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Live and Learn: Using the Fair Housing Act to Advance Educational Opportunity for Parenting Students

IHELG Monograph

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Live and Learn: Using the Fair Housing Act to Advance Educational Opportunity for Parenting Students

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INTRODUCTION

Approximately one-quarter of undergraduate students are parents.[1] Most collegiate programs, however, are not prepared to meet the unique needs of student-parents.[2]

Many postsecondary institutions with residential campuses have policies that explicitly or implicitly exclude student-parents from living in university-provided housing.[3] When housing for student-parents is provided, there are often insufficient units to serve all student families.[4] Although university-provided housing is often expensive,[5] it may be less expensive than off-campus alternatives, especially in destination cities.[6] Additionally, universities often tout

1. BARBARA GAULT, LINDSEY REICHLIN & STEPHANIE ROMÁN, COLLEGE AFFORDABILITY FOR LOW-INCOME ADULTS: IMPROVING RETURNS ON INVESTMENT FOR FAMILIES AND SOCIETY 4 (2014), http://www.iwpr.org/publications/pubs/college-affordability-for-low-income-adults-improving-returns-on-investment-for-families-and-society [https://perma.cc/WL7R-KGLW]. This source does not differentiate between traditional undergraduates and non-traditional undergraduates (those attending community college, part-time, or evening programs). However, if, as many assume, attendance rates at traditional four-year universities are lower among student-parents, this does not diminish their need for services there; rather, an increase in support for student-parents would likely increase the number of student-parents who choose to attend these institutions.

2. *See, e.g.*, Cara Newlon, *University Support for Pregnant Students Uncommon*, USA TODAY (Sept. 24, 2013, 2:36 AM), http://www.usatoday.com/story/news/nation/2013/09/24/pregnant-college-students-lack-univ-support/2861583/ [https://perma.cc/68QN-2JN9]; Gillian B. White, *The Quiet Struggle of College Students with Kids*, ATLANTIC (Dec. 11, 2014), http://www.theatlantic.com/business/archive/2014/12/the-quiet-struggle-of-college-students-with-kids/383636 [https://perma.cc/Q7QM-XWHM].

3. *See infra* Section I.A.

4. *See infra* Section I.A.

5. *See* Danielle Douglas-Gabriel, *Freshman Residency Rules Sometimes Force Students to Pay Prohibitive Costs*, WASH. POST (Sept. 29, 2015), https://www.washingtonpost.com/local/education/freshman-residency-rules-sometimes-force-students-to-pay-prohibitive-costs/2015/09/29/4693aed6-63b5-11e5-b38e-06883aacba64_story.html [https://perma.cc/5FA5-HK5F] (stating that the average monthly rent in university-provided housing is $1,014.44 per month, whereas the national median rent recorded by the Census Bureau is $803 per month).

6. *See* NYU RESIDENTIAL LIFE & HOUS. SERVS., 2015–2016 HOUSING RATES, https://www.nyu.edu/content/dam/nyu/resLifeHousServ/documents/ApplicationsandAssignments/2015-2016AYRates.pdf [https://perma.cc/9BVY-9QJZ] (highlighting in the right hand column the university-provided housing units that are lower cost than the local rental market); Katy Murphy, *College Housing Costs: How High Do They Go in Bay Area?*, MERCURY NEWS (Aug. 24, 2013), http://www.mercurynews.com/ci_23933401/college-housing-costs-how-high-do-they-go [https://perma.cc/TBW8-H869] ("Silicon Valley sticker shock appears to have driven more students than usual to San Jose State's residence halls this year, campus administrators say. Dorm living costs $12,400, about $350 less than what the school estimates it costs to live off campus."); *Housing for Student Families*, UNIV. OF CAL., SANTA CRUZ, http://housing.ucsc.edu/family/ [https://perma.cc/EFE2-6ZSE] (describing the benefits of living in family student housing, including the below average monthly rental rates for the Santa Cruz area).

the benefits university-provided housing offers students, including: (1) a "stable living environment[] . . . close to academic resources;" (2) "social interaction and exposure to new and diverse life experiences;" and (3) "supervision, counseling, and other assistance" that may be necessary for students.[7] Students who live on campus in residential communities during their first year experience significantly higher rates of progress and retention than off-campus students, regardless of race, gender, or admission type.[8] Student-parents may also be unable to find adequate off-campus housing—housing discrimination based on familial status remains a problem, especially in traditional college towns.[9] In 2013, familial-status-based discrimination complaints were the third most common type of complaint received by the U.S. Department of Housing and Urban Development (HUD).[10]

However, a nearly half-century old antidiscrimination statute, the Fair Housing Act (FHA),[11] may require universities to allow student-parents and their families to live in university-provided housing. The purpose of the FHA is to "provide, within constitutional limitations, for fair housing throughout the United States,"[12] by prohibiting, inter alia, discrimination on the basis of familial status.[13] Support for applying the FHA to university-provided housing is growing: multiple federal courts have determined, based on statutory interpre-

7. Brief in Support of Motion for Summary Judgment ¶ 6, United States v. Univ. of Neb., 940 F. Supp. 2d 974 (D. Neb. 2013) (No. 4:11-cv-3209); *see also Univ. of Neb.*, 940 F. Supp. 2d at 979 (arguing that "the purpose of university housing is educational, rather than to provide a residence"); Prostrollo v. Univ. of S.D., 507 F.2d 775, 777–78 (8th Cir. 1974) (finding that students living on campus educationally benefit from the experience of self-government, community living, proximity to study facilities, and the opportunities for relationships with student housing staff members); Tex. Woman's Univ. v. Chayklintaste, 530 S.W.2d 927, 929 (Tex. 1975) (finding that on-campus dormitory life adds to students' intellectual and emotional education, leads to closer student-faculty relationships, and exposes students of diverse personal backgrounds and experiences to an atmosphere of varied intellectual and political associations).

8. *See* Korrel W. Kanoy & Judy Woodson Bruhn, *Effects of a First-Year Living and Learning Residence Hall on Retention and Academic Performance*, 8 J. FRESHMAN YEAR EXPERIENCE & STUDENTS IN TRANSITION 7, 7 (1996) (finding that first-year residence in university-provided housing with programmatic components increased students' grade-point averages but did not greatly impact their retention rates); Jane Thompson, Virginia Samiratedu & John Rafter, *The Effects of On-Campus Residence on First-Time College Students*, 31 NASPA J. 41, 41 (1993).

9. *See generally* CNY FAIR HOUSING, FAMILIAL STATUS DISCRIMINATION IN THE UNIVERSITY NEIGHBORHOOD (Oct. 2013), http://cnyfairhousing.org/wp-content/uploads/2014/05/University-Neighborhood-ReportFINAL.pdf [https://perma.cc/P5EM-VRR4] (reporting increased housing discrimination based on familial status in university towns). *See also* Mary Jarvis, *When the Rent is Too High: Cornell's Student Housing Conundrum*, USA TODAY (May 11, 2015, 1:22 PM), http://college.usatoday.com/2015/05/11/when-the-rent-is-too-damn-high-cornells-student-housing-conundrum/ [https://perma.cc/UV77-WWWV] (describing common policies and practices in many university towns that burden students who experience unplanned pregnancies and childbearing, such as landlords requiring students sign their leases as early as a year in advance).

10. *See* HUD, ANNUAL REPORT ON FAIR HOUSING FY 2012–2013, at 19 (2014), http://portal.hud.gov/hudportal/documents/huddoc?id=2012-13annreport.pdf [https://perma.cc/3QD9-KBE6] [hereinafter ANNUAL REPORT ON FAIR HOUSING FY 2012–2013].

11. 42 U.S.C. §§ 3601–3619 (2016).

12. *Id.* § 3601.

13. *Id.* §§ 3602(k), 3605(a).

tation and judicially-created tests, that the FHA applies to university-provided housing.[14] Additionally, HUD has publicly supported this interpretation,[15] and other federal courts have begun to presume the FHA's application to university-provided housing.[16] To date, only a single litigant has challenged a university policy that excludes student-parents from university-provided housing under the FHA, but the Second Circuit determined that the plaintiff, representing herself pro se, failed to present sufficient evidence of a disparate impact of her university's policy.[17] Thus, this remains a novel legal claim.

To examine this potential legal claim, this Note proceeds as follows: Part I provides background information about the unmet housing needs of student-parents and the gaps in other antidiscrimination laws that leave student-parents out. Part II analyzes how courts have begun to apply the FHA to universities, looking to the statutory definition of "dwelling" in the Act as well as the judicially-created standard for assessing whether non-traditional housing should comply with the Act. Finally, Part III introduces the FHA's prohibition of familial-status discrimination and demonstrates that many university housing policies constitute disparate treatment on the basis of familial status or create a disparate impact based on the familial status of student-parents. This Part also introduces arguments to counter hypothetical university justifications that might be provided in a burden-shifting assessment of FHA challenges to policies that exclude student-parents.

I. HOUSING FOR STUDENT-PARENTS

Although a need for increased resources for student-parents is nationally recognized,[18] many of the policy proposals focus primarily on increasing access

14. United States v. Univ. of Neb., 940 F. Supp. 2d 974, 975 (D. Neb. 2013); United States v. Kent State Univ., No. 5:14-cv-1992, 2015 WL 5522132, at *3–4 (N.D. Ohio Sept. 16, 2015); *see also* discussion *infra* Section II.A.

15. *See* Bryan Greene, *University Housing and the FHA*, DISABILITY BLOG (Feb. 28, 2011), https://usodep.blogs.govdelivery.com/2011/02/28/university-housing-and-the-fair-housing-act/ [https://perma.cc/VST4-FZT4].

16. *See* Fialka-Feldman v. Oakland Univ. Bd. of Tr., 678 F. Supp. 2d 576, 587–88 (E.D. Mich. 2009) (assuming that the FHA applied to university-provided housing but denying the plaintiff's claim because the university-provided reasons other than the plaintiff's disability for refusing his rental application); Kuchmas v. Towson Univ., 553 F. Supp. 2d 556, 561–63 (D. Md. 2008) (determining that the statute of limitations on the plaintiff's claim had not run, without finding the need to assess whether the FHA can be applied to university-provided housing).

17. *See* Whitaker v. N.Y. Univ., 531 F. App'x 89, 91 (2d Cir. 2013), *cert. denied*, 135 S. Ct. 70 (2014) (assuming that the FHA applied to university-provided housing but denying the plaintiff's claim of familial status discrimination because her son was ineligible to live in the university-provided housing under the university's students-only policy).

18. *See, e.g.*, *Hillary Clinton's New College Compact: A Two-Generation Approach*, HILLARYCLINTON.COM (Apr. 14, 2015), https://www.hillaryclinton.com/briefing/factsheets/2015/08/14/two-generation-approach/ [https://perma.cc/5X8P-HNVU] (describing the Democratic Party's 2016 Presidential nominee's platform on educational opportunity for student-parents).

to childcare.[19] However, to integrate student-parents fully into the traditional four-year university, on-campus housing is also needed. This section demonstrates the unmet housing needs of student-parents and examines the gaps in legal protection left by other laws.

A. THE UNMET HOUSING NEEDS OF STUDENT-PARENTS

The typical student during the early years of many longstanding colleges and universities was a recent high school graduate, dependent on his parents for financial support, with no dependents of his own;[20] however, the student body has undergone massive changes since the mid-twentieth century.[21] Approximately one-quarter of current undergraduate students are now raising dependent children.[22] The needs of "nontraditional" students[23] were not contemplated in the initial design and resource allocation of many collegiate programs, including in the initial design and allocation of university-provided housing. These resources have only been minimally updated in accordance with the changing needs of the student body.

Many postsecondary institutions with residential campuses have policies that explicitly[24] or implicitly[25] exclude student-parents from living in university-provided housing. For example, some university-provided housing units do not allow children to enter or visit the facilities[26] or limit the times during which

19. *See id.* (describing Clinton's plans to "[i]ncreas[e] [a]ccess to [q]uality [c]hild [c]are on [c]ampus," as well as boost access to financial scholarships, without mentioning increasing access to on-campus housing for student-parents and their families).

20. *See* Stephen G. Pelletier, *Success for Adult Students*, PUBLIC PURPOSE 1 (2010), http://www.aascu.org/uploadedFiles/AASCU/Content/Root/MediaAndPublications/PublicPurposeMagazines/Issue/10fall_adultstudents.pdf [https://perma.cc/C9CD-4KDR].

21. *See* GLENN C. ALTSCHULER & STUART M. BLUMIN, THE GI BILL: A NEW DEAL FOR VETERANS 86–87 (2009).

22. GAULT, REICHLIN & ROMÁN, *supra* note 1, at 4.

23. "Nontraditional" students are defined as having one or more of seven characteristics: "delayed enrollment into postsecondary education; attends college part-time; works full time; is financially independent for financial aid purposes; has dependents other than a spouse; is a single parent; or does not have a high school diploma." Pelletier, *supra* note 20, at 1.

24. *See* WILLIAM A. KAPLIN & BARBARA A. LEE, LAW OF HIGHER EDUCATION 986 (5th ed. 2013) (stating that universities routinely classify who may, and who must, live in university-provided housing on the basis of marital status and age); *see also, e.g.*, *Housing FAQs*, KEAN UNIVERSITY, OFFICE OF RESIDENTIAL STUDENT SERVS., http://www.kean.edu/offices/rss/residential-information/faqs [https://perma.cc/2V5S-KYV4] ("There is currently no housing at Kean University for students with children."); *On-Campus Residency Requirement–Residence Hall Policy*, BALL STATE UNIV., HOUSING AND RESIDENCE LIFE, http://cms.bsu.edu/campuslife/housing/policies/residencyrequirement [https://perma.cc/D8ZV-97GX] ("All students are required to live in university housing for two semesters unless they . . . are a custodial parent of a dependent child . . . .").

25. *See* Whitaker v. N.Y. Univ., 531 F. App'x 89, 91 (2d Cir. 2013) (assessing an FHA familial status discrimination allegation regarding NYU's policy that only students may live in university-provided housing).

26. TENN. STATE UNIV., CAMPUS LIVING GUIDE 7 (2012), http://www.tnstate.edu/housing/Campus_Living_GuideMarch2012.pdf [https://perma.cc/5L5T-5NMB] ("Small children are not permitted to visit in University Housing/Apartments.").

children may be present.[27] Under these policies, student-parents are excluded from university-provided housing because their children are explicitly excluded. Other universities have policies under which only registered students are eligible for university-provided housing.[28] These policies implicitly exclude the children of students, who are unlikely to be students themselves, as well as students' spouses and elderly dependents.

Student-parents are in particularly high need of institutional support systems,[29] which are uniquely accessible to students living in on-campus housing.[30] In the current collegiate environment, student-parents who enroll in postsecondary education tend to take longer to finish their degrees, and delays in completion negatively affect their labor market returns and postgraduate employment opportunities.[31] Scholars have blamed student-parents' low performance on inadequate institutional support, including meager financial aid policies, inadequate childcare on campus, and reductions in public cash assistance programs.[32]

When housing for student-parents is provided, there are often too few units to serve all student families[33] because the housing stock for student-parents has

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27. UNIV. OF ALA., BIRMINGHAM STUDENT HOUSING & RESIDENCE LIFE, RESIDENCE LIFE HANDBOOK 21 (2016), https://www.uab.edu/students/housing/images/DOCUMENTS/Residence-Life-Handbook-2016-2017-WIP_final.pdf [https://perma.cc/X9AM-86UL] ("For the safety and security of small children and the privacy of the residents, persons under the age of 16 are only permitted in the residence halls for a maximum of 4 hours between the hours of 10:00 AM and 8:00 PM."); WINSTON-SALEM STATE UNIV., DEP'T OF HOUS. & RESIDENCE LIFE, GUIDE TO LIVING ON CAMPUS 7, http://www.wssu.edu/campus-life/housing-and-residence-life/documents/guide-to-campus-living.pdf [https://perma.cc/WC3Y-Y3PG] ("Residence halls are not designed or equipped to meet the needs of young children. Except for move-in and move-out periods, the presence of infants and children under the age of 13 is not allowed.").

28. *See Whitaker*, 531 F. App'x at 91 (describing NYU's policy, under which only full-time registered students are allowed to live in university-provided housing).

29. Sara Goldrick-Rab & Kia Sorensen, *Unmarried Parents in College*, 20 FUTURE CHILDREN 179, 195 (2010).

30. *See supra* note 7 and accompanying text.

31. Goldrick-Rab & Sorensen, *supra* note 29, at 182–83.

32. *Id.* at 184, 189.

33. *See, e.g.*, *Family Resources and Housing*, N. ARIZ. UNIV., http://nau.edu/gradcol/student-resources/family-resources-housing/ [https://perma.cc/LDK2-PKUM] ("Family apartments may be available for married students or students with children. These units are very limited and in very high demand." (emphasis omitted)); *Family Housing*, MASS. INST. OF TECH., https://studentlife.mit.edu/housing/graduate-family-housing/get-housing/family-housing [https://perma.cc/9B4Z-M3V3] ("Supply is limited. Not everyone who applies for family housing will receive an assignment."); *University Apartments for Student Families*, UNIV. OF CAL., L.A., https://housing.ucla.edu/student-housing/graduate-students-and-students-with-families/students-with-families/university-apartments-for-student-families [https://perma.cc/G6H9-LHUL] ("These apartments are in high demand and the waiting list for some complexes is carried over from the preceding year."); *Canyon Crest Family Student Housing*, UNIV. OF CAL., RIVERSIDE, http://vcsaweb.ucr.edu/housingwebsite/housing-options/family-student-housing.aspx [https://perma.cc/2FRM-T7UA] ("We recommend you apply for Family Housing quickly after being admitted to UCR. All Family Housing applicants will be placed on an assignment list prioritized by the date on which the application is received. There is no guarantee of accommodation associated with Family Housing."); *About Graduate & Family Housing*, UNIV. OF KY., http://www.uky.edu/housing/graduate/

not been substantially updated since World War II.[34] After World War II, the federal government provided universities with assistance to transform their housing stock to meet the needs of a changing postsecondary student body.[35] Veterans flocked to universities across the country, along with their wives and children, because Title II of the GI Bill of Rights sponsored their tuition.[36] With authority from the Lanham Act of 1940, which authorized the federal government to construct public housing to aid the war effort, Congress appropriated nearly $450 million to help universities provide 101,462 new accommodations to GI students and their families.[37] Many of these residences were intended to be permanent because universities and the federal government estimated that, after veterans graduated, enrollment at many postsecondary institutions "would remain far larger than it had been in the prewar years."[38] These facilities remain today as some of the few university-provided housing facilities offered to student families.[39]

Restrictions on pregnant students and student-parents' access to safe and supportive housing are not just restrictions on their academic opportunities; these policies coerce the reproductive choices of all students and potential students. In a recent amicus brief to the Supreme Court, an anonymous student asserted that her university's restrictive housing policy for pregnant students motivated her decision to obtain an abortion while she was a freshman in college.[40] The student wrote:

> I found out I was pregnant just a few weeks after moving away from home to start college. When I told my resident advisor, she told me that pregnant students were not allowed to live in the university's dormitories out of a concern for increased liability. I was on full financial aid and could not afford a place to live off-campus on top of tuition, books and food. My decision to have an abortion was essential to the freedom that allowed me to finish college while working more than one job . . . .[41]

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about [https://perma.cc/F52G-7MSG] ("Apply as early as possible before you are scheduled to arrive. You will be placed on our waiting list. Housing is limited and placement is not guaranteed.").

34. *See, e.g.*, Anna McCollum, *Married Students Appreciate Family Housing Benefits, Hope for Improvements*, DM ONLINE (Apr. 14, 2015, 9:16 AM), http://thedmonline.com/married-students-appreciate-family-housing-benefits-hope-for-improvements/ [https://perma.cc/BR8U-9NCC] (describing the married student housing available at the University of Mississippi, built after WWII to accommodate returning soldiers and their families).

35. ALTSCHULER & BLUMIN, *supra* note 21, at 87–88.

36. *See id.* at 86.

37. *Id.* at 88.

38. *Id.*

39. *See* McCollum, *supra* note 34.

40. Brief of Janice MacAvoy, Janie Schulman, and Over 110 Other Women in the Legal Profession Who Have Exercised Their Constitutional Right to an Abortion as Amici Curiae Supporting Petitioners at 14, Whole Woman's Health v. Cole, 136 S. Ct. 2292 (2016).

41. *Id.*

To support not just current student-parents, but all those attending institutions of higher education, universities must repeal discriminatory policies and increase the housing stock suitable for students with families.

B. THE LEGAL GAP FOR STUDENT-PARENTS

There is no federal law barring discrimination based on familial status by educational institutions. Moreover, many of the antidiscrimination laws that have traditionally been used to champion equal educational opportunity do not provide protection to student-parents facing discrimination in university-provided housing.

Although the U.S. Department of Education has interpreted Title IX[42] as protecting pregnant students from discrimination, the statute offers little protection for students after they give birth. At most, the statute requires that universities provide those recovering from the experience of childbirth the same medical leave opportunities as similarly incapacitated students.[43] If the university refuses to provide housing to all student-parents, not just female student-parents, Title IX likely cannot be used to challenge the policy because the law only protects against sex-based discrimination.[44]

Additionally, Title IX exempts from its requirements any "educational institution which is controlled by a religious organization if the [requirements'] application . . . would not be consistent with the religious tenets of such organization."[45] Religiously affiliated universities have already sought permission to discriminate against unwed pregnant students.[46]

Equal Protection claims on behalf of student-parents in university-provided housing have also failed: the decision to exclude students based on familial status must be reviewed under the highly deferential rational basis standard because discrimination based upon a "suspect" classification or interference

42. 20 U.S.C. §§ 1681–1688.

43. Frequently Asked Questions: Pregnant and Parenting College and Graduate Students Rights, NAT'L WOMEN'S LAW CTR., https://nwlc.org/wp-content/uploads/2016/08/FAQStudentRights_nwlc_PPToolkitAug2016.pdf [https://perma.cc/6SST-UJLA] (last visited Sept. 25, 2016) (interpreting universities' requirements under Title IX).

44. *See* 34 C.F.R. § 106.40 (2016) (stating that "any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex" is prohibited).

45. 20 U.S.C. § 1681(a)(3) (2012). Religious organizations are not exempted from the Fair Housing Act. *See infra* note 74 and accompanying text.

46. See Letter from Catherine E. Lhamon, Assistant Secretary for Civil Rights, U.S. Dep't of Justice, to Dr. Brent Ellis, President, Spring Arbor University 2–3 (June 27, 2014), https://www.scribd.com/document/235290077/Spring-Arbor-University-Religious-Exemption-Response-6-27-14-FINAL [https://perma.cc/9PVA-FFFF] (granting multiple exemptions from Title IX, including exemptions from regulations prohibiting expulsion of pregnant students); Dirk VanderHart, *A Portland University Wants Federal Permission to Ban Transgender Students*, PORTLAND MERCURY (Dec. 9, 2015), http://www.portlandmercury.com/portland/a-portland-university-wants-federal-permission-to-ban-transgender-students/Content?oid=17134931 [https://perma.cc/L9AT-M6QU] (describing multiple exemptions to Title IX issued by the Department of Education, including exemption from rules prohibiting expulsion of unmarried pregnant students).

with a fundamental interest cannot be claimed.[47] For example, in 1975, a married couple attending the State University of New York at Stony Brook brought a civil rights action against the university challenging a provision of all university-provided housing agreements that barred children of students from living in married students' suites.[48] The Second Circuit held that the university was not constitutionally required to allow married students with children to live on campus, and the decision to exclude these families was not irrational based on the potential fire hazards, traffic problems, and other risks on campus from which the university allegedly desired to protect students' children.[49]

With traditional vehicles for eradicating educational inequality closed off to student-parents, equal educational opportunity advocates must think outside the box.

II. APPLYING THE FHA TO UNIVERSITY-PROVIDED HOUSING

The FHA, although not traditionally thought of as applying to university-provided housing, is unique among federal antidiscrimination laws because it explicitly protects against discrimination on the basis of familial status.[50] It should therefore be considered a potentially powerful tool in the fight for student-parents' rights.

One reason for the lack of discussion surrounding the claim proposed in this Note is that the FHA has only recently been used to challenge university-provided housing policies in strategic litigation on behalf of students.[51] In these cases, courts have found, based on the statutory definition and judicially-created test for "dwellings" under the FHA, that university-provided housing fits comfortably within the zone of housing accommodations the FHA was intended to regulate.

A. THE FHA'S PROHIBITION ON DISCRIMINATION BASED ON FAMILIAL STATUS

The FHA was enacted to "eradicate discriminatory practices within [the housing] sector of our Nation's economy."[52] On April 11, 1968, Congress

47. *See* Bynes v. Toll, 512 F.2d 252, 257–58 (2d Cir. 1975) (finding that the university's policy of denying housing to students with children in university marital suites was not "an arbitrary or irrational decision").

48. *Id.* at 253.

49. *Id.* at 257–58.

50. Individuals who face familial status discrimination often must bring their claim under a legal theory that the discrimination is in fact based on sex, or in violation of family and medical leave laws. *See* MODEL STATE FAMILY RESPONSIBILITIES PROTECTION ACT, http://www.abetterbalance.org/docs/Model_FRD_Statute.pdf [https://perma.cc/Z5W7-XTL3]. One exception is Executive Order 13,152, which prohibits discrimination based on "an individual's status as a parent" in federal employment. Exec. Order 13,152, 65 Fed. Reg. 26,115, 26,115 (May 2, 2000), https://www.dol.gov/oasam/programs/crc/eo013152.pdf [https://perma.cc/KLD8-UWT9].

51. *See* United States v. Univ. of Neb., 940 F. Supp. 2d 974, 975 (D. Neb. 2013); United States v. Kent State Univ., No. 5:14-cv-1992, 2015 WL 5522132, at *3 (N.D. Ohio Sept. 16, 2015).

52. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2521 (2015).

passed the first iteration of the FHA, Title VIII of the Civil Rights Act of 1968, which outlawed discrimination on the basis of race, color, or national origin in the sale or rental of private or public housing.[53] Congress amended the FHA in 1974 to prohibit sex- and religious-based discrimination[54] and in 1988 to add disability and familial status as protected classes.[55]

President Reagan signed the Fair Housing Amendments Act of 1988 (the Amendments)[56] into law at a time when "adults-only" and limited occupancy apartments and condominiums were proliferating the United States' rental market.[57] HUD found that during the 1980's, 25.5% of rental units excluded families with children outright, and 50% of rental units placed some form of restriction on occupancy by families.[58] Prior to the passage of the Amendments, a few courts found adults-only policies already violated the FHA because they had a greater impact on black and Hispanic households, which were statistically more likely to include minor children.[59]

To combat familial status discrimination and increase the housing stock for families, the Amendments established a new protected class based on familial status, which includes: any parent or legal guardian domiciled with another individual under eighteen years of age, pregnant women, and any person in the process of gaining legal custody over any individual under eighteen years of age.[60] The Amendments created a new prohibition on discrimination based on familial status in the form of refusals to rent or sell a dwelling;[61] differential terms, conditions, or privileges of a sale or rental;[62] steering;[63] differential

53. 42 U.S.C. §§ 3601–3619 (2012).

54. Nondiscrimination in Programs and Activities Receiving Assistance Under Title I of the Housing and Community Development Act of 1974, 24 C.F.R. §§ 6.1–6.13 (2016).

55. Fair Housing Amendments Act of 1988, Pub. L. No. 100–430, 102 Stat. 1619 (1988).

56. H.R. Res. 1158, 100th Congress, 2d Sess., 134 CONG. REC. H6491–97 (daily ed. Aug. 8, 1988).

57. *See* Michael A. Wolff, Comment, *The Fair Housing Amendments Act of 1988: "A Critical Analysis of Familial Status,"* 54 MO. L. REV. 393, 396 (1989). Because many of the families that rent are black or Hispanic, advocates believed that these policies were racially motivated. *Id.* (citing *Fair Housing Amendments Act of 1987: Hearings on H.R. 1158 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 390–91 (statement of James B. Morales, Staff Atty., Nat'l Center for Youth Law)).

58. HUD, OFFICE OF POLICY DEVELOPMENT & RESEARCH, MEASURING RESTRICTIVE RENTAL PRACTICES AFFECTING FAMILIES WITH CHILDREN: A NATIONAL SURVEY 24 (1980).

59. *See* Halet v. Wend Invest. Co., 672 F.2d 1305, 1311–12 (9th Cir. 1982); Betsey v. Turtle Creek Assocs., 736 F.2d 983, 985 (4th Cir. 1984).

60. 42 U.S.C. § 3602(k) (2012). The familial status provision does not cover all married individuals; rather, it was designed to cover only families with children. *See* H.R. REP. NO. 100–711, at 23 (1988).

61. 42 U.S.C. § 3604(a) (2012). This includes imposing different sale or rental prices and using different application criteria. *See* 24 C.F.R. § 100.60b (2016).

62. 42 U.S.C. § 3604(b) (2012). This includes imposing different policies for rent, deposits, terms of payment, or closing; imposing different policies, including denying or limiting, as to general incentives, benefits or privileges; limiting or refusing to provide maintenance and repairs; and delaying communication of an offer to buy or rent. *See* 24 C.F.R. § 100.65b (2016).

63. 42 U.S.C. § 3604(b) (2012). This is defined in 24 C.F.R. § 100.70(a) as practices which attempt "to restrict or attempt to restrict the choices of a person by word or conduct . . . [or] to perpetuate . . . segregated housing patterns." Steering may include directing persons to specific communities

advertisement of a sale or rental of a dwelling;[64] and misrepresentations that a dwelling is unavailable for rental or sale.[65]

Although the FHA's prohibition on familial status discrimination in housing has been in place for nearly thirty years, discriminatory housing practices that target families persist through the housing market. In 2013, familial status was the third most common basis of housing discrimination complaints reported to HUD.[66]

When university policies close the door on student-parents, those students face obstacles trying to secure alternative housing because discrimination against families with children in rental housing in "college towns" is rampant. A recent study by CNY Fair Housing[67] conducted in the area surrounding Syracuse University revealed differential treatment based on familial status in the majority of rental housing tested.[68] Additionally, there are common policies and practices in many university towns that burden students who experience unplanned pregnancies and childbearing, such as landlords requiring students to sign their leases as early as a year in advance.[69]

B. THE STATUTORY DEFINITION OF "DWELLING" UNDER THE FHA

The text of the FHA prohibits discrimination in the occupancy, sale, or rental of a "dwelling."[70] A "dwelling" is defined as a building or structure that will serve as a "residence" for a family or single person.[71] The statute does not define "residence."[72]

Because many students "reside" in university-provided housing, such housing appears to fit within the plain meaning of the statute. HUD seems to have endorsed this reading of the statute, too, issuing regulations in 1989 further defining "dwelling" by providing examples including university-provided housing:

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based on their protected class; discouraging inspection or purchase of a unit because of their protected class; "exaggerating drawbacks or failing to inform . . . of desirable features"; warning about community dislike of persons of his or her protected class; or assigning persons to a particular area of the building or community based on their protected class. *Id.* § 100.70(c).

64. 42 U.S.C. § 3604(c) (2012).

65. *Id.* § 3604(d).

66. *See* ANNUAL REPORT ON FAIR HOUSING FY 2012–2013, *supra* note 10, at 19 (explaining that the first most common basis for discrimination complaints was disability and the second most common was race).

67. CNY Fair Housing is a private non-profit organization dedicated to eliminating housing discrimination in Central and Northern New York State. *See About Us*, CNY FAIR HOUSING, http://cnyfairhousing.org/about-us/ [https://perma.cc/JJG6-V3LQ].

68. CNY Fair Housing, *supra* note 9, at 6–7.

69. *See* Jarvis, *supra* note 9.

70. 42 U.S.C. § 3604 (2012)

71. *Id.* § 3602(b).

72. *See id.* §§ 3601–3619.

> Examples of dwelling units include a single family home and an apartment unit within an apartment building. In other types of dwellings . . . in which sleeping accommodations are provided but toileting or cooking facilities are shared by occupants of more than one room or portion of the dwelling, rooms in which people sleep are "dwelling units." For example, dormitory rooms . . . are "dwelling units."[73]

University-provided housing also likely fits within the statutory definition of "dwelling" because it is not included in the list of excluded housing units. The FHA explicitly exempts from its scope certain types of rentals or sales, including: rentals by certain religious organizations and clubs to which membership is exclusive, where the organization does not commercially rent the dwelling;[74] the sale or rental of rooms within single-family houses;[75] and the rental of rooms in a single building where the landlord lives in one of the rooms.[76] Additionally, pursuant to the Housing for Older Persons Act of 1995,[77] the prohibition on familial status discrimination does not apply to housing specifically designed and operated to assist elderly persons.[78]

In *United States v. Kent State University*, the Northern District of Ohio held that university-provided housing falls within the statutory definition of "dwelling" under the FHA.[79] The United States brought an FHA challenge[80] to the university's policy of refusing to grant accommodation requests from students seeking to live with untrained assistance animals, including therapy animals, support animals, and comfort animals, in university-provided housing.[81]

The district court relied heavily on "student housing" or "university owned housing" not being specifically exempted from the FHA;[82] therefore, the court found that the plain language of the FHA, encompassing any "building . . . which is occupied as . . . a residence by one or more families,"[83] renders the rights granted by the statute applicable to "student housing." The court noted that "it comes as no surprise to the Court that there are not any lengthy analyses in case law determining whether student housing is covered by the FHA" because the fit was so clear.[84]

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73. Implementation of the Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3,232, 3,244 (Jan. 23, 1989) (codified in scattered sections of 24 C.F.R.).

74. 42 U.S.C. § 3607(a) (2012).

75. *Id.* § 3603(b)(1).

76. *Id.* § 3603(b)(2).

77. Pub. L. 104–76, 109 Stat. 787 (1995).

78. 42 U.S.C. §§ 3607(b)(1)–(2) (2012).

79. No. 5:14-cv-1992, 2015 WL 5522132, at *3 (N.D. Ohio Sept. 16, 2015).

80. The FHA prohibits discrimination in housing on the basis of "handicap." *See* 42 U.S.C. § 3602(h) (2012).

81. Complaint at 4, United States v. Kent State Univ., No. 5:14-cv-1992 (N.D. Ohio Sept. 8, 2015).

82. United States v. Kent State Univ., No. 5:14-cv-1992, 2015 WL 5522132, at *3; *see also supra* notes 53–57 and accompanying text.

83. 42 U.S.C. § 3602(b) (2012).

84. *Kent State Univ.*, 2015 WL 5522132, at *3.

C. THE JUDICIALLY-CREATED STANDARD FOR ASSESSING WHETHER NONTRADITIONAL HOUSING IS A "DWELLING" UNDER THE FHA

Although university housing appears to fit well within the plain meaning of "dwelling" under the FHA, judicially-created tests further support that finding because courts have given generous construction to FHA's broad and inclusive language to effectuate the statute's overarching policy goals.[85] Using judicial interpretation, many nontraditional types of rentals fall within the scope of "dwelling" because the occupant intends to return[86] and treats the premises as her primary living space.[87] Under this analysis, federal courts have found some homeless shelters,[88] migrant farmer housing,[89] mobile home sites,[90] and boarding schools[91] fall within the scope of the FHA. But courts have consistently found that other types of nontraditional housing, such as bed and breakfasts,[92]

85. *See* Lakeside Resort Enters., LP v. Bd. of Supervisors of Palmyra Twp., 455 F.3d 154, 156 (3d Cir. 2006); *see also* United States v. Hughes Mem'l Home, 396 F. Supp. 544, 548 (W.D. Va. 1975) (citing Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211–12 (1972) (holding that the Court should be guided by the principle that the FHA implements a policy that has been accorded the highest national priority, and it is therefore to be construed liberally in accordance with that purpose)).

86. *See Hughes Mem'l Home*, 396 F. Supp. at 549 (holding that a private, nonreligious home for needy children qualified as a "residence" under the ordinary meaning of the term, which distinguished residences as a temporary or permanent place where the occupant "intends to return," rather than a place where one only intends to visit); United States v. Columbus Country Club, 915 F.2d 877, 881 (3d Cir. 1990) (holding that annual members of the social club's bungalow community were not "mere transients" because (1) occupants "intend[ed] to remain in the bungalows for any significant period of time," and (2) occupants "view[ed] their bungalows as a place to return to").

87. *See* Schwarz v. City of Treasure Island, 544 F.3d 1201, 1214–15 (11th Cir. 2008) (holding that a halfway house was a "dwelling" under the FHA because residents treated the space like a home by cooking, cleaning, doing laundry, and receiving mail there).

88. *See* Hunter v. District of Columbia, 64 F. Supp. 3d 158, 176 (D.D.C. 2014); Jenkins v. N.Y.C. Dep't of Homeless Servs., 643 F. Supp. 2d 507, 518 (S.D.N.Y. 2009) (finding that a homeless shelter qualified as a dwelling under the FHA because the occupants intended to stay there as long as possible); Turning Point, Inc. v. City of Caldwell, 74 F.3d 941, 945 (9th Cir. 1996); Woods v. Foster, 884 F. Supp. 1169, 1173 (N.D. Ill. 1995). Homeless shelters do not always fall within the scope of the FHA; courts look to the typical length of stay in the facility. *See* Smith v. Salvation Army, No. 13-114-J, 2015 WL 5008261 at *4–5 (W.D. Pa. Aug. 20, 2015) (finding that a homeless shelter was not a dwelling under the FHA); Intermountain Fair Hous. Council v. Boise Rescue Mission Ministries, 655 F. Supp. 2d 1150, 1158–59 (D. Idaho 2009) (finding that a homeless shelter was not a dwelling under the FHA because occupants could only stay for a maximum of 17 consecutive nights and were not guaranteed the same bed each night).

89. *See* Lauer Farms, Inc. v. Waushara Cnty. Bd. of Adjust., 986 F. Supp. 544, 557–58 (E.D. Wisc. 1997); Villegas v. Sandy Farms, Inc., 929 F. Supp. 1324, 1328 (D. Ore. 1996); Hernandez v. Ever Fresh Co., 923 F. Supp. 1305, 1308–09 (D. Ore. 1996).

90. *See* United States v. Grooms, 348 F. Supp. 1130, 1133 (M.D. Fla. 1972).

91. *See* Franchi v. New Hampton Sch., 656 F. Supp. 2d 252, 260 (D.N.H. 2009); United States v. Mass. Indus. Fin. Agency, 910 F. Supp. 21, 26 n.2 (D. Mass. 1996); *cf. Hughes Mem'l Home*, 396 F. Supp. at 549 (needy children's home).

92. *See* Amazing Grace Bed & Breakfast v. Blackmum, No. 9-298-WS-N, 2009 WL 4730729, at *4 (S.D. Ala. Nov. 30, 2009); Schneider v. County of Will, 190 F. Supp. 2d 1082, 1087 (N.D. Ill. 2002).

motels,[93] and jails,[94] cannot be "dwellings" under the FHA.

Under the judicially-created test, the District of Nebraska held that the FHA applies to university-provided dormitories in *United States v. University of Nebraska*.[95] The United States brought an FHA action on behalf of a student whose request to live with her emotional therapy dog in university-provided housing was denied based on the university's blanket "no-pets" policy.[96] The court found that university-provided student housing appears residential because "students living in those facilities eat their meals, wash their laundry, do their schoolwork, socialize, and sleep there, just as people ordinarily do in the places they call home."[97]

Although, as the University of Nebraska argued, students typically do not return to student housing after their first year and usually identify a "permanent" address elsewhere, the court emphasized that housing that is "temporary" is not also "transient."[98] Most rental housing has a set term limit, but the fact that the resident intends to leave "at some point" does not "remove any residential premises leased for a finite term from the scope of the FHA."[99]

The University also argued that dormitories are different from "dwellings" under the FHA because first-year students are typically required to live in university-provided housing in accordance with school policy.[100] Additionally, students are assigned to particular rooms and roommates with limited input and are subject to onerous rules and restrictions.[101] The University argued that this type of restrictive living environment is more closely associated with jails than residential housing.[102]

In response, the court held that "rules [do not] make a place less 'residential'" so long as the resident is a willing participant in the structured program.[103] Because the students chose to attend the University of Nebraska, they chose to live subject to the University's terms,[104] which may be less restrictive than other

93. *See* Patel v. Holley House Motels, 483 F. Supp. 374, 381 (S.D. Ala. 1979).

94. *See* Garcia v. Condarco, 114 F. Supp. 2d 1158, 1161 (D.N.M. 2000) (finding that a jail is not a dwelling because the primary purpose of occupancy of a jail is to experience punishment, to deter future breaches of the law, to protect the public, and to provide correctional treatment).

95. United States v. Univ. of Neb., 940 F. Supp. 2d 974, 983 (D. Neb. 2013). The Second Circuit has also applied the FHA to university-provided housing without extensive analysis of the dwelling requirement. *See* Hack v. President & Fellows of Yale Coll., 237 F.3d 81, 88 (2d Cir. 2000) (finding that the plaintiffs had stated a claim under the FHA for religious discrimination because they were required by the University's policy to live in coeducational dorms on campus during freshman and sophomore year although they held religious beliefs against living with the opposite sex).

96. *Univ. of Neb.*, 940 F. Supp. 2d at 975–76.

97. *Id.* at 978.

98. *Id.*

99. *Id.* (citing Cohen v. Twp. of Cheltenham, 174 F. Supp. 2d 307, 323 (E.D. Pa. 2001)).

100. *Id.* at 979.

101. *Id.*

102. *Id.* at 979–80.

103. *Univ. of Neb.*, 940 F. Supp. 2d at 980–81.

104. *Id.* at 980.

housing options, like their parental residences.[105]

In sum, federal district courts have found that university-provided housing falls within the statutory definition and judicially-created test for "dwelling" under the FHA. As more university housing policies are challenged under the FHA, the question of applicability is unlikely to present the biggest hurdle for litigants.

III. USING THE FAIR HOUSING ACT TO PROTECT STUDENT-PARENTS

Having concluded that university-provided housing fits within the scope of the FHA, this Part applies the FHA to university housing policies that explicitly or implicitly exclude student-parents. Section III.A assesses university policies and practices excluding student-parents under the disparate treatment and disparate impact tests of the FHA and demonstrates that many university policies are likely violating civil rights laws. Section III.B assesses potential justifications for excluding student-parents that universities could posit under the burden-shifting framework of the FHA and argues that most of these justifications will not hold water under FHA precedent.

A. APPLYING THE FHA TO UNIVERSITY-PROVIDED HOUSING THAT EXCLUDES STUDENT-PARENTS

The bulk of the complexity of this novel legal claim will lie in whether courts find policies that explicitly or implicitly exclude parenting students constitute disparate treatment or create disparate impact. First, this section determines that, as a threshold matter, university policies that exclude student-parents can be challenged under the FHA, even if universities argue that these policies are mere "qualification requirements." Next, this section finds that although university policies that explicitly exclude student-parents likely constitute disparate treatment under the FHA, policies that implicitly exclude these students likely do not. This section, however, concludes by finding that a disparate impact analysis may lead courts to overturn implicitly discriminatory policies if student-parents can show that these policies predictably lead to their underrepresentation in university-provided housing.

1. Are Student-Parents Simply Not Qualified for University-Provided Housing?

As a threshold in both disparate treatment and disparate impact claims, the plaintiffs must show that they are: (1) members of a statutorily protected class who (2) sought and were qualified for housing and (3) were rejected although the housing remained available to others.[106] One initial hurdle plaintiffs will face is showing that policies excluding student families do not constitute qualifications for housing.

105. *Id.* at 981.
106. *See* 42 U.S.C. §§ 3604(a), (c) (2012).

Housing providers may legally establish qualifications for tenants, and these qualifications may include enrollment at a particular university.[107] A potential tenant who does not meet the qualifications for housing does not have standing to sue under the FHA because a favorable decision on the discrimination claim would not redress the injury of being denied housing if the person was still not qualified for the housing.[108] For example, in *Wilson v. Glenwood Intermountain Properties, Inc.*, the plaintiffs lacked standing to challenge the operation of gender-segregated and single-gender apartments that were reserved solely for Brigham Young University students because "[a]s non-students . . . they would not have qualified to rent the student apartments."[109]

Plaintiffs, however, may challenge a qualification if it excludes applicants on the basis of a protected characteristic. For example, a family with children may challenge an adults-only policy that technically disqualifies their housing application because the qualification discriminates on the basis of familial status.[110] Thus, a qualification requirement that a student with children is ineligible to live in university-provided housing is challengeable under a disparate treatment theory because it excludes applicants on the basis of a protected characteristic.

"Students-only" qualifications have been viewed both as neutral qualifications requirements[111] and as facially discriminatory qualifications.[112] In *Whitaker*, a challenge to NYU's students-only housing policy brought by a student-parent, the Second Circuit found that the policy was not facially discriminatory on the basis of familial status because Whitaker's child was not a student, and therefore the child was not qualified to live in the dormitories on an unprotected basis, "non-student" status.[113] However, in *Interfaith Housing Center of the Northern Suburbs v. Bernsen*, the Northern District of Illinois viewed students-only policies differently. Looking to the student-parent only, who was qualified for the housing at issue because he was a student, the district court found that the students-only policy made the applicant unqualified solely because he wanted to live with his child, and thus discriminated based on his familial status.[114]

Whitaker was wrongly decided because the court implicitly viewed the child as an applicant for the housing and assessed the child's eligibility for occupancy on an individual basis. This legal fiction could swallow the familial status discrimination prohibition whole because children as individual applicants would not qualify for occupancy under a wide swath of neutral housing policies, such

107. Wilson v. Glenwood Intermountain Props., Inc., 98 F.3d 590, 594 (10th Cir. 1996) ("The [FHA] does not make it unlawful for landlords to give preference to college students over non-students . . . .")

108. *See id.*

109. *Id.*

110. *See* Morgan v. Sec'y of Hous. & Urban Dev., 985 F.2d 1451, 1457 (10th Cir. 1993).

111. *See* Whitaker v. N.Y. Univ., 531 F. App'x 89, 91 (2d Cir. 2013).

112. *See* Interfaith Hous. Ctr. of the N. Suburbs v. Bernsen, No. 11-cv-1146, 2011 WL 2712587, at *3–4 (N.D. Ill. July 13, 2011).

113. 531 F. App'x at 91.

114. *Bernsen*, 2011 WL 2712587, at *4.

as minimum income requirements. Additionally, this view runs counter to common rental practices of viewing the applicants for occupancy as a unit, rather than individuals. For example, with minimum income requirements it is commonplace that the income of one applicant, if it alone satisfies the overall income requirement, would satisfy the requirement on behalf of all applicants. Although some neutral housing policies, like non-smoker policies, view each potential occupant as an individual, allowing landlords to use these individualistic policies to exclude children would run counter to the purpose of the Amendments.

Plaintiffs may also challenge a qualification if the requirement has a discriminatory impact on members of a protected class. For example, in *Bronson v. Crestwood Lake Section 1 Holding Corp.*, a federal court found that the housing owner's policy of not considering as qualified applicants persons who received a certain type of federal housing assistance, or who did not have an income of at least three times the rent for the desired apartment, had a disproportionate and adverse impact on black and Hispanic housing applicants in violation of the FHA.[115] The challengers in that case were not "qualified" for the housing; however, the court preliminarily enjoined the policy because it had "a substantially disparate impact upon otherwise qualified minority households."[116] Thus, even if students-only policies constitute neutral qualification requirements as a matter of disparate treatment, the qualification requirement may be challenged under a disparate impact theory. The plaintiff's disparate impact claim in *Whitaker* was unsuccessful because the plaintiff, representing herself pro se, failed to produce sufficient evidence of the impact of the students-only policy on others.[117] A litigant with greater resources could have a better chance of proving that students-only policies produce a substantial impact not only on the named plaintiff, but also on all student-parents enrolled at a university.

2. Disparate Treatment of Student-Parents

Disparate treatment claims are based on intentional discrimination. Intentional discrimination exists when a policy facially discriminates on the basis of a protected characteristic[118] or when a discriminatory motive can be shown.[119] Discriminatory motive can be inferred from the circumstances surrounding the

115. 724 F. Supp. 148, 154 (S.D.N.Y. 1989).

116. *Id.*

117. *Whitaker*, 531 F. App'x at 91 (assessing the students-only policy under a disparate impact theory to determine whether there was a "significantly adverse or disproportionate impact on persons of a particular type produced by the defendant's facially neutral acts or practices," but finding that the plaintiff had failed to produce sufficient evidence to establish a prima facie case).

118. *See* Iniestra v. Cliff Warren Invs., Inc., 886 F. Supp. 2d 1161, 1166 (C.D. Cal. 2012) (holding a policy requiring only children to obey a curfew in the housing complex was facially discriminatory).

119. *See* Frederic S. Schwartz, *Making and Meeting the Prima Facie Case Under the Fair Housing Act*, 20 AKRON L. REV. 291, 296–97 (1986).

policy's adoption[120] or if the clear effect from a policy or practice cannot be explained on permissible grounds.[121]

Courts have found several types of housing rules or policies impermissible because they constitute disparate treatment on the basis of familial status, including policies that limit housing to "adults-only,"[122] that mandate adult supervision of children in the housing unit at particular times[123] and restrict the use of certain amenities within a housing facility to adults only.[124]

Policies that forbid children from entering university-provided housing,[125] or forbid student-parents from applying to live in university-provided housing,[126] use protected characteristics to deny housing for student-parents and their children, and are therefore facially discriminatory under the FHA.

Students-only policies present a harder case under the disparate treatment framework. Students-only housing policies do prevent student-parents from living in university-provided housing because their dependents are ineligible to live there. These policies are arguably akin to the adults-only policies[127] that the Amendments were passed to prohibit[128] because they limit housing eligibility based on age, although implicitly, and therefore prevent families with children from accessing housing.

Students-only policies might constitute de facto adults-only policies because children are rarely university students. Although the Age Discrimination Act of 1975[129] prohibits discrimination based on age in educational programs that receive federal financial assistance,[130] including reverse age discrimination,[131] the actual number of postsecondary students under the age of eighteen is

120. *See, e.g.*, United States v. Lepore, 816 F. Supp. 1011, 1017–21 (M.D. Pa. 1991) (finding a discriminatory motive for an occupancy cap because the mobile home park previously had an adults-only policy in place).

121. *See* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977) (citing Yick Wo v. Hopkins, 118 U.S. 356 (1886); Gomillion v. Lightfoot, 364 U.S. 339 (1960)).

122. *See* Morgan v. Sec'y of Hous. & Urban Dev., 985 F.2d 1451, 1454–57 (10th Cir. 1993) (holding that the mobile home park's adults-only policy constituted disparate treatment based on "familial status" by preventing a family with a 3-year-old from purchasing a home on the lot). The FHA exempts housing for older people, like nursing homes and retirement communities. *See* 42 U.S.C. § 3607(b)(1) (2012).

123. *See Iniestra*, 886 F. Supp. 2d at 1166 (striking down a policy requiring supervision for children under eighteen in the swimming pool and other common areas under the FHA).

124. *See* United States v. Plaza Mobile Estates, 273 F. Supp. 2d 1084, 1091 (C.D. Cal. 2003) (holding that age-restrictive rules governing the use of community facilities such as swimming pools, recreational buildings, and park streets, were facially discriminatory because they treated children, and thus families with children, less favorably than adults).

125. *See supra* notes 26–27 and accompanying text.

126. *See* WILLIAM A. KAPLIN & BARBARA A. LEE, *supra* note 24, at 986.

127. *See Morgan*, 985 F.2d at 1457 (holding that the mobile home park's adults-only policy constituted disparate treatment based on "familial status").

128. *See supra* note 57 and accompanying text.

129. 42 U.S.C. §§ 6101–6107 (2012).

130. *Id.* § 6107(4)(B)(i).

131. *See* Long v. Fulton Cnty. Sch. Dist., 807 F. Supp. 2d 1274, 1284–85 (N.D. Ga. 2011); Rannels v. Hargrove, 731 F. Supp. 1214, 1220 (E.D. Pa. 1990).

extremely low because high school completion is a college prerequisite for many university accreditation organizations.[132] Additionally, the youngest person to graduate college in the United States was ten years old;[133] student-parents are more likely to have younger children. Therefore, although students-only policies do not explicitly relate to the age of occupants, they treat children, and thus student-parents, less favorably by making them de facto ineligible for the housing.

However, students-only policies may exclude potential residents other than the children of student-parents. If the university does not allow married students to live with non-student spouses in campus housing, these students may be similarly disproportionately forced out of on-campus housing.[134] Likewise, students with dependent elderly family members may be compelled to live off-campus to provide their family members with care under students-only policies.[135] Because students-only policies affect more than just student-parents, one cannot simply assume that these policies were designed with a discriminatory intent.[136] If a court finds that students-only policies are not facially discriminatory on the basis of familial status, a disparate treatment challenge can only succeed if a litigant proves that the policy was adopted under circumstances that suggest a discriminatory motive.[137]

3. Disparate Impact on Student-Parents

Student-parents may be able to allege an FHA violation by showing that a facially neutral policy has a disproportionate effect on student-parents as a class. In a narrowly decided case, *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, the Supreme Court recently held that the FHA's prohibition on discrimination "because of" race encompassed disparate impact causes of action.[138] Although Justice Alito asserted that this interpretation of the statutory phrase "because of" "tortur[ed] the English

132. *See* JOHN S. BRUBACHER & WILLIS RUDY, HIGHER EDUCATION IN TRANSITION: A HISTORY OF AMERICAN COLLEGES AND UNIVERSITIES 244–45 (4th ed. 1997) (discussing the accreditation organizations' standardization of high school education as a prerequisite for college admission in the 1880s).

133. *The 10 Youngest College Students of All Time*, TEACHTHOUGHT.COM (Aug. 24, 2012), http://www.teachthought.com/uncategorized/the-10-youngest-college-students-of-all-time/ [perma.cc/V7ZJ-JSDU].

134. The FHA does not prohibit housing discrimination based on marital status. *See id.* § 3604 (omitting marital status from the list of protected characteristics).

135. The FHA only protects families with children, not families with elderly dependents. *See* 42 U.S.C. § 3602(k) (specifying that family status protection is provided for "one or more individuals (who have not attained the age of 18 years) being domiciled with . . . a parent or another person having legal custody of such individual or individuals . . . .").

136. *See supra* note 121 (describing a line of cases in which the policies at issue affected narrow classes of individuals, leading the Court to assume discriminatory intent).

137. *See* Schwartz, *supra* note 119, at 296–97.

138. *See* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2519 (2015).

language,"[139] a point not directly answered by the majority, the *Inclusive Communities* majority relied on precedent involving the interpretation of the phrase "because of" in similar antidiscrimination statutes[140] as well as Congress move to amend the FHA in 1988 at a time when many appellate courts had already endorsed disparate impact claims and the legislative body's decision to retain the relevant statutory text in that legal context.[141]

To establish a disparate impact claim under the FHA, student-parents "must demonstrate that a facially neutral policy actually or predictably leads to underrepresentation of families with children in the housing relative to the general population."[142] For example, although the FHA does not overturn reasonable local, state, or federal maximum occupancy restrictions,[143] facially neutral numerical occupancy restrictions may be subject to disparate impact challenges.[144] Thus, a plaintiff may use statistics to show that a policy prohibiting more than two persons per bedroom disparately impacts families with children when, for example, approximately 30% of households with children in the city are affected by the rule, compared to 9.98% of households without children.[145]

A showing of disparate impact requires more than a simple showing of statistical imbalance negatively affecting a protected class;[146] rather, a plaintiff

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139. *Id.* at 2534 (Alito, J., dissenting); *see also id.* at 2526–28 (Thomas, J., dissenting) (writing separately to argue that the textual interpretation underpinning the Court's Title VII decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), was errant and that "because of" in Title VII means "motivated by").

140. *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2519 (referring to Smith v. City of Jackson, 544 U.S. 228 (2005) (interpreting "because of" in the Age Discrimination in Employment Act of 1967); *Griggs*, 401 U.S. at 424 (interpreting "because of" in the Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000e-2(h))).

141. *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2519–20.

142. Meyer v. Bear Rd. Assocs., 124 F. App'x 686, 688 (2d Cir. 2005) (citing Hack v. President & Fellows of Yale Coll., 237 F.3d 81, 90–91 (2d Cir. 2000)).

143. 42 U.S.C. § 3607(b)(1) (2012).

144. *See* H.R. REP. NO. 100–711, at 31 (stating that maximum occupancy regulations may "not operate to discriminate" against any of the classes protected by the FHA); *see also* Fair Hous. Council of Orange Cty., Inc. v. Ayres, 855 F. Supp. 315, 318 (C.D. Cal. 1994) (finding that defendant's occupancy restriction limiting households to two people was facially neutral but had a disparate impact on intact families with children, i.e. two parents and a child); United States v. Badgett, 976 F.2d 1176, 1179–80 (8th Cir. 1992) (holding that a one-person/one-bedroom policy violated the FHA even though it was "applied to everybody, whether they be married or whether they be couples seeking to live together without benefit of marriage or whether they be a child").

145. *See* Gashi v. Grubb & Ellis Prop. Mgmt. Servs., Inc., 801 F. Supp. 2d 12, 17 (D. Conn. 2011); *see also Ayres*, 855 F. Supp. at 318 (supporting disparate impact claim with U.S. Census data to show the large percentage of families with children excluded from renting apartments under the two-person occupancy policy).

146. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2523 (2015); *see also* Whitaker v. N.Y. Univ., 531 F. App'x 89, 91 (2d Cir. 2013) (holding that the plaintiff failed to produce enough data to show that students with children were more harmed by the students-only policy than other students); Pack v. Fort Washington II, 689 F. Supp. 2d 1237, 1244–45 (E.D. Cal. 2009) (rejecting the plaintiffs' bare assertion that children were more likely to use skateboards, bicycles, and roller blades in the apartment complex than other tenants).

must prove a "robust" causal connection between the challenged policy and any statistical disparity.[147] Additionally, disparate impact challenges must concern a policy or practice by a housing provider, not a one-time decision.[148]

Student-parents may thus challenge neutral students-only housing policies under the FHA with a disparate impact claim if they are able to show that the policy actually or predictably leads to underrepresentation of student families in the housing provided by universities relative to the general population of students.[149]

For typical college-aged students, who are dependent on their parents, students-only policies have little to no effect on housing choices; therefore, these "traditional students" are able to seek and attain accommodation in university-provided housing in far greater numbers than students who must live with their own dependents.[150]

However, a disparate impact claim may face problems because other classes of students—those with non-student spouses or elderly dependents—are also barred from living in university-provided housing by students-only policies. In some jurisdictions, student-parents may need to show they have a greater need to live together than these other types of students.[151] Other jurisdictions allow FHA disparate impact challenges of facially neutral laws to proceed without a showing of greater harm to the protected class;[152] under this test, occupancy limits have been successfully challenged on the basis of familial status discrimination even though these policies also negatively affect those who wish to live together for other, unprotected reasons.[153]

The latter test should be applied in FHA challenges in every jurisdiction. The FHA allows for disparate impact challenges of facially neutral laws,[154] but requiring a showing of a greater burden than other impacted groups allows facial neutrality to creep back in as a defense. For the *Inclusive Communities* majority, the most crucial consideration in finding disparate impact claims viable under the FHA was the need for an expansive reading of the law to

147. *Id.*

148. *Id.*

149. *See* 42 U.S.C. § 3604(b) (2012); *see also* Hack v. President & Fellows of Yale Coll., 237 F.3d 81, 90–91 (2d Cir. 2000) (holding that students' claim failed because it did not allege that Yale's policy resulted in the underrepresentation of Orthodox Jewish students in student housing).

150. Of course, statistical support for such a claim would need to be provided by the plaintiff in a FHA case. Such specific data analyses are beyond the scope of this Note.

151. *See* Meyer v. Bear Rd. Assocs, 124 F. App'x 686, 688 (2d Cir. 2005) (holding that to meet their burden of demonstrating a disparate impact based on familial status of a housing policy charging more in rent to groups larger than four tenants living in two- or three-bedroom apartments that plaintiffs must show that "families have a greater need to live together than other large groups (qualitatively or through statistical analysis), and that the rental pricing policy prevents them from doing so").

152. United States v. Badgett, 976 F.2d 1176, 1179 (8th Cir. 1992) ("If the result of this policy is a disparate impact on a protected class, facial neutrality will not save the restriction from violating the Act.").

153. *See supra* notes 144–45 and accompanying text.

154. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2516 (2015).

accomplish Congress' goal in enacting it: replacing a residentially segregated society with a more integrated one.[155] Justice Kennedy acknowledged that disparate impact litigation "plays a role in uncovering discriminatory intent: [i]t permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment."[156] Congress chose to protect against discrimination based on familial status, rather than marital status[157] or caregiver status,[158] and to provide families as defined by the statute with a greater supply of housing; therefore, legal tests for disparate impact must not find equal treatment with other excluded but unprotected classes sufficient.

B. COUNTERING UNIVERSITY JUSTIFICATIONS FOR STUDENTS-ONLY HOUSING POLICIES

Where a prima facie violation of the FHA has been established, the defendant may justify its facially neutral policy by demonstrating a legitimate public interest for the action, in the case of governmental defendants, or by demonstrating a legitimate business reason for the conduct, in the case of nongovernmental defendants.[159] If the defendant satisfies this burden, the plaintiff must prove that the nondiscriminatory reasons asserted by the defendant are merely a pretext for discrimination.[160]

The contradictory language about the necessary fit between a defendant's justifications and his actions in *Inclusive Communities* has led to some confusion regarding how narrowly tailored the defendant's policy must be to his proffered justification.[161] The majority stated that the defendant must present a justification for the policy or practice that is not "artificial, arbitrary, and unnecessary"[162] and show that the policy is "necessary to achieve a valid

155. *Id.* at 2516 (reviewing the nation's history of housing segregation and discrimination and noting that the FHA was passed during a time of increased racial violence and urban riots); *see also id.* at 2525 ("Much progress remains to be made in our Nation's continuing struggle against racial isolation.").

156. *Id.* at 2522.

157. *See supra* note 134 and accompanying text.

158. *See supra* note 135 and accompanying text.

159. *See* Brown v. Artery Org., Inc., 654 F. Supp. 1106, 1115 (D.D.C. 1987).

160. This three-part burden-shifting test, set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), is used to evaluate claims of discrimination under the FHA. *See* Implementation of the FHA's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,482 (Feb. 15, 2013) (codified at 24 C.F.R. § 100.500) (stating that the burden-shifting scheme in HUD's disparate impact rule is consistent with that of Title VII); *see also* HUD v. Blackwell, 908 F.2d 864, 870 (11th Cir. 1990); United States v. Badgett, 976 F.2d 1176, 1178 (8th Cir. 1992); Casa Marie, Inc. v. Superior Court of P.R. for Dist. of Arecibo, 988 F.2d 252, 269 n.20 (1st Cir. 1993); Cabrera v. Jakabovitz, 24 F.3d 372, 382 (2d Cir. 1994); Mountain Side Mobile Estates P'ship v. Sec'y of Hous & Urban Dev., 56 F.3d 1243, 1250–51 (10th Cir. 1995); Gamble v. City of Escondido, 104 F.3d 300, 305 (9th Cir. 1997).

161. *See* Samuel R. Bagenstos, *Disparate Impact and the Role of Classification and Motivation in Equal Protection Law After* Inclusive Communities, MICH. L. PUB. L. & LEGAL THEORY RES. PAPER SERIES 1, 22–23 (2015) (arguing that although the defendant's burden was not "emphatically . . . resolve[d]" by *Inclusive Communities*, a more stringent reading of the defendant's burden is consistent with the overall thrust of the Court's opinion).

162. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2524 (2015).

interest."[163] Prior to *Inclusive Communities*, many federal courts required property owners to justify their policy or practice by showing that they had used the least restrictive means to achieve a permissible end.[164] On remand in *Inclusive Communities*, the Northern District of Texas maintained this framework by requesting additional briefing from the parties on less discriminatory alternatives to the challenged housing practice.[165] Therefore, a close fit requirement likely remains.

Under the burden-shifting framework, universities may feel that their policies are closely related to a variety of justifications for excluding student-parents from university provided housing. First, universities may have practical concerns about their ability to accommodate all students and will justify their policies by arguing that students-only policies allow the university to provide housing to a larger total number of students than they would be able to if they allowed some students to live with their families. Additionally, university administrators may argue that university-provided housing is unsafe for children because many facilities provide only communal dining and bathing, which would expose children to danger. Universities may also posit that students-only policies are necessary to decrease the university's potential risk of liability. Finally, universities may argue that barring student-parents from university-provided housing respects the interests of non-parenting students, who may be vehemently opposed to living with their student-parent peers. The analysis below will weigh these arguments in light of precedent from FHA litigation as well as other antidiscrimination laws.

Ultimately, only the justification regarding health and safety will likely hold water in court; however, this justification will probably be limited to "traditional dormitories" that require tenants to use communal bathrooms and kitchens and will not apply to more modern university-provided housing options.[166]

1. Providing Housing to "As Many Students As Possible"

Universities will likely argue that they have a legitimate interest in excluding student-parents because they do not have enough housing units for student families as well as students without families; therefore, to provide housing to the largest total number of enrolled students, they need to limit access to housing to "students-only."

However, the limited supply of university-provided housing does not justify different treatment on the basis of familial status. The Amendments established "familial status" as a protected status because Congress determined that this form of discrimination interfered with the efficient allocation of housing re-

163. *Id.* at 2523.

164. *See, e.g.*, United States v. Plaza Mobile Estates, 273 F. Supp. 2d 1084, 1091 (C.D. Cal. 2003).

165. *See* Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs, No. 3:08-CV-546-D, 2015 WL 5916220, at *5 (N.D. Tex. Oct. 8, 2015) (ordering additional briefing of the plaintiff's less restrictive alternative).

166. *See infra* note 184 and accompanying text.

sources.[167] Bans on student family housing inefficiently allocate the limited resource of university-provided housing.

Financial limitations have not been a successful justification for discriminatory policies under other antidiscrimination laws. For example, in *Texas Woman's University v. Chayklintaste*, the University proved that it did not have enough space or money to provide on-campus housing to all students, but the court held that mere financial constraints could not justify the choice of providing on-campus housing only to female, and not male, students, under the Equal Protection doctrine.[168]

Although a university may claim that integrated housing for students with families pushes the university beyond its limited capacity, universities have shown that they are capable of modifying the housing they provide to comply with other federal antidiscrimination laws. Pursuant to regulations promulgated under section 504 of the Rehabilitation Act, universities must provide a "sufficient quantity and variety" of housing to students with disabilities, giving them a choice among several types of housing.[169] Universities have had to adjust much of the housing they provide to ensure that students with disabilities have an array of choices in housing comparable to students without disabilities. Similar modifications ought to be made to bring student-parents into the university-provided housing community in compliance with the prohibition of familial status discrimination.

Additionally, as more universities engage in public-private partnerships to increase and enhance their student-housing offerings,[170] private business interests will likely offset universities' limitations. In 2014 alone, private investors procured nearly $3 billion worth of student-housing properties.[171] Although most private investment has taken place off campus, budget constraints have motivated many universities to allow private investors on campus so universities can allocate their limited assets to academic programs.[172] These investors are reportedly motivated by student housing's resilient performance through the Great Recession. Whereas apartment properties fell overall by 20%, the average

167. *See* Morgan v. Sec'y of Hous. & Urban Dev., 985 F.2d 1451, 1455 (10th Cir. 1993) (citing H.R. REP. NO. 100–711, at 19, *reprinted in* 1988 U.S.C.C.A.N. 2173, 2180) (discussing Congress's authority to pass the FHA under the Commerce Clause).

168. 521 S.W.2d 949, 951–52 (Tex. Civ. App.) (holding that the University violated the Fourteenth Amendment equal protection rights of male students by not providing them housing on campus and of female students by requiring them to live on campus), *rev'd on other grounds*, 530 S.W.2d 927 (Tex. 1975).

169. 34 C.F.R. § 104.45 (2016).

170. *See P3 Perspectives*, STUDENT HOUSING BUS. 48 (2015), http://studenthousingbusiness.epubxp.com/i/616872-nov-dec-2015/48 [https://perma.cc/2528-TSD7].

171. *See* Bendix Anderson, *New Investors Rush into Student Housing*, NAT'L REAL EST. INV. (Feb. 2, 2015), http://nreionline.com/student-housing/new-investors-rush-student-housing [https://perma.cc/7YSQ-678Y].

172. *See* Diana Olick, *Investors Get Schooled in Housing*, CNBC (July 8, 2014, 11:58 AM), http://www.cnbc.com/2014/07/08/et-schooled-in-housing.html [https://perma.cc/G7SA-R4W2].

price per bed for student housing remained constant.[173] In 2014, private developers built 4,149 student-housing beds.[174] These private housing providers should not be allowed to be out of compliance with the FHA simply because they partner with universities to take advantage of a burgeoning housing market, but their availability to expand universities' housing capacity should be considered when universities argue that that financial limitations prevent them from providing student-parents with equal housing opportunities.

2. Health and Safety of Children of Student-Parents

Universities may argue that they have a legitimate interest in excluding student families because allowing children to live in traditional residence halls where students share communal restrooms and kitchens would be unsafe for the children of student-parents.

Certain health, safety, and noise justifications have been found to justify policies that prevent families with children from living in limited occupancy housing facilities. For example, in *Sierra v. City of New York*, the Southern District of New York upheld a restriction on family occupancy of certain single-room units in an apartment building that required tenants to use shared bathrooms and kitchens.[175] The defendant argued that this policy was justified because children would be put in danger in the shared spaces.[176]

The health and safety risks created by communal restrooms and kitchens are the product of intentional design plans that did not incorporate student-parents' interests into universities' visions of the "traditional student," despite approximately one-quarter of all undergraduate students raising dependent children.[177] Even if these structural design choices were not made with the intent to exclude student-parents from on-campus housing, they create barriers to this class of students' access to the benefits of university-provided housing.

The Amendments do not include an affirmative duty for housing providers to make housing accommodations safe for families. Therefore, this justification may be universities' most compelling argument to avoid FHA liability for the "traditional dormitory" with shared bathrooms and kitchens because universities do not have a duty to change the housing options they offer to make it safe for student families.

However, universities provide a diverse array of housing options to students, some of which would not raise health and safety concerns. For example, "suite-style" units that include bathrooms and kitchens intended to be shared by the suitemates only may be suitable for student families, as would apartment-

173. *See* Anderson, *supra* note 171.
174. *See id.*
175. 579 F. Supp. 2d 543 (S.D.N.Y. 2008).
176. *Id.* at 549–50.
177. GAULT, REICHLIN & ROMÁN, *supra* note 1, at 4.

style single units.[178] Living on the same floor or in the same building as traditional college students should not be considered a sufficient risk to the health and safety of student-parents' children; if it were, there would be no safe place in college towns for student families to reside.

3. Limiting University Liability

Because universities may be held liable for the actions of non-students who reside on campus,[179] universities may attempt to justify students-only policies by arguing that these rules serve a legitimate interest in reducing the risk of potential litigation.

In *Godfrey v. Princeton Theological Seminary*, two students brought a sexual harassment claim against their university for failure to adequately respond to student complaints about a non-student, non-employee tenant who resided in university-provided housing.[180] The unaffiliated tenant allegedly harassed students by stalking them and attempting to coerce them into an unwanted social relationship.[181] Although the New Jersey Supreme Court ultimately found that the University was not liable because the harassment was not sufficiently "severe or pervasive,"[182] the court did note that the University would be liable if this requirement was met and the University failed to properly respond.[183]

Creating a students-only policy to respond to this concern is not sufficiently related to the university's purported interest in reducing liability. For practical purposes, universities cannot exclude all outsiders from campus to ensure they are not liable for non-student actions. Outside the housing context, universities frequently rely on unaffiliated vendors and independent contractors to ensure the smooth functioning of the institution, and universities could be liable for these non-students' actions, as well as the actions of visiting alumni and guest lecturers. Rather than limiting student-parents' access to university housing, universities could properly respond to harassment by ensuring that their harassment policies adequately applied to harassment of students and employees by individuals who are not students or employees, but who are otherwise on campus.

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178. *See, e.g.*, *Room Layouts*, UNIV. OF MIAMI, http://www.miami.edu/sa/index.php/residential_life/housing_a-z/room_layouts/ [https://perma.cc/8TGN-SKKX] (depicting available single suites with private bathrooms and one-bedroom apartment-style rooms with private bathrooms and kitchens); *Room Types*, UNIV. OF OR., https://housing.uoregon.edu/room-types [https://perma.cc/5DJX-NQ5U] (describing available single units with private bathrooms and two-person suites with private bathrooms); *Singles*, UNIV. OF MICH., http://www.housing.umich.edu/reshalls/gallery/singles [https://perma.cc/AB5V-BAZ7] (describing available single units with private bathrooms).

179. Godfrey v. Princeton Theological Seminary, 952 A.2d 1034, 1048 (N.J. 2008) (commenting that, were the tenant's behavior more pervasive and severe, the University could be held liable for his harassing behavior).

180. *Id.* at 1037–43.

181. *Id.* at 1037–40.

182. *Id.* at 1049.

183. *Id.* at 1048.

4. The Preferences of Other Students

Non-parenting students may be strongly opposed to living with student-parents and their families. For example, an NYU student wrote a public letter complaining that her roommate, a student-parent, was able to have her four-year-old son visit their shared dormitory suite every day and sleep over six nights per month.[184] Although the non-parenting student expressed sympathy for the student-parent's situation, she argued that she should not face consequences related to her roommate's "life decisions."[185] "How can I be a successful student with a four-year old running around my study/living space?" she complained.[186]

The prejudicial preferences of other tenants do not justify discriminatory housing policies. For example, in *Morgan v. Secretary of Housing and Urban Development*, the Tenth Circuit held a landlord liable for an adults-only housing policy in a mobile home community, even though a tenants' committee drafted the policy.[187] The FHA also prohibits "steering" tenants of a protected class away from housing by suggesting that other members of the housing community dislike members of the protected class.[188] Thus, students without children will have to learn to coexist with student-parents and their families, an invaluable life skill that will help them mitigate future conflicts when they enter the non-university housing market.

CONCLUSION

Universities must reassess their treatment of student-parents in the provision of student housing in light of their potential liability under the FHA. Student-parents are often excluded from university-provided housing, but the FHA prohibits discrimination in the rental of housing on the basis of familial status. Given the strong case that university-provided housing fits within the scope of the FHA, universities may not explicitly or implicitly bar student-parents from living in university-provided housing unless that housing is not safe for children. Universities should update their housing stock for student families to ensure that student-parents have access to the benefits of university-provided housing.

184. *Shasten Snellgroves, NYU Junior, 'Shocked' That She Must Share Suite with Toddler*, HUFFPOST COLL. (Jan. 18, 2013, 12:10 PM), http://www.huffingtonpost.com/2013/01/18/shasten-snellgroves-nyu_n_2504202.html [https://perma.cc/E4BH-5ABQ].

185. *Id.*

186. *Id.*

187. 985 F.2d 1451, 1453–55 (10th Cir. 1993).

188. 24 C.F.R. § 100.70(c) (2016).