

USING TITLE IX AND THE MODEL OF PUBLIC HOUSING TO PREVENT HOUSING DISCRIMINATION AGAINST SURVIVORS OF SEXUAL ASSAULTS ON COLLEGE CAMPUSES

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INTRODUCTION—A BIG BREAK THAT NO ONE WAS WATCHING

At the time of its passage, the vast scope of Title IX of the Education Amendments of 1972 was virtually unknown.¹ Bernice Sandler, a women's rights activist who helped draft Title IX, noted that Oregon congresswoman Edith Green, one of the bill's sponsors, shunned the idea of lobbying for Title IX.² Lobbying, she explained, would lead to questions and to people finding out what Title IX could actually do; instead, when Title IX passed, the law became, in Sandler's words, "a big break that no one was watching."³

Initially, Title IX was used to require that universities provide athletic opportunities for women and men that are proportionate to their rates of enrollment.⁴ Now, over forty years later, Title IX is being utilized in a new way that shows just how big a break its passage really was: Title IX is now a way to sue colleges for not protecting their students from sexual assault and the trauma survivors face during subsequent disciplinary proceedings. Title IX provides that, "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination

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1 SPORTING CHANCE: THE LASTING LEGACY OF TITLE IX (NCAA and Creative Street Entertainment 2012).

2 *Id.*

3 *Id.*

4 *Title IX Frequently Asked Questions*, NAT'L COLLEGE ATHLETIC ASS'N, <http://www.ncaa.org/about/resources/inclusion/title-ix-frequently-asked-questions> [<http://perma.cc/JA2L-Z5Q8>] (last visited Nov. 30, 2015).

under any education program or activity receiving Federal financial assistance.”⁵ By late July 2015, the United States Department of Education Office of Civil Rights (OCR) had announced that 124 colleges were under federal investigation for violating Title IX through their handling of sexual assault cases, including such elite institutions as Harvard College, Columbia University, Dartmouth College, and Brown University.⁶

While much of the focus of these investigations has been the reporting mechanisms in place for students and the disciplinary procedures that colleges use to determine whether an alleged perpetrator should be removed from campus, another important reality of college sexual assaults is that survivors and their assailants often both live within the campus community. For survivors of assault, living in close proximity to their assailants and knowing that their assailants could, at any time, swipe their access card and enter the dormitories where survivors live may be debilitating, causing feelings of intense fear, anger, guilt, shame, or panic.⁷

I will therefore argue in this Note that Title IX compliance must include procedures for guaranteed safe housing after an assault. Because so few students do file complaints with their universities, I will argue that these procedures should be available regardless of police involvement or whether a student files a formal complaint. In Part I, I will explain how sexual assaults fit within the Title IX framework of discrimination. In Part II, I will provide a brief history of how Title IX has been used in response to campus sexual assaults in the lead up to the current wave of complaints. I will also give an overview of the OCR guidelines regarding how colleges and universities should handle reports of sexual assaults within their campus communities and what the role of housing has been in complaints thus far. In Part III, I will analyze a campus survey conducted at the Massachusetts Institute of Technology (MIT) to show how current reporting mechanisms are underutilized for a variety of reasons, including the inability of survivors to label their experiences. In Part IV, I will examine how public housing attempts to ensure the safety of residents who are survivors of domestic violence. Lastly, in Part V, I will show how public housing policies

5 20 U.S.C. § 1681(a) (2012).

6 Tyler Kingkade, *124 Colleges, 40 School Districts Under Investigation For Handling Of Sexual Assault*, HUFFINGTON POST (July 24, 2015, 2:06 PM), http://www.huffingtonpost.com/entry/schools-investigation-sexual-assault_55b19b43e4b0074ba5a40b77 [<http://perma.cc/VB3U-USZU>].

7 In this Note, I will utilize a heteronormative, male-perpetrator, female-victim narrative unless otherwise noted, as these sexual assaults are most common statistically. The existence of assaults outside this traditionally-gendered, heteronormative narrative should not, however, be minimized by universities and may, in some instances, present special challenges with regard to housing.

can be adapted to fit within a university system, guiding how and when universities can move students accused of assault and ways to move complainants that are not stigmatizing or isolating. Such policies could limit discrimination against survivors who seek safer housing that does not impair their access to education and will give universities more guidance on how to comply with Title IX.

I. Sexual Assault on College Campuses—Gendered Crime

Underlying any claim that colleges' handling of sexual assault can be a violation of Title IX is the assertion that sexual assaults and the subsequent experience that survivors have are based in part on sex. Though it may seem obvious that sexual assaults are by nature sex-based crimes, it is worth explaining that sexual assault disproportionately affects women and is disproportionately perpetrated by men: In its 2014 report based on statistics from 2011, the Centers for Disease Control and Prevention (CDC) estimated that 19.3% of women in the United States have been raped during their lifetime, compared to 1.7% of men.⁸ Among female survivors, 38.3% experienced their first rape between the ages of eighteen and twenty-four, the ages that often align with university attendance.⁹ For both male and female rape survivors, the overwhelming majority of perpetrators were male (79.3% of male rape survivors and 99.0% of female rape survivors).¹⁰

Sexual assaults are a part of the broader category of offenses called sexual harassment and gender-based harassment.¹¹ If sexual or gender-based harassment creates a hostile environment, it is a form of sex discrimination prohibited by Title IX.¹² Sexual harassment and gender-based harassment of a student create a hostile environment if the conduct is

8 MATTHEW BREIDING ET AL., U.S. CTRS. FOR DISEASE CONTROL & PREVENTION, PREVALENCE AND CHARACTERISTICS OF SEXUAL VIOLENCE, STALKING, AND INTIMATE PARTNER VIOLENCE VICTIMIZATION—NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY (2014) [hereinafter "CDC REPORT 2014"].

9 *Id.*

10 *Id.*

11 Letter from U.S. Dep't of Educ. Office for Civil Rights to Dr. R. Gerald Turner, President of Southern Methodist University, Re: OCR Case Nos. 06-11-2126, 06-13-2081, and 06-13-2088 Southern Methodist University (Dec. 11, 2014), <http://www2.ed.gov/documents/press-releases/southern-methodist-university-letter.pdf> [<http://perma.cc/9H5Y-FSPK>] [hereinafter SMU Letter].

12 *Id.*

sufficiently serious that it interferes with or limits a student's ability to participate in or benefit from the university's programming.¹³

For the purposes of this Note, I will generally use a heteronormative, male-perpetrator and female-victim narrative for two reasons: First, this narrative of assault is statistically the most prevalent,¹⁴ and second, Title IX has most notably been used to protect the rights of women on college campuses.¹⁵ This is not to say, however, that the arguments made could not be applied to men who are survivors of sexual assaults and seek safe housing arrangements after reporting the assault.

Further, the application of Title IX to victims of crimes based on sexual identity and gender expression is not clear. The OCR has noted that "Title IX does not explicitly cover discrimination based on sexual orientation but it has not yet clarified whether Title IX covers discrimination based on actual or perceived gender identity."¹⁶ Therefore, although throughout this Note I will speak in generally heteronormative, cis-gendered terms, it is my hope that, as the OCR continues to clarify how Title IX can apply to members of the LGBT community, the arguments made will be adaptable to apply to survivors of assaults based on sexual orientation or gender identity.¹⁷

II. Initial Applications of Title IX to Sexual Assault Cases

In the years following the passage of Title IX, there were a number of challenges to

13 *Id.*

14 CDC REPORT 2014, *supra* note 8.

15 See U.S. DEP'T OF JUSTICE, EQUAL ACCESS TO EDUCATION: FORTY YEARS OF TITLE IX (2012), <http://www.justice.gov/sites/default/files/crt/legacy/2012/06/20/titleixreport.pdf> [<http://perma.cc/SG2M-Z5JF>] ("[I]n the forty years since its enactment, Title IX has improved access to educational opportunities for millions of students helping to ensure that no educational opportunity is denied to women on the basis of sex and that women are granted 'equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.'" (citing *United States v. Virginia*, 518 U.S. 515, 531 (1996)).

16 NAT'L WOMEN'S LAW CTR., TITLE IX PROTECTIONS FROM BULLYING AND HARASSMENT IN SCHOOLS: FAQs FOR LGBT OR GENDER NON-CONFORMING STUDENTS AND THEIR FAMILIES (Oct. 2012), http://www.nwlc.org/sites/default/files/pdfs/lgbt_bullying_title_ix_fact_sheet.pdf [<http://perma.cc/XU5D-HGSD>].

17 Notably, in the case of *Complainant v. Anthony Foxx*, the Equal Employment Opportunity Commission has concluded that Title VII of the 1964 Civil Rights Act forbids sexual orientation discrimination as a form of "sex" discrimination, which is explicitly forbidden. See *Complainant v. Anthony Foxx*, No. 0120133080, 2015 WL 4397641, at *5 (EEOC July 16, 2015).

the law's reach at universities, often because of its effects on college athletics.¹⁸ Title IX required, for the first time, that universities provide athletic opportunities for women and men that are proportionate to their rates of enrollment, which has often resulted in an equal number of athletic teams for men and women.¹⁹ Critics of Title IX sought to limit its applicability to only the spheres of universities that received federal funding, instead of to the university as a whole. The Supreme Court ruled in favor of these critics in *Grove City v. Bell*, drastically limiting the scope of Title IX by requiring compliance only from specific programs within universities that received federal funding, such as the financial aid offices that may offer scholarships.²⁰ Universities were again required to comply broadly with Title IX, however, with the passage of the Civil Rights Restoration Act of 1987, which required all programs at an institution to comply with Title IX if any program received federal funding.²¹

A. First Cases Using Title IX in Response to Sexual Assault

Just as the text of Title IX does not explicitly mention college athletics, it also does not explicitly indicate how the law may apply to colleges' sexual assault policies and procedures, or lack thereof. However, Title IX's application to these cases is growing in both momentum and scale. Prior to the limits on Title IX imposed by *Grove City*, five women who were former students at Yale University filed a lawsuit against the university, arguing that Yale violated Title IX by refusing to take any action based on their complaints of sexual harassment by faculty and administrators.²² These novel arguments were constructed by Catharine MacKinnon, a 1977 graduate of Yale Law School.²³ MacKinnon

18 *Title IX Legislative Chronology*, WOMEN'S SPORTS FOUNDATION (2012), <http://www.womenssportsfoundation.org/en/home/advocate/title-ix-and-issues/history-of-title-ix/history-of-title-ix> [http://perma.cc/L57X-7M57] (last visited Jan. 6, 2016). Notably, legislative proposals such as the "Tower Amendment" to exempt revenue-producing sports from compliance, and Senator Helms' S. 2146 bill to exempt the application of Title IX to college athletics except when athletics are required by the curriculum, were rejected. S. 2146, 94th Cong. (1975).

19 *Title IX Frequently Asked Questions*, NAT'L COLLEGE ATHLETIC ASS'N (2014), <http://www.ncaa.org/about/resources/inclusion/title-ix-frequently-asked-questions> [http://perma.cc/YY65-UNZU].

20 *Grove City Coll. v. Bell*, 465 U.S. 555, 569–74 (1984).

21 Civil Rights Restoration Act (CRRRA), Pub. L. No. 100-259, 102 Stat. 28 (1988); *Title IX Legislative Chronology*, *supra* note 18.

22 *See Alexander v. Yale Univ.*, 631 F.2d 178, 181 (2d Cir. 1980).

23 Tyler Kingkade, *How a Title IX Harassment Case at Yale in 1980 Set the Stage for Today's Sexual Assault Activism*, HUFFINGTON POST (June 10, 2014), <http://www.huffingtonpost.com/2014/06/10/title-ix-yale->

shared with the counsel representing the Yale students an academic paper, in which she argued that sexual harassment constitutes sexual discrimination. Thus, the Yale students' case became the first forum in which the argument was tested.²⁴

The court eventually ruled that the plaintiffs did not have standing to sue Yale because they had already graduated, so no decision was reached based on the merits of the arguments. Faced with these proceedings, however, Yale established a grievance board to hear complaints, so the legal loss still had a practical benefit.²⁵

Though the full breadth of Title IX was restored in 1987, MacKinnon's arguments did not resurface until over a decade later, when Kathryn Kelly, another young woman from Yale University, brought a claim under Title IX, alleging that Yale's response to her report of being sexually assaulted by a fellow student was inadequate.²⁶ In this case, the issue of housing took a more prominent role. As part of her complaint, Kelly noted that she had "repeatedly requested alternative housing during the pendency of the grievance procedures" because she and her attacker lived in the same dormitory.²⁷ Several weeks after Kelly filed her complaint, a professor assisted her in finally receiving an alternate room on campus.²⁸

Kelly did not dispute that Yale followed its internal grievance procedures, which resulted in her attacker being forced to take a leave of absence until she could finish her studies.²⁹ She instead argued that Yale's insufficient response to her requests for alternative housing and additional academic counseling constituted deliberate indifference, which caused her to "undergo harassment or ma[d]e [her] liable or vulnerable to it."³⁰ Though Yale was granted summary judgment for Kelly's state law claims for breach of contract, negligence, and intentional infliction of emotional distress, her Title IX claim was allowed to proceed,

catherine-mackinnon_n_5462140.html [http://perma.cc/XC8T-5TNJ].

24 *Id.*

25 *Id.*; *Alexander*, 631 F.2d at 184.

26 *Kelly v. Yale Univ.*, No. CIV.A. 3:01-CV-1591, 2003 WL 1563424 (D. Conn. Mar. 26, 2003), http://www.ctd.uscourts.gov/sites/default/files/opinions/032603.JCH_Kelly_.pdf [http://perma.cc/4HF6-W98V].

27 *Id.* at 2.

28 *Id.* at 2.

29 *Id.* at 4.

30 *Id.* at 4 (citing *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 644–45 (1999)).

in part because “Yale’s failure to provide Kelly with accommodations, either academic or residential, immediately following Nolan’s assault of her, was clearly unreasonable given all the circumstances of which it was aware.”³¹ Six months after the summary judgment decision, Yale settled the suit for an undisclosed amount.³²

B. Sexual Assault within the Scope of Athletic Programs

Momentum grew in 2007 when the general sentiment held by the American public that Title IX applied to college sports became a foundation for holding colleges accountable for sexual harassment and assault within their athletic programs. A federal appeals court held that the University of Georgia could be sued under Title IX for admitting and not supervising a student-athlete who raped another student.³³ This athlete had been removed from other universities for committing harassment, so the University of Georgia knew the risk he posed to other students when he was admitted.³⁴ Similarly, another federal appeals court ruled that the University of Colorado at Boulder could be sued under Title IX after rapes occurred within the scope of its football-recruiting program.³⁵

C. OCR Guidelines for Handling Sexual Assault

Finally in 2011, the OCR published a “Dear Colleague” letter to clarify how Title IX applies to cases of universities handling sexual assault claims.³⁶ This letter set out guidelines for how universities should give students notice of grievance procedures, investigate complaints, provide timely resolutions, and supply notice of the outcome to both parties. Most notably, this letter recommended that the standard of proof in university disciplinary proceedings for sexual assault should be the preponderance of the evidence standard, such

31 *Id.* at 4.

32 Naomi Wolf, *The Silent Treatment*, NEW YORK, Mar. 1, 2004, http://nymag.com/nymetro/news/features/n_9932/index3.html [<http://perma.cc/E9S2-GCWJ>].

33 *Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1294 (11th Cir. 2007).

34 *Id.* at 1296.

35 *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1174–79 (10th Cir. 2007).

36 U.S. Dep’t of Educ. Office for Civil Rights, *Dear Colleague Letter: Sexual Violence* (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<http://perma.cc/9CLZ-6GVU>] [hereinafter *Dear Colleague Letter*].

as is used in civil cases, which is lower than the beyond reasonable doubt standard used in criminal proceedings.³⁷

In discussing protection of complainants, the OCR outlines how universities “should notify the complainant of his or her options to avoid contact with the alleged perpetrator and allow students to change academic or living situations as appropriate.”³⁸ The OCR clarifies that the school neither must nor should wait until a decision has been reached in the disciplinary proceeding, instead acting once it has notice of an allegation. Also, with consideration given to the difficulties facing survivors of sexual assaults, the OCR explains that universities “should minimize the burden on the complainant, and thus should not, as a matter of course, remove complainants from classes or housing while allowing alleged perpetrators to remain.”³⁹

The OCR also lists possible remedies for complainants, which universities could use depending on the specific facts of a given case. Listed remedies include “providing an escort to ensure that the complainant can move safely between classes and activities” and “moving the complainant or alleged perpetrator to a different residence hall,” both of which speak to the fear complainants may have about encountering their attackers as they attempt to continue their daily lives as students.⁴⁰

D. The Role of Housing in Current Title IX Complaints

Though Title IX claims have been filed against dozens of universities, in recent months the OCR has concluded two such investigations, finding that both Princeton University and Southern Methodist University (SMU) were in violation of Title IX.⁴¹ In the descriptions of both complaints, at least one student requested and was granted alternate housing. First, at Princeton, both Student 1 and Student 3⁴² received new housing after filing their

37 *Id.* at 11.

38 *Id.* at 15.

39 *Id.* at 15–16.

40 *Id.* at 16.

41 SMU Letter, *supra* note 11. Letter from U.S. Dep’t of Educ. Office for Civil Rights to Christopher L. Eisgruber, President, Princeton Univ., Re: Case No. 02-11-2025 Princeton University (Nov. 5, 2014), <http://www2.ed.gov/documents/press-releases/princeton-letter.pdf> [<http://perma.cc/CPD9-ECE6>].

42 The students are identified as “Student 1” and “Student 3” throughout the OCR case.

sexual assault cases with the University.⁴³ Student 1 requested this accommodation, but it is unclear whether Student 3 requested or was simply offered a change in housing. At SMU, Complainant 3, a young man who had been assaulted by another male student, also requested and received alternate housing.⁴⁴ Unfortunately, the harassment he endured after his assault continued even after moving into a new room, as he received hang-up phone calls late at night and people would knock on his windows and door and then run away.⁴⁵

In these cases, the complainants—the survivors of sexual violence—moved to different dormitories on campus after their assaults. The information available does not indicate whether moving was their first choice of remedy or how the moving process was managed, but these are important questions to ask from a legal perspective. The OCR made clear that universities should minimize the burden on survivors of sexual assaults and listed as a possible remedy moving either the complainant or the alleged perpetrator to a different residence hall.⁴⁶ Though the survivors at Princeton and SMU may have wanted to move, it is still important to consider whether their universities discussed the possibility of moving the alleged perpetrator because the OCR explicitly stated that universities should not move survivors while allowing alleged perpetrators to remain in their dorm as a matter of course.⁴⁷

III. Title IX at the Massachusetts Institute of Technology

In the spring of 2014, MIT conducted its own survey of students' attitudes on sexual assault and chose to publish the results of the survey publicly.⁴⁸ The survey was sent to all enrolled students, and 46% of female undergraduate students and 35% of male undergraduate students responded.⁴⁹ The survey asked about personal experiences with sexual assault while the students were at MIT in two ways: labeled and unlabeled experiences. First, the labeled experiences questions asked participants about unwanted sexual experiences using

43 *Id.*

44 SMU Letter, *supra* note 11.

45 *Id.*

46 *Dear Colleague Letter*, *supra* note 36.

47 *Id.*

48 *Survey Results: 2014 Community Attitudes on Sexual Assault*, MASS. INST. OF TECH. (Oct. 27, 2014), <http://web.mit.edu/surveys/health/MIT-CASA-Survey-Summary.pdf> [<http://perma.cc/6FYU-2QQX>].

49 *Id.* at 1.

common terms that were mostly left undefined, such as “sexually assaulted” and “raped.” In this part of the survey, 10% of female undergraduates and 2% of male undergraduates indicated that they had been sexually assaulted, while 5% of female undergraduates and 1% of male undergraduates indicated that they had been raped.⁵⁰

In the unlabeled experiences portion of the survey, participants indicated whether they had experienced specific unwanted sexual behaviors: sexual touching or kissing, attempted oral sex, oral sex, attempted sexual penetration, and sexual penetration. Overall, 17% of female undergraduates and 5% of male undergraduates experienced at least one of these behaviors.⁵¹ These numbers more closely align with the results found in the 2015 Association of American Universities’ (AAU) Campus Survey on Sexual Assault and Sexual Misconduct. This survey, distributed across twenty-four institutions of higher education, found that the average rates of students experiencing nonconsensual sexual conduct were 23.6% of females, 5.8% of males, and 27.8% of TGQN students.⁵² Notably, though only 5% of female undergraduates had answered that they had been raped while at MIT, 6% indicated that they had been unwantedly sexually penetrated, and, though there may be overlap in these numbers, 7% indicated unwanted attempted sexual penetration, 3% indicated unwanted oral sex, and 6% indicated unwanted attempted oral sex.⁵³ Thus, the unlabeled experiences portion of the survey captures a larger number of unwanted sexual incidents occurring at MIT, and this larger number speaks to another statistic gleaned from the survey: more than one in five undergraduates taking the survey indicated knowing a perpetrator.⁵⁴

Though respondents experienced a range of unwanted sexual behaviors, the negative impact of these incidents was common among many respondents. The most common behaviors respondents indicated were loss of interest in intimacy or sex (36%), being unable to work or complete assignments (35%), being unable to eat (30%), and grades dropping (29%).⁵⁵

50 *Id.* at 4 tbl.2.1.

51 *Id.* at 5 tbl.2.2.

52 DAVID CANTOR ET AL., REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT 1, 56 tbl.3-1 (Sept. 21, 2015) [hereinafter AAU REPORT]. TGQN is defined by the report as “Transgender woman, Transgender man, Genderqueer, gender non-conforming, questioning, not listed.”

53 *Survey Results: 2014 Community Attitudes on Sexual Assault*, *supra* note 48.

54 *Id.* at 6.

55 *Id.*

Another section of the survey asked respondents who indicated that they had an unwanted sexual experience at MIT whether they reported the incident in any way. Nearly two-thirds (63%) of respondents who experienced unwanted sexual behaviors told somebody that the event had occurred; however, less than 5% reported the incident to an official.⁵⁶ Respondents often told a friend (90%), family (19%), or medical professional (13%).⁵⁷ Respondents were also asked about their reasons for not reporting, and 72% did not think the incident was serious enough to be officially reported, while 47% noted that they did not want any action to be taken, including arrests, legal actions, and disciplinary actions.⁵⁸ The idea that these assaults are not serious enough to report is further broken down in the AAU survey, which found that 75.6% of students did not think sexual touching by incapacitation was serious enough to report, 74.1% did not think sexual touching by force was serious enough to report, 62.1% did not think penetration by incapacitation was serious enough to report, and 58.6% did not think penetration by force was serious enough to report.⁵⁹

Given the negative physical, emotional, and psychological impacts that respondents indicated experiencing, some may have been interested in changing their housing to better avoid contact with their perpetrator or the location of the assault. However, the data on reporting indicates two additional issues that students who wish to alter housing arrangements based on sexual misconduct face: some may not be able to label their experience or believe it is serious enough to warrant an internal disciplinary proceeding, and some may not want to open a disciplinary proceeding because they do not want any action taken.

These concerns align with issues that Sarah Rankin, MIT's Title IX Investigator, often experiences after receiving a request regarding student housing.⁶⁰ Rankin noted that the OCR has not given much specific guidance except that universities should not always

56 *Id.*

57 *Id.*

58 *Id.*

59 AAU REPORT, *supra* note 52, at 100 tbl.6-1, *Percent of Victims of Nonconsensual Sexual Contact by Physical Force or Incapacitation that Reported an Incident to an Agency or Program, Reasons Why Victim Did Not Report and Whether Victim Reported it to Someone Else.*

60 Email from Sarah Rankin, Title IX Investigator, Mass. Inst. of Tech., to Shannon Cleary (Dec. 16, 2014, 10:33 AM) (on file with author). Sarah Rankin has worked as a Title IX Investigator at MIT since October 2013. Her prior experience includes being the Director of Harvard University's Office of Sexual Assault Prevention and Response, a position she held for seven years.

move survivors, so her office tends to divide requests into two categories—those that are coupled with a formal complaint and those that are not.

Rankin explained that with a formal complaint, many schools will temporarily move the accused student, unless there are extenuating circumstances, as an interim measure. If the accused student is found to be responsible, the student may be suspended or expelled, which resolves the housing issue. However, if a lesser sanction is implemented, the temporary housing could become a permanent relocation. If the student is found to not be responsible and the accused student is moved back to their original housing, the university can offer to move the complainant.⁶¹

The more difficult cases, in her opinion, occur when the complainant does not want to file an official report but does want the accused student moved. Without a formal complaint, Rankin and her office cannot implement any measures unless there are extenuating circumstances. Thus, Rankin can ask the accused student if he will voluntarily move, but if he will not, Rankin can offer to relocate the complainant.⁶²

With this information, it is clear that, though Princeton and SMU moved the complainants in their cases, universities can and do move students who have been accused and against whom reports have been filed. Given students' infrequency in reporting assaults to university officials and their concerns about beginning a disciplinary proceeding, however, a larger problem may be that even when students want to request housing protections and accommodations, they may not feel able to do so. This lack of student initiative may stem from the student's view that the incident is not serious enough to warrant any university involvement or because the student does not want official actions taken against the perpetrator.

IV. Public Housing and Gender-Based Violence

Universities are not unique in supplying housing to large amounts of people, some of whom may ultimately be survivors of gender-based assaults. The federal government, through Department of Housing and Urban Development programs like public housing and Section 8 as well as the Department of Agriculture's Rural Development program and the Department of Treasury's Low-Income Housing Tax Credit program, assists low-income families and individuals in attaining stable housing. The Violence Against

61 *Id.*

62 *Id.*

Women Reauthorization Act of 2013 (VAWA) has a number of housing protections for people utilizing federal programs for housing who are survivors of gender-based violence, including domestic violence, dating violence, sexual assault, and stalking.⁶³ Survivors do not need to have been living with the assailant when the gender-based violence occurred to receive VAWA protections, though they may have been, especially in instances of domestic and dating violence.⁶⁴

Some of the housing protections established through VAWA are specific to concerns facing individuals in federal housing programs. For example, survivors of gender-based violence can bifurcate a lease so that if a perpetrator is on the lease, he can be removed from housing while other members of the household can remain.⁶⁵ In addition, survivors cannot be held to more exacting standards in formal eviction proceedings.⁶⁶ However, VAWA also has rules about how property managers can certify that tenants are survivors and how their housing is protected because of that status, which could be examples for universities as they work with survivors of sexual assault.

First, VAWA allows property owners to extend VAWA protections to an individual based solely on the individual's statement.⁶⁷ A survivor need only tell a property owner about the violence she experienced to receive legal protections. If a property owner would like a form of certification that a resident is a survivor of violence, the property owner must make a written request to the individual for certification.

The certification process does not require proof that domestic violence occurred but does require written statements by either the survivor or professionals. First, there is an agency-approved form that a resident can complete to certify her need for VAWA protections.⁶⁸ The form asks that the resident state that she is a survivor of gender-based violence, state that the incident which is the basis for protection meets statutory requirements, and supply the name of the perpetrator if the resident knows the name and feels safe providing it.

63 42 U.S.C. § 14043e-11 (Supp. I 2013–14).

64 42 U.S.C. § 14043e-11(a)(1) (Supp. I 2013–14); 42 U.S.C. § 13925(a)(8) (2012 & Supp. I 2013–14).

65 42 U.S.C. § 14043e-11(b)(3)(B)(i) (Supp. I 2013–14).

66 42 U.S.C. § 14043e-11(b)(3)(C)(ii) (Supp. I 2013–14).

67 42 U.S.C. §§ 14043e-11(c)(3)(D), (c)(5) (Supp. I 2013–14).

68 42 U.S.C. § 14043e-11(c)(3)(A) (Supp. I 2013–14).

Additionally, a resident may be certified through third-party documentation. Instead of the agency-approved form, a resident can provide documents signed by the resident and a victim service provider, attorney, medical professional, or mental health professional.⁶⁹ The professional must attest under penalty of perjury to his belief that the resident has experienced gender-based violence. Lastly, a resident can provide official documentation from a federal, state, tribal, territorial, or local law enforcement office, court, or administrative record.

If property owners receive conflicting reports of violence, such that two people claim to be survivors and name the other as perpetrators, the property owner can require third-party documentation instead of the agency-approved form, to assist in his understanding of the circumstances.⁷⁰

After a resident has been certified as a survivor, VAWA offers a number of housing protections. For example, a survivor cannot be denied housing on the basis of being a survivor of gender-based violence or for having engaged in criminal activity, if that activity was directly related to the experienced violence.⁷¹ Further, specifically related to the Section 8 voucher program that allows families to lease residences from private listings, the public housing agency can allow a survivor and her family to move to another jurisdiction, even if the family's lease has not yet expired.⁷² This protection allows survivors to remain with their families. If, in the alternative, families cannot break their leases after one family member experiences violence, the survivor may be forced to live in a shelter or less expensive studio or one-bedroom apartment, while the family remains in the larger apartment leased through Section 8. Families utilizing Section 8 would not be able to afford two leases for large apartments that can house an entire family, so VAWA allows them to break the lease of their Section 8 apartment after reporting violence and carry their Section 8 benefits to their next residence. This allows families to stay together and support survivors of violence, instead of leaving survivors isolated and unable to maintain reciprocal, familial relationships after reporting violence.

69 42 U.S.C. §§ 14043e-11(c)(3)(B), (C) (Supp. I 2013–14).

70 42 U.S.C. § 14043e-11(c)(7) (Supp. I 2013–14).

71 42 U.S.C. §§ 14043e-11(b)(1), (b)(2), (b)(3)(A) (Supp. I 2013–14).

72 42 U.S.C. § 1437f(r)(5) (Supp. I 2013–14).

V. Using Universities' Action and Public Housing Policies to Model OCR Policies

As Rankin noted, the OCR has not offered universities significant guidance about housing complications resulting from sexual assault complaints. The OCR should, however, look to the work done at MIT and other institutions and the policies created in VAWA for public housing to create more comprehensive housing protections for survivors of campus assaults, so that universities can better protect their students and comply with the aims of Title IX. The OCR is in position to take the broad aims of Title IX and distill them into specific housing policies through further Dear Colleague letters and decisions in Title IX investigations it is currently conducting.

Using Rankin's system of dividing incidents into those coupled with formal complaints and those that are not, I propose that the OCR should offer the following recommendations to universities regarding Title IX compliance.

A. Formal Complaint Filed

After an assault, students can notify university officials and file a formal complaint to begin a disciplinary proceeding against their attackers. As highlighted in the MIT campus survey, reporting an incident to university officials is rare among survivors, but when survivors do report their assaults, the university is in a strong position to act.

1. Interim Measures

Once an assault has been reported and a student decides to file a formal complaint, many universities relocate the accused, absent extenuating circumstances. Given that this is already the practice at some universities and that the OCR has stated that the burden on survivors should be low following an assault, the OCR should recommend that all universities adopt a policy to move accused students against whom a complaint is filed, absent extenuating circumstances. This relocation would be temporary during the course of the disciplinary proceeding.

2. Student Found Responsible

If students are found responsible for sexual misconduct, universities can suspend or expel them, which effectively removes them from campus housing. The OCR should, however, recommend that in any case when a student is found responsible but given a lesser sanction than suspension, the temporary relocation should be made permanent. The

universities would be able to impose other sanctions as they see fit, but should ensure that all students found to be responsible should not live near their victims.

3. Student Found Not Responsible

If students are not found responsible, universities have less power to make their temporary relocations permanent. The OCR should therefore recommend that universities use an approach similar to MIT's, such that the complainant is allowed to relocate if the accused plans to return to his original housing placement.

In moving the complainant, the OCR should look to VAWA's Section 8 policy as a model for how to support survivors. After experiencing unwanted sexual behaviors, survivors at MIT often told a friend about the incident and also often experienced some amount of negative physical, emotional, and psychological effects. In college settings, friends can often play a large role in students' lives and support systems. The fact that ninety percent of students who experienced unwanted sexual behaviors at MIT told a friend should be a sign to universities that students look to their peers for support more than to university officials, family, or mental health professionals combined. Therefore, universities should attempt to treat survivors and their friends as supportive, family units when considering relocating survivors.

In practice, when universities plan to move survivors, they should not default to moving the student into a single room, but instead ask for the student's input about what an ideal and supportive housing arrangement would be. For some students, a single may be the best option, but others may want roommates either to reduce stigma or increase informal support. Unfortunately, on many college campuses, single rooms are reserved for lucky upperclassmen and those students deemed to need a "psycho single." "Psycho single" is the derogatory term associated with "a single room assigned to a freshman who, based on housing forms filled out, seems unsuited for living with another humanoid."⁷³ In some colleges, "placement in a single [is] conspicuous, and not uncommonly a stigma."⁷⁴ Survivors may therefore want to avoid living in a single simply to avoid stigma.

Further, if a survivor's friends are willing to also be relocated or a friend has an open space in her room, relocating a survivor but keeping her with friends may be helpful as

73 Susan B. Vavrick & Maya Silver, *That's Bangin' Slang*, U.S. NEWS & WORLD REP., Aug. 28, 2006, at 104.

74 *There Are No 'Psycho Singles' on Craigslist*, SADPOWER (Mar. 19, 2013), <https://sadpower.wordpress.com/2013/12/01/there-are-no-psycho-singles-on-craigslist/> [<http://perma.cc/SV2F-3AXA>].

she copes with the aftermath of her assault. Friends can be a support system for survivors and can keep survivors connected to campus activities that they may otherwise not feel motivated to attend. The OCR should recognize the special, familial relationships that roommates can have on college campuses and include in their guidelines that universities weigh survivor input on how relocation could include friends and supporters.

B. Formal Complaint Not Filed

In most instances of sexual misconduct, survivors do not file formal complaints with the university. As the MIT survey showed, students struggle to label their experiences and may not consider what happened serious enough for the university to be involved or they may not want actions to be taken against their attackers. However, regardless of whether a student wants to file a formal complaint, survivors should be able to request housing protections.

1. Housing Protections Requests

Currently, students who do report sexual misconduct to their university may discuss housing relocations, even without filing a formal complaint. However, to make this process easier for students, the OCR should recommend that requests can be filed not only with Title IX coordinators and violence response offices at universities, but also with the housing office. Students who do not want to discuss what happened to them with offices designed to support survivors of assault may still want to request a housing relocation. Housing offices at universities could therefore have a certification process like that used in public housing.

The OCR should recommend that students can request relocation with the housing office. The housing office can offer relocation of the survivor based only on the stated request but could also ask for certification in writing. Universities may also require certification in some instances, just as public housing requires certification when conflicting narratives are presented. Circumstances in which universities may require certification may include if relocation would involve somebody other than the survivor, such as a request to move with roommates or a request to relocate an accused student.

The certification process can be modeled on the process used for public housing. Students can file a housing form with the university, explaining what incident occurred that has prompted their request, along with the attacker's name if it is known and the student feels safe providing it. In addition, just as public housing allows third-party documentation, universities should accept signed statements by professionals such as mental health and

medical professionals and attorneys. Notably, in the MIT survey, more students disclosed unwanted sexual behaviors to medical professionals than reported to the university (thirteen percent compared to less than five percent).⁷⁵ Further, considering the unique supports in place at universities, Resident Assistants (RAs), upper-year students who live in dormitories and support a group of students, or peer advisers who have been trained by the university may also be able to provide documentation of an incident.

After a student requests a housing relocation and when necessary that request has been certified, universities may need to decide whether to relocate the accused. The OCR should recommend that, without a formal complaint, universities should assess the danger that the accused poses to the community, using factors like where an assault was perpetrated, whether drugs were used to make the complainant unconscious, or whether the perpetrator is a repeat offender. If the student is not a danger or there is not enough information to determine dangerousness, the university should not move the accused, unless the student agrees to move voluntarily, because the university would thus not be following its own disciplinary rules and housing policies. Failure to follow these guidelines can give rise to due process or breach of contract claims if the accused student believes that involuntarily moving his housing was not a reserved right of the university.⁷⁶ If the university therefore plans to move the survivor, as detailed above, the university should take the survivor's input about how relocation can be structured to maintain the student's support network.

CONCLUSION

For over forty years, Title IX's broad decree that educational institutions cannot discriminate on the basis of sex has enhanced opportunities available to women on college campuses. Today, Title IX's most prominent role on many campuses stems from protections that the OCR mandates through Title IX for survivors of sexual assault.

Given that survivors and perpetrators often live in close proximity in college housing, universities must take steps to offer housing protections to survivors of assault. By examining the actions already taken by universities like MIT for moving accused students

75 See MASS. INST. OF TECH., *supra* note 48, at 6.

76 See Harvey A. Silvergate & Josh Gewolb, *Due Process and Fair Procedure on Campus*, FOUND. FOR INDIVIDUAL RTS. IN EDUC. 47 (2003), <http://www.thefire.org/pdfs/due-process.pdf> [<http://perma.cc/8K9P-JPJL>] (“Public universities, as an arm of the government, have to follow certain constitutionally required standards in setting rules and disciplining students Once private institutions establish and publish disciplinary rules, however, they are then obliged, by principles of contract law, to follow them in good faith, even if not always to the strict letter.”).

and complainants, even when formal complaints are not filed, and the system in place under VAWA for survivors of domestic violence in public housing, the OCR should create a new set of guidelines for how universities can comply with Title IX regarding housing. The OCR's current position that survivors should not be moved as a matter of course is a first step, but expounding on how and when universities can move students accused of assault and ways to move complainants that are not stigmatizing or isolating will give universities more guidance on how to comply with Title IX.