

Spring 2006

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Repository Citation

Holly Hogan, *What Athletic Departments Must Know about Title IX and Sexual Harassment*, 16 Marq. Sports L. Rev. 317 (2006)

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WHAT ATHLETIC DEPARTMENTS MUST KNOW ABOUT TITLE IX AND SEXUAL HARASSMENT

HOLLY HOGAN*

INTRODUCTION: THE INDISPUTABLE NEED FOR ATHLETIC DEPARTMENTS TO UNDERSTAND TITLE IX SEXUAL HARASSMENT LAW

“Prosecutor [w]ants [m]ore [i]nformation [a]bout Wildcat Lodge [r]ape [c]ase.”¹

“Third La Salle player charged with rape.”²

“Sixth rape allegation surfaces at CU.”³

These news snippets regarding sexual assault cases against members of the University of Kentucky basketball team, the La Salle basketball team, and the University of Colorado football team demonstrate that an understanding of how sexual harassment and sexual assault law applies to colleges generally, and athletic departments in particular, is critical for college athletic departments. Title IX, a federal law, creates obligations for universities when a student is sexually harassed or sexually assaulted. These obligations extend to the athletic department. Athletic departments become very involved in Title IX investigations of sexual harassment complaints (or the lack thereof) when a coach or student-athlete is the harasser or harasser. Athletic departments may, in fact, be involved more frequently in cases where a student is sexually harassed than any other department on campus other than the department(s) that handle university disciplinary proceedings and sexual assault survivor services. At a minimum, they may be one of the most involved departments. When researchers at Northeastern University and the University of

* Author would like to thank Diane Rosenfeld for her guidance on this article.

1. Valerie Honeycutt Spears, *Prosecutor Wants More Information About Wildcat Lodge Rape Case*, LEXINGTON HERALD-LEADER (Lexington, Ky.), Aug. 24, 2005 at 6.

2. MayClaire Dale, *Third La Salle Player Charged with Rape*, SFGATE.COM, Sept. 22, 2004, <http://www.sfgate.com/cgi-bin/article.cgi?f=/news/archive/2004/09/22/sports2227EDT0418.DTL>.

3. *Sixth Rape Allegation Surfaces at CU*, CNN.COM, Feb. 20, 2004, <http://www.cnn.com/2004/US/Central/02/19/colorado.football/>.

Massachusetts reviewed 107 reported sexual assaults at 30 NCAA Division I schools over a 2 year period, they found that at 10 of the schools “student-athletes comprised only 3.3% of the male student body, but were involved in 19% of the reported sexual assaults.”⁴

Even though it remains imperative that athletic departments understand Title IX sexual harassment and sexual assault law, many college athletic administrators do not understand the connection between Title IX sexual harassment and sexual assault law and college athletic departments. The lack of understanding in athletic departments is reflective of a university-wide problem. Many colleges and universities presently handle sexual harassment complaints in an extremely poor fashion for a combination of reasons. A school may not fully understand its obligations under Title IX. A school may “bend over backwards” to aid the accused student (“accused”) out of fear that the accused will bring a lawsuit against the school for unfair proceedings. School officials may hold societal misconceptions about sexual harassment. And when an athlete or coach is the accused, a school may not want to risk losing the accused and, in turn, losing games.

The following article will counter the current problems in handling college and university sexual harassment complaints by explaining university-wide Title IX obligations; how those obligations apply to athletic departments; why a school must also fear lawsuits from harassed students; and misunderstood sexual harassment facts. Additionally, this article stresses practical ways to prevent and address sexual harassment beyond what the law requires. Before delving into Title IX sexual harassment and sexual assault law, an explanation of key concepts is necessary.

TITLE IX, SEXUAL HARASSMENT, AND SEXUAL ASSAULT

Title IX states that “[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination” under any academic extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives federal financial assistance.⁵ Denying women equality in sports limits women’s ability to participate in an educational activity. Likewise, when a woman or a man is sexually harassed, that can also limit his or her ability to participate in an educational program or activity. This limitation on equal participation in an educational program or activity is the reason sexual

4. Ellen E. Dabbs, Note, *Intentional Fouls: Athletes and Violence Against Women*, 31 COLUM. J.L. & SOC. PROBS. 167, 170 (1998).

5. 20 U.S.C. § 1681(a) (2000).

harassment of students is illegal and why the federal government and/or court system intervenes.

Sexual harassment is “unwelcome conduct of a sexual nature. [It] can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature.”⁶ Note that sexual harassment includes opposite gender and same gender sexual harassment. Many of us are aware that actions like a coworker grabbing another coworker’s buttocks or a coach making jokes about his female players’ breasts can be sexual harassment. What many people do not realize is that rape and other types of sexual assault are not different forms of harassment; rather, rape and sexual assault are severe forms of sexual harassment. Sexual assault is a term that includes such actions as rape, attempted rape, and forced fondling. Sexual assault is unwelcome physical conduct of a sexual nature, and like the other forms of sexual harassment, it “can deny or limit, on the basis of sex, the student’s ability to participate in or to receive benefits, services, or opportunities in the school’s program.”⁷ Surviving sexual assault and other forms of sexual harassment can involve physical injuries, emotional distress, and mental distress, all which can stand in the way of the survivor’s educational opportunities when, for example, a student drops out of a class because the harasser is in the same class or continues to attend that class with great emotional and mental difficulty. Sexual harassment can affect the educational opportunities of the survivor because it creates what the legal system identifies as a hostile environment.

The theory of a hostile environment is one theory under which a student may bring a Title IX lawsuit for sexual harassment. The other way to bring a sexual harassment lawsuit is under the quid pro quo theory. Quid pro quo sexual harassment occurs when a teacher or employee conditions an educational decision or benefit, such as a grade in a class or an athletic scholarship, on the student’s submission to unwelcome sexual contact. For example, when a coach tells a student-athlete that she will terminate the student’s scholarship unless the student-athlete begins a sexual relationship with the coach, the coach has sexually harassed the student-athlete in a quid pro quo manner.

Title IX, a federal law, requires that once a college or university knows or reasonably should know of possible sexual harassment of students, it must take “immediate and appropriate steps to investigate or otherwise determine

6. U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES, 2 (2001), available at <http://www.ed.gov/offices/OCR/archives/pdf/shguide.pdf>.

7. *Id.*

what occurred and take prompt and effective steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again," regardless of whether the student who has been harassed complains of the harassment or asks the college to act.⁸ When a college fails to do so, it becomes subject to legal action, either through a private civil lawsuit brought by the survivor or an administrative proceeding through the U.S. Department of Education, Office for Civil Rights (OCR). In some circumstances, quid pro quo harassment makes the university liable for the harasser's actions. In other quid pro quo circumstances and in all hostile environment harassment, a school is liable not for the harasser's actions, but for its own actions by either failing to respond or responding in a way that is clearly unreasonable. When a school does not respond or responds unreasonably, it has deprived the harassed student of educational opportunities and the school is discriminating against the harassed student.

OCR AND PRIVATE LAWSUITS COMPARED

OCR is an administrative agency in the federal government. It, like the courts, also enforces Title IX. OCR conducts compliance reviews that evaluate whether a school is fulfilling its Title IX duties. OCR conducts these reviews as a result of a complaint by a student or an OCR plan with neutral criteria for selecting schools for review.⁹ Before, during, and after a review, if the agency believes there is adequate evidence of noncompliance with Title IX, OCR will seek voluntary compliance from the school.¹⁰ In other words, the school will voluntarily correct its Title IX failings. If voluntary compliance is unsuccessful, OCR will make a formal finding of noncompliance that would be enforced either through the courts or by taking away federal funding.¹¹

The other way that Title IX is enforced is via private lawsuits. These are civil lawsuits brought by students. A civil lawsuit is harder to prove than an OCR complaint because it requires that a school have actual knowledge of the harassment; but, that heightened requirement is necessary because via a civil lawsuit a student may receive money damages.¹² A student may also request or exclusively request what is called equitable relief – non-monetary damages

8. *Id.* at 15.

9. U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., TITLE IX LEGAL MANUAL 125-126 (2001), available at <http://www.usdoj.gov/crt/cor/coord/ixlegal.pdf>.

10. *Id.* at 130.

11. *Id.*

12. See generally *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998).

like reforming the college's policy. If a student requests only non-monetary damages, a school's actual knowledge is not required.¹³ The process of a civil lawsuit is longer than the OCR process, as it usually takes several years.

OCR AND PRIVATE LITIGATION STANDARDS FOR EVALUATING HARASSMENT CLAIMS

The courts use a higher standard for evaluating harassment claims than OCR, meaning that it is harder to show that the school is in violation of Title IX. The reason it is harder to prove a violation in a lawsuit is because if the courts find a violation, they often order a school to pay damages to the harassed student.¹⁴ Although a school may lose federal funding through the OCR process, OCR first allows the school to voluntarily change its practices.¹⁵ It will seek voluntary changes before an investigation commences, during an investigation, and post-investigation if it finds a school is not in compliance with Title IX.¹⁶ As a result, the OCR threshold for demonstrating liability is lower.

Student-on-Student Harassment (Hostile Environment Harassment)

Student-on-student harassment is nearly always hostile environment harassment because the harasser student generally has no ability to condition an educational benefit on sexual harassment. When a student sexually harasses another student, a school's failure to respond creates a hostile environment.

Private Litigation Standards

When one student harasses another student, the courts in private litigation will look at several factors to determine whether or not the school has committed a Title IX violation. Note that some of the cases discussed below involve colleges and others involve high schools, middle schools, and elementary schools. The same factors apply no matter what kind of school is involved. These factors come from a 1999 U.S. Supreme Court case, *Davis v. Monroe County Board of Education*,¹⁷ which identified three factors to use in

13. U.S. DEP'T OF EDUC., *supra* note 6, at iii-iv.

14. *See Gebser*, 524 U.S. 274.

15. U.S. DEP'T OF EDUC., *supra* note 6, at iii-iv.

16. U.S. DEP'T OF EDUC., OCR COMPLAINT RESOLUTION PROCEDURES (2005), *available at* <http://www.ed.gov/about/offices/list/ocr/complaints-how.html>.

17. 526 U.S. 629.

determining whether or not a school is liable under Title IX. If a plaintiff, the student bringing the lawsuit, can prove all three factors, the school is liable:

1. A school official who has the authority to institute corrective measures has notice of the harassment. In other words, the official knows that harassment is occurring.¹⁸
2. The school official with knowledge was deliberately indifferent to the harassment.¹⁹
3. The harassment is so severe, pervasive, and objectively offensive that it effectively limits the harassed student's access to an educational opportunity or benefit.²⁰

We will return to these factors momentarily and explain them in more detail.

OCR Standards

In evaluating a school's Title IX compliance when a student has allegedly been sexually harassed, OCR looks at three factors:

1. Whether a responsible school official knew of or reasonably should have known of harassment. A responsible employee is someone who has the authority to redress the harassment, has a duty to report sexual harassment to school officials, or an employee whom a student would reasonably believe had a duty to report or the ability to redress the harassment.²¹
2. Whether the school responded promptly and effectively to eliminate the hostile environment and prevent its recurrence.²²
3. Whether the conduct was unwanted and sufficiently serious to deny or limit a student's ability to participate in an educational program or benefit.²³

OCR groups together hostile environment harassment whether the harasser is a teacher, employee, student, or visitor to the campus, like a recruit, so this same standard applies to all those situations.

18. *Davis*, 526 U.S. at 650.

19. *Id.*

20. *Id.*

21. U.S. DEP'T OF EDUC., *supra* note 6, at 13.

22. *Id.* at 12.

23. *Id.* at 5.

Teacher/Employee-on-Student Harassment

OCR and private litigation standards for evaluating employee-on-student harassment (which includes teachers) differ slightly from the standards used to evaluate student-on-student harassment. Additionally, the standards change somewhat if the harassment was hostile environment harassment or quid pro quo harassment.

Hostile Environment Harassment

Hostile environment harassment applies to all sexual harassment when the employee-harasser does not condition an educational decision or benefit on sexual harassment.

Private Litigation Standards

In a 1998 case, *Gebser v. Lago Vista Independent School District*,²⁴ the U.S. Supreme Court created the factors for determining whether a school was liable when an employee's harassment of a student created a hostile environment.²⁵ The factors are almost identical to student-on-student hostile environment harassment.²⁶

1. A school official who has the authority to institute corrective measures has notice of the harassment. In other words, the official knows that harassment is occurring.²⁷
2. The school official with knowledge was deliberately indifferent to the harassment.²⁸

In *Gebser*, the Supreme Court does not mention that the harassment must be severe, pervasive, and objectively offensive, which has led legal commentators to two different conclusions. First, that the student bringing the lawsuit does not have to prove that the harassment was severe, pervasive, and objectively offensive; instead, the student must prove only that the sexual harassment was unwanted (if over the age of consent), as in the OCR standard.²⁹ This low burden of proof is probably because one can assume that

24. 524 U.S. 274.

25. *See generally id.*

26. *Gebser* involved teacher-on-student harassment. Legal commentators generally believe that the same standard would apply to employee-on-student harassment. *See* William A. Kaplin, *A Typology and Critique of Title IX Sexual Harassment Law After Gebser and Davis*, 26 J. C. & U. L. 615, 634 (2000).

27. *Gebser*, 524 U.S. at 277.

28. *Id.*

29. Brett A. Sokolow, CHRON. OF CAMPUS CONDUCT (Nat'l Ctr. For Higher Educ. Risk Mgmt.,

harassment by a teacher or employee automatically is severe, pervasive and objectively offensive.³⁰ Or second, since the student-on-student scenario described in *Davis* came later, it was adding an additional requirement that is effective in both student-on-student and employee-on-student harassment.³¹ Whether or not the severe, pervasive, and objectively offensive prong exists is more relevant in hindsight when a school is defending against a lawsuit. When a school is looking forward as to how to respond to complaints of sexual harassment in the future, it is safe to assume that most sexual harassment is severe, pervasive, and objectively offensive.

OCR Standards

OCR groups together hostile environment harassment whether the harasser is a teacher, employee, student or visitor to the campus, like a recruit. The same three factors we discussed above apply here as well:

1. Whether a responsible school official knew or reasonably should have known of harassment. A responsible employee is someone who has the authority to redress the harassment, has a duty to report sexual harassment to school officials, or is an employee who a student would reasonably believe had a duty to report or the ability to redress the harassment.³²
2. Whether the school responded promptly and effectively to eliminate the hostile environment and prevent its recurrence.³³
3. Whether the harassment was unwanted (if over the age of consent) and sufficiently serious to deny or limit a student's ability to participate in an educational program or benefit.³⁴

Quid Pro Quo Standards

Quid pro quo harassment occurs when a teacher or other employee conditions an educational benefit, service, or aid on sexual harassment.³⁵ Essentially, it is in the context of the employee's performance of job responsibilities over students, such as teaching, counseling, supervising,

Malvern, Pa.), Mar. 25, 2005, at 3-6, <http://www.ncherm.org/pdfs/newsletter-voll-issue6.pdf>.

30. *Id.*

31. *Id.*

32. U.S. DEP'T OF EDUC., *supra* note 6, at 13.

33. *Id.* at 12.

34. *Id.* at 5, 7-8.

35. *Id.* at 10.

and/or advising students.³⁶ Some examples of quid pro quo harassment include:

a faculty member at a university's medical school conditions an intern's evaluation on submission to his sexual advances and then gives her a poor evaluation for rejecting the advances; . . . a faculty member withdraws approval of research funds for her assistant because he has rebuffed her advances; [and] a journalism professor who supervises a college newspaper continually and inappropriately touches a student editor in a sexual manner, causing the student to resign from the newspaper staff . . .³⁷

Compare these examples to a hostile environment example: A history professor repeatedly touches and makes sexually suggestive remarks over the course of several weeks to an engineering student, over whom she does not have any authority, while waiting at a university bus stop.³⁸ "[T]he student stops using the campus shuttle and walks the very long distances between her classes."³⁹ Because the history professor has no supervisory authority over the engineering student, the professor cannot condition an educational decision or benefit upon the sexual harassment, and therefore, quid pro quo harassment has not occurred. However, because the student's educational opportunities have been affected, hostile environment harassment has taken place.

Private Litigation Standards

The *Gebser* case concerned hostile environment harassment because the harasser did not condition the sexual harassment on receipt of an educational benefit, such as a grade, which would have made it quid pro quo harassment. In the OCR review context, as discussed below, the difference between quid pro quo and hostile environment harassment is that quid pro quo harassment does not require notice. In other words, OCR does require that a school official actually knew that harassment was taking place. It remains unclear whether courts, in private litigation situations, would also make this distinction. *Gebser* and *Davis*, the cases that laid out the standards for hostile environment harassment, did not mention quid pro quo harassment; thus, as of now, we do not know if that silence means that the same standards apply to

36. *Id.* Note that in some circumstances a student may be considered an employee of the school if the student has some sort of responsibility over the harassed student, such as a teaching assistant, depending on the supervising student's role.

37. *Id.* at 11.

38. *Id.*

39. *Id.*

employee-on-student quid pro quo and hostile environment or if the silence means that a different standard exists for employee-on-student quid pro quo harassment. A lower court, in *Liu v. Striuli*,⁴⁰ held that the same hostile environment harassment standards in *Gebser* apply to quid pro quo harassment;⁴¹ nonetheless, other lower courts could find differently. Legal commentators have argued that the only conceivable difference the Supreme Court would draw is whether notice is required.⁴² As mentioned previously, even without notice, OCR may still find a school in violation. And again, looking at the problem of sexual harassment prospectively, these distinctions do not matter when we are looking at how to respond appropriately to sexual harassment.

OCR Standards

The only difference between OCR's standards for hostile environment review and quid pro quo review is that quid pro quo review does not include the notice standard.⁴³ A university may be subject to an OCR review even if it did not have actual knowledge of the harassment or should have known of the harassment using reasonable care. The justifications are that (a) OCR first seeks voluntary compliance; (b) schools eventually do receive notice, only it is from OCR instead of the harassed student; and (c) theoretically, the school is discriminating against the student through the employee's actions because it has charged teachers and employees to provide educational aid, benefits, and services on behalf of the school. The employee, thus, is acting for the school. In hostile environment harassment, OCR also holds a school responsible for its own actions, but those actions are in response to sexual harassment that becomes discriminatory, in and of itself, because of an inappropriate response. Schools are not held responsible for the first discriminatory action, harassment by the harasser, in hostile environment harassment. In quid pro quo harassment situations, schools are held responsible for the harassment by the harasser, and not just their own response:

40. 36 F. Supp. 2d 452 (D.R.I. 1999).

41. *Id.* at 463-66.

42. Kaplin, *supra* note 26, at 635.

43. *Id.*

OCR Hostile Environment Liability Timeline

Initial Harassment	Notice Actual or Should Have	School's Response =Liability
Not within context of the school providing educational aid, benefit, or services		Within the context of the school providing educational aid, benefit, or services

OCR Quid Pro Quo Liability Timeline

Initial Harassment = Liability	School's Response = Liability
Within context of the school providing educational aid, benefit, or services	Within the context of the school providing educational aid, benefit, or services

Visitor-on-Student Harassment (Hostile Environment or Quid Pro Quo Harassment)

Private Litigation Standards

A school may also be liable for deliberate indifference to known acts of harassment committed by a third party, such as a recruit, a visiting team, a stranger, or a supervisor at a clinical placement. The key issue in such a case would be whether or not the harassment occurred in the context of an educational program or activity, and if so, whether the relationship is more like teacher/employee-to-student harassment or student-to-student harassment.⁴⁴ Again, the only possible difference between these two standards is whether or not the severe, pervasive, and objectively offensive prong applies.

OCR Standards

OCR groups together hostile environment harassment whether the harasser

44. *Id.* at 634.

is a teacher, employee, student, or visitor to the campus, like a recruit.⁴⁵

Summary Table

Form of Harassment	Notice		School Action		Conduct	
Student-on-Student (Hostile Environment Only)	Responsible school official knew or should have known	School official with corrective authority had actual knowledge	Prompt and effective	Deliberate indifference	Unwanted and sufficiently severe	Severe, pervasive, and objectively offensive
Employee-on-Student (Hostile Environment)	Responsible school official knew or should have known	School official with corrective authority had actual knowledge	Prompt and effective	Deliberate indifference	Unwanted and sufficiently severe	?
Employee-on-Student (Quid Pro Quo)	No notice or responsible school official knew or should have known	?	No notice required, so school action prong not necessary	?	Unwanted and sufficiently severe	?
Visitor-on-Student	Responsible school official knew or should have known	School official with corrective authority had actual knowledge	Prompt and effective	Deliberate indifference	Unwanted and sufficiently severe	?

45. U.S. DEP'T OF EDUC., *supra* note 6, at 10-13.

THE OCR AND PRIVATE LITIGATION STANDARDS IN-DEPTH

Let us now look at the notice, school action, and conduct prongs in more depth, including how these prongs apply to situations that athletic departments may confront.

The Notice Requirement

As just discussed, a private lawsuit requires the student to prove that a school official with the ability to implement corrective action had actual knowledge of the sexual harassment. In the OCR context, although quid pro quo harassment does not have a notice requirement, hostile environment harassment complaints require a showing that a responsible school official knew or should have known about the harassment. The following section will examine the type of information that counts as notice; who is a responsible school official and who is a school official with the ability to implement corrective action; and considerations if a student reports sexual harassment.

What information counts as notice?

Assume for this portion of the article that the school official has corrective abilities and is a responsible school official. If that school official witnesses the sexual harassment, the school official clearly knows that sexual harassment has occurred. Nevertheless, the school official does not need to witness an attempted rape or a professor conditioning a grade a sexual favors to be put on notice. Nor does notice under the private litigation and OCR standards require that the official is 100% positive that a student has been sexually harassed. Witnessing sexual harassment, receiving a report of sexual harassment from the harassed student, or receiving a report of sexual harassment from another concerned individual, all create a duty to act in some way.

In *Doe A. v. Green*,⁴⁶ the U.S. District Court for the District of Nevada held that knowledge of harassment need not be undisputed or uncorroborated to put the school on notice.⁴⁷ Doe B., a fourteen-year-old high school freshman, told her health teacher that her soccer coach, Jeremy Green, made her feel uncomfortable when he leered at her, asked her if she had a boyfriend, and called her at home.⁴⁸ The health teacher promptly reported Doe B.'s concerns to the principal who discussed Doe B.'s concerns with Doe B.⁴⁹ Doe

46. *Doe A. v. Green*, 298 F. Supp. 2d 1025 (D. Nev. 2004).

47. *Id.* at 1034.

48. *Id.* at 1028.

49. *Id.*

B. denied stating that her soccer coach made her feel uncomfortable, although she did admit that Coach Green telephoned her at her home, paged her with the number "69," and told her that he had previously had a relationship with a high school student.⁵⁰ She also repeatedly asked if Coach Green was going to get in trouble.⁵¹ However, when she later spoke to the head soccer coach, Coach Michaels, Doe B. told her that she was afraid Green would make her do something she did not want to do and that he was pursuing her sexually.⁵² Coach Michaels also reported Doe B.'s concerns to the principal.⁵³ The principal told Coach Michaels that the problem had been taken care of after a very brief conversation during which he did not allow Coach Michaels to fully discuss Doe B.'s concerns.⁵⁴ The principal did meet with Coach Green, who admitted some of the inappropriate behavior, and advised him to act professionally around students.⁵⁵ Soon after, Doe B.'s father met with the principal reporting additional concerns about Coach Green, who had apparently touched Doe B.'s thigh while giving her a ride in his car.⁵⁶ Doe B.'s father alleged that the principal told him the problem would be taken care of, that the principal would monitor the situation, and that Coach Green would receive a letter of reprimand, counseling, or possibly a suspension.⁵⁷ The athletic director also met with Coach Green and explained the appropriate boundaries for student-faculty interaction.⁵⁸

The athletic director in this case should have had the following concerns:

1. Coach Green was pursuing a sexual relationship with Doe B.
2. A sexual relationship between the two had already begun.
3. Coach Green may have had or was currently having, relationships with other students.
4. Coach Green may be pursuing other students sexually or at minimum making other students feel uncomfortable.

Such concerns would have been legitimate.

Despite meetings with the principal and the athletic director, Coach Green's behavior escalated. Doe B. and Coach Green continued to meet and

50. *Id.*

51. *Id.*

52. *Id.* at 1028-29.

53. *Id.* at 1029.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

within a few weeks their relationship became sexual.⁵⁹ Two months after Doe B. first expressed her concerns to her health teacher, Doe B.'s sister told Coach Michaels that she witnessed Coach Green massaging Doe B.'s allegedly injured thigh.⁶⁰ Coach Michaels again reported Coach Green's inappropriate conduct to school officials; she also told them about frequent meetings between Coach Green and Doe B.⁶¹ Several days later, the campus monitor, who had been pulling Doe B. out of class per Coach Green's request, reported that Doe B. and Coach Green were having a sexual relationship.⁶² In the Title IX lawsuit, the court rejected the school's defense that it had no idea any sexual harassment was occurring and held that a school district need not receive clearly credible information before being placed on notice.⁶³

The school assumed that because Doe B. had denied many of her concerns, they did not exist. It also mistakenly believed that the concerns Doe B. admitted to the principal were properly addressed by meeting with Coach Green and outlining appropriate behavior. The school, particularly the principal and the athletic director, could have addressed the problem much more effectively and complied with Title IX, by taking the following actions:

1. Immediately conducting an investigation comprised of more than just speaking with Coach Green and Doe B. Meeting with Coach Michaels and listening to her concerns because she had additional information.
2. Recognizing that a student may have mixed emotions about the situation. Doe B. felt uncomfortable, but did not want to get Coach Green into trouble, perhaps because she liked him as a coach or was afraid of him.
3. Acknowledging, as more reports about misconduct arose, that the verbal reprimands were not sufficient discipline for Coach Green and further discipline was necessary. Advising Coach Green during the meetings that any further infractions would subject him to further discipline. If a school undertakes some form of corrective action, but is unsuccessful in remedying sexual harassment, the school must take additional corrective measures.⁶⁴

Athletic officials may find themselves in Coach Michaels's position. The response of the school as a whole, and the athletic department in particular,

59. *Id.* at 1030.

60. *Id.*

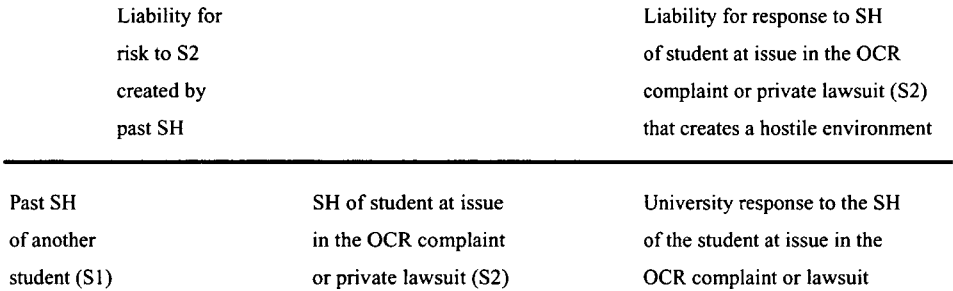
61. *Id.*

62. *Id.*

63. *Id.* at 1034.

64. U.S. DEP'T OF EDUC., *supra* note 6, at 12-13.

affects whether the school is legally liable for harassment of a student like Doe B. Note as well that if the school had received previous reports that Coach Green had been harassing students and responded poorly, it could also be liable for the risk Coach Green presented to Doe B. As the diagram below indicates, a school may be liable for both the risk created by a failure to respond to previous reports of sexual harassment, as well as its failure to respond to the student at-issue’s report of sexual harassment, both of which can create a hostile environment. This timeline shows how a school could be liable if (a) the university had notice of the risk a particular person presented to the school community based on prior sexual harassment reports, was deliberately indifferent to that risk, and as a result, the student bringing the case forward endured sexual harassment, and/or (b) the university had notice of the sexual harassment of the student bringing the case forward and endured sexual harassment (SH):



The criminal history of and previous sexual harassment allegations against players and employees before they arrived at an institution may be sufficient information for notice of a risk presented by these individuals.⁶⁵ Athletic departments must be cautious of who they recruit and who they hire. Examining the history of players in the major leagues who currently have discipline or legal problems reveals that those problems often stem back into high school. Ask recruits’ prior coaches about any discipline or character problems, including sexual assault. Look at their school records for any infractions. The college application often asks if the applicant has ever been arrested or convicted of a crime; look at it. The same principles apply for coaching staff. If an athletics department has heard rumors about sexual harassment or mishandling discipline cases, look into those rumors. Kathy Redmond, the founder of the National Coalition Against Violent Athletes,

65. Christopher M. Parent, *Personal Fouls: How Sexual Assault by Football Players is Exposing Universities to Title IX Liability*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 617, 646 (2003).

describes a “cycle of coaches that is at the crux of many scandals in the country.”⁶⁶ While an assistant coach, University of Colorado head football coach Gary Barnett worked with another assistant coach who went on to two universities that each faced allegations of sexual assaults by football players while he was a coach there. At one university this assistant coach’s response to a gang rape by four football players was “[t]he bitch shouldn’t have been at the party.”⁶⁷ The second university is in the midst of two Title IX lawsuits, one as a result of an extremely brutal and heinous rape by four football players.⁶⁸

In addition to receiving information about the risk posed by a particular individual, school officials may also be exposed to sexual harassment complaints against an entire group, such as a team. If an athletic department receives information about a group of individuals, that information may put it on notice about a risk posed not just by the particular individuals involved, but also the group as a whole. This group notice is the key issue on appeal in the University of Colorado (CU) case: whether previous reports of sexual assaults and other forms of sexual harassment by football players put CU on notice of a risk that football players would sexually assault female students as part of the recruiting program.

What happened in the CU case that could have created a risk? In early December 2001, a CU football player, identified as Player #1 in court documents, and a female student who tutored for the athletic department, devised a plan to give recruits the opportunity for sex with intoxicated students.⁶⁹ The tutor knew that the plaintiff, Lisa Simpson, was having a “girls’ night in” party playing drinking games at Lisa’s apartment, and when the tutor arrived at Lisa’s party she told Lisa that two football players and their recruits might stop by the party.⁷⁰ Sixteen to twenty football players and recruits arrived.⁷¹ About a half hour after the players’ arrival, Football Player #2, one of the players in the group, was getting ready to leave the party when the female tutor told him not to leave because “it was about to go down,” which Player #2 understood to mean that the female students would perform sexual favors on the players and recruits.⁷² Around this time, Lisa went to her

66. Kathy Redmond, Founder, Nat’l Coal. Against Violent Athletes, Testimony to the Univ. of Colo. Indep. Investigation Comm. (2004) (on file with author).

67. *Id.*

68. *Id.*

69. Simpson v. Univ. of Colo., 372 F. Supp. 2d 1229, 1232 (D. Colo. 2005).

70. *Id.*

71. *Id.*

72. *Id.*

room to fall asleep but woke up to find two recruits removing her clothes.⁷³ Those two recruits and several players took turns sexually assaulting her while others watched.⁷⁴ Lisa tried to resist but was unsuccessful as she was terrified and surrounded by at least five large football players.⁷⁵ While Lisa was being sexually assaulted, at least three players and recruits were also assaulting another woman in the same room.⁷⁶

Four years earlier, a nearly identical sexual assault occurred. At a party attended by football players and recruits as part of the football-recruiting program, a high school student alleged that she was sexually assaulted by some of the players and recruits.⁷⁷ District Attorneys believed the purpose of the party was to provide sex to the recruits, warned CU that the practice must stop, and advised CU to adopt zero tolerance policies for alcohol consumption and sexual contact in the football recruiting program.⁷⁸ Also, in 2000, the father of Katharine Hnida, the female member of the football team, reported to Football Coach Gary Barnett and Athletic Director Richard Tharp that his daughter had been subject to sexual harassment by teammates with no response by the coaching staff.⁷⁹ Later, Katharine reported that she had been sexually assaulted by a teammate.⁸⁰ And two months before the 2001 recruiting party rapes, a female student trainer reported that a football player had raped her.⁸¹ A football department staff member arranged for her to meet with Coach Barnett, who the student felt tried to pressure her out of pursuing criminal charges.⁸²

Regardless of how the Colorado case is resolved, if an athletics department observes an emerging pattern of sexual assaults and/or sexual assaults in contexts it controls, it must do something to rectify it because (a) it has an ethical obligation to create a safe environment for all students at the university; and (b) even if courts determined that no group notice existed in the CU lawsuit, this does not mean that the facts at another school would also fail the group notice test. If athletic departments receive information that its players are sexually harassing women during recruiting parties, after games,

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 1237.

78. *Id.* at 1237-38.

79. *Id.* at 1239.

80. *Id.*

81. *Id.* at 1240.

82. *Id.*

on road trips, or in other situations it controls, it must address this sexual harassment. Whether an athletic department's response was effective depends on the particular facts at hand. Generally, though, taking all of the following measures would be a very effective response:

1. Do not intimidate a student from coming forward with allegations of sexual assault.
2. Do not interfere with a university or police investigation. The Boulder Police Department apparently had an athlete liaison unit that responded to reports of athlete violations of the law and if a police report needed to be filed, the unit would take the report to the coaches to decide what to do next.⁸³ Helping police determine whether to arrest someone is interference. Work with the police and the university disciplinary body, get information from them that could help the athletic department prevent future problems, but do not interfere with investigations.
3. Refer sexual assault complaints to the university disciplinary body.
4. Discipline players accused of sexual harassment through meaningful verbal reprimand, game suspension, etc. If a player is found guilty of sexual assault by the university disciplinary body, he should be removed from the team.
5. Provide meaningful sexual assault/sexual harassment prevention training and reinforce that training when sexual assault allegations arise. CU's program consisted of Coach Barnett reading from the sexual assault materials prepared by Coach Osborne at Nebraska, which was quite clearly ineffective there.⁸⁴
6. During team meetings and meetings with recruits, explain the code of conduct for the team and the consequences for violating the code. If an athletic department does not have a code of conduct, it should create one.

Who is a school official with the ability to implement corrective action? Who is a responsible school official?

A sexual harassment survivor may receive monetary damages via a private lawsuit only if the school official with the ability to implement corrective measures had actual knowledge of the harassment.⁸⁵ A school official with

83. Redmond, *supra* note 66.

84. Redmond, *supra* note 66.

85. *Davis*, 526 U.S. at 629; *Gebser*, 524 U.S. at 290.

the ability to implement corrective measures is, put simply, someone who can discipline the harasser. Such an individual could, for example, fire a professor or expel a student for harassing another student. OCR uses a much broader conception of notice by including more types of employees and more types of information as constituting notice. And, when the harasser is a professor or other school employee who is engaging in quid pro quo harassment, no notice at all is required for OCR action. For hostile environment harassment, when notice is required, OCR finds that a school had notice if a responsible employee either actually knew or, if using reasonable care, should have known about the harassment.⁸⁶ A responsible employee is someone who has the authority to redress the harassment, who has a duty to report sexual harassment to school officials, or who is an employee whom a student would reasonably believe had a duty to report or the ability to redress the harassment.⁸⁷ Whether the term "redress sexual harassment" includes a broader range of actions than "taking corrective measures" is unclear; what is clear though is that regardless of the exact terminology, OCR will find a school in violation of Title IX using a broader conception of what constitutes notice. Again, the justification is that OCR seeks voluntary compliance from schools. The following table illustrates the various types of notice. At the top of the chart is the narrowest conception of notice, and as one moves down the chart, the conception of notice broadens:

86. U.S. DEP'T OF EDUC., *supra* note 6, at 10.

87. *Id.* at 13.

Type of Notice	Notice Requirement Met
School official with the ability to take corrective measures	OCR – Met for all types of harassment Private Litigation – Met for all types of harassment
Responsible authority (with ability to redress action, duty to report, or whom a student reasonably could believe had ability to redress or duty to report) actually knew of the harassment.	OCR - Met for all types of harassment Private Litigation – Not met
Responsible authority (with ability to redress action, duty to report, or whom a student reasonably could believe had ability to redress or duty to report) using reasonable care should have known about the harassment.	OCR - Met for all types of harassment Private Litigation – Not met
No notice.	OCR – Met only for quid pro quo harassment, but not hostile environment harassment Private Litigation – Not Met

To better show these distinctions, let us consider three examples:

Example One: A female student reports to the Dean of Students that a classmate sexually assaulted her. The Dean of Students is in charge of the disciplinary board that disciplines students for violations of the student code of conduct. Does the Dean of Students have notice under the private litigation standards? Under the OCR standards? The Dean of Students has the ability to take corrective measures via the disciplinary board and therefore the private litigation standard for notice has been met. Because it is the narrowest conception of notice, the broader OCR notice requirement has also been met. Specifically, the Dean of Students is a responsible authority because of his or her ability to correct the sexual harassment and because he or she has actual notice of the sexual harassment.

Example Two: A student tells his history professor that a female student who sits next to him in the professor’s Egyptian history seminar repeatedly writes notes to him during class propositioning him even though he has asked her numerous times to stop, follows him home from class asking him out on dates, possibly placed a date rape drug in his drink at a party and later attempted unsuccessfully to have sex with him while he was unconscious, and makes jokes about his genitalia to others every day while waiting for the class to begin. Does the professor have notice under the private litigation

standards? Under the OCR standards?

Under the OCR standards, this professor has likely received notice as most colleges have procedures that give the professor a duty to report sexual harassment to the university administration. Although the university disciplinary procedures would likely not allow the professor to discipline the female student as it is not an academic infraction, the professor may be able to redress the sexual harassment in some way within the classroom by, for example, moving the male student's seat or informing the female student that her behavior is unacceptable in the classroom. This example shows how there might be a difference between the ability to take corrective action, the courts' standard for notice, and the ability to redress, the OCR standard. Since the professor cannot discipline the student via probation, suspension, expulsion, and the like, the courts may not consider him to be in the position of corrective action.⁸⁸ Whether or not the professor like the one in this example is in the position to implement corrective action is an unsettled matter of law. Note, however, that it would be extremely rare for notice to stop with the professor because the professor would likely have a duty to report and would refer the student to the appropriate disciplinary authorities.

Example Three: A female lacrosse player tells her coach that her statistics professor told her that she could get an "A" for her final grade if the lacrosse player would go out on a date with her. Does the coach have notice under the private litigation standards? Under the OCR standards? This notice would not meet the private litigation lawsuit standards because the coach has no ability to take corrective actions. However, when quid pro quo harassment occurs, OCR does not require notice before it takes action.

The following chart describes how the standards for a responsible employee and an employee with the ability to institute corrective action apply to coaches and athletic administrators.

88. *See Murrell v. Sch. Dist. No. 1, Denver, Colo.*, 186 F.3d 1238, 1247 (10th Cir. 1999).

Person To Whom Sexual Assault is Reported				
Legal Standards	Responsible Employee? Ability to redress the harassment; or Duty to report; or An employee whom a student would reasonably believe is the above		Ability to Institute Corrective Action?	
Type of Harassment	Coach	Athletic Admin.	Coach	Athletic Admin.
Coach-on-Student Harassment	Yes, because of duty to report. Probably because student's reasonable belief. And maybe ability to redress in some way. ⁸⁹	Yes, because ability to redress; duty to report; and student would reasonably believe.	If the coach has the ability to discipline (i.e., if a head coach could fire an assistant coach for sexual harassment).	Yes.
Professor/Other Employee-on-Student Harassment	Duty to report.	Duty to report.	No.	No.
Student-Athlete-on-Student Harassment	Yes, because ability to redress, duty to report, and student's reasonable belief.	Yes, because ability to redress, duty to report, and student's reasonable belief.	Likely because the coach can discipline player. ⁹⁰	Likely because the athletic administrator can discipline player. ⁹¹
Non-Student Athlete on Student Harassment	Duty to report.	Duty to report.	No.	No.

89. I.e., if a head coach to whom the sexual harassment was reported could fire an assistant coach for sexual harassment, or if the coach to whom the sexual assault is reported could remove the harasser coach from giving one-on-one practices with the harassed student and assign another coach.

90. To the author's knowledge, there are no court decisions regarding cases where only the coach and/or other athletic administrators knew of harassment as generally other school officials become involved. There are no cases stating that coaches or athletic administrators alone are school officials with the ability to implement corrective action because that issue has not arisen in the courts; however, it is likely that coaches and athletic administrators would be considered as such because of their disciplinary power over student-athletes.

91. See *supra* text accompanying note 89.

These fine distinctions can be confusing. They are more informative when a school is defending against an OCR complaint or private lawsuit. It is necessary to have a general understanding of these distinctions not for the distinctions themselves but to illustrate why it is important that the school take action after it has notice – because the school can address the harassment. Prospectively, looking to have a good response going forward, the most important piece of information to remember is not whether an employee with corrective action or a responsible employee, but rather that if an employee knows of or suspects sexual harassment, he or she needs to do something about it. Many schools' sexual harassment guidelines instruct employees that they have a duty to report possible sexual harassment to the appropriate authorities at the school.

Sometimes schools are so worried about the negative publicity of a rape that they attempt to hide the fact that a rape occurred, which is entirely backward thinking because the negative publicity is much worse when the public discovers that a rape occurred and the university did nothing about it. Moreover, creating an environment in which rape and other forms of sexual harassment are not addressed merely perpetuates more sexual harassment because harassers know that they can get away with it. CU again serves as a prime example. Granted, if CU had addressed the rapes as they happened it may suffer some negative publicity; yet, compare that negative publicity to the embarrassment that CU has become. Regardless of whether or not CU wins the pending lawsuit, it has spent at least \$2 million in legal costs and the university is an embarrassment. When you see someone pass you in an airport wearing a CU sweatshirt what do you immediately think of? Not the fact that the mountains there are beautiful. You are thinking about the current scandal. When that football team takes the field on Saturdays, what do home television viewers think? I wonder if that player is a rapist. When former, current, and future CU football players apply for jobs what are their interviewers going to think? The same thing – I wonder if this guy is a rapist. And recruits who are good players and quality young men are going to be more hesitant before choosing CU. The interests of students and the university are actually mutually aligned. It is much better for the school's public face as well as the harassed students' well being that the university handles rape and other forms of sexual harassment rather than hide them.

A school can respond to a rape report even if the victim requests confidentiality. OCR requires that if a harassed student requests confidentiality, the school must discuss the consequences of confidentiality with the student, including that confidentiality may limit the school's ability to respond and that the school will take steps to prevent and respond to

retaliation.⁹² If a student still requests confidentiality, the school “should take all reasonable steps to investigate and respond to the complaint consistent with the student’s request as long as doing so does not prevent the school from responding effectively to the harassment and preventing harassment of other students.”⁹³ The university may not be able to discipline the harasser if the harassed student requests confidentiality, but the university can respond in other ways. For example, the school could conduct sexual harassment training for the portion of the university community where the harassment occurred.⁹⁴ Furthermore, an investigation may reveal other incidents of sexual harassment and harassed students who may be ready to come forward, as well as witnesses to the sexual harassment at issue who can provide additional information.⁹⁵

The School Action Prong

Again in the second prong, the school action prong, private lawsuits have a higher threshold to establish liability. The OCR standard, whether the school responded immediately and appropriately, is a lower standard than the private litigation standard, whether the school responded with deliberate indifference. It is a lower standard because it is easier to prove that a school failed to respond immediately and appropriately than it is to prove that a school responded with deliberate indifference. To determine whether or not the school responded immediately and appropriately, OCR looks at all relevant circumstances, including:

1. The degree to which the sexual harassment affected a student’s education;
2. The type, frequency, and duration of sexual harassment;
3. The relationship between the alleged harasser(s) and harassee(s);
4. The number of individuals involved;
5. The age and sex of the harasser(s) and harassee(s);
6. School size and where and in what context sexual harassment occurred;
7. Sexual harassment involving other harasser(s) and harassee(s) as well as gender-based, but nonsexual, harassment.⁹⁶

Another example of the less stringent standard in the OCR process is its enforcement of grievance procedures. A school must create a sexual

92. U.S. DEP’T OF EDUC., *supra* note 6, at 17.

93. *Id.*

94. *Id.* at 18.

95. *Id.*

96. *Id.* at 6-7.

harassment policy that explains how a student can file a complaint and what will happen after he or she makes that complaint, commonly referred to as grievance procedures. The grievance procedures must provide for “prompt and equitable resolution of complaints.”⁹⁷ That means that the procedures must be set up so that the college handles complaints in a prompt, fair, and impartial manner. However, the courts do not consider inadequate grievance procedures alone to be enough to constitute discrimination that is actionable in the court system; nevertheless, OCR requires grievance procedures, may evaluate them in a compliance review, and may find a violation based on grievance procedures alone.⁹⁸

In OCR’s 2004 review of Christian Brothers University, OCR found numerous problems with Christian Brothers University’s grievance procedures.⁹⁹ Christian Brothers had multiple procedures for various forms of discrimination, including sexual harassment, and it remained unclear which provisions of the various codes applied to which forms of discrimination.¹⁰⁰ Nor did the grievance procedures explain the timeframe for major stages of the disciplinary process against the accused.¹⁰¹ The procedures also lacked requirements for confidentiality; notice of the outcome of disciplinary proceedings; an explanation that an accuser could request a disciplinary hearing if the disciplinary officer or campus security rejected the complaint; a description of who is responsible for investigating a complaint; or any assistance to the accuser in bringing his or her case before the disciplinary committee.¹⁰² Grievance procedures that are confusing and excessively burdensome for the complainant perpetuate violations of Title IX. A harassed student does not know how to effectively seek redress from the school, and the school does not know how to best respond. The result is a hostile environment. Schools must have clear grievance procedures that describe the process, including the components Christian Brothers did not incorporate into its grievance procedures.

One can also look at the Christian Brothers OCR case as an example of a poor investigation. When the student who had been sexually assaulted first met with the head of campus security, he failed her on multiple levels: he had not received any training on sexual harassment; he asked the accused student-

97. *Id.* at 4.

98. *Gebser*, 524 U.S. at 291-92.

99. Finding Letter of Office of Civil Rights, U.S. Dep’t of Educ. regarding Christian Bros. Univ., Comp. No. 04-03-2043 (Mar. 26, 2004) (on file with author).

100. *Id.* at *2.

101. *Id.* at *3.

102. *Id.* at *4.

athlete, but not the harassed student, to prepare a statement; and without any more investigation into factors that could affect credibility and without interviewing possible witnesses, he concluded the claims were unsubstantiated because the accused denied the assault.¹⁰³ When the harassed student went to see the Dean of Student Life, the Dean handled the investigation with similar inadequacies.¹⁰⁴ The harassed student eventually was able to take her case to a disciplinary committee, which because of its lack of training on sexual harassment, handled the case inappropriately. The disciplinary committee looked only at the lack of physical evidence and did not consider the significance of the harassed student's or the accused student's reports about the alleged harassment to their friends.¹⁰⁵ Because of its lack of training, the disciplinary committee did not understand the significance of these reports and how to evaluate them. Nor did it know how to interpret the harassed student's request that the accused student receive community service as his punishment rather than something like suspension or expulsion.¹⁰⁶ The disciplinary committee concluded that because the harassed student wanted only a community service punishment, she could not have been harassed.¹⁰⁷ One may assume that survivors of sexual harassment would want their harassers expelled from school, and many do. Others, though, may desire a different form of punishment because when they know the attacker they may not wish to see him or her severely punished.

A 1994 OCR case involving Sonoma State University provides another example of a poorly handled investigation. The six harassed students spoke with school officials responsible for giving information about sexual harassment grievance procedures, each of whom failed to give the students adequate information about the cumbersome and confusing procedures.¹⁰⁸ When the school met with the accused student, school officials read portions of the harassed students' written complaints to the accused student, giving him an opportunity to refute the allegations without first being questioned.¹⁰⁹ OCR found that "because SSU could not complete a thorough and objective investigation without asking independent and objective questions," the

103. *Id.* at *6-*7.

104. *Id.*

105. *Id.* at *8.

106. *Id.*

107. *Id.*

108. Finding Letter of the Office of Civil Rights, U.S. Dep't of Educ. regarding Sonoma St. Univ., Compl. No. 09-93-2131, at *9 (Apr. 29, 1994).

109. *Id.*

investigation was tainted.¹¹⁰ Moreover, the school official responsible for making a housing determination for the accused and harassed student, wrote a letter to the accused student that “show[ed] bias and a lack of objectivity favoring the male student . . . [and] unnecessarily focuse[d] on and emphasize[d] the female students’ alcohol consumption and whether or not there was a previous ‘romantic’ relationship between the parties.”¹¹¹ This university official also told OCR that the sexual assaults and rape were the result of taking advantage of “opportunities” the women created.¹¹² When another university official prepared reports for the District Attorney, that official also demonstrated bias. OCR highlighted that these reports “appear[ed] biased in that they describe[d] rape allegations and forced kissing in terms commonly used to reference consensual sex and then ma[d]e the alleged victims appear under investigation by describing aspects of their statements as ‘admissions.’”¹¹³

Eventually the accused student was sanctioned for “abusive behavior” by “continuing to aggressively pursue sexual activities with women who express disinterest in same.”¹¹⁴ Note that this sanction is an oxymoron. It acknowledges that the women expressed disinterest, but were not raped or sexual assaulted. Additionally, the student was sanctioned without admitting fault and without the complaining students opting for a disciplinary hearing.¹¹⁵ The sanction was inadequate to remedy a hostile environment. Furthermore, the university did not find the accused student in violation of his disciplinary sanction for failing to attend the required counseling sessions or fulfilling the requirement to stay away from the complaining students’ housing, and in fact suggested to him that he was falsely accused because of racism.¹¹⁶ This case clearly shows how a university’s response can create a hostile environment. The inadequate discipline reinforced a perception among students that the school would not treat sexual assault reports seriously.¹¹⁷

What should Sonoma State University and Christian Brothers University have done differently? How could they have protected their students from a hostile environment?

1. School officials who handle sexual harassment cases should have

110. *Id.*

111. *Id.* at *9-*10.

112. *Id.* at *10.

113. *Id.* at *11.

114. *Id.* at *10 (quoting the Student Code of Conduct).

115. *Id.*

116. *See id.* at *10, *12.

117. *Id.* at *13.

- had a better understanding of sexual harassment and, in particular, sexual assault. Training can accomplish this understanding.
2. School officials should not have given the complaining students the “run around,” and should have instead explained the harassed student’s options to them.
 3. The police and disciplinary officers should have independently questioned the accused student before allowing him to provide a statement. And, both the survivors and the accused student should be given the opportunity to write a statement. More broadly, schools should give the same due process protections to the survivor that they give to the accused student.
 4. If the accused student does not admit guilt, the harassed student must have the option to pursue a disciplinary proceeding.
 5. A university should not treat rape with a “slap on the wrist.” And, after disciplining a student, a school must follow-up on reports that a student is not adhering to the terms of the discipline, take steps to prevent retaliation of the harassed student, and respond to reports of retaliation.¹¹⁸

The courts are reluctant to second-guess schools’ disciplinary sanctions, but OCR will, as the *Sonoma State* case demonstrates. Rape and sexual assault survivors generally do not want to attend school with their attackers and see them in classes, at basketball games, and in the dining hall. Imagine the terror of knowing that the person who raped you could be just around the corner at any time. Colleges and universities expel and suspend students for plagiarism, and the same should be true for rape. OCR has insinuated, but never explicitly stated, what sanctions should be levied for rape. It has criticized schools for inadequate sanctions and some of those schools have changed the sanction as part of the voluntary agreement with OCR.¹¹⁹ To treat sexual assault seriously, schools should expel the attacker or suspend him until the complaining student graduates. Why would any school want a rapist to graduate with a degree from the school and become a representative of it?

Note, though, that the punishment levied on the harassing student remains only part of a school’s Title IX liability. Schools must also alleviate the hostile environment while disciplinary action is pending. It may be appropriate for the college to adopt interim measures while investigating the complaint. These interim measures are sometimes referred to as reasonable

118. See U.S. DEP’T OF EDUC., *supra* note 6, at 16-17.

119. Posting of Brett A. Sokolow, President, Nat’l Ctr. for Higher Educ. Risk Mgmt., to studentjudicial@yahoogroups.com (Mar. 11, 2005) (on file with author) (discussing Finding Letter of the Office of Civil Rights regarding Univ. of Cal., Santa Cruz, Compl. 09-93-2141 (Apr. 29, 1994).

accommodations. A federal law called the Jeanne Clery Act requires the school to change the complainant's living and academic arrangements if the complainant requests the change and arrangements are reasonably available.¹²⁰ This may happen before the school takes any other action, and should be as immediate as possible. Since the complainant is being moved, not the accused student, there are no due process issues and hence should be no delay. Under Title IX, a school could impose an interim suspension on the harasser from housing, or school altogether, or other arrangement, and could do so even without a specific request from the complainant. If potential criminal conduct is involved the college should determine whether to notify law enforcement.¹²¹ However, schools have violated Title IX when the school stopped its investigation after a complaint was filed with the police or decided to wait until the end of a police investigation to conduct a school investigation.¹²² Such action is a violation in part because a law enforcement investigation may take a very long time and a school cannot allow a hostile environment to persist for that long, as well as because law enforcement investigations and sexual harassment investigations use different standards (i.e., a criminal conviction requires proof beyond a reasonable doubt and a finding of sexual harassment requires a lower standard of proof).

Moving into private litigation cases where deliberate indifference is the threshold standard, *Kelly v. Yale University*¹²³ demonstrates how failure to provide reasonable accommodations can equal deliberate indifference.¹²⁴ The fellow student who raped Kathryn Kelly was suspended until Kelly's graduation from Yale Divinity School; however, during the course of the investigation, Kelly made repeated requests for academic and housing accommodations to which Yale did not even respond.¹²⁵ Because Kelly lived in the same dorm as her rapist, she requested that Yale provide her with alternative housing, which Yale provided only when a professor intervened after Kelly's repeated requests.¹²⁶ She also asked for academic accommodations because she shared classes with the rapist.¹²⁷ In rejecting Yale's motion to dismiss the case, the U.S. District Court for the District of Connecticut held that: "[the] jury could find that Yale's response, or lack

120. 20 U.S.C. 1092(f)(8)(a)(vii) (2000).

121. U.S. DEP'T OF EDUC., *supra* note 6, at 16.

122. *Id.* at 21.

123. *Kelly v. Yale Univ.*, 2003 U.S. Dist. LEXIS 4543 (D. Conn. Mar. 26, 2003).

124. *See generally id.*

125. *Id.* at *3-*4.

126. *Id.* at *4.

127. *Id.* at *3-4.

thereof, rendered Kelly ‘liable or vulnerable’ to . . . harassment[,] and that Yale’s failure to provide Kelly with accommodations, either academic or residential, immediately following [the] assault of her, was clearly unreasonable.”¹²⁸

Courts find that schools acted with deliberate indifference when the response, like the one in Yale, was clearly unreasonable. This standard extends to all the ways that a school responds to sexual harassment, from reasonable accommodations to the investigation of the sexual harassment complaint. In *Benefield v. Board of Trustees of the University of Alabama*,¹²⁹ the U.S. District Court for the Northern District of Alabama found that the university’s investigation was not deliberately indifferent.¹³⁰ Brittany Benefield, a fifteen-year-old girl who attended the University of Alabama at Birmingham (UAB), became friends with football and basketball players living in her dorm.¹³¹ That friendship escalated into a terrible situation as the players provided her with beer and drugs, and made Brittany into their sexual “play thing.”¹³² When the school learned of rumors about this behavior, they immediately interviewed Brittany and, because of her age, contacted her parents.¹³³ Although Brittany denied the rumors, the school met with Brittany repeatedly as more rumors came to its attention.¹³⁴ Additionally, school officials discussed with the football coaching staff the liability issues if the rumors were true; the football coaching staff informed the football team of those issues and instructed them stay away from Brittany.¹³⁵

What did UAB do correctly? How does UAB’s actions differ from some of the other cases we discussed previously?

1. It remained proactive despite the victim’s denials.
2. Even without a direct complaint from Brittany, school officials responded like they might respond in a situation where the harassed student desires confidentiality.
3. Unlike the school officials in *Doe* in which the soccer coach was having a relationship with the high school student, school officials followed up with the potentially harassed student and other individuals when new rumors arose, and took remedial actions in

128. *Id.* at *12 (citation omitted).

129. *Benefield v. Bd. of Trs. of the Univ. of Ala.*, 214 F. Supp. 2d 1212 (N.D. Ala. 2002).

130. *Id.* at 1221-24.

131. *Id.* at 1213-14.

132. *Id.* at 1213.

133. *Id.*

134. *Id.* at 1214-15.

135. *Id.*

case sexual harassment was occurring by issuing warnings to the football team.

The Conduct Prong

OCR and the courts use different standards to determine whether or not the alleged harasser's conduct reached the level of harassment.

Student-on-Student Harassment

OCR will find conduct of a sexual nature to be sexual harassment when it is sufficiently severe to limit access to educational programs or benefits and is unwelcome. Unwelcome is defined as "the student did not request or invite it and 'regarded the conduct as undesirable or offensive.'"¹³⁶ Acquiescence to the conduct does not equal welcomeness because a student may not resist out of fear. Additionally, if a student willingly participated in the conduct once, the student can still feel the same conduct has become unwelcome on a later occasion.¹³⁷ The courts require not only that the harassment be unwelcome and sufficiently severe, but that it also be pervasive and objectively offensive, meaning not just that the harassed student found it offensive, but that any reasonable person would find the conduct offensive.¹³⁸ Note that a single occurrence of sexual harassment could be objectively offensive¹³⁹ – rape is such a single occurrence.

Consider whether or not the following examples are objectively offensive:

1. In the cafeteria, a male student tries to grab a female student's breasts and genitalia and rubs himself against her repeatedly over a five-month period. This is objectively offensive.¹⁴⁰
2. While two students are at a meeting for the lesbian and gay student alliance, one male student tells the other that he is a "slut" and a "pussy." This is not objectively offensive, regardless of whether it is heterosexual or homosexual harassment.¹⁴¹ Nonetheless, the hypothetical is based on a single incident, repeated incidents can amount to sexual harassment under the private litigation and/or OCR standards, or at minimum other

136. U.S. DEP'T OF EDUC., *supra* note 6, at 7-8.

137. *Id.*

138. *Davis*, 526 U.S. 629.

139. *Id.*

140. *See id.*

141. *See e.g.*, *Burwell v. Pekin Cmty. High Sch. Dis.*, 213 F. Supp. 2d 917, 930-31 (C.D.Ill. 2002).

forms of disciplinary action that would not be covered by Title IX.

3. A female student is repeatedly groped by a group of male students who on one occasion stabbed her hand, and on another, held her hands while pulling her hair and attempting to remove her shirt. Again, this is objectively offensive.¹⁴²

Teacher/Employee-on-Student Harassment

As noted above, for private litigation there may not be an objectively offensive requirement when an employee or teacher who has supervisory authority over the student is the harasser. OCR uses the same welcomeness and sufficiently severe standard as in student-on-student harassment, with a special caution that schools “should be particularly concerned about the issue of welcomeness if the harasser is in a position of authority” because a student may acquiesce out of fear of what the harasser may do if the student resists and may hesitate to report the conduct out of fear that no one will believe him or her.¹⁴³ There are additional considerations used to evaluate whether or not the relationship was truly consensual when the harassment relates to allegedly consensual relationships between employees and college students:

1. The nature of the conduct and the relationship of the employee to the student, such as the degree of influence, authority, or control over the student.
2. The student’s legal or practical ability to consent because of age or disability.
3. Other information such as statements by witnesses to the incidents, the credibility of the parties, prior similar complaints of harassment against the harasser, the allegedly harassed student’s reaction, and information the harasser and harassed student communicated to others.¹⁴⁴

These factors apply to relationships between coaches and their student-athletes, along with the school’s sexual harassment guidelines. I highly recommend policies for coaches, professors, and others with supervisory authority that prohibit any sexual relationships between them and students or, at minimum, make it more difficult to prove that a relationship was consensual. Because the coach is inherently in a position of power, a student may acquiesce but not consent, out of fear of losing a scholarship, playing time, special training, and the like, and/or fears that a well-respected coach

142. *Id.* (citing *Murrell*, 186 F.3d 1238).

143. U.S. DEP’T OF EDUC., *supra* note 6, at 7-8.

144. *Id.* at 8-9.

with a good record will be believed over the student. Irrespective of potential legal liability, these relationships are terrible for team morale and should be prohibited for that reason alone.

A sexual relationship between a coach and a student-athlete is not the only way in which a coach could sexually harass a student. Verbal interactions can also amount to sexual harassment. Legal commentators, including the Women's Sports Foundation, have suggested several factors to consider in evaluating whether one's conduct as a coach could violate Title IX:

1. Do you look at your athletes' bodies in ways that are intrusive or in any way inappropriate?
2. Do you understand the difference between physical contact that is appropriate in the sport context (e.g., spotting in gymnastics) and inappropriate physical contact?
3. Do you understand the difference between appropriate conversations with athletes about their personal lives and inappropriate conversation, relating to, involving, or characteristic of sex, sexuality, the sex organs or their functions, or the sexual activities of one or more athletes, even if in jest?¹⁴⁵

CONCLUSION: PREVENTION STARTS IN THE LOCKERROOM

What are other ways that coaches can prevent sexual assault and other forms of sexual harassment on campus? The most important point to remember is that if someone is aware of potential sexual harassment, he or she must do something about it. That person must report the conduct to the appropriate university officials and take actions to redress the sexual harassment that is within that person's job duties.

Disciplining those who are harassers is an effective way to address the harassment and prevent it. Compare the actions of two teams who had the infamous Christian Peter on their roster. When the New England Patriots discovered that Peter, one of their draft picks, had been convicted of sexually assaulting a female student and was under investigation for raping another University of Nebraska student, the Patriots dropped him. The Superbowl champions are highly regarded as having men of good character on their team. The actions of Nebraska Coach Tom Osborne stand in stark contrast. Osborne has said that Peter "has been the object of more accusations and negative press than almost anyone I've known . . . He has refused to go public with his side

145. Jesse Mendelson, Note, *Sexual Harassment in Intercollegiate Athletics by Male Coaches of Female Athletes: What It Is, What It Means for the Future, and What the NCAA Should Do*, 9 CARDOZO WOMEN'S L.J. 597, 623-625 (2002).

of the story. I hope with time and effort, his reputation can be restored.”¹⁴⁶ Even after Peter was convicted and sentenced for sexually assaulting a student, Osborne only suspended him from one practice game.¹⁴⁷

Additionally, there are other actions a coach can take to prevent sexual harassment from occurring in the first place. A coach is a role model for his or her players and athletic administrators and sets the standards for the department. As part of that role, coaches and athletic administrators must reinforce the sexual harassment and sexual assault prevention training athletes and department employees receive. Training is meaningless unless an athletic department sets a tone that the messages from that training are actually messages that the athletic department believes in.¹⁴⁸ The smallest of actions can make a huge difference. Jokes about rape should not be permitted in the clubhouse. A clubhouse should not tolerate jokes about getting girls drunk and screwing them. If an athletic administrator is suspicious of a coach’s relationship with a student, the administrator must address those concerns with the coach. Setting a tone occurs in large scale ways like disciplining players and reporting sexual harassment as well as smaller, more individual ways, in the discussions a coach has with players and employees, a coach’s own comments and actions, and how the coach reacts to what players and athletics employees say.

Responding to sexual harassment complaints and preventing sexual harassment is not actually all that hard as it comes down to one basic principle – do what is right.

146. Posting of L.N. Smithee to <http://www.freerepublic.com/forum/a3891729f14f0.htm> (Jan. 28, 200, 02:42:39 PST) (including article to be found at http://www.sportsillustrated.cnn.com/football/college/news/1999/06/22/osborne_book/).

147. Debbie Schlusel, *Harassed by an Older Congressman*, WORLDNETDAILY.COM, Aug. 7, 2001, http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=23955.

148. Parent, *supra* note 65, at 644.

