

UNIVERSITY *of* PENNSYLVANIA

JOURNAL *of* LAW & PUBLIC AFFAIRS

Vol. 2

June 2017

No. 1

INTERCAMPUS SEXUAL ASSAULT ACCOUNTABILITY: PROTECTING STUDENTS OFF CAMPUS

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In this Comment, I argue that while schools are not statutorily obligated to investigate or adjudicate intercampus sexual assault cases, the use of regional agreements providing for adjudication of claims from member schools' students on an equal basis by the respondent student's school, is in the best interests of all participating schools and consistent with the spirit of Title IX.

While the legal argument for requiring schools to adjudicate intercampus sexual assault cases does not apply where the school has no educational relationship with the complainant (for example a cross registration agreement with the complainant's school), the same safety concerns do apply regardless of whether or not such an educational relationship exists. Because campus sexual assaults are often committed by serial offenders, many of whom can be appropriately characterized as target rapists, these offenders pose a significant campus safety threat even if schools are not statutorily obligated to adjudicate intercampus sexual assault cases. Absent some sort of regional agreement to hold students accountable for assaults committed against students from other area schools, intercampus sexual assault becomes a potential minefield of targeted serial assaults, whereby the perpetrator faces no consequences, nor is an investigation even conducted. Not only do regional agreements have the potential to resolve this important safety issue on campus, but they also provide students with additional protection when they leave campus and socialize with students from other institutions in the area.

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INTRODUCTION

The social aspect of the modern college experience often extends well beyond the campus gates, and as a result, students from neighboring institutions often interact with one another in social settings. In some cases, these students' interactions are facilitated by their respective institutions, whether through a brother-sister school relationship, consortium, or even just university-funded transportation. Whether the school sanctions these social interactions or not, these social interactions are far from risk-free. The risks for students attending social functions from off campus are equal to, if not greater than, the risks that students face at social functions on their own campuses, but there are few legal protections in place requiring institutions to take action in response to a complaint from a student enrolled at a neighboring institution.¹ Because Title IX's statutory language focuses on intracampus sexual assault, it is unlikely that existing legislation can be used to compel colleges and universities to engage in any intercampus sexual assault adjudication system. As a result, there is a gap in statutory coverage where students' educational experiences are affected by sexual assault and harassment, but because that harassment or assault occurred on another campus, their respective home institutions do not have the authority to sanction the perpetrator or protect other students.

Under the existing statutory framework of Title IX and the Campus Sexual Violence Elimination Act (Campus SaVE Act), schools are required to employ a Title IX coordinator who is tasked with overseeing and implementing the college or university's sexual assault investigation and adjudication policy.² While this obligation was not clearly laid out for schools and effectively enforced upon institutions of higher education prior to the Dear Colleague

¹ Title IX and the Dear Colleague Letter refer to the responsibility that schools have to their own campus or prospective students, and not to students at nearby institutions. 20 U.S.C. § 1681 (1972); *see* *Davis v. Monroe Cty. Bd. Educ.*, 526 U.S. 629, 644 (1999) (holding that schools are liable to students for known acts of student gender-based harassment).

² 20 U.S.C. § 1681; Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 § 304 (2013) [hereinafter VAWA].

Letter in 2011, courts have long acknowledged that peer-on-peer sexual harassment and assault can be a barrier to equal access to educational opportunities, when the harassment is so severe or pervasive as to alter the conditions of the educational environment.³ Under the Department of Education Office of Civil Rights' guidance in the Dear Colleague Letter, schools are obligated to have a policy in place for addressing what most schools refer to as "sexual misconduct"⁴ and adjudicate cases of student-on-student sexual assault.⁵ Under this policy, schools are required to provide a speedy adjudication process—which should never involve mediation in sexual assault cases—including an investigation of the complaint, the opportunity to call witnesses or produce other evidence, and after which students have a right to know about any remedies instituted against the other party that have an impact on their own education experience, as well as an equal right of appeal.⁶ Finally, in recognition of the fact that these are civil rights cases and not criminal cases with corresponding criminal penalties, Title IX requires that schools apply the preponderance-of-the-evidence standard when evaluating campus sexual assault cases, placing the focus on the survivor's right to equal access to education, unlike criminal trials, which focus on society's interest in punishing or isolating those who are guilty of violent crimes, thereby deterring potential future offenders.⁷ However because the Dear Colleague Letter does not specify that these requirements also cover survivors who attend other schools, many schools' policies are ambiguous as to whether or not these survivors have any recourse through the school's adjudicative process, despite the fact that the assault may have a very direct impact on their equal access to educational opportunities.

³ See *Davis*, 526 U.S. at 648 (“[S]tudent-on-student sexual harassment, if sufficiently severe, can . . . rise to the level of discrimination actionable under [Title IX].”).

⁴ Sexual misconduct can include harassment, unwanted touching, coerced sexual acts, and sexual assault, depending upon the school's policy. In some cases schools define sexual misconduct as any sexual acts to which both parties did not affirmatively consent, others use a standard of unwanted sexual acts, while still others rely on the use of force. The standard varies significantly across institutions, contributing to the barriers a survivor faces should she wish to pursue a complaint against her assailant in a case of interschool sexual assault.

⁵ Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, Dep't of Educ., to Colleague (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [hereinafter *Dear Colleague Letter*].

⁶ *Id.*

⁷ 20 U.S.C. § 1681(a) (mandating that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity . . .”). See generally Amy Chmielewski, *Defending the Preponderance of the Evidence Standard in College Adjudications of Sexual Assault*, 2013 B.Y.U. EDUC. & L.J. 143 (2013).

The Campus SaVE Act was designed to enhance Title IX protection against campus sexual assault, but is similarly ambiguous as to the rights of survivors in intercampus sexual assault cases. While one of the Campus SaVE Act's major selling points at the time of its proposal was its focus on collaboration to prevent future sexual assault cases, this focus on collaboration was at the federal agency level, leaving the degree of collaboration among the schools themselves relatively unchanged.⁸ As a result, while the Campus SaVE Act has had a huge impact on how schools track sexual assault on campus, train adjudicators, and educate students and employees about campus sexual violence, these benefits have not extended to survivors of intercampus assaults, leaving a gap in both the available data on intercampus sexual assaults and the enforcement of survivors' rights. As a result, although women are likely to face similar power dynamics and offenders in intercampus and intracampus assaults, they will likely receive less support if they are subject to an intercampus assault than an intracampus assault.

Target rape, a phenomenon whereby men view women as prey, seek out women acquaintances for the purpose of rape, and use alcohol as a weapon to facilitate sexual assault, is rampant on college campuses in this country.⁹ This phenomenon may be exaggerated when dealing intercampus socialization, particularly between women's colleges and coeducational colleges, where there is a large influx of women, who may be unfamiliar with their surroundings on a strange campus. Additionally, when planning a party at a finals club or a fraternity, members often advertise at other schools in the area, and in some cases even use women from other schools as part of their recruitment process.¹⁰ Target rape is pervasive on campuses with a high male power quotient, and a focus on male dominated space.¹¹ This dynamic is exaggerated in social situations at which women from several institutions are in attendance, when the power dynamic becomes not only about amplifying male power, but also about which men can do what to whose women.¹² Most

⁸ *The Campus Sexual Violence Elimination (SaVE) Act*, THE CLERY CTR., <http://clerycenter.org/campus-sexual-violence-elimination-save-act> (last visited Mar. 11, 2016).

⁹ Diane L. Rosenfeld, *Uncomfortable Conversations: Confronting the Reality of Target Rape on Campus*, 360 HARV. L. REV. F. 359, 372–73 (2015).

¹⁰ Organizations at Harvard and MIT both routinely advertise social events at Wellesley College, for example. Furthermore, the MIT Chapters of the Chi Phi and Phi Sigma fraternities use Wellesley women as “rush girls” who attend rush events, socialize with potential new members, and provide their opinion on who among the group of men should be granted membership. These women are often members of social clubs at their own institutions and are held up to pledges as the type of women that brothers have access to as part of their membership in the fraternity.

¹¹ Rosenfeld, *supra* note 9, at 378–79.

¹² This dynamic is particularly evident in the use of terminology like “BU bitches,” as compared with Harvard women, or the rhyme, “Simmons and Boston to bed, Wellesley to

of all, target rape derives from a social power structure that centers on men's control over access to social space, and alcohol—problems that are not limited to intracampus cases.¹³ Once they walk through the door, students from other institutions will be at as great or greater risk of target rape on campuses with male dominated cultures and social spaces, making regional agreements addressing inter-campus sexual assault adjudications key to a comprehensive approach to campus sexual assault.

I. DEFINING INTERCAMPUS SOCIAL RELATIONSHIPS

There are three basic contexts in which these kinds of social relationships might exist: consortiums or schools with generous cross registration agreements, schools with established and institutionally endorsed social relationships, and schools within close geographic proximity but without any school sanctioned or established social or academic relationship. These categories are not exhaustive, but cover the majority of inter-campus relationships. Schools' statutory obligations will vary depending upon which of these categories is most applicable to their relationship with the complainant's school, and whether or not they arguably have an obligation to provide the complainant with equal educational opportunity under Title IX.

The respondent's school has a significant conflict of interest in determining whether to entertain complaints from students at other colleges and universities only grows as the relationship between the two institutions becomes more tenuous. In addition to the inherent conflict of interest in protecting their own student perhaps even at the expense of others, but also the business interest in promoting their brand, including the character of their students. Although most colleges and universities have not-for-profit status they also maintain large fundraising operations, and rely on their reputation as a selling point for prospective students considering what value added their degree can provide in a competitive post-graduation job market. Perhaps these considerations should not play a role in determining whether to accept, investigate or adjudicate reports of sexual assault from students at other colleges and universities in the region, but as a practical matter those considerations may well play a role in an institution's decision making process.

Wed," implying that a woman's affiliation with a particular institution gives men from another institution (in the case of this particular rhyme, Harvard and MIT) the right to those women's bodies in a very particular way. See, e.g., Alexandra M. Gutierrez, *The Girls Next Door*, HARVARD CRIMSON (Feb. 22, 2006), <http://www.thecrimson.com/article/2006/2/22/the-girls-next-door-what-are/>.

¹³ *Id.*

A. Cross Registration Agreements

Schools with a formal cross-registration agreement or consortium agreement arguably have an obligation to students at other member institutions as a result of such agreements. Consortia like the five Claremont Colleges and the Five College Consortium in Western Massachusetts permit students to cross register at member institutions and often fund transportation between campuses for both academic and social functions.¹⁴ These types of arrangements are particularly common at women's colleges, and often involve an ample social component in addition to cross-registration privileges.¹⁵ Given that students can cross register there it is possible that all member schools have an obligation to seriously investigate and adjudicate Title IX complaints brought forth by complainants from any member school. Title IX obligates schools to provide equal access to education for all students and prohibits gender-based discrimination in education¹⁶, so arguing that a school has a statutory obligation to investigate a reported sexual assault is the easiest when the institution has some sort of academic relationship with that institution. Where a complainant has actually enrolled as a cross-registered student at the respondent's institution when she¹⁷ is assaulted, there is a strong argument that

¹⁴ See, e.g., *About CMC*, CLAREMONT MCKENNA COLLEGE, <https://www.cmc.edu/about> (last visited Dec. 18, 2015) (“[S]tudents [may] choose from more than 2,200 classes and participate in co-curricular activities with 7,000 other students at Harvey Mudd College, Pitzer College, Pomona College, and Scripps College, as well as the Claremont Graduate University and Keck Graduate Institute”); *The Consortium: Brief History and Overview*, FIVE COLLEGE CONSORTIUM, <https://www.fivecolleges.edu/consortium> (last visited Dec. 18, 2015) (explaining that the Five Colleges comprise Amherst College, Mount Holyoke College, Smith College, University of Massachusetts Amherst, and, Hampshire College, and that this consortium offers “long-term forms of cooperation” such as “[s]hared use of educational and cultural resources and facilities” and “open cross registration”) [hereinafter *Consortium Overview*].

¹⁵ See, e.g., *Bi-Co, Tri-Co, and Penn*, BRYN MAWR COLLEGE <https://www.brynmawr.edu/academics/bi-co-tri-co-and-penn-0> (last visited Dec. 18, 2015); *Consortium Overview*, *supra* note 14; *About Scripps College*, SCRIPPS, <http://www.scrippscollege.edu/about/consortium> (last visited Dec. 18, 2015); *Cooperative Program*, SAINT MARY'S COLLEGE <https://www.saintmarys.edu/academics/undergraduate/partnerships> (last visited Dec. 18, 2015); *Opportunities at Other Schools*, WELLESLEY COLLEGE <http://www.wellesley.edu/academics/theacademicprogram/otherschools> (last visited Dec. 18, 2015).

¹⁶ 20 U.S.C. § 1681(a) (prohibiting any education programs or activity that receives federal financial assistance from excluding students or subjecting them to discrimination on the basis of sex).

¹⁷ While there are male survivors of sexual assault and they are entitled to the same statutory protection as female survivors under Title IX, I will use feminine pronouns when referring to survivors in this Comment in recognition of the statistical evidence that women make up

the respondent's institution would be denying her equal access to an education by refusing to investigate or adjudicate her complaint. However cross-registered students also do not have the same kind of educational relationship with the institution as students who are enrolled full time, and thus those institutions might argue that they are not denying the cross-registered student equal access to educational opportunities on their campus, because cross-registered students' educational access to the campus is limited to the courses in which they are enrolled, and they do not live in the dorms, eat in the dining halls, or participate in student organizations.

While this does not eliminate the college or university's obligation to protect the cross-registered student's right to equal access to educational opportunities, it may limit the remedies schools are statutorily required to provide in these cases, meaning that at least in practical terms intercampus sexual assault cases might be treated less stringently than intracampus cases. Remedies as described in the Dear Colleague Letter may range from no contact orders to barring the respondent from certain dormitories, to suspension or expulsion.¹⁸ Although suspension and expulsion are clearly still on the table many of the smaller remedies such as banning the respondent from dining halls or dormitories simply don't seem to fit an intercampus case, limiting the manner in which schools could respond to cases where the respondent is responsible but the remedy falls short of suspension or expulsion—remedies that schools may be loath to employ in cases where the complainant is a cross-registered student from another institution, and without some kind of formal arrangement in place, the institutional conflict of interest could well win out at the expense of hundreds of cross-registered students' safety.

Formal cross registration programs like those in place at the Claremont colleges throw hundreds of students into a second college environment as a part of their college experience.¹⁹ Whereas in the case of Scripps College, one of those schools is a women's college, the consortium also floods that second campus with a large group of young women each fall, where their presence is recognizable as the number of women on campus skyrockets, particularly at social functions. Given the that men who commit campus sexual assault are often serial offenders, failure to address cases of intercampus sexual assault would leave a huge gap in coverage that assailants could use to target this group of women with the knowledge that they will not be held accountable through

the majority of survivors and because the examples contained in this Comment refer to survivors who use feminine pronouns.

¹⁸ *Dear Colleague Letter*, *supra* note 5.

¹⁹ CLAREMONT UNIVERSITY CONSORTIUM, <http://www.cuc.claremont.edu/> (last visited Dec. 18, 2015).

campus adjudications or in a criminal justice system that is so steeped in rape culture that rapists are rarely held criminally responsible for their actions.²⁰ Ultimately this same kind of targeting can occur in any type of intercampus relationship, although the number of students who become vulnerable to this targeting in the absence of any formal intercampus sexual assault reporting policy is likely to increase dramatically, when predators know that they can target women from other institutions without consequence.

Even schools like Columbia University and Barnard College, which technically operates under the larger University umbrella, have different sexual assault policies, training requirements for students, adjudicators, and procedures for handling sexual assault cases.²¹ Although Columbia and Barnard are as closely connected as two schools can be, their sexual assault policies still have some significant differences, particularly from the perspective of a student wondering what to expect from a campus adjudicative process. Both policies are easily searchable with a quick Google search or perusal of the Barnard or Columbia websites, these policies do not readily provide information about the appropriate contacts at each respective institution, or which institution's policy governs under what circumstances, leaving a lot of ambiguity for survivors attempting to navigate these policies in the midst of a trauma. A problem that can be exacerbated as the connection between the schools becomes more tenuous.

Notre Dame and its sister school, Saint Mary's College, have a co-registration program and longstanding history of intercampus socialization. They also have a long and dark history of intercampus sexual assault, with investigations biased in favor of the respondent, particularly when those cases involve football players.²² Although Saint Mary's administrators knew that at least two of the football players accused of raping a Saint Mary's student in 1976 case were implicated in a 1974 rape case, and that at least one of the

²⁰ See, e.g., David Lisak, *Understanding the Predatory Nature of Sexual Violence*, 14:4 SEXUAL ASSAULT REP. (Civic Res. Inst.), Mar./Apr. 2011, at 49, 55-56.

²¹ Where Columbia University uses three trained adjudicators, all of whom have backgrounds handling sexual assault cases, Barnard College has the same Residential Life Dean handle all sexual assault cases at Barnard. See Caroline Andrews, *Barnard Administrators Reveal Sexual Assault Adjudication Process Details*, COLUMBIA SPECTATOR (Apr. 8, 2015, 10:16 PM), <http://columbiaspectator.com/news/2015/04/08/barnard-administrators-reveal-sexual-assault-adjudication-process-details>. Additionally, up until recently, all cases involving Columbia students, either complainants or respondents, were handled by Columbia, leaving Barnard to adjudicate only cases where both students were Barnard students. *Id.*

²² Melinda Henneberger, *Reported Sexual Assault at Notre Dame Campus Leaves More Questions than Answers*, NAT'L CATHOLIC REP. (Mar. 26, 2012), <http://ncronline.org/news/accountability/reported-sexual-assault-notre-dame-campus-leaves-more-questions-answers>.

assailants had raped another Saint Mary's student, the administrators ultimately told the women to keep quiet, and that there was nothing more to be done.²³ This 1976 case in particular points to a potential serial offender targeting Saint Mary's students, without facing any consequences.

The Saint Mary's administrators' response in the 1976 case also highlights another barrier that complainants face when reporting an inter-campus sexual assault: the politics of the two institutions' relationship, which can often be as strong a force as the complainant's school's desire to protect its students. These schools' relationships have their own power dynamics, which necessarily impact the schools' interactions. As a result, without some kind of safeguard in place to address that power dynamic and the impact an adjudication might have on the school's relationship outside of that power dynamic, it may be difficult to escape that power structure which could quickly become the driving force behind how these complaints are handled, perhaps by telling complainants that nothing more can be done. While Title IX likely does not require any kind of formal interschool sexual assault adjudication process, a process that would guard against these kinds of power relationships controlling the adjudicatory process would certainly fall within the spirit of Title IX.

The string of cases involving Saint Mary's complainants and Notre Dame respondents continues to this day. One of the most well-publicized cases in recent memory, which involved Lizzy Seeberg's complaint against Prince Shembo, highlights how both the investigation and the adjudication process were stacked to protect Notre Dame football, an essential component of Notre Dame's brand.²⁴ Lizzy Seeberg, a Saint Mary's student, was sexually assaulted on Notre Dame's campus on August 31, 2010; she disclosed the assault to close friends immediately and quickly reported the assault.²⁵ Like many other survivors, Ms. Seeberg was almost immediately inundated with text messages warning her not to "mess with Notre Dame football."²⁶ Although the Notre Dame police discussed these messages with the young men who sent them, urging them to change their behavior and stop bothering Ms. Seeberg, the police failed to question these young men or Ms. Seeberg's assailant about the assault at that time.²⁷ In fact, the University failed to pursue the investigation until months after Ms. Seeberg committed suicide, claiming that following her

²³ Dom Consentino, *This is What Happens When You Accuse a Notre Dame Football Player of Sexually Assaulting You*, DEADSPIN (Apr. 6, 2012, 10:00 AM), <http://deadspin.com/5897809/this-is-what-happens-when-you-accuse-a-notre-dame-football-player-of-sexually-assaulting-you>.

²⁴ Henneberger, *supra* note 22.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

death the investigation was a low priority compared with underage drinking at football games—priorities that former Notre Dame police officers claim hold true when dealing with any survivor²⁸. According to retired Lieutenant Cattrell, Notre Dame has a policy prohibiting officers from questioning student athletes while they are in the athletic complex, a policy that permits students to effectively hide out in the athletic complex and avoid an investigation into their conduct let alone a hearing or potential ruling that they are responsible for sexual misconduct.²⁹

Not only were the football players fighting to protect their teammate and their season when they tried to silence Ms. Seeberg, but the adults in charge of running the University itself were so interested in protecting the football program and the University's reputation that they ran a smear campaign against Ms. Seeberg even after her death, which remains unmatched in the cases involving both a Notre Dame complainant and respondent.³⁰ Not even Ms. Seeberg's longstanding family connection with both Notre Dame and Saint Mary's, giving her more of a connection with Notre Dame than the average Saint Mary's student, couldn't move the University to seriously investigate her complaint or protect her from retaliation by Notre Dame students.³¹ Instead, Notre Dame allowed her attacker to finish out the football season before deciding not to charge him; her attacker, Prince Shembo, went on to have an NFL career.³²

While Lizzy Seeberg's case is not representative of all intercampus sexual assaults, it is a striking reminder of just how devastating it can be when these cases go unaddressed. These cases are prevalent in a world where college students regularly interact with students from other campuses, whether as a result of formal institutional relationships or simply geographic proximity. But even in cases where there is a formal academic relationship and the school might have some obligation to pursue the case, we've seen that there are often other barriers to reporting, investigation or fair, Title IX compliant adjudication.

In some cases, schools exist at the crossroads between relationships defined by cross registration agreements and those defined by longstanding social relationships and geographic proximity. This is perhaps the most accurate description of the relationships between schools like Spelman College and

²⁸ Melinda Henneberger, *Why I Won't Be Cheering for Old Notre Dame*, WASH. POST (Dec. 4, 2012), <https://www.washingtonpost.com/blogs/she-the-people/wp/2012/12/04/why-i-won-t-be-cheering-for-old-notre-dame/>.

²⁹ THE HUNTING GROUND (The Weinstein Company 2015).

³⁰ *Id.*

³¹ Henneberger, *supra* note 22.

³² Nick Bromberg, *Prince Shembo Says He Was the Notre Dame Player in the Lizzy Seeberg Investigation*, YAHOO SPORTS (Feb. 23, 2014, 3:32 PM), <http://sports.yahoo.com/blogs/ncaa-af-dr-saturday/prince-shembo-says-notre-dame-player-lizzy-seeberg-203204907—ncaaf.html>.

Morehouse College, or Barnard College and Columbia University, and Saint Mary's and Notre Dame. In many cases, students live on what is effectively a common campus, socialize together, and have extensive cross registration privileges at their brother or sister schools. These relationships ultimately create an atmosphere that feels comparable to a single coeducational school rather than two separate schools, which may or may not be single sex schools, and can result in a string of sexual assault claims, without a clear path to adjudicating those claims as a result of the two separate administrative systems, with different sexual misconduct policies, and separate student bodies, even if that separation exists in name only.

Following the appearance of the anonymous Twitter account @Raped-AtSpelman, the Spelman and Morehouse communities, and the public watched as the bureaucratic barriers to investigating campus sexual assaults, and enforcing existing sexual misconduct policies.³³ Although the student in this case reported her assault to Spelman's public safety and eventually shared her story with the public via an anonymous twitter account, neither Spelman nor Morehouse has taken any action against the four men accused of laying in wait in a bathroom at Spelman, forcibly removing the woman, and brutally gang raping her.³⁴ Although the survivor reported her rape to Spelman administrators and made her desire to proceed with an investigation clear, she reports that administrators told her that Morehouse men were her brothers, so she should "give them a pass."³⁵ In fact it wasn't until the anonymous survivor

³³ The appearance of this account followed reports from BuzzFeed news of a long string of reported and uninvestigated sexual assaults at Spelman College and Morehouse College. See Anita Badejo, "Our Hands Are Tied Because Of This Damn Brother-Sisterhood Thing" BUZZFEED (Jan. 21, 2016), <https://www.buzzfeed.com/anitabadejo/where-is-that-narrative>. The report further detailed how the administration at both Spelman and Morehouse reminded survivors of the importance of the colleges' reputations, and brotherhood and sisterhood among the alumni of both schools, engaging in a form of respectability politics that turned a blind eye to the survivors' experiences and pain. *Id.* ("[F]or decades, students at Spelman—the elite historically black women's college—have spoken out about instances of sexual assault committed by students from Morehouse College, their unofficial brother school. Now, in the wake of a petition, protests, and a federal investigation, their messages are ringing louder than ever. Why haven't we heard them?"); see also Kristen West Savali, #RapedByMorehouse: Allegations of a Rape Cover-Up at Spelman Spark Controversy, ROOT (May 5, 2016), http://www.theroot.com/articles/culture/2016/05/_rapedbymorehouse_allegations_of_a_rape_cover_up_at_spelman_and_morehouse/.

³⁴ @RapedAtSpelman, TWITTER, <https://twitter.com/rapedatspelman> (last visited Aug. 30, 2016); see also Tyler Kingkade, *Spelman Rape Victim Says School President Failed on Promise to Meet with Her*, HUFFINGTON POST (July 28, 2016), http://www.huffingtonpost.com/entry/spelman-president-campus-rape_us_57996063e4b02d5d5ed453f0.

³⁵ Savali, *supra* note 33.

launched an anonymous twitter account and the hashtags, #RapedAtSpelman and #RapedByMorehouse, trended on twitter for hours, attracting national media attention, that Spelman and Morehouse announced separate investigations into the sexual assault in question.³⁶ Yet these investigations have yielded no reports, and the survivor reports that despite all of their promises, and apologies for the pain she was experiencing, the President of Spelman has failed to meet with her and administrators have yet to complete an investigation into the sexual assault she reported, despite Title IX's strict requirements that investigation and adjudication of a claim be completed within one academic year.³⁷

This problem of prioritizing the institutional reputation and structures of power over survivors is not unique to Morehouse and Spelman, and in some ways is most entrenched in these kinds of hybrid relationships, where the schools function as one on a day to day basis, but retain separate administrations, handbooks, policies, and student bodies, at least on paper. As Spelman and Morehouse appear to have done in this case, many schools wait until any media attention dies down, and carry on with business as usual, a trend reflected in BuzzFeed's coverage of the handling of sexual assault at Spelman and Morehouse over several decades, and in Stanford University's new policy barring hard liquor from campus in response to Brock Turner's conviction and the media attention it received, rather than adopting pragmatic policies designed to protect survivors, even if the institution is forced to endure a media firestorm in the process.³⁸

B. Longstanding Social Relationships and Geographic Proximity

When the two institutions involved have cultivated a social relationship between their campuses, but do not maintain any form of academic consortium or cross registration, any arguments that the university is statutorily required to accept and investigate these complaints let alone engage in an intercampus adjudicative process to address these complaints, are undermined by the absence of an educational relationship between the complainant and the respondent's

³⁶ Emanuella Grinberg, *Atlanta Colleges Look into Anonymous Twitter Rape Claim*, CNN (May 5, 2016) <http://www.cnn.com/2016/05/05/us/morehouse-selman-rape-allegations-twitter/>; Shantell E. Jameson, *'Raped at Spelman' Twitter Account Emerges*, JET (May 3, 2016), <http://www.jetmag.com/news/raped-at-selman-twitter-account/>; Anita Badejo, *Anonymous Student Behind "Raped At Spelman" Says "This Is Bigger Than Me,"* BUZZFEED (May 6, 2016, 12:11 AM), <https://www.buzzfeed.com/anitabadejo/anonymous-sudent-behind-raped-at-selman-says-this-is-bigge>.

³⁷ Kingkade, *supra* note 34.

³⁸ See Madison Park, *Stanford Bans Hard Alcohol at Campus Parties*, CNN (Aug. 23, 2016), <http://www.cnn.com/2016/08/23/us/stanford-hard-alcohol-ban/>; see also Badejo, *supra* note 33.

school. Because Title IX refers to educational experiences, a complainant could theoretically argue that social experiences are a part of the educational experience in college, and as a result should be covered under Title IX.³⁹ But, given that many of these social experiences are not school sanctioned or controlled, even where the schools provide transportation between their campuses to facilitate cross campus socialization it is difficult to prove that students have a civil right to intercampus socialization. As a result, any intercampus sexual assault reporting and adjudication process in the spirit of Title IX would likely have to be voluntary.

Claimants face a similar problem in cases where the claimant's school and respondent's school are in close geographic proximity but have not facilitated any kind of social relationship between their schools. This kind of case does not fit within the traditional Title IX framework, and there is likely no basis for forcing the schools to hold their students responsible under these circumstances, because the respondent's school likely has no relationship with the complainant. In the event that the complainant reports the assault to her own school the school may have some obligation to take steps like barring the respondent from campus or issuing a no contact order, but because that university has very limited authority over the respondent those may be the only steps required under even the most expansive definition of Title IX.⁴⁰ Furthermore those remedies do not address the problem of possible future assaults but are instead accommodations that the complainant's school may be required to make whether the complainant wished to file a formal report and pursue an adjudication even if it were a purely intracampus case. Given these limitations, complainants cannot rely on Title IX to address this problem, and instead survivors who wish to pursue a complaint must rely on their schools to enter into some sort of agreement with other schools in the region to protect their right not to face sexual harassment and gender based violence on college campuses.

Some schools, however, take these limitations to extremes. When Emily,⁴¹ an NYU student was sexually assaulted while participating in an NYU study abroad program in Buenos Aires, NYU officials told her that unless she went through the police, there was nothing the University could do to help her.⁴² Despite the fact that the assault occurred in connection with NYU's Buenos Aires campus, the university made no effort to accommodate Emily,

³⁹ 20 U.S.C. § 1681.

⁴⁰ *Id.*

⁴¹ Name has been changed.

⁴² Rajeev Dhir & Alexandra Palmer, *Sexual Assaults at NYC College Campuses*, AL JAZEERA AMERICA (Feb. 4, 2015 5:00 AM), <http://america.aljazeera.com/articles/2015/2/4/sexual-assaults-at-nyc-college-campuses.html>.

nor to investigate her claim, leaving her on her own to deal with an unfamiliar justice system in a foreign country, or to choose not to pursue the case.⁴³ This kind of response takes the limitations on survivors' access to adjudication in interschool sexual assault cases to an extreme, effectively denying the survivor access to any adjudicative process. Further, because Emily chose not to pursue her case through NYU public safety when she returned to New York, NYU never reported the assault on its police blotter or in its Clery numbers.⁴⁴

While there are few cases to draw upon here, as the legal argument for enforcement is weaker, those survivors who have pursued complaints against assailants at schools in close geographic proximity pointed to the impact the assault had on their access to education. In many of these cases, the assailants carry many of the markers of target rapists, making the acquaintance of women from other schools for the purpose of bringing them into a male dominated environment, often a fraternity, plying them with alcohol, and assaulting them.⁴⁵ While discussing her assault with filmmakers in the documentary *The Hunting Ground*, one survivor from Emerson College referred to the MIT fraternity where she was assaulted, Sigma Alpha Epsilon, as "Sexual Assault Expected," implying that her experience was part of a much larger pattern of assault both at the individual chapter and, based on the multiplicity of similar interviews using the same terminology, throughout the national organization.

When Emerson College sophomore Sarah Tedesco arrived at an MIT fraternity party, an MIT student brought her a drink and asked to see her student I.D. to confirm that she was an MIT student; upon discovering that Sarah was not an MIT student, he told her he wanted to show her something, and led her away from the party, where he attacked her.⁴⁶ This young man's actions, bringing Sarah a drink laced with GHB which made her head feel foggy, rendering her unable to say "yes" or "no," and confirming that she was not an MIT student before assaulting her, suggests that he intentionally targeted Sarah as a woman from another school, asking for her I.D. to confirm that he was right that she was not an MIT student.⁴⁷ Whether Sarah's assailant was purposefully taking advantage of the fact that MIT is not statutorily obligated to adjudicate

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *See, e.g.,* THE HUNTING GROUND, *supra* note 29.

⁴⁶ Ashe Schow, *Dateline Highlights Campus Sexual Assault and the Difficulties for College Adjudication*, WASH. EXAMINER (Oct. 9, 2013), <http://www.washingtonexaminer.com/dateline-highlights-campus-sexual-assault-and-the-difficulties-for-college-adjudication/article/2566773>.

⁴⁷ Jessica Wakeman, *Emerson Student Files Federal Complaint over Alleged Mishandling of Sexual Assault*, FRISKY (Oct. 9, 2013), <http://www.thefrisky.com/2013-10-09/emerson-student-files-federal-complaint-over-alleged-mishandling-of-sexual-assault/>.

the case, or simply targeting a woman based upon misogynistic beliefs about his right to assault women from other institutions, his actions in targeting a student from Emerson exemplify an extreme manifestation of target rape.

Not only does Sarah's experience exemplify how some men target women from other universities, but also exactly how the system fails women who report intercampus assaults. Although Sarah reported her assault to both Cambridge Police and Emerson Police, her case was never heard either in court or in a school adjudicative proceeding.⁴⁸ Emerson administrators actively discouraged Sarah from reporting her assault to the police, and the criminal case was eventually dropped, despite Sarah's positive identification of her assailant from a lineup.⁴⁹ While there is no guarantee that an interschool agreement to adjudicate the case would have resulted in an appropriate remedy for Sarah, its availability alone would have increased the likelihood that Sarah's assailant would face consequences for his actions and made all women safer on MIT's campus.

II. THE PROPOSAL: VOLUNTARY REGIONAL AGREEMENTS

The absence of a statutory obligation to engage in a Title IX compliant investigation and adjudication should not be a barrier to fighting sexual assaults occurring across college campuses. Given the low reporting rate on college campuses, throwing up roadblocks to students who want to report—even if those students are enrolled at other universities in the area—is likely to leave serial offenders on campus where their presence and any assaults they commit do pose a real threat to equal access to educational opportunity.⁵⁰ From a campus safety perspective, the assailants are a significant threat to women on their campus regardless of whether the woman reporting the assault is enrolled at the same university or another school in the area, meaning schools should focus more on a model of investigating and adjudicating all reported sexual violence on campus, rather than a model that focuses more on where the women are enrolled than the safety risk their assailants pose to women on campus. Intercampus sexual assaults may still create a hostile educational environment at the respondent's school, even if those schools don't have a Title IX obligation to the complainant, where students have the knowledge that an assault or series of assaults has occurred without any path to adjudication.

⁴⁸ *Id.*

⁴⁹ Schow, *supra* note 46.

⁵⁰ Christopher P. Krebs, Christine H. Lindquist, Tara D. Warner, Bonnie S. Fisher & Sandra L. Martin, Nat'l Crim. Just. Reference Serv., The Campus Sexual Assault Study 5-21 (Oct. 2007) (unpublished report), <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>.

As regional consortiums are beginning to pop up in response to problems of intercampus campus sexual assault, or even as a resource to Title IX coordinators attempting to develop best practices, Title IX coordinators are better equipped to connect students with their counterparts on other campuses, if a student wants to file a complaint.⁵¹ While this is a significant step in the right direction, providing students with access to the right administrator at the respondent's school, it doesn't address other gaps in coverage for survivors. Without an agreement between the schools obligating the respondent's school to pursue an investigation and adjudication where the complainant is a student at a signatory school, these regional agreements don't guarantee survivors that the respondent's school will take the complaint seriously or pursue any kind of investigation. Further, these consortiums don't increase students' direct access to information about each school's policy, where any hearings might be held, and their rights as complainants under each different policy.

Regional agreements, under which schools would pledge to provide a mechanism for students from other institutions to report sexual assaults and agree to investigate and pursue complaints filed by students from other institutions on an equal basis with their own students' complaints. Such an agreement is in all schools' interests because it protects their students on all college and university campuses in the area and helps reveal serial offenders who might otherwise prey on women from other universities as a way of avoiding the consequences of enforcement. However in order to be effective such a regional agreement must be accessible and provide practical safeguards to ensure that students feel comfortable engaging in these adjudications.

Engaging in adjudications requires first and foremost that students have easy access to information about how to file a complaint in an inter-campus sexual assault case, and how the process will proceed. The Claremont Colleges appear to be the only colleges in the country with a published policy on intercampus sexual assault, although several other regions have attempted to put intercampus sexual assault policies in place.⁵² While the Claremont Colleges have set up a website specifically addressing sexual assault at the Claremont Colleges, with contact information for each school's Title IX coordinator and links to each college's sexual misconduct policy, it does not detail what the intercampus policy entails, but instead instructs students to contact their Title IX

⁵¹ Jane Vaughan, *Report on Sexual Misconduct Highlights both Progress and Deficiencies at Wellesley*, WELLESLEY NEWS (Feb. 24, 2016), <http://thewellesleynews.com/2016/02/24/report-on-sexual-misconduct-highlights-both-progress-and-deficiencies-at-wellesley/>.

⁵² *College Sexual Misconduct Policy (ch. 1, § 3)*, AMHERST COLLEGE, <https://www.amherst.edu/offices/student-affairs/community-standards/college-standards/examples-of-sexual-misconduct>; *Sexual Misconduct Resources*, THE CLAREMONT COLLEGES, <http://7csexualmisconductresources.claremont.edu/support/policies-and-grievance-procedures/> [hereinafter CLAREMONT COLLEGES].

coordinator for information about how to file an intercampus complaint.⁵³ While this information provides students with clear directions about where to get information about filing an intercampus complaint, it also forces students who have experienced intercampus sexual assault to speak with their Title IX coordinator, making it difficult for students to anonymously explore the option of filing an intercampus complaint. The Title IX coordinator can be a valuable resource for students going through an intercampus adjudication proceeding, but the prospect of speaking with an unfamiliar administrator might act as a barrier to filing a complaint. The website also fails to address how a student might file an anonymous complaint, and once the student approaches a Title IX administrator the complaint is no longer anonymous.⁵⁴ Despite these missing pieces, the 7C website is an excellent model for a centralized repository of information about each school's sexual assault policy, Title IX coordinators, and any other resources for survivors.

One of the Claremont Colleges' website's greatest strengths is its accessibility. It is readily searchable, in contrast to the Five Colleges Inc. policy that governs Amherst College, UMass Amherst, Hampshire College, Smith College and Mount Holyoke College, which does not appear on the first page of Google search results for "Five College Intercampus Sexual Assault," "Five Colleges Title IX," or even in connection with any of the member schools' websites.⁵⁵ The Five Colleges Inc. website does provide a clear policy statement describing which schools are responsible for providing services, investigating and adjudicating the complaint, and which school's sexual misconduct policy governs.⁵⁶

The best regional agreements will be detailed and account for each school's responsibilities at every stage of the process. Having a searchable policy does not do students any good if the policy does not also tell survivors what to expect from the interschool process and what each school is responsible for, giving survivors all the information they need to pursue a complaint. Schools should settle whose policy will govern adjudications, what procedural requirements must be satisfied during the adjudication, which school is responsible for any costs that might be incurred during the adjudicative process, and which school will provide resources and remedies both prior to the adjudication and after a final judgment.

⁵³ CLAREMONT COLLEGES, *supra* note 52.

⁵⁴ *Id.*

⁵⁵ *Five College Risk Management*, FIVE COLLEGE CONSORTIUM, <https://www.fivecolleges.edu/riskmgmt/studentrisk/sexual-harassment-assault> (last visited Dec. 18, 2015) [hereinafter FIVE COLLEGE CONSORTIUM].

⁵⁶ *Id.*

Under both the Claremont policy and the Five Colleges, Inc. policy, the respondent's school's policy governs for purposes of the investigation and adjudication, while the claimant's school provides services for the survivor before the adjudication.⁵⁷ What is less clear under both policies is how the schools divide responsibilities for both preliminary and final remedies, including but not limited to enforcing no-contact orders, and preventing any retaliation against the complainant. While both policies provide a clear accounting of each school's responsibilities on paper, they do not appear to address grey areas that might arise in dividing up the responsibilities, like where any hearings should be held, which school will bear the students' legal costs if the policy permits students to have legal counsel. While these issues may not have a significant impact on students' access to the services they need or the adjudicative process to which they're entitled, they may have a significant impact on how smoothly the interschool process runs from day to day. By sorting out these kinds of issues ahead of time, schools can avoid having to jockey for power to determine who is responsible for bearing specific costs while dealing with an open case, which might raise the kinds of concerns about power relations that arise when there isn't a regional agreement in place to begin with.

Schools should also draft their regional agreements with an eye toward protecting survivors in an interschool process. Interschool hearings under existing consortium or regional agreements place the investigations and adjudications under the respondent's school's policies, which could make survivors feel that the hearing is an unsafe space both physically and emotionally, or that the adjudication is skewed in the respondent's favor even if only as a result of the respondent's greater familiarity with the system.⁵⁸ If survivors feel that they are at a disadvantage due to lack of familiarity with the system or that the hearing will be in an unsafe space, she may be less likely to pursue a complaint, making addressing these problems an essential function of any effective regional agreement. To avoid some of these concerns, schools can agree to conduct hearings in neutral location, in recognition of the fact that returning to the respondent's campus may be a triggering experience for the survivor, permit outside advocates to provide the survivor with both a support system within the room and guidance in an unfamiliar adjudicatory system, and require all participating schools to submit to trauma informed training from a local rape crisis center, to help minimize additional trauma throughout the adjudicative process.

Regional agreements to conduct intercampus hearings in a neutral forum with outside advocates acknowledges that the survivor in an intercampus hearing is an outsider in the proceedings and attempts to compensate for that status. The

⁵⁷ CLAREMONT COLLEGES, *supra* note 52.

⁵⁸ CLAREMONT COLLEGES, *supra* note 52; FIVE COLLEGE CONSORTIUM, *supra* note 55.

neutral forum can be at a third campus in the area, a conference room at a local rape crisis center, or another appropriate off-campus forum. The school should also agree to cover transportation costs to and from the hearing for both the complainant and the respondent, and any witnesses that they intend to call, in order to provide all students with equal access to the adjudicative process and comply with the Title IX obligation that schools cover the same costs for both parties, as well as providing the same procedural options to both parties throughout the process. Given Title IX's requirement that both parties be treated equally throughout the process⁵⁹, a neutral forum is in keeping with the spirit of Title IX, while a hearing conducted on the respondent's campus might be considered less than equitable to the complainant. This same concern about equitable treatment of the parties in an adjudicative procedure also applies to the advocates in the room. An advocate from the respondent's school is unlikely to provide the survivor with the same benefits that she might get from an outside or "neutral" advisor, who is familiar with the adjudicative process at the respondent's school but is not employed by the school and has no vested interest in protecting the respondent's school or its students. The option of choosing an outside advisor would also give the complainant the benefit of choosing a trusted advisor with whom she might have a prior relationship, just as the respondent's chosen advisor is likely to be a trusted faculty member or an attorney. In either case, the spirit of the Dear Colleague Letter's requirement that schools provide the parties with identical rights to appeal, to have advisors, and to afford notice of the outcome of the hearing, supports a provision allowing outside advisors.

While regional agreements are not subject to Title IX's statutory requirements because they are not technically statutorily required just as schools are not statutorily required to enter into intercampus adjudications, the best regional agreements embody the spirit of Title IX, and would therefore use the same procedural standards required under Title IX. Regional agreements should abide by the preponderance of the evidence standard, which is most appropriate for use in campus adjudications under Title IX because these cases deal with civil rights violations and not criminal liability.⁶⁰ Similarly, regional agreements should explicitly require that both parties be granted identical rights both in the initial hearing and any appeals process under the respondent's school's policy.

Finally regionally agreements should be rooted in trauma informed training, in light of the additional trauma that an intercampus proceeding may elicit. Claimants may have to return to the campus where the assault occurred, and may fear retaliation while on that campus, adding to the already

⁵⁹ 20 U.S.C. § 1681; *Dear Colleague Letter*, *supra* note 5.

⁶⁰ *See generally* Chmielewski, *supra* note 7.

extraordinary stressors a survivor faces during any sexual assault investigation and subsequent adjudication. With that in mind, regional agreements should provide for trauma informed training for any investigators and adjudicators from all participating schools, and should put additional safeguards in place, including outside advocates and neutral forums to provide survivors with an additional sense of security when participating in an adversarial process governed by the respondent's school. Because the claimant's school does not have binding authority over the respondent, using the respondent's school's policies and procedures is likely unavoidable to some extent. But so long as the schools provide their students with notice of any changes to the intracampus proceedings that will occur in the event of an intercampus investigation and adjudication that is governed by the regional agreement, schools are free to provide for these changes in the regional agreement.

CONCLUSION

Intercampus sexual assault proceedings have several added layers of complexity as a result of the number of parties involved and the power relations and politics that arise when dealing with two institutions of higher learning. A regional agreement can help to address these issues before the schools are engaged in an investigation or a hearing and can help address issues like what services each school will provide, the schools' respective responsibilities, and the complainant's rights in an intercampus proceeding. As a result, schools that choose to enter into a regional agreement will have the assurance that their students' rights will be protected in the event that they are assaulted on another campus, and help schools to carry out the spirit of Title IX in an era in which college students are rarely insulated from students at other schools and intercampus assaults are not uncommon.

In a world filled with dating apps, OkCupid, MeetUps, and Facebook events, students are more likely than ever to socialize across campus lines. As students are socializing on other campuses, or throughout the greater metropolitan areas surrounding their campuses, the risks of sexual assault do not disappear, nor do the barriers that sexual assault creates to equal educational opportunity. Schools can mitigate those barriers by entering into regional agreements that provide students with more protection, options, and information following a sexual assault. Although schools are not currently under any statutory obligation to adjudicate cases involving complainants from other schools, or take any additional steps for those survivors' comfort throughout the adjudicative process should they choose to adjudicate the case, these protections are in keeping with the spirit of Title IX and other similar civil rights laws. These statutes aim to redress discrimination society

has deemed repugnant by focusing on protected classes' civil rights and placing harmed individuals in the place they would have been were it not for the discriminatory act or acts. Schools aiming to do better than just comply with Title IX should look to its spirit and pursue regional agreements that would afford all student survivors with the right to a Title IX compliant adjudicative process and equal educational opportunity.