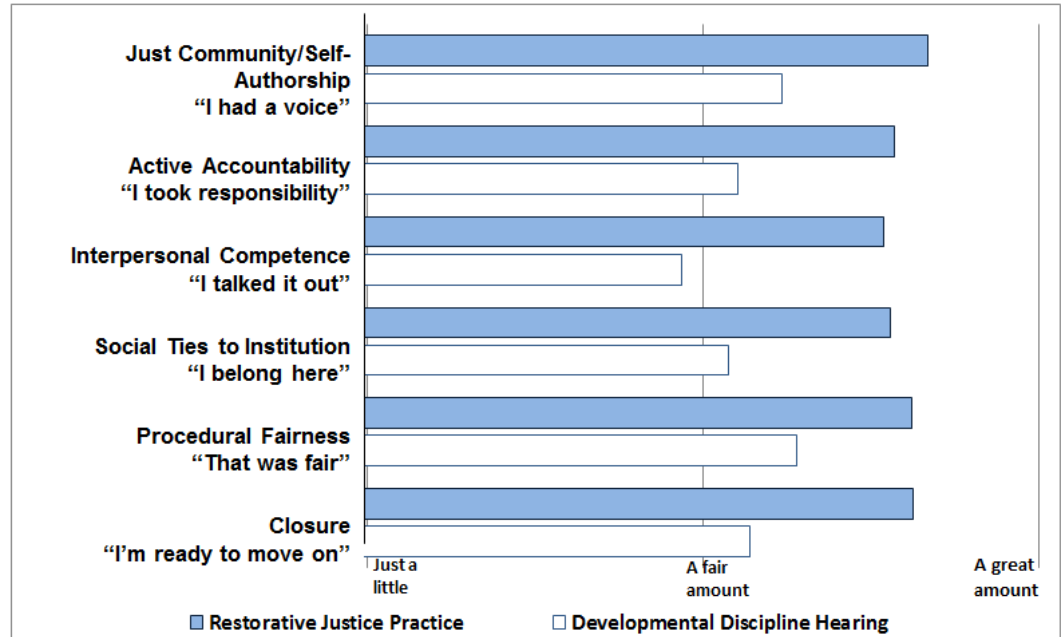
Why should schools consider RJ?

- RJ serves institutional goals of promoting safety and furthering educational objectives
- **Provide more opportunities for students to come forward**
- More effective use of resources, diverting away from costly investigations and adjudications
- Increase satisfaction with process and outcome . . . less OCR and litigation risk?

Student Accountability and Restorative Research Project Offender Survey (STARR)

- Harmed Party Survey
- Offender Surveys
- Conduct Administrator Surveys

Type of Process	Cases
Developmental Discipline Administrative/Board Hearing	403
Restorative Justice Circle/Conference/Board	165



Alternative Resolution for Cases involving Student Respondent

“Alternative resolution is a voluntary process within The College of New Jersey’s Title IX Policy that allows a Respondent in a Title IX investigation process to accept responsibility for their behavior and/or potential Harm. By fully participating in this process the Respondent will not be charged with a violation of College Policy. The alternative resolution process is designed to eliminate the Prohibited Conduct, prevent its recurrence, and remedy its effects in a manner that meets the needs of the Reporter while still maintaining the safety of the overall campus community.”

TCNJ Staff Labor:

(Average Hours/Case Formal Hearing vs RJ (Indirect))

TCNJ
THE COLLEGE OF
NEW JERSEY

Process	Hearing	RJ
Meetings with Reporter	7	6
Meetings with Respondent	7	7
Meetings with Witnesses	7	0
Documentation/Report	14	2
Hearing/Appeal	6	0
Email Communications	34	10
TOTAL	75	25

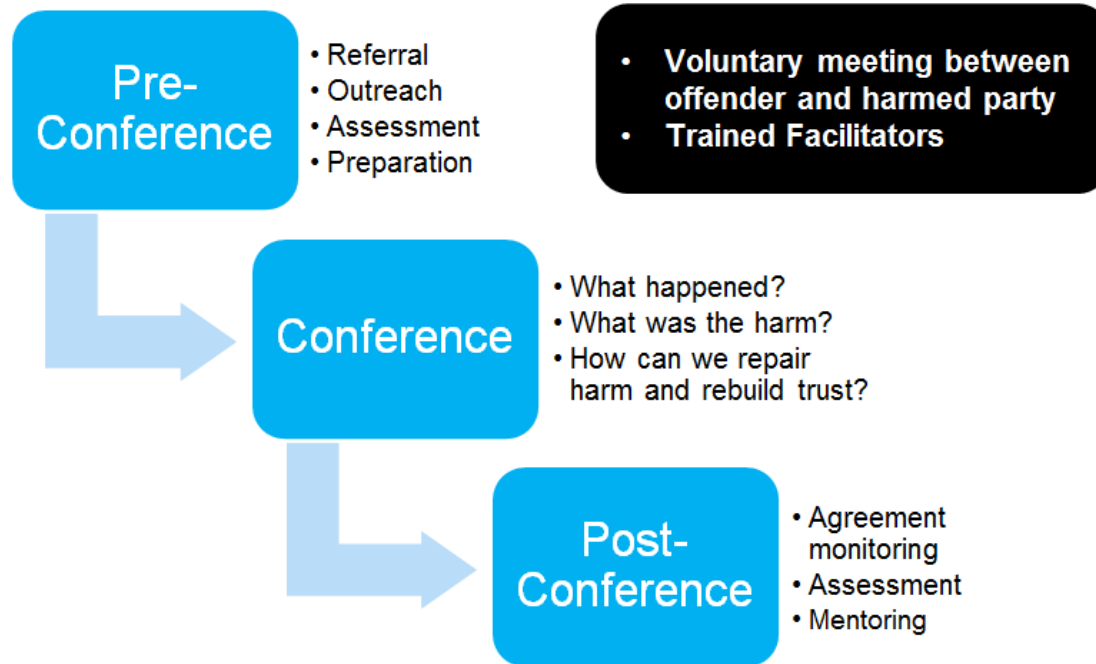


University of San Diego

Center for Restorative Justice
sandiego.edu/rj



Fundamental RJ Process



Anwen and Sameer

"I started talking with him, I think about what I wanted and that **I didn't want a formal proceeding**. I didn't want a verdict handed down. I wanted something to come out of it. I wanted it to be discussion and I wanted to decide with Sameer what the results were going to be . . . It was a **powerful feeling** to feel that I was not just crazy. And that he also knew that it had been wrong."

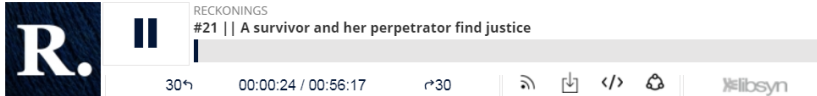
"

"I was **terrified** that I assaulted her. I was terrified that I'd hurt her in this way. I was terrified of myself. Because if this was true and I did assault her then what did that make me?"

I was terrified of being found out. I was terrified of being sent to jail. I was terrified of all the consequences that come with sexual assault and rape and I didn't have anybody that I was like who I could tell because like . . . how do I say, 'Hi. I think I think I assaulted and raped somebody, but I'm not entirely sure.'"

21 || A SURVIVOR AND HER PERPETRATOR FIND JUSTICE

12/3/2018



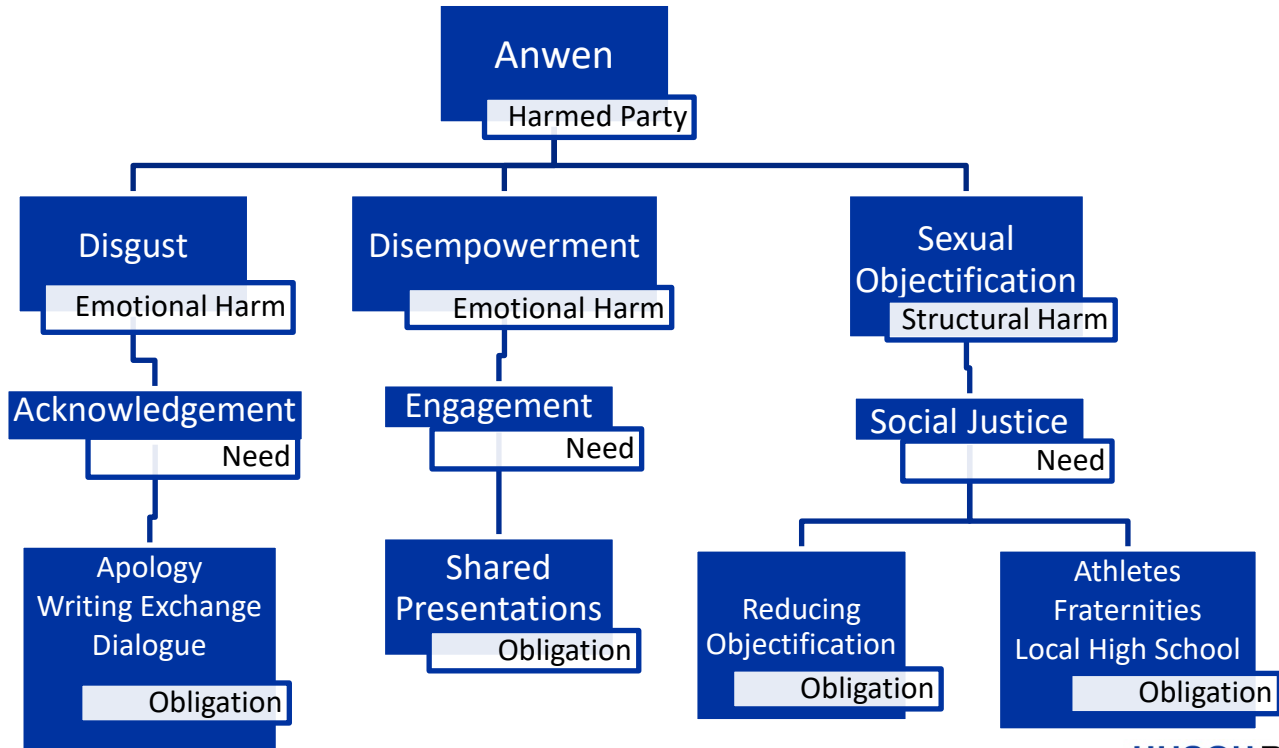
Sameer met Anwen freshman year. He was into her, and they started seeing each other. Then one night, after a fraternity party, Sameer convinced Anwen to come home with him — which is when he coerced her into sexual activity. Their senior year, Anwen invited Sameer into a process of restorative justice.

<http://www.reckonings.show/episodes/21>

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Harms, Needs, and Obligations: Anwen and Sameer



Accepting Responsibility: Anwen and Sameer

Agreement

- Read/respond to Anwen's writings
- Write article for student publication
- Present story together at bystander intervention workshop
- Collaborate on gender violence programming for student athletes and Greek system
- Outreach to peer advocates for mutual learning
- Develop sexual violence prevention education curriculum for local high school

RECKONINGS

#21 || A survivor and her perpetrator find justice

RJ for Re-entry and Reintegration

- Providing support so the returning student can be academically successful
- Providing accountability so the community can be reassured about safety



McMahon, Karp, and Mulhern. 2018. "Addressing Individual and Community Needs in the Aftermath of Campus Sexual Misconduct: Restorative Justice as a Way Forward in the Re-Entry Process." *Journal of Sexual Aggression*

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Shank v. Carleton College (D. Minn. 2019)

- RJ conference utilized for reintegration of disciplined respondent
- Court found that RJ conference did not violate ED's guidance prohibiting victims to "work out the problem directly with the alleged perpetrator"
- Rejected deliberate indifference claim
 - Plaintiff voluntarily participated
 - Institution appropriately facilitated the conference
- **Caution:** "It is possible to hypothesize a different case where, for example, a meeting is not voluntary or a school knows or should know that a victim's ability to make rational decisions is compromised."



Implications for Potential Legal Proceedings?

Many students charged with sexual or other misconduct that implicates criminal justice issues may be reluctant to participate without assurances that their admissions of causing harm won't be used against them.

- MOU with local prosecutor?
- Civil litigation waiver?
- Mutual confidentiality agreement?
- State privilege or confidentiality law?
- FRE 408?

Federal Rule of Evidence 408

Evidence of the following is not admissible—on behalf of any party—either disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

...

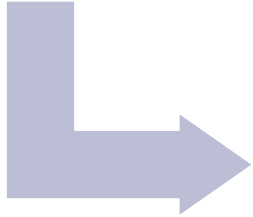
(2) conduct or a statement made during compromise negotiations about the claim"

NEB. REV. STAT. § 25-2914.01

"No admission, confession, or incriminating information obtained from a juvenile in the course of any restorative justice program . . . shall be admitted into evidence against such juvenile, except as rebuttal or impeachment evidence, in any future adjudication hearing under the Nebraska Juvenile Code or in any criminal proceeding."

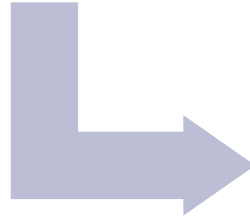
Preparation/ Adoption

- Decision regarding commitment to adopting and supporting RJ program/practices
- Review current policies, practices, personnel, and resources to determine capacity for integrating RJ
- Develop plan for implementation



Initial Implementation

- Issue revised conduct and other policies
- Provide training for involved personnel and offices, such as Student Affairs, OIE, campus safety, general counsel/compliance
- Implement protocol for screening and referring cases for RJ process for targeted location, conduct, population, etc.
- Assess outcomes, areas for improvement, etc.



Broader Implementation/ Continuous Improvement

- Expand program/practices to address other populations or conduct
- Assess for opportunities to make process more efficient and accessible

Resources

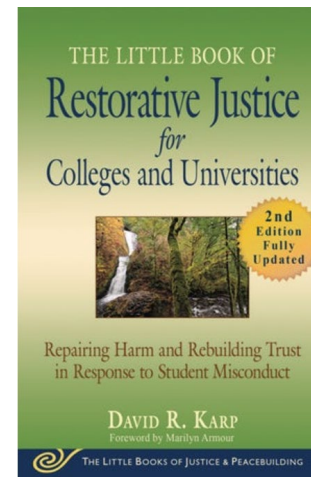
Stay Informed

SIGN UP FOR ONE OF OUR [GOOGLE GROUPS](#)

- Campus RJ (General Interest in RJ in Higher Education)
- Campus PRISM (RJ and Campus Sexual Harm)
- RJ and Bias
- RJNCC (RJ Network of Catholic Campuses)
- Rx for RJ (RJ for Education in Health Professions)
- RJ for K-12 Educators



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