



ESSAY

**Bias Response Teams:
Designing for Free Speech and Conflict
Resolution on the University Campus**

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Abstract. University administrations have created Bias Response Teams (BRTs) as a means to navigate student-to-student campus disputes. BRTs both collect data on reported student conflicts as well as offer students conflict resolution, educational, and other university resources to manage their disputes. Yet these BRTs have been under siege in the courts, often challenged on the grounds that such systems chill students' speech. This Essay examines the structure and purpose of BRTs as well as many of the legal challenges they have faced in the past decade. It then intertwines this analysis with scholarship on dispute system design to explore how such university systems may be reconfigured in response to these legal challenges. Any solution should both maintain student resources and address concerns over First Amendment violations. As such, rather than fully stripping BRTs of their power, campuses should consider severing connections between their formal, punitive campus resources and BRTs while maintaining access to informal resolution options such as mediation and restorative justice practices.

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Introduction

Throughout the United States, colleges and universities have waded through the challenges of navigating student-to-student identity-based discourse and disputes.¹ In an attempt to manage such student-to-student disputes,² numerous universities have developed dispute resolution mechanisms called Bias Response Teams (BRTs), which are resources specifically designed to address and collect data on concerns regarding incidents of perceived identity-based discrimination.³ Yet while universities seek pathways to address discriminatory student conduct, students—represented by nonprofits—have challenged such programs in court.⁴ Plaintiffs accuse universities of violating principles of free speech. Since 2018, nonprofits have filed at least seven lawsuits against universities for their implementation of BRTs.⁵ The resulting court opinions and settlements are enough to give pause to any university thinking about developing a BRT or similar program.

While many universities have stripped their BRTs of power in the face of court action,⁶ this Essay argues that campuses should instead maintain their BRTs as tools for education and civil discourse. Part I surveys BRTs and their approaches to managing perceived bias incidents, including the provision of access to other dispute resolution systems such as restorative justice and mediation processes. Part II examines recent legal challenges aimed at BRTs and the resulting changes that universities have made to BRT programs. Finally, considering scholarship on dispute system design, Part III discusses how universities may reimagine their BRTs to not only better serve their

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1. For a recent example describing campus disputes regarding Arab and Jewish identities, see Stephanie Saul & Anemona Hartocollis, *College Presidents Under Fire After Dodging Questions About Anti-Semitism*, N.Y. TIMES (Dec. 6, 2023), <https://perma.cc/6WPF-HB8M>.
 2. Note that universities experience intergroup conflict beyond student-to-student conflicts, which could also include conflicts among faculty, staff, postdoctoral fellows, and beyond. This short Essay limits discussion to student-to-student conflicts.
 3. See *infra* Part I.
 4. See *infra* Part II.
 5. See *Speech First, Inc. v. Sands*, 69 F.4th 184 (4th Cir. 2023) (Virginia Tech), *vacated*, 144 S. Ct. 675 (2024); *Speech First, Inc. v. Cartwright*, 32 F.4th 1110 (11th Cir. 2022) (University of Central Florida); Amended Complaint, *Speech First, Inc. v. Wintersteen*, No. 20-cv-2 (S.D. Iowa filed Jan. 10, 2020), 2020 WL 6131402 (Iowa State University); Complaint, *Young Ams. for Liberty at Montclair State Univ. v. Trs. of Montclair State Univ.*, No. 20-cv-00508 (D.N.J. filed Jan. 15, 2020), ECF No. 1, <https://perma.cc/6P3J-TYGQ> [hereinafter Complaint, *Montclair State*]; *Speech First, Inc. v. Killeen*, 968 F.3d 628 (7th Cir. 2020) (University of Illinois at Urbana-Champaign); *Speech First, Inc. v. Fennes*, 979 F.3d 319 (5th Cir. 2020) (University of Texas at Austin); *Speech First, Inc. v. Schissel*, 939 F.3d 756 (6th Cir. 2019) (University of Michigan).
 6. See *infra* Part II.B.

student population but also learn from the legal challenges faced by their peer institutions. Specifically, while universities should forego BRTs' connections to formal or punitive resources, they should continue to embrace BRTs' informal resources, such as mediation and restorative justice offerings.

I. The Structure of University BRTs

First established in the early 2000s, BRTs are a relatively new trend in universities that developed as a response to growing “awareness of incidents of hate against minoritized students.”⁷ BRTs allow campus members, especially students, to report potential incidents of identity bias to administrators.⁸ These BRT systems “promote . . . supporting students who are harmed or providing educational opportunities” to help students better understand bias.⁹ Often, these BRTs connect with the students involved in the incident afterwards to offer support or direct them to other campus resources.¹⁰ Simultaneously, BRTs may also track information about the incident at hand to inform the university administration’s sense of the campus climate.¹¹ BRT procedures can effectively be broken down into three phases: reporting, meeting with BRT staff, and data collection.

A. Reporting

The ways in which campus community members can report perceived bias incidents vary from institution to institution, but many universities permit student users to report through online portals where reporters’ identities may be kept anonymous.¹² While students may report incidents regarding a harm they have directly experienced, they may also report on behalf of their peers.¹³

7. Lilian M. Garces, Evelyn Ambriz & Jackie Pedota, *Legal Challenges to Bias Response Teams on College Campuses*, 51 EDUC. RESEARCHER 431, 432 (2022). Note that the term Bias Response Team is being used here to refer to similar institutional processes across universities, as has been done in other literature on these systems. *See id.* However, universities may use various names for their BRTs, such as Protected Identity Harm Reporting or the Campus Climate Response Team. *See The Process*, STANFORD UNIV.: PROTECTED IDENTITY HARM REPORTING, <https://perma.cc/32TQ-XP4> (archived May 19, 2024); *Fenves*, 979 F.3d at 338.

8. *See* Garces et al., *supra* note 7, at 431-32.

9. *Id.* at 431.

10. *Id.* at 432.

11. *Id.*

12. *See, e.g.*, *Speech First, Inc. v. Killeen*, 968 F.3d 628, 633 (7th Cir. 2020); *Fenves*, 979 F.3d at 325.

13. For just one example, the University of Washington’s Bias Reporting Tool is a virtual form to report nonemergency incidents of bias, which allows reporters to provide information about an incident without directly informing the parties to the incident.

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B. Meeting with BRT Staff

When a student user shares their identity in their report, they may be invited to speak with a professional staff member of the BRT about the perceived bias and/or harm they witnessed or personally experienced.¹⁴ During this phase, the BRT staff member may ask for additional information on the incident and offer the reporting student resources, including counseling, to help them manage the harm they experienced.¹⁵

Support is meant not only for students who have experienced harm, but also for students who have been accused of doing harm. The BRT may contact accused students and offer to meet with them.¹⁶ This meeting is voluntary and can entail discussing the harm alleged by the reporter or offering additional resources for the students.¹⁷ While BRTs are not themselves punitive, they may refer cases to other administrative offices at the university, which could lead to punitive action.¹⁸ While this may be the end of the process for some universities, others provide a variety of resources to help resolve the dispute between the parties, such as mediation,¹⁹

Reporting Bias Incidents: Frequently Asked Questions, UNIV. OF WASH., <https://perma.cc/255H-B8V3> (last updated Aug. 21, 2017). This process allows third parties to an incident to maintain anonymity while still giving them the capacity to report an incident in which they are not directly involved. *See id.*

14. Garces et al., *supra* note 7, at 432.

15. *See, e.g., The Process*, *supra* note 7 (discussing Stanford University’s BRT process, including connecting reporting students with counseling and psychological services, otherwise known as CAPS). On September 17, 2024, as this Essay went to print, Stanford disbanded its BRT system for reasons including that “there had been long-standing concerns about the potential for the [BRT] process to chill freedom of expression.” Email from Jenny Martinez, Provost, Stanford Univ., and Michelle Rasmussen, Vice Provost for Student Affairs, Stanford Univ., to Stanford Community (Sept. 17, 2024, 10:48 PM PST) (on file with author). It has been replaced with a Title VI process which focuses on “possible violations of federal law” within the university. *Id.*; George Porteous, *Inside the University’s Updated Free Speech Policies*, STAN. DAILY (updated Sept. 26, 2024, 9:36 PM), <https://perma.cc/NNZ7-S3GD>.

16. Garces et al., *supra* note 7, at 432.

17. *Killeen*, 968 F.3d at 633; *Fenves*, 979 F.3d at 325-26.

18. Garces et al., *supra* note 7, at 432; *see also* Stephen L. Wessler, *Hate Crimes and Bias-Motivated Harassment on Campus*, in RESTORATIVE JUSTICE ON THE COLLEGE CAMPUS: PROMOTING STUDENT GROWTH AND RESPONSIBILITY, AND REAWAKENING THE SPIRIT OF CAMPUS COMMUNITY 194, 201 (David R. Karp & Thom Allena eds., 2004) (noting that, when reporting leads to sanctions, they “are usually punitive rather than restorative.”); Ryan A. Miller, Tonia Guida, Stella Smith, S. Kiersten Ferguson & Elizabeth Medina, *A Balancing Act: Whose Interests Do Bias Response Teams Serve?*, 42 REV. HIGHER EDUC. 313, 326-27 (2018) (noting that some BRT personnel take a punitive approach to their work).

19. Within universities, mediation services can take many forms. Sometimes, universities rely on official mediation services provided by designated university staff or trained peer mediators. *See, e.g., Peer Mediators*, STANFORD UNIV.: OFF. OF INCLUSION, CMTY & INTEGRATIVE LEARNING, <https://perma.cc/9QMU-6HHR> (archived May 19, 2024);
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restorative justice,²⁰ or other creative solutions like voluntary educational experiences or workshops²¹ that are open to the accused parties.²²

C. Data Collection

Finally, even when the BRT does not refer students to additional resources, it may collect critical data for the university about the incident, including “general information about the types of incidents reported, where they have taken place, and the actions taken to address them.”²³ In some instances, limited parts of this data are shared publicly.²⁴ For example, Stanford University’s Protected Identity Harm Reporting process publishes the details of

Mediation, UNIV. OF MICH.: OFF. OF STUDENT CONFLICT RESOL., <https://perma.cc/X2R9-KNUN> (archived May 19, 2024). Some institutions may have more unofficial approaches—Student Affairs personnel might informally attempt to facilitate conversations amongst roommates, classmates, or other community members. *See, e.g., How We Can Help*, STANFORD UNIV.: RESIDENTIAL EDUC., <https://perma.cc/43TF-B9LF> (archived May 19, 2024); *Residential Education*, UNIV. OF S. CAL.: HOUSING, <https://perma.cc/SR5H-ZEJE> (archived Sept. 11, 2024). Mediation practices rely upon the services of a third-party mediator who facilitates conversation and guides the parties towards shared understanding and resolution; parties are often expected to design and mutually agree upon their own solution, although the mediator provides support. LISA BLOMGREN AMSLER, JANET K. MARTINEZ & STEPHANIE E. SMITH, DISPUTE SYSTEM DESIGN: PREVENTING, MANAGING, AND RESOLVING CONFLICT 47-48 (2020).

20. Like mediation processes, restorative justice processes often involve the participation of a third-party neutral to support parties in managing their disputes; however, unlike mediation, these practices foreground healing relationships and repairing harm between parties. Carrie Menkel-Meadow, *Restorative Justice: What Is It and Does It Work?*, 3 ANN. REV. L. SOC. SCI. 161, 162, 164 (2007). Some universities, such as UC San Diego, rely on in-house restorative justice systems in coordination with their student affairs departments. *Restorative Justice*, UC SAN DIEGO: CTR. FOR STUDENT ACCOUNTABILITY, GROWTH & EDUC., <https://perma.cc/SR5H-ZEJE> (archived May 19, 2024). Others, such as UC Berkeley, use restorative justice practices and practitioners located outside of student affairs offices. *See About Us*, RESTORATIVE JUST. CTR. OF UC BERKELEY, <https://perma.cc/N7GK-9NL6> (archived May 19, 2024).
21. These voluntary educational opportunities seek to prevent future identity-based discrimination incidents by educating students about harmful stereotypes and microaggressions. *See, e.g., Restoration*, STANFORD UNIV.: PROTECTED IDENTITY HARM REPORTING, <https://perma.cc/L3MJ-6SPN> (archived May 19, 2024).
22. *See* Lucy A. LePeau, J.T. Snipes, Demetri Morgan & Hilary Zimmerman, *Campus Educators Deploying Cultural and Social Capital: Critically Examining a Bias Response Team*, 59 J. COLL. STUDENT DEV. 681, 681 (2018); *see also, e.g., Speech First, Inc. v. Killeen*, 968 F.3d 628, 633 (7th Cir. 2020); *Restoration*, *supra* note 21.
23. Garces et al., *supra* note 7, at 432.
24. *See, e.g., News*, STANFORD UNIV.: PROTECTED IDENTITY HARM REPORTING, <https://perma.cc/8AWQ-DEPC> (archived May 19, 2024).

some such cases on their website, along with the steps the university has taken to address the conflicts.²⁵

D. The Role of BRTs in Universities

BRTs provide a unique service to universities. Often, the bias incidents with which they engage exist in a “gray area, short of a legal or policy violation” yet are still “hostile to various diverse groups.”²⁶ While universities are often prepared to manage criminal behavior, they are less prepared to respond to harmful behavior that falls in this middle ground.²⁷ For this reason, BRTs offer universities an indispensable resource as they actively seek to address concerns that fall somewhere along the spectrum between policy violations/hate crimes and legally protected speech.²⁸

Moreover, not only are these systems collecting reports of bias, but they are also offering a means of education and dispute resolution, like mediation and restorative justice, which are effective tools for managing hate-based or biased speech and strengthening community ties across identities.²⁹ Thus, by soliciting reports of bias and guiding students to suitable resources, BRTs may be an important step to creating fruitful dialogue between adverse parties, addressing harmful behaviors, and finding paths towards resolution.

In an ever-conflicted world, well-established systems like BRTs support universities in understanding the campus climate and their students’ needs while also providing concrete ways to address student-to-student conflicts.

II. Legal Challenges to BRTs

Despite their central role in many universities’ approach to managing campus disputes, BRTs have been and continue to be actively challenged in

25. See, e.g., *Restroom Vandalized with Homophobic Language (04/24/23)*, STANFORD UNIV.: PROTECTED IDENTITY HARM REPORTING (May 2, 2023), <https://perma.cc/AAD2-YRL8>.

26. Miller et al., *supra* note 18, at 315-16 (“These incidents might include microaggressions, protests, displays . . . and are considered to have a deleterious effect on overall campus climate.”).

27. *Id.*

28. In this context, hate crime refers to “a crime of violence, property damage, or threat that is motivated in whole or in part by an offender’s bias based on race, religion, ethnicity, national origin, gender, physical or mental disability, or sexual orientation.” STEPHEN WESSLER & MARGARET MOSS, U.S. DEPT. OF JUST., NCJ 187249, HATE CRIMES ON CAMPUS: THE PROBLEM AND EFFORTS TO CONFRONT IT 17 (2001), <https://perma.cc/L4AA-6EPP>.

29. See MARK AUSTIN WALTERS, HATE CRIME AND RESTORATIVE JUSTICE: EXPLORING CAUSES, REPAIRING HARM 97-100 (2014); Livia Luan, *Making Victims Whole Again: Using Restorative Justice to Heal Hate Crime Victims, Reform Offenders, and Strengthen Communities*, 37 TEMP. INT’L & COMPAR. L.J. 161, 166 (2022).

court. These legal challenges are often led by nonprofit organizations—such as Speech First and the Alliance Defending Freedom—on behalf of students.³⁰ They claim that BRTs chill constitutionally protected speech.³¹ Some of these cases have led to appellate rulings disfavoring BRTs, specifically in the Fifth, Sixth, and Eleventh Circuit Courts of Appeals.³² Other courts, however, have ruled against plaintiffs in cases regarding university BRTs.³³ Yet even in the cases where these non-profits have failed to convince the court, numerous universities have still decided to place limitations on their BRTs or dismantle them entirely without the coercion of the court.³⁴ Below, I provide an overview of some of the legal arguments brought forth by these plaintiffs, the subsequent court rulings, and, ultimately, the resulting changes in BRTs’ structures.

A. Relevant Suits and Court Rulings on BRTs

In *Speech First, Inc. v. Schlissel*, Speech First sued the University of Michigan for the creation and use of its BRT, which was established to address incidents of bias and their harms on campus as well as to administer remedies for such behavior.³⁵ Despite noting that the BRT itself could not enact punishments, the Sixth Circuit reasoned that the ability to refer accused students to both formal and informal campus offices and services—including the police, the

30. *See, e.g.*, *Speech First, Inc. v. Sands*, 69 F.4th 184, 188 (4th Cir. 2023), *vacated*, 144 S. Ct. 675 (2024); Complaint, *Montclair State*, *supra* note 5, at 1.

31. *See, e.g.*, *Speech First, Inc. v. Killeen*, 968 F.3d 628, 632 (7th Cir. 2020); *Sands*, 69 F.4th at 196.

32. Garces et al., *supra* note 7, at 433; *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1124-25 (11th Cir. 2022).

33. *See, e.g.*, *Killeen*, 968 F.3d at 644, 647; *Sands*, 69 F.4th at 188. While the Fourth Circuit originally sided against Speech First’s accusations against BRTs, the Supreme Court recently vacated this case, ordering the Fourth Circuit to dismiss the case as moot following Virginia Tech’s removal of their university bias policies. *Speech First, Inc. v. Sands*, 144 S. Ct. 675, 675 (2024); Ishan Bhabha, Lauren Hartz & Erica Turret, Jenner & Block LLP, *Client Alert: The Supreme Court Declines to Weigh in on Dispute over Campus Speech Policies*, JD SUPRA (Mar. 8, 2024), <https://perma.cc/JSP5-FXT5>. While the Supreme Court has decided to remove itself from the conversation on BRTs for now, the dissent provided by Justices Thomas and Alito signals that the Court may intervene in the near future. *Sands*, 144 S. Ct. at 678 (Thomas, J., dissenting) (“This petition presents a high-stakes issue for our Nation’s system of higher education. Until we resolve it, there will be a patchwork of First Amendment rights on college campuses.”).

34. *See, e.g.*, *Killeen*, 968 F.3d at 647; *Speech First, University of Illinois: Settlement Summary 1* (n.d.), <https://perma.cc/85QC-G7HX>; Zach Schonfeld, *Supreme Court Ducks Challenge to College Bias Response Teams*, HILL (Mar. 4, 2024, 9:58 AM ET), <https://perma.cc/8TZ3-3JVG> (explaining that while the Fourth Circuit sided with Virginia Tech, the university still did away with its BRT, likely because Speech First petitioned for a writ of certiorari from the Supreme Court).

35. 939 F.3d 756, 762-63 (6th Cir. 2019).

Office of Student Conflict Resolution,³⁶ and student counseling—could nevertheless function to intimidate or “implicit[ly] threat[en]” students.³⁷ Furthermore, the institution’s classification as a “Bias Response” resource “suggests that the accused student’s actions have been prejudged to be biased.”³⁸ Consequently, referral to such a process might lead a student to fear social consequences, including “currying disfavor with a professor, or impacting future job prospects,” thereby chilling student speech.³⁹ In the view of the court, the voluntary nature of participating in any BRT referral was insufficient to outweigh this chilling effect.⁴⁰

The claims made in *Schlissel* are reflected in other cases, including claims made against the University of Central Florida (UCF) in *Speech First, Inc. v. Cartwright*, where Speech First challenged the university’s BRT, staffed by university officials and a campus police officer, among others.⁴¹ Like the Sixth Circuit, the Eleventh Circuit held that a university’s bias policy and the accompanying BRT could chill free speech by intimidating impressionable students afraid of violating university norms or being accused of “offensive,” hateful, or biased conduct.⁴² In addition, the court reasoned that the bias policy utilized an overly broad definition of bias that could categorize protected speech, such as “core political speech,” as prohibited biased speech.⁴³

36. The University of Michigan’s Office of Student Conflict Resolution provides both restorative justice and mediation along with a host of other types of facilitated resolution styles. See *Resolution Options*, UNIV. OF MICH.: OFF. OF STUDENT CONFLICT RESOL., <https://perma.cc/293T-N3FU> (archived Sept. 11, 2024).

37. *Schlissel*, 939 F.3d at 763, 765. The reasoning that Speech First used in *Schlissel* to argue against BRTs is similar to that in many other cases, although sometimes there are other, exacerbating factors. For example, when challenging the BRT at the University of Central Florida, Speech First noted the inclusion of a police officer on the team. Complaint para. 5, *Speech First, Inc. v. Cartwright*, No. 21-cv-00313, 2021 WL 3399829 (M.D. Fla. July 29, 2021), ECF No. 1, <https://perma.cc/H54Z-2KX7>. Similarly, the University of Michigan allegedly included a law enforcement representative in its BRT. Complaint para. 44, *Speech First, Inc. v. Schlissel*, 333 F. Supp. 3d 700 (E.D. Mich. 2018), 2018 WL 2123702.

38. *Schlissel*, 939 F.3d at 765.

39. *Id.*

40. *Id.* Similarly, the Fifth Circuit suggested that the University of Texas’s BRT, which is called the “Campus Climate Response Team,” was the “clenched fist in the velvet glove” because of its ability to generate “referrals to campus resources such as the UT Austin Police Department, the Office of the Dean of Students, and the Office for Inclusion and Equity.” *Speech First, Inc. v. Fenves*, 979 F.3d 319, 338 (5th Cir. 2020).

41. 32 F.4th 1110, 1116 (11th Cir. 2022).

42. *Id.* at 1124.

43. *Id.* at 1125. Similar claims have been made against the bias policies of the BRT at Montclair State University. There, the plaintiffs, represented by the Alliance Defending Freedom, alleged that the university’s definition of a “bias incident” was

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The cases in which the courts sided with plaintiffs against BRTs have emphasized a fear that BRTs act as means of formal or social punishment for students accused of biased speech. In both *Schlissel* and *Cartwright*, the Sixth and Eleventh Circuits relied heavily on the reasoning in *Bantam Books, Inc. v. Sullivan*, a 1963 Supreme Court case.⁴⁴ The two appellate courts interpreted this case to mean that the “threat of punishment,” even if there is no “actual power to punish, . . . can be enough to produce an objective chill.”⁴⁵ For example, in *Schlissel*, while university officials on the BRT could not actually punish students, the appearance that they could was enough to scare students into silence.⁴⁶ The Eleventh Circuit extended this logic, even indicating that the “indirect pressure” caused by a student “being accused of ‘offensive’ . . . conduct” could be enough to unconstitutionally silence a young and impressionable scholar.⁴⁷ Thus, according to the Sixth and Eleventh Circuits, one does not have to actually be punished or even threatened with punishment to have their speech effectively chilled. A reasonable fear of negative consequences meted out by the institution, university officials, and even peers or mentors is enough to violate a student’s constitutionally protected speech.

While some courts have sided against BRTs, others have defended them, as exemplified by the Seventh Circuit’s ruling in *Speech First, Inc. v. Killeen*.⁴⁸ Just as in the aforementioned cases, Speech First’s complaint included suggestions that BRTs create a chilling effect on free speech because incident reporters “leverage bias reporting policies to shut down unpopular or minority viewpoints.”⁴⁹ Speech First also claimed that the University of Illinois’s use of No Contact Directives (NCDs), which prohibit involved parties from

“unconstitutionally overbroad,” thereby violating the students’ First Amendment rights. Complaint, *Montclair State*, *supra* note 5, paras. 158-59.

44. 372 U.S. 58 (1963). In this case, the Rhode Island Commission to Encourage Morality in Youth was sending notices “either solicit[ing] or thank[ing]” publishers for their compliance in not distributing “objectionable” books. *Id.* at 59-62. Such notices were often followed by a visit from the police, who asked the publisher “what action he had taken” to prevent the distribution of such books. *Id.* at 63. The Court ruled that such actions, even if only a threat, “suppress[ed] . . . constitutionally protected” speech by the publishers. *Id.* at 71.

45. *Schlissel*, 939 F.3d at 764; *see also Cartwright*, 32 F.4th at 1122-23.

46. *Schlissel*, 939 F.3d at 765.

47. *Cartwright*, 32 F.4th at 1123-24.

48. 968 F.3d 628 (7th Cir. 2020).

49. Complaint para. 35, *Speech First, Inc. v. Killeen*, No. 19-cv-03142 (C.D. Ill. filed May 30, 2019), ECF No. 1, <https://perma.cc/V2KK-9LGE> (quoting Jeffrey Aaron Snyder & Amna Khalid, *The Rise of “Bias Response Teams” on Campus*, NEW REPUBLIC (Mar. 30, 2016), <https://perma.cc/VJH9-LXEF>).

contacting one another, created a further chilling effect.⁵⁰ Unlike the Sixth and Eleventh Circuits, however, the Seventh Circuit declined to give credence to these accusations, accepting that the University of Illinois's BRT effectively "lack[ed] disciplinary authority" as evidenced by the voluntary nature of the process.⁵¹ Further, the university's BRT did not disclose any information about its interactions without their permission.⁵² Here, the court noted that Speech First failed to show that "any of its members face a credible threat of any enforcement on the basis of their speech."⁵³

Though later vacated by the Supreme Court on mootness grounds, the Fourth Circuit in *Speech First, Inc. v. Sands* similarly sided with Virginia Tech, partially because there was no evidence that the university's BRT was a tool of discipline or threatened discipline in any way.⁵⁴ Instead, the court upheld the use of BRTs, stating: "[T]he University here has devised a way to educate its student body about both 'protected speech and the role of tolerance in the campus community.' This is precisely the type of government speech that the First Amendment permits."⁵⁵ The dissent argued that referrals to BRTs could cause a chilling effect on student speech by threatening "significant reputational harm," reflecting the views of the Sixth and Eleventh Circuits.⁵⁶ The majority disagreed, instead reasoning that because the BRT did not demand participation or compliance and had no real punitive function, including having no impact on a student's disciplinary record, Virginia Tech had not violated students' rights.⁵⁷

Unlike their counterparts in the Sixth and Eleventh Circuits, the Fourth and Seventh Circuits rejected the premise that BRTs effectively threaten students with punishment. Instead, the latter courts refused to apply the reasoning of *Bantam Books* to the case of BRTs because their voluntary nature,

50. *Killeen*, 968 F.3d at 632. While NCDs are not noted on student disciplinary records, the university's student handbook suggests that students may be dismissed from the university if they violate NCDs. *Id.* at 635.

51. *Id.* at 641.

52. *Id.* at 643.

53. *Id.* at 644.

54. 69 F.4th 184, 198 (4th Cir. 2023), *vacated*, 144 S. Ct. 675 (2024) (mem.).

55. *Id.* at 199 (citation omitted) (quoting *Speech First, Inc. v. Sands*, No. 21-cv-00203, 2021 WL 4315459, at *8 (W.D. Va. Sept. 22, 2021)).

56. *Id.* at 212-13 (Wilkinson, J., dissenting) (citing *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 765 (6th Cir. 2019)).

57. *Id.* at 195-96, 202 (majority opinion). Note that *Speech First* also brought an argument stating that the BRT process was "burdensome enough to itself chill speech." *Id.* at 196. The court also found this argument unconvincing, finding no indication that the BRT process was unreasonably burdensome. *Id.*

with “essentially no consequences,” could not be deemed coercive.⁵⁸ Thus, despite the similarity in accusations made by the plaintiffs, different circuits have arrived at opposite conclusions.⁵⁹

B. The Changing Design of BRTs

Many universities that have been sued have chosen to settle, leading to the stripping of the resources and services provided by their BRTs. For example, despite the Seventh Circuit’s ruling in favor of the University of Illinois, the case nevertheless ended in settlement, preventing it from reaching the Supreme Court’s docket.⁶⁰ As part of the settlement, the University of Illinois restricted the power of its BRT.⁶¹ For one, the university clearly specified that its BRT is a voluntary measure that cannot punish students for refusing to engage with the process.⁶² Additionally, the settlement limited the use of NCDs to cases in which a report is “accompanied by allegations of an actual or foreseeable Student Code violation, such as sexual harassment or stalking.”⁶³

Other universities have also reimaged their bias response frameworks, including by dismantling any interpersonal aspects of their systems in favor of data collection. For example, when UCF settled with Speech First, it discontinued its BRT.⁶⁴ Now, when students seek to report an incident of bias, UCF’s webpage directs students to the university’s “IntegrityLine” in the Office of University Compliance, Ethics, and Risk—an office specifically tasked with matters such as risk mitigation/assessment, monitoring, and auditing.⁶⁵ The

58. *Killeen*, 968 F.3d at 640; *Sands*, 69 F.4th at 193-94; see *supra* note 44 (discussing *Bantam Books*).

59. In fact, the University of Illinois’s BRT could be considered to be more coercive than the BRTs at the University of Michigan or the University of Central Florida because of the additional use of NCDs, which order students to not communicate with each other on threat of being recommended dismissal from the university. See *supra* note 50 and accompanying text.

60. See Greta Anderson, *Speech Org. Settles With U of Illinois About Bias Response*, INSIDE HIGHER ED (Feb. 3, 2021), <https://perma.cc/K3P5-U6X5>.

61. *Id.*; Notice of Dismissal at 4, *Speech First, Inc. v. Killeen*, No. 19-cv-03142 (filed Feb. 2, 2021), ECF No. 33, <https://perma.cc/HDG5-AE4Q>.

62. Notice of Dismissal, *supra* note 61, at 4.

63. *Id.*

64. Joint Stipulation of Dismissal at 4, *Speech First, Inc. v. Cartwright*, No. 21-cv-00313, 2021 WL 3399829 (M.D. Fla. July 29, 2021), ECF No. 64, <https://perma.cc/JQ95-5Y2D>.

65. *File a Report*, UNIV. OF CENT. FLA.: OFF. OF STUDENT RTS & RESPS., <https://perma.cc/JCV2-9PET> (archived May 19, 2024); *UCF IntegrityLine*, UNIV. OF CENT. FLA.: UNIV. COMPLIANCE, ETHICS & RISK, <https://perma.cc/U2H4-Q4FR> (archived May 19, 2024); *About the Office*, UNIV. OF CENT. FLA.: UNIV. COMPLIANCE, ETHICS & RISK, <https://perma.cc/R3BF-4JX2> (archived May 19, 2024).

interpersonal services provided by UCF's previous BRT, including "mediation, training, counseling and consensus building," are nowhere to be found.⁶⁶

In another example, Iowa State University settled after being sued, changing its BRT to a "Campus Climate Reporting System" that, unlike the BRT, "does not contact or meet with students who are reported to it."⁶⁷ Instead of connecting accused students with interpersonal services or support following an incident of bias-related harm, this reporting system now provides a variety of forms in which students can report any number of incidents on campus;⁶⁸ here no informal resolution steps or support are publicized, if they exist at all.⁶⁹ Because this new system does not engage in referrals to other formal or informal campus resources, it has thereby removed any interpersonal element between impacted students—along with any perceived punishment that the court in *Schlissel* feared would chill speech.

Alternatively, some universities have instead chosen to provide enhanced counseling and mediation services. In one example, California Polytechnic State University (Cal Poly), in response to threatened litigation, transformed its proposed BRT into an ombuds office, offering "an informal, independent, impartial and confidential resource to assist in the resolution of university-related complaints or concerns."⁷⁰ The third-party ombuds at Cal Poly cannot "participate in any internal or external formal processes,"⁷¹ thereby diminishing concerns that students will feel coerced to participate.

There have numerous suits challenging BRTs in the last decade, and there is no sign that the challenges will stop anytime soon. Yet as concerns around free speech on campuses continue to boil over, the importance of systems like BRTs will grow. As such, any campus seeking to institute or modify a BRT must understand these legal challenges in order to withstand judicial scrutiny.

66. *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1117 (11th Cir. 2022).

67. Notice of Dismissal at 3, *Speech First, Inc. v. Wintersteen*, No. 20-cv-00002 (S.D. Iowa filed Mar. 12, 2020), ECF No. 25, <https://perma.cc/S6SL-XZ2A>.

68. See *ReportIt*, IOWA STATE UNIV., <https://perma.cc/6NE6-H9HN> (archived May 19, 2024). The Campus Climate Reporting System has been replaced by a new program called ReportIt. See *Campus Climate Reporting System*, IOWA STATE UNIV., <https://perma.cc/798B-N3EQ> (archived May 19, 2024) (archived version of the Campus Climate Reporting System site, which now redirects to ReportIt).

69. See *ReportIt*, *supra* note 68.

70. Adam Kissel, *Cal Poly Establishes Neutral Ombuds as Successor to CARE-Net, Resolving Yearlong Controversy*, FIRE (Mar. 22, 2010), <https://perma.cc/8CER-S5QU> (quoting CAL POLY REPORT (Cal. Polytechnic State Univ., San Luis Obispo, Cal.), Feb. 17, 2010, at 2, <https://perma.cc/84MA-MU28>). Ombuds offices are common at many universities. Jane Morson, *A Delicate Balance: The Role of the Ombuds in Resolving Campus Conflict*, HIGHERED JOBS (Nov. 7, 2016), <https://perma.cc/4S6N-D7XE>.

71. *Standards of Practice*, CAL POLY: STUDENT OMBUDS SERVS., <https://perma.cc/79ZK-K3K7> (archived Sept. 16, 2024).

III. Redesigning BRTs to Advance Their Goals and Address Stakeholders' Needs

The ripple effects of court opinions and settlements concerning BRTs are enough to give pause to any university thinking about developing such a program. But as discussed above in Part I, BRTs can offer real and substantial benefits to universities trying to address bias incidents across the student community. Rather than discontinue the use of BRTs, universities should view these legal challenges as an opportunity to restructure and re-engage their systems for the benefit of campus culture and student-to-student relationships.

As universities respond to growing critiques of BRTs, they overreact and strip their BRTs (and institutions) of conflict resolution resources. As mentioned above,⁷² some universities, like Iowa State, will no longer reach out to accused students,⁷³ effectively doing away with any formal or informal referral capabilities in their BRTs—such as to university administrators or alternative dispute resolution options, respectively. While this may be borne out of a fear that such referral processes can be interpreted as threatening or coercive, universities are overcorrecting by removing both formal and informal referral processes from their BRTs. Both an analysis of recent suits against BRTs⁷⁴ and the literature on dispute system design⁷⁵ suggest that informal resolution options can benefit students without violating the First Amendment. As such, while universities may consider removing any formal, policy violation reporting process from their BRTs, they should maintain referrals to informal educational and discussion-based resolution options.

Even in cases that ruled against plaintiffs challenging BRTs, courts seem to prefer the use of informal over formal resources and resolution options. While in these cases plaintiffs suggested that informal resolution options could chill student speech, courts seemed inclined to believe that connections to formal, punitive resources, like the police, posed a greater threat. For example, while the court in *Schlissel* determined that the BRT's ability to refer cases to the police "objectively chills speech," it merely suggested that "invitations to meet with these teams *could* carry an implicit threat of consequences."⁷⁶ Additionally, as previously mentioned, courts that favor BRTs are exceptionally fond of their educational potential. For example, in *Sands*, the Fourth Circuit suggested that BRTs could be mechanisms for universities "to

72. See *supra* Part II.B.

73. Notice of Dismissal, *supra* note 67, at 3.

74. See *supra* Part II.A.

75. See generally AMSLER ET AL., *supra* note 19 (leading the conversation on dispute system design).

76. *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 765 (emphasis added).

promote civility and a sense of belonging among the student body” as well as to educate their students.⁷⁷ Furthermore, as witnessed at Cal Poly, in some instances legal challenges have been dropped when formal, punitive options were preemptively replaced with informal resources like an ombuds office.⁷⁸ Thus, while the courts may be skeptical of referrals to formal, punitive resources from BRTs, there may be more flexibility regarding referral to informal resources.

An analysis of dispute system design scholarship also supports maintaining informal resolution options while severing referrals to formal, punitive systems. In developing dispute systems, there is often a benefit to having multiple options available to users (i.e., both formal and informal pathways);⁷⁹ however, any pathway made available to users must first be reflective of the system’s goals and stakeholders’ needs.⁸⁰ If the goals of BRTs are to address bias incidents and educate about the impact of harmful speech,⁸¹ then referring cases to informal resolution systems may be effective. By referring cases to informal resolution options, like restorative justice and mediation, BRTs offer interest-based processes that focus on healing relationships and reaching mutually agreeable resolutions, respectively.⁸² Mediation, for example, provides a private space where parties can express their emotions, “exercise self-determination,” and explore creative pathways forward benefitting all parties.⁸³ Furthermore, as already stated, restorative justice processes offer opportunities to uncover and heal mutual injury, especially with regard to identity-based harm.⁸⁴ Because these informal resolution resources offer students the ability to unpack and address incidents of protected yet biased speech, they are worth protecting, even in the face of recent legal challenges. Without such pathways, BRTs may neither adequately meet their goals nor serve their users.

77. *Speech First, Inc. v. Sands*, 69 F.4th 184, 199, *vacated*, 144 S. Ct. 675 (2024).

78. Kissel, *supra* note 70.

79. AMSLER ET AL., *supra* note 19, at 34.

80. *Id.* at 25. “Stakeholders include the people and organizations that create, host, use, and are affected” by the dispute resolution system. *Id.* at 29. Universities, then, might turn to work with administrators who oversee BRTs and the students they support. Stakeholder engagement can include conducting a series of interviews or assessments to determine stakeholder expectations and concerns with the process. *Id.* at 63. Thus, this process can both collect data, as well as build a working relationship between engaged parties and endow stakeholders with a sense of ownership in the process. *See id.* at 65 (describing the benefits of leading a conflict stream assessment on a dispute system).

81. *See* Garcés et al., *supra* note 7, at 431-32.

82. *See* Menkel-Meadow, *supra* note 20, at 164; AMSLER ET AL., *supra* note 19, at 34, 47.

83. Kimberlee K. Kovach, *Mediation*, in *THE HANDBOOK OF DISPUTE RESOLUTION* 304, 305 (Michael L. Moffitt & Robert C. Bordone eds., 2005).

84. *See supra* Part I.D; WALTERS, *supra* note 29, at 97-100; Luan, *supra* note 29, at 166.

Conversely, referring bias incidents to formal, punitive resources like university administrators or the police may be done away with, not only because their constitutionality is more questionable than their informal counterparts, but also because they do not serve BRTs' objectives of supporting harmed students and creating educational opportunities.⁸⁵ Universities are already successful at handling incidents of crime or policy violations through their other administrative offices.⁸⁶ But they are not nearly as talented at managing the delicate nature of protected yet biased speech.⁸⁷ Thus, universities may choose to forgo their reporting responsibilities to punitive entities, as they already have functional systems that can address criminal activity or policy violations. Instead, when universities make concerted efforts to remove any punitive elements in the BRT structure, courts may be more inclined to view BRTs as educational rather than disciplinary tools.

If universities nevertheless worry that referring students to informal resolution options still exposes them to legal action, they could completely omit referrals from their BRTs. For example, as part of its settlement, the University of Michigan replaced its BRT with a "Campus Climate Support" team.⁸⁸ While the BRT was previously able to refer cases to other university offices and resources,⁸⁹ the new organization merely offers to walk students through the formal and informal resources available to them across the university, which students must then seek independently.⁹⁰

One should wonder whether such a change would truly serve the function of BRTs. Certainly, as a data collecting resource, BRTs could usefully track campus climate, giving administrations an idea of student concerns and encouraging them to build preventative education tools, like unconscious bias trainings, or host events, such as talks about incendiary international news, elections, and other political happenings. However, if the purpose of a BRT is to provide individualized support for instances of bias, then such a model would fail to serve students. As simply a data collection mechanism, BRTs

85. Garces et al., *supra* note 7, at 431; AMSLER ET AL., *supra* note 19, at 33.

86. Miller et al., *supra* note 18, at 315.

87. *Id.* at 315-16.

88. Lauren Fisher, *U. of Michigan Settles With Free-Speech Group in Suit About Bias-Response Team*, CHRON. HIGHER EDUC. (Oct. 30, 2019, 10:12 AM), <https://perma.cc/H67Z-T3X8>.

89. *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 763, 765 (6th Cir. 2019).

90. See *Campus Climate Support*, UNIV. OF MICH.: DEAN OF STUDENTS, <https://perma.cc/2BHM-UG7Q> (archived May 19, 2024). From there, students have access to campus resources through the Office of Student Conflict Resolution, such as the university's Adaptable Conflict Resolution model, which includes practices like social justice mediation, restorative justice circles, and conflict coaching. *Id.*; *Adaptable Conflict Resolution (ACR)*, UNIV. OF MICH.: OFF. OF STUDENT CONFLICT RESOL., <https://perma.cc/JJ6L-WUSQ> (archived May 19, 2024).

would be incapable of actually working with students to educate or foster civil discourse for the parties most in need.⁹¹

* * *

In an ever-conflicted world, BRTs are effective tools for managing complex identity-based issues on university campuses. Yet they have encountered legal backlash, facing lawsuits for their potential chilling of students' protected speech. In the wake of these suits, universities have typically settled these lawsuits and stripped their BRTs of their useful functions. But rather than treating legal challenges as an insurmountable barrier, universities should protect the components of their BRTs that serve their mission of educating students and navigating civil discourse. While connections to formal, punitive resources have caused unnecessary grief, BRTs' collaboration with informal resources, like mediation and restorative justice, should be embraced.

91. Though not fully discussed in this Essay, there are other alternatives that could make BRTs more appealing to courts. For example, as universities consider restructuring their BRTs in light of recent legal challenges, they may also consider publicly rebranding as a means to reduce their risk of liability. This can include changing the BRT name and advertising its reimagined structure. Many of the aforementioned legal complaints cited the use of word "bias" in "Bias Response Team" as contributing to chilling student speech. In *Schlissel*, for example, Speech First argued that, by labeling the process as a bias response system, incidents reported to the BRT would immediately be interpreted as "biased" without proper review. *Schlissel*, 939 F.3d at 765. To that end, many universities have renamed their BRTs. Some examples include the "Campus Climate Support" team at the University of Michigan and "Campus Belonging" at the University of Illinois. *Campus Climate Support*, *supra* note 90; *Campus Belonging*, UNIV. OF ILL.: OFFICE OF THE VICE CHANCELLOR FOR DIVERSITY, EQUITY & INCLUSION, <https://perma.cc/2BJK-NGAH> (archived May 19, 2024). The benefits of renaming BRTs are twofold: Universities can minimize risk of legal action against them and select names that better reflect the goals and new structure of their updated systems.

Other ways in which universities could better design their BRTs include collaborating with students and utilizing peer mediators to lessen the mystique and punitive aura of the process. Additionally, universities could craft completely anonymized data collection systems so that BRT reports cannot be traced back to individual students, thereby lessening concerns of future punitive action.