

**Process Improvement Proposal:
Instituting a Restorative Justice Option for Title IX**

Bennington College

May 27th, 2020

This document proposes the addition of a restorative justice-based procedure for reviewing and addressing Title IX complaints. The current procedures available have been found lacking by students at Bennington College as well as the broader community in Higher Education, as evidenced by both research and surveys involving Bennington College students and research and surveys involving student bodies at institutions nationwide. This proposal will begin with a review of aforementioned evidence, followed by the suggested restorative addition to Title IX proceedings on the Bennington College campus.

A note on language

For the purpose of this proposal:

- The term “survivor” will be used in reference to anyone who divulges, in a meeting, interview, survey, or elsewhere, an experience of sexual misconduct, either without regard to formal reporting status or specifically having not formally reported the misconduct. The term “survivor” will also be used in reference to anyone who formally reports an incident of sexual misconduct for which the respondent/responsible party takes full responsibility.
- The term “complainant” will be used in reference to anyone who divulges having formally reported an experience of sexual misconduct in which the respondent did not take full responsibility.
- The term “respondent” will be used in reference to anyone against whom a complaint of sexual misconduct has been levelled but who has not taken full responsibility.
- The term “responsible party” will be used in reference to any respondent who has taken full responsibility, as well as in reference to anyone inculpated by a survivor who did not formally report.

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1. Concerns about Title IX proceedings at Bennington College and Nationwide

1.1. 2018 survey of and interviews with Bennington College students

A number of common themes emerged from conversation and survey research conducted by Eve Mefferd and Claire Webb in the fall of 2018. One leading concern was retraumatization. Some students perceived the Title IX procedure as long and emotionally taxing. Being required to talk to investigators, recount traumatic memories, and attempt to prove their case was a strong impediment to reporting. Many students voiced frustration that the process forced the burden of proof on the complainant and pitted them in opposition to the respondent. A number of students indicated that they did not report an incident of sexual misconduct because they felt there was “no promise of validation, only a promise of social ostracism.” Many students question whether this long and stressful process is worth it. Another factor which deters student reporting is that many cases of sexual misconduct are not black and white. In complicated interpersonal situations, complainants may feel that formal Title IX processes are inappropriate. Nevertheless, they still desire to be heard and to ensure that the respondent is aware of the harm that has been done. While students may be enduring trauma on account of an incident of sexual misconduct, they may feel that some situations could be better resolved outside of an oppositional formal process.

Four out of nine survey participants stated that they did not report their experience of sexual misconduct to a confidential resource. Six out of nine survey participants stated that they did not report their experience of sexual misconduct to a non-confidential resource or pursue a formal Title IX procedure. One House Chair indicated that they had conducted a Title IX engagement 4-5 times in 8 weeks as House Chair, but that none of the students they encountered wanted to report the incident to Title IX coordinators. Some of these students were adjacent to Title IX cases but not directly involved. They were nevertheless deeply impacted by the events but found few avenues to heal. Many of the House Chairs we spoke to were concerned that students don’t fully comprehend the complexities of Title IX, and hoped to see this information disseminated early on in the Bennington education.

Some students expressed concern that the lack of opportunities for truth-telling and public dialogue around Title IX cases led to increased fear and, in some cases, ostracization of individuals believed to be abusers or rapists. A student noted that this could ultimately be damaging to the community if the situation is more nuanced than the surrounding gossip allows for. Students and administrators alike seek solutions for community healing and dialogue on this small and tight-knit campus. House Chairs, in particular, are community members who require support for their often difficult work. Because House Chairs are often the first responders in cases of sexual misconduct, they need to be assisted practically and emotionally in dealing with these distressing cases. Some House Chairs we talked to expressed discomfort when they knew about ongoing Title IX cases but were unable to warn others of threats to their safety. A stronger community network for dialogue and healing is a necessary supplement to the hard work House Chairs perform each day.

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1.2. *Nation-wide concerns about Title IX proceedings in Higher Education: Survey Evidence*

A campus climate survey conducted by Brown University in 2015 found that only 25.6% of students believed that campus officials would conduct a “very fair” or “extremely fair” investigation into Title IX complaints. 74.4% believed that the investigation would fall on or between “not at all fair” and “somewhat” fair.^{1,2}

When a similar campus climate survey conducted by the University of Notre Dame asked students to rate the effectiveness of university response to sexual misconduct, 46% reported that the university’s responses were “somewhat effective” or “not effective at all.” When asked about reports of personal experiences of sexual assault on the Notre Dame campus, 90% answered that they did not report the assault to the university. In a follow-up question for which students could select multiple answers, 54% responded that they did not report because they did not think it would solve anything, 53% because they did not want to go through the process, and 30% because they did not trust the university’s process. When asked the same set of questions about non-assault forms of sexual misconduct, 98% answered that they did not report the misconduct to the university. 40% of these students believed that reporting would not solve anything, 32% did not want to go through the university’s process, and 17% did not trust the university’s process. Responses were similar for dating and domestic violence and stalking.³

Nationwide, 90% or more of sexual assault survivors on college campuses do not report.⁴ But why? Cantalupo writes that,

Fear of hostile treatment or disbelief by legal and medical authorities prevents 24.7% of college rape survivors from reporting. Other factors include not seeing the incidents as harmful, not thinking a crime had been committed, not thinking what happened was serious enough to involve law enforcement, not wanting family or others to know, lack of proof, and the belief that no one will believe them and nothing will happen to the perpetrator.

The Campus Sexual Assault (CSA) Study found that survivors (in this case, specifically women) were more likely to report if the perpetrator was a stranger. The CSA also found that survivors were more likely to report if the perpetrator was of another race or ethnicity. Survivors had concerns about labelling someone they knew “a rapist,” or accepting that an incident perpetrated by someone they had or still did consider a friend was nonconsensual.⁵ Since, in the University of Notre Dame’s Sexual Conduct and Climate Questionnaire, only 7% of students who reported a sexual assault answered that they did not know the person who assaulted them, it is likely that these factors often prevent survivors from reporting.⁶

¹ Brown University, “Campus Climate Survey,” Full Data Tables, Table 1.1 (2015).

² In a following section of this proposal, I will examine the changes between this 2015 survey and the 2019 followup.

³ University of Notre Dame, “Sexual Conduct and Climate Questionnaire,” Tables 27, 39, 41, 50, 52, pp. 12-25, (2016).

⁴ Nancy Chi Cantalupo, “Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence,” 43 LOY. U. CHI. L.J. 205, 205, 227, 232–33 (2011).

⁵ Krebs et al. “Campus Sexual Assault (CSA) Study, Final Report,” RTI International. Section 2, p. 10, (2007).

⁶ University of Notre Dame, “Sexual Conduct and Climate Questionnaire,” Table 36, p. 18, (2016).

1.3. *Department of Education's Title IX Final Rule*

The intention behind this proposal, initiated before the Department of Education's Title IX Final Rule was announced on May 6th, 2020, is the improvement of a flawed process. On May 6th, many of those flaws and problems which existed in the Title IX system were compounded and exacerbated. Because the audience of this proposal is certainly well versed in these new regulations, there will be no summary, but this proposal will touch on a few key points which intensify pre-existing and aforementioned obstacles to reporting and areas of trouble within Title IX.

A requirement of adjudication and hearing decreases reporting.⁷ In 2005, approximately 1/3 of schools required adjudication for Title IX violations.⁸ With the new Title IX Final Rule, live hearings and cross-examination are a requirement for postsecondary institutions. When confidential and anonymous reporting methods are two predictors of increases in reporting,⁹ the inference can be made that many survivors of sexual misconduct do not want to be known. With mandatory live hearings, not only will survivors be easily identifiable, they will have no choice but to face the person they have brought the complaint against. The retraumatization inherent in this cannot be overstated: at least 67% of survivors report attempting to avoid or minimize contact with their responsible parties. Additionally, the likelihood of the direction of questioning moving towards inquiries about the complainant's past sexual relationships and behaviors at the time of the misconduct is high. In a society rife with "slut-shaming" beliefs, these questions are inherently inflammatory and can be activating or triggering to complainants.

One of the most common reasons survivors choose not to report is the fear of the misconduct not being serious enough or not being considered misconduct by the regulations.^{10,11} Under the Title IX Final Rule's decision to mandate live cross-examination, these survivors will have even more motivation not to report, because the other party will be actively trying to show that the misconduct was not serious enough or is not considered misconduct by the regulations. In a study by Sabina and Ho of assault survivors on college campuses,

in the top three reasons for not reporting a sexual assault to the police were being unclear that it was crime or that harm was intended, not having proof the incident occurred, not wanting others/family to know, not wanting the police involved, believing that the police would not think it was serious enough, fear of reprisal, and the victim thinking she was partially or fully responsible.¹²

Ways in which the new Title IX Final Rule will exacerbate each and everyone one of these reasons are clear. The new Title IX Final Rule will put complainants in a position of active defense and retraumatization.

⁷ Krebs et al. "Campus Sexual Assault (CSA) Study, Final Report," RTI International. Section 2, p. 9, (2007).

⁸ Karjane et al. "Sexual Assault on Campus: What Colleges and Universities Are Doing About It." Washington, DC: U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, p. 8 (2005).

⁹ Krebs et al. "Campus Sexual Assault (CSA) Study, Final Report," RTI International. Section 2, p. 9, (2007).

¹⁰ Sabina, C., & Ho, L. Y. "Campus and College Victim Responses to Sexual Assault and Dating Violence." *Trauma, Violence, & Abuse*, 15(3), 201–226 (2014).

¹¹ University of Notre Dame, "Sexual Conduct and Climate Questionnaire," Tables 41, 52, (2018).

¹² Sabina, C., & Ho, L. Y. "Campus and College Victim Responses to Sexual Assault and Dating Violence." *Trauma, Violence, & Abuse*, 15(3), 216 (2014).

2. Restorative solutions from other colleges and universities

2.1. *University of Michigan*

University of Michigan's Office of Student Conflict Resolution is leading the way in restorative responses to Title IX violations. According to University of Michigan's "Policy & Procedures on Student Sexual & Gender-Based Misconduct & Other Forms of Interpersonal Violence" (hereafter referred to as "The Policy"),

The University recognizes that it is important to take into account the needs of students, some of whom may prefer not to go through an investigative resolution. Adaptable resolution is a voluntary, remedies-based, structured interaction between or among affected parties that balances support and accountability without formal disciplinary action against a Respondent. Adaptable resolution is generally designed to allow a Respondent to acknowledge harm and accept responsibility for repairing harm (to the extent possible) experienced by the Claimant and/or the University community. Adaptable resolution is designed to eliminate the Prohibited Conduct, prevent its recurrence, and remedy its effects in a manner that meets the needs of the Claimant while maintaining the safety of the campus community.^{13,14}

The Policy proceeds to lay out circumstances in which adaptable resolution may be used. These circumstances include:

- **Only** situations in which participation is entirely voluntary and the consent of the Claimant, the Respondent, and any other participating individuals is obtained in advance.
- **Only** situations in which a written consent form has been signed informing both the Claimant and the Respondent that **either** can request to end adaptable resolution at any time and pursue an investigative resolution.
- **Only** situations in which there has been no administrative pressure on the Claimant, Respondent, or any other participating individual to proceed through a process of adaptable resolution.
- **Only** situations in which "the Title IX Coordinator reviews the matter to the extent necessary to confirm that it is of the type that would be appropriate for an adaptable resolution process and that use of an adaptable resolution process was without pressure or compulsion from others."¹⁵

The Policy then explains some of the forms which adaptable resolution may take. These forms are, as the name implies, adaptable. Due to the significance of input from the claimant/complainant, respondent, and other parties, many cases involve blending forms of adaptable resolution to create a form which satisfies the needs of the involved parties. The forms of Adaptable Resolution as laid out by The Policy include:

¹³ Note that the University of Michigan uses the term "Claimant" to replace the term "Complainant" due to an unwillingness to make students reporting feel as though they are bringing forward a "complaint."

¹⁴ University of Michigan, "University of Michigan Policy & Procedures on Student Sexual & Gender-Based Misconduct & Other Forms of Interpersonal Violence." *XIV. ADAPTABLE RESOLUTION*, The Regents of the University of Michigan, 2020.

¹⁵ University of Michigan, "University of Michigan Policy & Procedures on Student Sexual & Gender-Based Misconduct & Other Forms of Interpersonal Violence." *A. CIRCUMSTANCES IN WHICH ADAPTABLE RESOLUTION MAY BE USED*, The Regents of the University of Michigan, 2020.

- **Facilitated Dialogue**, or a structured and facilitated conversation between two or more participants which allows the sharing of perspectives and sometimes the development of a shared agreement, although this is not always the intended outcome.
- **Restorative Circle or Conference Process**, or a facilitated interaction in which most or all of the participating individuals come together to explore impacts on individuals and the community, harms, obligations, and opportunities for repair. The Claimant and Respondent must agree on which individuals will be present.
- **Shuttle Negotiation**, or an indirect, facilitated conversation individually with the Claimant, Respondent, and other participating individuals to discuss experiences, perspectives, and how to meet needs. This process does not require direct, face-to-face interaction between parties, but independent conversation with a facilitator.
- **Circle of Accountability (COA)**, or a facilitated interaction between the Respondent and University staff promoting accountability, support, and the development of a learning plan. While a COA does not require participation on the part of the Claimant, both the Claimant and the Respondent must agree on its occurrence.¹⁶

Next, The Policy provides some potential measures that may be agreed to as a result of a resolution process. **These measures are merely examples.** The measures which stem from a resolution process will vary based on the situation, needs of the participants, etc. The examples provided in The Policy include:

- Alcohol Education Classes
- Regular check-ins with university members
- Permanent extension of a no contact directive
- Restriction from participation in specific clubs and/or organizations
- Respondent restriction from participation in particular events
- Respondent completion of an educational plan with regular meetings with the adaptable resolution coordinator or other appropriate University staff or faculty member
- Counseling sessions for the Respondent

I will provide several more examples of potential resolution measures on page **NUMBER**.

The final Adaptable Resolution section of The Policy explains that any resolution agreement reached as a result of an Adaptable Resolution process must be agreed upon by both the Adaptable Resolution Coordinator overseeing the case and by the Title IX Coordinator overseeing the case. If the Title IX Coordinator does not approve an agreement, it will not be valid.¹⁷

If both the Adaptable Resolution Coordinator and Title IX Coordinator overseeing the case approve a resolution agreement, it becomes binding for the Respondent and failure to comply is

¹⁶ University of Michigan, “University of Michigan Policy & Procedures on Student Sexual & Gender-Based Misconduct & Other Forms of Interpersonal Violence.” *B. Adaptable Resolution Options*, The Regents of the University of Michigan, 2020.

¹⁷ University of Michigan, “University of Michigan Policy & Procedures on Student Sexual & Gender-Based Misconduct & Other Forms of Interpersonal Violence.” *C. Adaptable Resolution Agreements*, The Regents of the University of Michigan, 2020.

considered a violation of, at the University of Michigan, the Statement of Student Rights and Responsibilities. Only **after** the agreement becomes binding does the option to revert to an investigative resolution become unavailable.

Every year, the number of students choosing to proceed with a Title IX report through an Adaptable Resolution pathway increases. 2019 was the first year in which Adaptable Resolution could be used for sexual assault (as opposed to other forms of sexual misconduct, for which it was already in use). In 2019, twelve cases proceeded through Adaptable Resolution. In 2019, 36% of Adaptable Resolution cases were sexual assault cases. Of the twelve Adaptable Resolution cases, $\frac{1}{2}$ used Shuttle Negotiation as the method of resolution, although some combined Shuttle Negotiation with other resolution forms.

For more information on differences between Adaptable Resolution and Investigative Resolution, see Section 3. For more information on the forms of adaptable resolution proceedings mentioned, see Section 4. For more information on the personnel and resources needed to make use of Adaptable Resolution, see Section 5. For examples of potential Adaptable Resolution proceedings, see Section 6.

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2.2. *Other Universities and Studies*

Although Rutgers does not incorporate explicitly RJ-related language into its Title IX policy, it does include an informal resolution option with restorative elements:

The Title IX Coordinator may seek to resolve certain cases through an informal process involving both the Complainant and Respondent. (For example, a Complainant and Respondent may agree with the Title IX Coordinator that education and training for the Respondent are an appropriate and sufficient response in a particular case, or that a No Contact order between the parties provides remediation for the Complainant).¹⁸

Similarly, Brown University provides an informal resolution option which “allows parties to propose their own resolution or terms as an appropriate outcome to a complaint. This process does not require the complainant to communicate directly with the respondent, nor does it involve an investigation, hearing or finding.” Informal resolution outcomes are varied and include interventions such as

training on the concepts of implicit bias, consent and inclusive teaching practices; reflective conversations or clinical assessments to reduce repeated behavior; changes in academic program or concentration; letters of acknowledgement sent to the complainant; and restrictions on participation in leadership roles on campus.

Brown reports that between July of 2018 and June of 2019, 11 out of the 26 Title IX complaints proceeded through informal resolution, or ~42%.¹⁹

In the academic article “Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance With Title IX Guidance,” Koss et al. provide a flowchart outlining one potential process for including restorative practices in Title IX proceedings. This flowchart is provided on the following page.²⁰

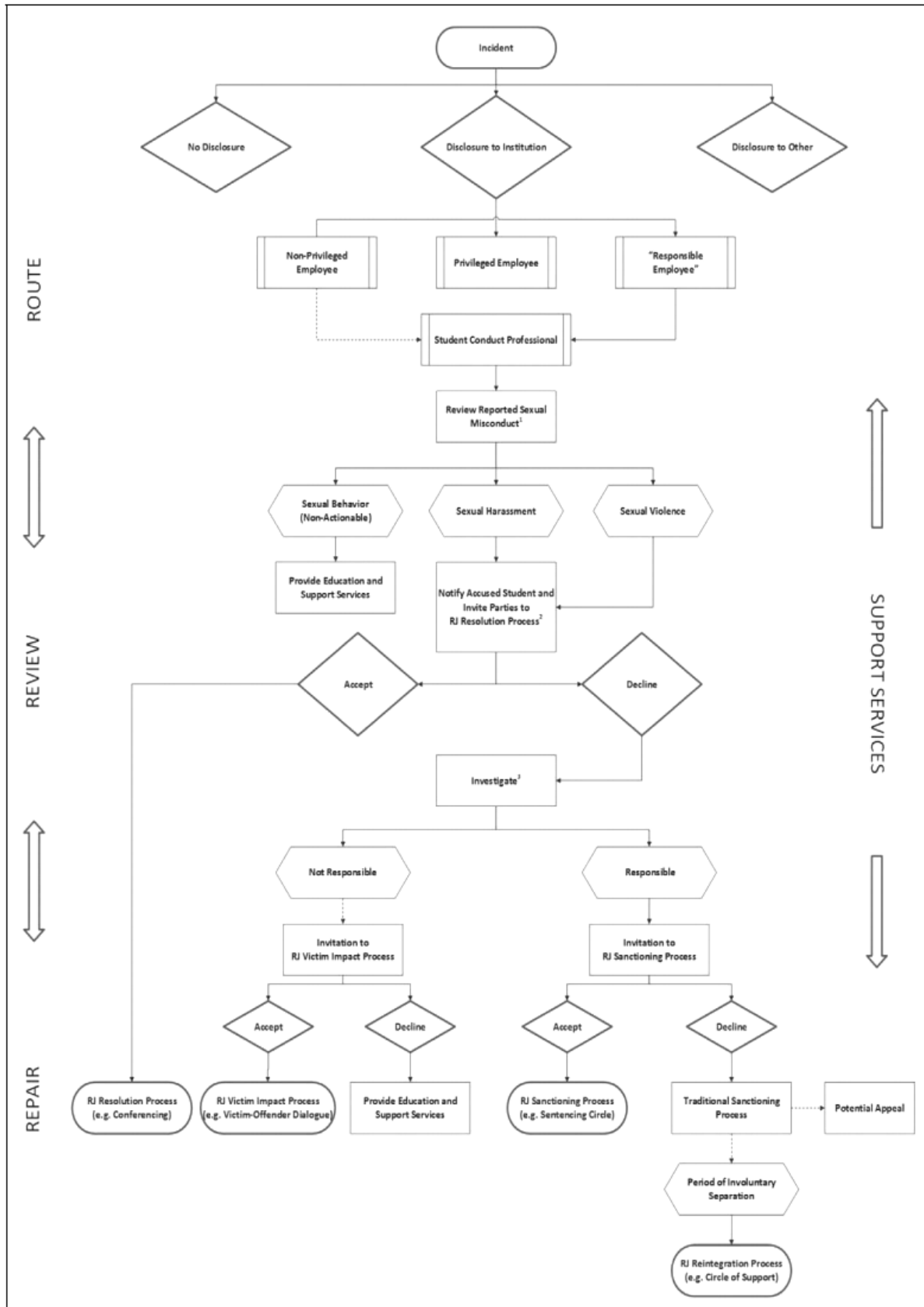
Provided [here](#) is a folder of examples of other college and university policies implementing restorative practices.²¹

¹⁸ Student Affairs Compliance and Title IX, “Questions You Might Have.” *Resources for Complainants*, Rutgers Student Affairs, 2020.

¹⁹ Title IX and Gender Equity Office, “Annual Outcome Report.” *Office of Institutional Equity and Diversity*, Brown University, 2019.

²⁰ Koss, M. P., Wilgus, J. K., & Williamsen, K. M. “Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance With Title IX Guidance.” *Campus Sexual Misconduct. Trauma, Violence, & Abuse*, 15(3), 242–257.

²¹ “Code Language and Websites Including RJ Implementation Language”
<https://drive.google.com/drive/u/0/folders/1JvkJX36BcdbnoWE-3Ed8motOv259te5y>



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3. Differences Between Alternative/Adaptable and Traditional/Disciplinary Resolution

3.1. *Language*

I propose that Bennington College refer to options which are alternative to disciplinary as “adaptable.” “Alternative” is a viable term, but it carries the implication that it should be the alternative to the “normal” form of resolution, rather than showcasing the equal significance and usefulness of the two methods. “Adaptable” displays the nature of the processes, that they are able to adapt to the specific situations in which they are being used, as well as putting alternative forms of resolution on equal footing with disciplinary resolution.

3.2. *Parties Involved*

Alternative/Adaptable: Facilitator, harmed party, responsible party, community members affected, advocates for each party, anyone else requested by the harmed or responsible parties.

Traditional/Disciplinary: Investigator, attorneys, ?

3.3. *Requests*

Alternative/Adaptable:

Traditional/Disciplinary:

3.4. *Investigation vs. Collaboration*

Alternative/Adaptable:

Traditional/Disciplinary:

3.5. *Set vs. Flexible*

Alternative/Adaptable:

Traditional/Disciplinary:

3.6. *Imposition of Sanctions vs. Determination of Resolution*

Alternative/Adaptable:

Traditional/Disciplinary:

4. Alternative/Adaptable Resolution in Action

- 4.1. *Restorative Circles*
- 4.2. *Restorative Facilitated Dialogue*
- 4.3. *Shuttle Negotiation*
- 4.4. *Circles of Support and Accountability*
- 4.5. *A Note on the Use of Mediation*

5. Personnel and Resources

Trained facilitators

Trained team of legal and non-legal personnel

6. Examples

6.1. *Example 1: Face-To-Face Facilitated Dialogue*

The complainant is given many potential pathways to address the harm and chooses face-to-face facilitated dialogue. A trained facilitator meets with both the complainant and the respondent individually before arranging the dialogue. The responsible party takes full responsibility and agrees to participate in the dialogue. The participants are given every option possible—what room to use, how to arrange the chairs, how long the dialogue should last, what to discuss, etc. They sit for two hours and hear each other's accounts of what happened, the effects of what happened, and anything else the participants choose to discuss. They spend the last half hour coming to a resolution agreement. The agreement states that the responsible party will complete an offender education program, begin attending therapy, and cut back on their drinking. The survivor does not want the responsible party to face disciplinary sanctions by the school, merely understand why what they did was wrong.

6.2. *Example 2: Shuttle Negotiation*

The complainant is given many potential pathways to address the harm and chooses not to meet with their offender face to face. Instead, they choose shuttle negotiation. After the responsible party agrees to participate and takes full responsibility, a trained facilitator takes statements from both parties. The facilitator then summarizes the perspectives of both parties (at the request of the survivor) and reads each statement to the other party. They come to an agreement in this way. One outcome of the agreement is a no-contact order, including the relocation of the responsible party to another house and a meal plan schedule so there will not be overlap in dining times. Another outcome is an education program for the responsible party, specifically determined to focus around gender roles, respecting people of all gender identities, and toxic masculinity. The third outcome is another education program, this one explaining what sexual assault and harassment do to the brain chemistry of the survivor. The responsible party is to complete these education courses and then write an informed apology to the survivor, which the survivor predicts will be more meaningful after educational programs have been completed.

6.3. *Example 3: Circle Process and Hearing*

The complainant is given many potential pathways to address the harm and chooses a circle process. The responsible party agrees and takes full responsibility, but partway through the circle, due to the lack of apology from the responsible party and the responsible party's general behavior, the survivor decides they want to pursue formal resolution instead. The case immediately switches to a formal investigation and *nothing said in the circle process can be used in court*. Thus, fear on the part of now-complainants and now-respondents that admissions during the alternative resolution process will be used against them in court can be mitigated or avoided. Formal resolution will then commence as usual, and nothing, including any acknowledgement of fault on the part of the respondent, will transfer into the courtroom.

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7. Summary of Needs and Solutions

8. Appendix A: Training Resources

Thank you for your time and for reading and considering this proposal. Please feel free to contact me with followup questions or comments.