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Peyton Phillips

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DELIBERATELY INDIFFERENT: AN ANALYSIS OF SEXUAL HARASSMENT CLAIMS IN UNIVERSITY SPONSORED ESPORTS ACTIVITIES USING *SIMPSON V. UNIVERSITY OF COLORADO BOULDER'S* DELIBERATE INDIFFERENCE STANDARD

PEYTON PHILLIPS*

INTRODUCTION

On March 29th, 2021, Virginia Tech and Penn State faced off virtually in *Valorant*.¹ While the players waited in an online lobby for the game to start, one of the Penn State players made a remark about being “erect and ready.”² Then, a female player on Virginia Tech responded, initially getting in on the joke.³ However, the jokes quickly turned into the Penn State players mocking and harassing the female Virginia Tech player.⁴ Ultimately, Penn State lost the match, but before the parties left, they let the female Virginia Tech player know how unfair the match was because she received advantages by playing as a woman.⁵ After the match, Conference One, the electronic sports (Esports)

* Peyton Phillips is a third-year student at Marquette University Law School and a Sports Law Certificate candidate through the National Sports Law Institute. Peyton is a 2020 graduate of the University of Minnesota - Twin Cities, where he earned a B.S. in Economics and minored in Mathematics and Sports Management. Peyton was the winner of the 2022 *Marquette Sports Law Review Comment Competition Award*, *Anne Wall “Ethics in Sports Law” Writing Competition and Award*, *National Sports Law Student Writing Competition*, and *Collegiate Issues in Sports Writing Competition and Award*. Peyton would like to thank his family, friends, mentors, and professors for their support.

1. Matt DiSanto, *Penn State Esports Disciplined For Players’ Misogynistic Comments*, ONWARD STATE (Apr. 2, 2021, 7:27 PM), <https://onwardstate.com/2021/04/02/penn-state-esports-disciplined-for-players-misogynistic-comments/>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

conference Penn State is a member of, penalized Penn State for the players' comments.⁶ The penalties included putting Penn State on probation, banning Penn State from live streaming any Conference One matches on its Twitch account for the remainder of that year, and suspending two players for one week and another player indefinitely.⁷ Sadly, this is only one example of the already growing number of sexual misconduct cases in collegiate Esports and has been a problem in Esports for a long time.⁸

This Comment argues that universities could be held liable under the deliberate indifference standard set forth in *Simpson v. University of Colorado Boulder*⁹ if they do not take proactive steps and provide ample guidance and training regarding online sexual harassment to students participating in university-sponsored Esports programs. This Comment will first offer a brief history of Esports. Then, this Comment will discuss the history of Title IX, look at how the statute has changed over the years through notable cases, and discuss the recent changes in Title IX regulations. Next, this Comment will pose a hypothetical and then analyze the hypothetical using the standard created by the U.S. Court of Appeals for the Tenth Circuit in *Simpson*. Lastly, this Comment will provide possible solutions universities can implement to address online sexual harassment in university-sponsored Esports programs. Universities should take proactive steps to provide ample guidance and training on online sexual harassment to students participating in university-sponsored Esports programs instead of waiting until a victim files a lawsuit to take action.

I. THE HISTORY OF ESPORTS

A. Esports' Origins

The origin of Esports dates back to the 1970s. On October 19th, 1972, Stanford University hosted what most claim to be the world's first competitive video game tournament.¹⁰ Five students competed against each other in

6. *Id.*

7. *Id.*

8. See, e.g., Caitlin Dewey, *The Only Guide to Gamergate You Will Ever Need to Read*, WASH. POST (Oct. 14, 2014, 5:23 PM), <https://www.washingtonpost.com/news/the-intersect/wp/2014/10/14/the-only-guide-to-gamergate-you-will-ever-need-to-read/>.

9. 500 F.3d 1170 (10th Cir. 2007).

10. Chris Baker, *Stewart Brand Recalls First 'Spacewar' Video Game Tournament*, ROLLING STONE (May 25, 2016), <https://www.rollingstone.com/culture/culture-news/stewart-brand-recalls-first-spacewar-video-game-tournament-187669/>; John T. Holden et al., *A Short Treatise on Esports and the Law: How America Regulates Its Next National Pastime*, 2020 U. ILL. L. REV. 509, 517 (2020).

Spacewar.¹¹ The tournament's winner, Bruce Baumgart, was awarded a one-year subscription to *Rolling Stone* magazine and an opportunity to be immortalized in print by a photographer on the magazine's staff.¹² However, the real prize was being named the "Intergalactic *Spacewar* Champion of 1972" and the bragging rights that came with it.¹³ Building on the momentum created in the 1970s, "[c]ompetitive gaming had worked its way into popular culture in the 1980's."¹⁴

The 1980s brought video games into the eyes of the public. Atari hosted the first large-scale video game competition, known as the *Space Invaders* Championship, in 1980, which had more than 10,000 competitors.¹⁵ Furthermore, in 1981, competitive gaming took another major stride when Walter Day founded Twin Galaxies, which keeps track of high scores in video games and publishes the results in publications like the *Guinness Book of World Records*.¹⁶ With an organization committed to keeping track of world records, the race for high scores unfolded worldwide.¹⁷ These races caught the eye of television show producers, which led to arcade game competitions being aired on shows like *First Class* in the United Kingdom and *Starcade* in the United States.¹⁸ Around the same time arcade game competitions began to be aired on television shows,¹⁹ Twin Galaxies created the U.S. National Video Game Team in 1983.²⁰ From the creation of a national team to video games being aired on television shows, the 1980s laid the foundation for modern Esports.²¹ However, the 1990s is when "e[s]ports was truly born."²²

11. *The History of Esports: How it Started, and Where We Are Now*, UNIV. OF NEW HAVEN (June 17, 2021), <https://onlinedegrees.newhaven.edu/resources/infographic/history-of-esports/>.

12. Baker, *supra* note 10; Megan Farokhmanesh, *First Game Tournament, 'Intergalactic Spacewar Olympics,' Held 40 Years Ago*, POLYGON (Oct. 20, 2012, 9:01 AM), <https://www.polygon.com/2012/10/20/3529662/first-game-tournament-intergalactic-spacewar-olympics-held-40-years>.

13. *Id.*

14. *The History of Esports*, AM. ESPORTS, <https://americanesports.net/cgi-sys/suspendedpage.cgi> [<https://perma.cc/7TP2-4XYM>] (last visited Dec. 30, 2022).

15. *History of Esports*, ESPORTS FOR GAMERS, <https://esportsforgamers.weebly.com/history-of-esports.html#:~:text=The%20Space%20Invaders%20Championship%20held%20by%20Atari%20in,high%20score%20record%20keeping%20organization%20called%20Twin%20Galaxies> (last visited Dec. 30, 2022).

16. *Welcome to Twin Galaxies*, TWIN GALAXIES, <https://www.twingalaxies.com/about-us.php> (last visited Dec. 30, 2022).

17. *The History Of Esports*, *supra* note 14.

18. *The History of Esports: How it Started, and Where We Are Now*, *supra* note 11.

19. *Id.*

20. *Twin Galaxies - Back in the Day! (1980's)*, TWIN GALAXIES, [https://www.twingalaxies.com/content.php/4190-Twin-Galaxies-Back-In-The-Day!-\(1980-s](https://www.twingalaxies.com/content.php/4190-Twin-Galaxies-Back-In-The-Day!-(1980-s) (last visited Dec. 30, 2022).

21. Holden et al., *supra* note 10, at 517.

The technological advancements in the 1990s ushered in a new era of competitive video gaming.²³ In 1989, the Sega Genesis was released, sparking an “arms race” in the early 1990s that caused video games to get “exponentially better in a short period of time.”²⁴ While video games became more accessible to individuals worldwide, competitive video gaming consistently grew.²⁵ Game-makers, such as Nintendo, started to host world championships in the early 1990s.²⁶ These world championships opened the door for more prominent video game championships, such as the Red Annihilation *Quake* tournament.²⁷ The Red Annihilation *Quake* tournament held in May of 1997 paved the way for the modern era of Esports.²⁸ Many consider the tournament “to be one of the [world’s] first true [Esports] competitions.”²⁹ The tournament consisted of over two thousand online participants battling each other in head-to-head competitions in the online game *Quake*.³⁰ The final sixteen remaining players were flown to Atlanta, Georgia, where they competed in front of online and in-person spectators.³¹ The winner of the tournament, Dennis Fong,³² is considered by most to be the first professional gamer.³³ Inspired by the Red Annihilation *Quake* tournament, some of the first Esports leagues like the Professional Gamers League (PGL) and Cyberathlete Professional League (CPL) were founded.³⁴ With the game-maker championships and professional leagues gaining sufficient interest from people worldwide, the early 2000s saw the launch of the first Esports world championships, such as the Electronic Sports World Cup and the World Cyber Games.³⁵

22. *The Evolution of Esports*, DOT ESPORTS (July 22, 2015, 5:13 AM), <https://dotesports.com/news/the-evolution-of-esports-7693>.

23. *The History of Esports*, *supra* note 14.

24. *Id.*

25. Holden et al., *supra* note 10, at 517-18.

26. *Id.* at 518.

27. *The History of Esports*, *supra* note 14.

28. Holden et al., *supra* note 10, at 517.

29. *The History of Esports*, *supra* note 14.

30. *Id.*

31. *Id.*

32. *Id.*

33. Holden et al., *supra* note 10, at 518.

34. *Id.*; *The History of Esports*, *supra* note 14.

35. Holden et al., *supra* note 10, at 518.

The World Cyber Games were the preeminent international Esports event of the early 2000s.³⁶ Competitors from more than seventy-eight countries participated in the World Cyber Games.³⁷ Similarly, the Electronic Sports World Cup drew upwards of five hundred thousand spectators for its events and distributed over two million dollars in prize money.³⁸ While countries were battling on the international stage, Esports leagues, like Major League Gaming, continued to form and develop.³⁹ Major League Gaming launched in 2002 and is considered one of the most successful Esports leagues.⁴⁰ One of its most notable accomplishments was becoming the first Esports organization or league to get a deal with a U.S. cable channel in 2006.⁴¹ Partnering up with USA Network, Major League Gaming was able to broadcast Esports competitions on television to U.S. consumers.⁴² However, it was an untraditional means of broadcasting events that allowed Esports to grow to what it has become today.

B. The Present State: The Era of Twitch

That untraditional means of broadcasting events was Twitch. Twitch is a live-streaming platform that was launched in 2011.⁴³ It has become one of the leading platforms used to connect fans to players live streaming their gameplay and Esports competitions.⁴⁴ When Twitch first began, it had slightly over three million unique visitors per month.⁴⁵ Today, Twitch averages over one hundred and forty million active users per month and has remained a juggernaut in the Esports streaming market.⁴⁶ Twitch has made Esports what it is today.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *A History of Esports*, CDW (Sept. 10, 2021), <https://www.cdw.com/content/cdw/en/articles/hardware/history-of-esports.html>.

44. *Id.*

45. *The History of Esports: How it Started, and Where We Are Now*, *supra* note 11.

46. Jason Wise, *Twitch Statistics 2022: How Many People Use Twitch?*, EARTHWEB, <https://earthweb.com/twitch-statistics/> (Sept. 6, 2022).

Currently, the Esports industry is growing exponentially every day with no hint of slowing down.⁴⁷ The rise of Twitch streamers has led to Esports players turning into influencers and becoming faces of consumer brands.⁴⁸ Titles such as *Call of Duty*, *League of Legends*, and *Overwatch* are now adopting franchise league systems.⁴⁹ These franchise leagues are offering more stability for sponsors and team owners.⁵⁰ Furthermore, traditional sports teams, recognizing Esports as a way to attract new followers, are investing in established Esports organizations.⁵¹ In addition, the International Olympic Committee (IOC) has left open the possibility of Esports becoming an Olympic sport.⁵² All this potential growth in Esports has led investors scrambling to get a piece of the pie.⁵³ This massive influx of investments has played a part in the rapid revenue growth seen in Esports in the last couple of years.⁵⁴ Notably, Esports' global revenues increased more than thirty percent annually until 2018, when the growth decreased slightly.⁵⁵ Despite not increasing at an annual rate as it was before 2018, in 2021, Esports' global revenues exceeded one billion dollars.⁵⁶ Significantly, over seventy-five percent of Esports' global revenues came from sponsorships and media rights.⁵⁷ Esports' global revenues are expected to grow to one billion six hundred million dollars by 2024, averaging an eleven percent compound annual growth rate from 2019-2024.⁵⁸

47. *A Brief History of Esports and Competitive Gaming*, SPORTING, <https://thesporting.blog/blog/a-brief-history-of-esports-and-competitive-gaming> (last visited Dec. 30, 2022).

48. Lawrence Phillips, *The History of Esports*, HOTSPAWN (Apr. 1, 2020, 4:01 PM), <https://www.hotspawn.com/other/guides/the-history-of-esports>.

49. *Id.*

50. *Id.*

51. *Id.*

52. *A History of Esports*, *supra* note 43.

53. *EsportsEcosystem in 2022: Key Industry Companies, Viewership Growth Trends, and Market Revenue Stats*, INSIDER INTEL. (Mar. 7, 2022), <https://www.insiderintelligence.com/insights/esports-ecosystem-market-report/>.

54. Werner Geysler, *The Incredible Growth of Esports[+ EsportsStatistics]*, INFLUENCER MKTG. HUB, <https://influencermarketinghub.com/esports-stats/> (Aug. 1, 2022).

55. *Id.*

56. *Global Esports & Live Streaming Marketing Report 2021, Free Version*, NEWZOO (Mar. 9, 2021), <https://newzoo.com/insights/trend-reports/newzoos-global-esports-live-streaming-market-report-2021-free-version>.

57. *Id.*

58. Geysler, *supra* note 54.

Due to the massive growth in the Esports industry and the overwhelming interest in Esports by adolescents and young adults, universities have begun adding Esports to their curricula.⁵⁹

C. Esports Arrives on Campus

Esports competitions on university campuses had been generally managed by student organizations and were, for the most part, informal.⁶⁰ That all changed in 2014 when Robert Morris University took Esports from the dorms to the athletic department by creating the first varsity Esports team and awarding scholarships to players on that team.⁶¹ Other programs followed shortly after, opening the floodgates for varsity Esports programs.⁶² The massive increase in collegiate Esports varsity programs led to the creation of the National Association of Collegiate Esports (NACE).⁶³ NACE started with seven member institutions in 2016 but quickly grew to sixty-three member institutions by 2018.⁶⁴ Today, NACE has over 170 member institutions.⁶⁵ In addition, far more institutions are exploring or have launched Esports programs and will most likely join NACE in the near future.⁶⁶

With colleges hungry to attract students and the potential monetary gains of adding an Esports program, many commentators are worried that colleges are overlooking one major issue, the Title IX implications of universities sponsoring and promoting Esports.⁶⁷

59. E.g., *Academics, Research and Student Engagement Strengthen Ohio State's Esports and Game Studies Efforts*, THE OHIO STATE UNIV., <https://esports.osu.edu/about-us/> (last visited Dec. 30, 2022).

60. Brent Marsh & Dennis Hall, *The Rapid Rise of Esports*, NASPA (Sept. 24, 2019), <https://www.naspa.org/blog/the-rapid-rise-of-esports>.

61. *Id.*; *The Rise of Collegiate Esports Programs*, ATH. DIR. UNIV., <https://www.athleticdirector.uconn.edu/articles/the-rise-of-collegiate-esports-programs/> (last visited Dec. 30, 2022).

62. *The Rise Of Collegiate Esports Programs*, *supra* note 61.

63. Marsh & Hall, *supra* note 60.

64. *Id.*

65. *About*, NAT'L ASS'N OF COLLEGIATE ESPORTS, <https://nacesports.org/about/> (last visited Dec. 30, 2022).

66. *Id.*; Marsh & Hall, *supra* note 60.

67. Jane K. Stoeber, *Title IX, Esports, and #EToo*, 89 GEO. WASH. L. REV. 857, 864 (2021); Hillary Pettegrew, *Esports in Higher Education: Prepare Your Institution*, UNITED EDUCATORS (June 2021), <https://www.ue.org/risk-management/athletics/esports-in-higher-education-prepare-your-institution/>.

II. TITLE IX: HISTORY AND NOTABLE CASES

A. *The Creation of Title IX*

Before Title IX, women had only limited access to or were often excluded from educational programs.⁶⁸ Those who accepted women's applications set quotas for the number of women admitted and often required higher grades and test scores.⁶⁹ Once enrolled in the university, women faced more restrictive rules than their male peers, were excluded from fields stereotypically associated with men, and had less access to scholarships.⁷⁰ Female students were not the only ones being discriminated against.⁷¹ Female faculty members "were more frequently denied tenure than their male counterparts, required to take pregnancy and maternity leaves, or prohibited from entering faculty clubs."⁷²

In response to these inequalities women faced in education prior to the 1970s, Congress passed Title IX.⁷³ Title IX states: "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance"⁷⁴ Simply put, Title IX bars educational programs or activities that receive federal funding from discriminating based on sex.⁷⁵ When Congress enacted Title IX, it sought to accomplish two objectives.⁷⁶ Congress wanted to: (1) "avoid the use of federal resources to support discriminatory practices" and (2) "provide individual citizens effective protection against those practices."⁷⁷ Although Title IX and its objectives seemed straightforward, many questions remained about its application.

68. *Equal Access to Education: Forty Years of Title IX*, U.S. DEP'T OF JUST. 1, 2 (June 30, 2012), <https://www.justice.gov/sites/default/files/crt/legacy/2012/06/20/titleixreport.pdf>.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. 20 U.S.C. § 1681(a) (2022).

75. *See id.*

76. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979).

77. *Id.*

B. Title IX Goes to Court

The confusion around Title IX's application has led to notable United States Supreme Court decisions. At first, there was confusion over whether a person discriminated against based on sex has a private right of action under Title IX.⁷⁸ In *Cannon v. University of Chicago*, the Court concluded that the statute is enforceable through an implied private right of action.⁷⁹ In other words, the Court determined that private individuals had the right to sue an institution for violating Title IX.⁸⁰ Nevertheless, questions remained as to what parts of an institution must comply with the statute.

Initially, in *Grove City College v. Bell*, the Court concluded that only the specific program or activity receiving federal financial assistance was required to comply with Title IX, and other parts of the educational institution that did not receive federal financial assistance were outside the scope of the statute.⁸¹ However, Congress nullified *Grove City College* three years later when it passed the Civil Rights Restoration Act of 1987.⁸² By passing this Act, Congress clarified that Title IX applies to an entire institution that receives any federal financial assistance, even if only specific activities or programs were receiving those funds.⁸³ Thus, if any component of an educational institution receives federal financial assistance, then Title IX prohibits the whole institution from discriminating based on sex.⁸⁴

A few years after Congress nullified *Grove City College*, the Court faced another critical issue involving Title IX's application.⁸⁵ In *Franklin v. Gwinnett County Public Schools*, a high school student was subjected to continual sexual harassment from her teacher, who was also her coach.⁸⁶ After the school became aware of and investigated the sexual harassment of the student, administrators and teachers took no action to stop the harassment and discouraged the student from pressing charges.⁸⁷ Eventually, the teacher resigned, and the school thereupon closed its investigation.⁸⁸ The student sued

78. *See id.* at 680-89.

79. *Id.* at 717.

80. *Id.*

81. *Grove City Coll. v. Bell*, 465 U.S. 555, 573-74 (1984).

82. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259 § 908, 102 Stat. 28 (1988).

83. *Id.*

84. 20 U.S.C. § 1681(a) (2022).

85. *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 63 (1992).

86. *Id.*

87. *Id.* at 64.

88. *Id.*

after feeling the school did nothing to redress her situation.⁸⁹ The question that the Court needed to resolve in this case was whether the implied right of action under Title IX supports a claim for monetary damages.⁹⁰ The Court concluded that monetary damages are available under Title IX.⁹¹ Furthermore, the Court determined that Title IX places a duty on educational institutions to stop coaches and teachers from discriminating against students based on their sex and that sexual harassment is a form of sex discrimination.⁹²

Although the Court recognized that sexual harassment could constitute sex discrimination under Title IX,⁹³ it never formally established when a school or school district may be held liable for damages under Title IX for sexual harassment of a student. The Court initially faced this question in *Gebser v. Lago Vista Independent School District*.⁹⁴ *Gebser* involved a sexual relationship between a high school teacher and a student.⁹⁵ The Court concluded that a school district may be held liable under Title IX only when an appropriate person “has actual notice of, and is deliberately indifferent to, the teacher’s misconduct.”⁹⁶ The Court defined an “appropriate person” as someone who is, “at a minimum, an official of the recipient entity with authority to take corrective action to end the discrimination.”⁹⁷ In other words, a “district could be liable for damages only where the district *itself intentionally acted* in clear violation of Title IX by remaining deliberately indifferent to acts of teacher-student harassment of which it had actual knowledge.”⁹⁸ The Court limited this conclusion to “cases like this one that do not involve [an] official policy of the recipient”⁹⁹ Ultimately, the Court concluded that the school district in *Gebser* was not liable under Title IX because it did not have actual notice of the harassment.¹⁰⁰

Building on its holding in *Gebser*, the Court in *Davis v. Monroe County Board of Education* established the modern framework for Title IX liability in

89. *See id.* at 63-65.

90. *Id.* at 63.

91. *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 76 (1992).

92. *Id.* at 75.

93. *Id.*

94. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998).

95. *Id.* at 277-78.

96. *Id.* at 277.

97. *Id.* at 290.

98. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 642 (1999) (emphasis added).

99. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998).

100. *Id.* at 292.

sexual harassment cases.¹⁰¹ In *Davis*, LaShonda, a fifth-grade student, was a victim of prolonged sexual harassment by one of her classmates.¹⁰² LaShonda's classmate attempted to touch LaShonda's genital area and breasts and made vulgar statements such as "I want to feel your boobs" and "I want to get in bed with you."¹⁰³ LaShonda and her mother repeatedly reported these incidents to LaShonda's teacher and principal.¹⁰⁴ However, the school failed to take action, and the conduct continued for several months until LaShonda's classmate "was charged with, and pleaded guilty to, sexual battery for his misconduct."¹⁰⁵ As a result of the prolonged harassment, LaShonda had written a suicide note, and her grades dropped because she was unable to concentrate on her studies.¹⁰⁶

The Supreme Court began its analysis in *Davis* by concluding that an educational institution could be liable for student-on-student sexual harassment under Title IX.¹⁰⁷ Furthermore, the Court determined that in order to prevail on a Title IX sexual harassment claim, the claimant must show: (1) the educational institution received federal funds; (2) sexual harassment occurred; (3) the educational institution exercised "substantial control over both the harasser and the context in which the known harassment occur[red];" (4) the educational institution had actual knowledge of the harassment; (5) the educational institution was deliberately indifferent to the harassment; and (6) the harassment was "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the [educational institution]."¹⁰⁸

For the second element, the Supreme Court provided helpful factors to determine whether the conduct rises to the level of actionable sexual harassment under Title IX. The Court explained that one should consider the "'surrounding circumstances, expectations, and relationships,' including, but not limited to, the age of the harasser and the victim and the number of individuals involved."¹⁰⁹ Additionally, the Court noted that "simple acts of teasing and name-calling among school children" do not rise to the level of

101. *Davis*, 526 U.S. at 651-54.

102. *Id.* at 633.

103. *Id.*

104. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633-34 (1999).

105. *Id.* at 634.

106. *Id.* at 635.

107. *Id.* at 646-47.

108. *See id.* at 645-50.

109. *Id.* at 651 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998)).

actionable sexual harassment under Title IX, even when those comments target gender differences.¹¹⁰ Moreover, under the fifth element, the Court determined that an educational institution's response constitutes deliberate indifference when the "response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances" and, "at a minimum, cause[s] students to undergo harassment or make[s] them liable or vulnerable to it."¹¹¹ After considering the elements and factors, the Court found that the LaShonda did not fail to state a claim and reversed and remanded the case.¹¹²

Guided by the Supreme Court's reasoning outlined in *Gebser* and *Davis*, the U.S. Court of Appeals for the Tenth Circuit in *Simpson v. University of Colorado Boulder* adopted a variation of the *Davis* framework to better address the situation presented.¹¹³ *Simpson* involved the University of Colorado at Boulder (CU) football team and its recruitment program.¹¹⁴ Each year, CU would bring in talented high school players from across the country to visit the campus.¹¹⁵ As part of the visits, recruits were paired with player hosts and female "ambassadors."¹¹⁶ The purpose of the program was to show recruits "a good time," and hosts "were chosen because they knew how to party."¹¹⁷ In December 2001, during one of these recruiting visits, claimants were assaulted by players on the team and recruits.¹¹⁸ Due to the assault, one of the claimants withdrew from CU, and the other left for a year.¹¹⁹

At the beginning of the *Simpson* court's analysis, the U.S. Court of Appeals for the Tenth Circuit believed that the "[p]laintiffs' claims [had] critical elements that [made] the [*Davis*] framework an imperfect one for analysis of their claims."¹²⁰ One critical element was that the claimants' alleged assaults arose out of an official university program, the recruitment of

110. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 652 (1999).

111. *Id.* at 645, 647.

112. *Id.* at 654. Lower courts have not followed the standard set forth in *Gebser* and *Davis* in a uniform way. *E.g.*, compare, *Thomas v. Meharry Med. Coll.*, 1 F. Supp. 3d 816, 827 (M.D. Tenn. 2014) (holding the school's response was not inadequate because there were no allegations of contact or sexual harassment by the perpetrator after the filing of plaintiff's report), with *Doe ex rel. Doe v. Derby Bd. of Educ.*, 451 F. Supp. 2d 438, 444 (D. Conn. 2006) (holding that a court could still find a school deliberately indifferent even if no post-assault harassment occurs).

113. *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1178-79 (10th Cir. 2007).

114. *Id.* at 1173.

115. *Id.*

116. *Id.*

117. *Id.* at 1180.

118. *Id.*

119. *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1180 (10th Cir. 2007).

120. *Id.* at 1174.

athletes.¹²¹ Because the U.S. Supreme Court had limited the holding in *Gebser* to cases that did not involve an official policy of the educational institution,¹²² the U.S. Court of Appeals for the Tenth Circuit determined that the *Davis* framework as is, which was based on *Gebser*'s holding, did not apply to cases such as this one involving an official school policy. Using United States Supreme Court civil-rights cases involving municipal liability under 42 U.S.C. § 1983,¹²³ the U.S. Court of Appeals for the Tenth Circuit concluded that a federal funding recipient is deliberately indifferent if it fails “to provid[e] adequate training or guidance that is obviously necessary for implementation” of the specific policy or program.¹²⁴ The court’s standard focuses on the adequacy of the training program in relation to the particular tasks one has to perform.¹²⁵

Under the U.S. Court of Appeals for the Tenth Circuit’s standard, a policy or program is a “deliberate” or “conscious” decision by the educational institution.¹²⁶ Additionally, if one knows to a moral certainty¹²⁷ or it is highly predictable¹²⁸ that a violation will occur, then it is said that the potential for such violation is obvious. Moreover, previous incidents of a violation of rights are not the only way to prove an obvious need for better training, supervision, or guidance.¹²⁹ Instead, the United States Supreme Court in *City of Canton, Ohio v. Harris* left open the possibility that a municipality could be liable for a single violation of a right if the municipality “failed to train its employees to handle recurring situations presenting an obvious potential for such a violation.”¹³⁰

Applying this new standard to the plaintiffs’ claims, the *Simpson* court determined that CU was deliberately indifferent because it failed to provide adequate guidance and supervision that was obviously necessary for the

121. *Id.*; see *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998) (“[I]n cases like this one that do not involve official policy of the recipient . . .”).

122. *Gebser*, 524 U.S. at 290.

123. The Supreme Court in *Gebser* also used cases involving municipal liability under 42 U.S.C. § 1983 when the Court established the deliberate indifference element in sexual harassment claims. *Id.* at 290-91.

124. *Simpson*, 500 F.3d at 1178.

125. See *City of Canton v. Harris*, 489 U.S. 378, 390 (1989).

126. *Id.* at 389.

127. *Id.* at 390 n.10.

128. *Bd. of the Cnty. Comm’rs of Bryan Cnty., Okla. v. Brown*, 520 U.S. 397, 398 (1997).

129. *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1178-79 (10th Cir. 2007).

130. *Brown*, 520 U.S. at 398.

implementation of the player-host program.¹³¹ Specifically, the *Simpson* court found that numerous articles, academic studies, and reports pointed out that sexual misconduct was problematic at CU and in college athletics.¹³² Furthermore, the *Simpson* court found that CU's football program had been investigated several times by local police for alleged sexual misconduct in the past.¹³³ In addition, attorneys from the district attorney's office met with CU's Chancellor and several people within the football program, athletic department, and CU's counsel's office to discuss these investigations.¹³⁴ At these meetings, the district attorney and assistant district attorneys told these CU officials that the sexual misconduct by football players was a problem and the attorneys even offered various suggestions for how to prevent the sexual misconduct from recurring.¹³⁵ However, the *Simpson* court found that the suggestions were never implemented, nor did CU do much to solve the problem before the plaintiffs in the case were assaulted.¹³⁶ As a result of the court's findings, the *Simpson* court determined that a need for more training and supervision of the player-host program was so obvious that CU was deliberately indifferent when it failed to increase training and supervision of the program.¹³⁷

C. Recent Changes to Title IX Regulations

Here, it is valuable to note that both the U. S. Supreme Court and the U. S. Department of Education's Office for Civil Rights (OCR) have recognized that there are important differences between administrative and judicial enforcement of Title IX.¹³⁸ Specifically, "a court's focus is on a school's liability to compensate a person who suffered harm as a result of the school's action or inaction."¹³⁹ On the other hand, the "OCR's focus in the administrative enforcement context is on a recipient's responsibility under the

131. *Simpson*, 500 F.3d at 1173.

132. *Id.* at 1173, 1181.

133. *Id.* at 1181-82.

134. *Id.* at 1181.

135. *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1181-82 (10th Cir. 2007).

136. *Id.* at 1184-85.

137. *Id.*

138. *E.g.*, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41,390, 41,432 (proposed July 12, 2022); Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,032 (May 19, 2020). *See, e.g.*, *Cannon v. Univ. of Chi.*, 441 U.S. 677, 706 n.41 (1979).

139. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41,390, 41,432 (proposed July 12, 2022).

nondiscrimination requirements of the Title IX statute and regulations to take prompt and effective action to prevent, eliminate, and remedy sex discrimination occurring in its programs or activities.”¹⁴⁰ Because the focus of the two entities is different, “some violations of Title IX may lend themselves to the administrative remedy of terminating Federal financial assistance, while other violations may lend themselves to a judicial remedy in private litigation.”¹⁴¹ Moreover, the Court in *Gebser* recognized the authority of federal agencies, like the U.S. Department of Education, “to ‘promulgate and enforce requirements that effectuate [Title IX’s] nondiscrimination mandate,’ even in circumstances that would not give rise to a claim for money damages.”¹⁴²

Up until 2020, in the administrative enforcement context, Title IX was interpreted through guidance documents published by the OCR.¹⁴³ However, in 2020, Betsy DeVos, the Secretary of Education of President Trump’s Administration, utilized the U.S. Department of Education’s rulemaking authority to enact changes to Title IX regulations.¹⁴⁴ Unlike previous guidance documents issued by the OCR, these new regulations have the force of law.¹⁴⁵ Significantly, DeVos’ Title IX regulations require that “Title IX Coordinators, investigators, decisionmakers, and any person who facilitates an informal resolution process” to receive training on Title IX.¹⁴⁶ In addition, DeVos’ Title IX regulations require recipients to respond in a way that is not “deliberately indifferent” when they have actual knowledge of sexual harassment.¹⁴⁷ Under the current regulations, “[a] recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances,”¹⁴⁸ which is how the Supreme Court in *Davis* defined when a

140. *Id.*

141. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. at 30,032 (citing *Cannon*, 441 U.S. at 704-06).

142. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41,390, 41,394 (proposed July 12, 2022) (alteration in original) (quoting *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998)).

143. Stoeber, *supra* note 67, at 910-12.

144. *Id.*

145. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,026 (May 19, 2020).

146. 34 C.F.R. § 106.45(b)(iii) (2022).

147. 34 C.F.R. § 106.44(a) (2022).

148. *Id.*

recipient is deliberately indifferent.¹⁴⁹ In essence, when it comes to a recipient's response to sexual harassment, the regulations implemented by DeVos "adapted the *Gebser/Davis* framework from private litigation for monetary damages to the context of administrative enforcement of Title IX"¹⁵⁰ rather than adopting the reasonableness standard that was used in the administrative enforcement context when Barack Obama was President of the United States.¹⁵¹

Numerous concerns regarding DeVos' Title IX regulations have been brought to the OCR's attention by "[a] variety of stakeholders representing all educational levels, including elementary school and secondary school administrators, representatives from postsecondary institutions, Title IX Coordinators, State Attorneys General, and advocacy organizations."¹⁵² Notably, several stakeholders are concerned that by "shifting from a reasonableness standard to deliberate indifference, the [U.S. Department of Education] no longer require[s] schools to act proactively to address sex discrimination"¹⁵³ Additionally, there are concerns regarding "the application of the standard of liability for private actions for monetary damages to a recipient's obligation to respond to sexual harassment in the administrative enforcement context."¹⁵⁴ Specifically, these stakeholders are concerned that the deliberate indifference standard used in the judicial enforcement context of Title IX is inappropriate to use in the administrative enforcement context.¹⁵⁵ They point out that the deliberate indifference standard is not consistent with administrative enforcement standards across other civil rights statutes, and could be interpreted in a way that deprives the OCR of essential enforcement authority, "including the ability to address sex discrimination before it rises to the level of the recipient being held liable for money damages in private lawsuits."¹⁵⁶

149. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 648 (1999) ("[R]ecipients are deemed 'deliberately indifferent' to acts of student-on-student harassment only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.").

150. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41,390, 41,432 (proposed July 12, 2022).

151. Stoeber, *supra* note 67, at 911-12.

152. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. at 41,433.

153. *Id.* at 41,434.

154. *Id.* at 41,433.

155. *Id.*

156. *Id.*

Listening to these concerns, the U.S. Department of Education recently released for public comment proposed changes to DeVos' Title IX regulations.¹⁵⁷ One proposed change is to eliminate the deliberate indifference standard and instead require recipients to “take prompt and effective action to end any sex discrimination that has occurred in its education program or activity, prevent its recurrence, and remedy its effects.”¹⁵⁸ This proposed change is meant to close the “troubling gap[s]” that DeVos' Title IX regulations may have created.¹⁵⁹ Another proposed change is to broaden a recipient's training requirements under Title IX.¹⁶⁰ The proposed change would require a recipient to train all employees “on the recipient's obligation to address sex discrimination in its education program or activity, the scope of conduct that constitutes sex discrimination, including the proposed definition of ‘sex-based harassment,’ and all applicable notification and information requirements” under the new proposed regulations.¹⁶¹ Nevertheless, the proposed changes are far from finished, meaning DeVos' Title IX regulations remain for now.¹⁶² As a result, the deliberate indifference standard is applied in both the administrative and judicial enforcement of Title IX.¹⁶³ However, this Comment will only look at the judicial enforcement aspect of Title IX. Specifically, this Comment will analyze a hypothetical sexual harassment claim under the deliberate indifference standard set forth by the U.S. Court of Appeals for the Tenth Circuit in *Simpson*.

As universities rush to add Esports programs to their curriculum,¹⁶⁴ the U.S. Court of Appeals for the Tenth Circuit's deliberate indifference standard developed in *Simpson* could cause universities to be found deliberately

157. Dustin Jones, *Biden's Title IX Reforms Would Roll Back Trump-Era Rules, Expand Victim Protections*, NPR (June 23, 2022, 2:40 PM), <https://www.npr.org/2022/06/23/1107045291/title-ix-9-biden-expand-victim-protections-discrimination>.

158. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41,390, 41,433 (proposed July 12, 2022). The U.S. Department of Education did not propose a specific timeframe for what would constitute as prompt action to end sex discrimination. *Id.*

159. *Id.* at 41,434 (“[T]he 2020 amendments may have created a troubling gap in implementing Title IX's prohibition on sex discrimination: a recipient may have information about possible sex discrimination in its education program or activity and yet may have no obligation to take any action to address it . . .”). *Id.* at 41,433 (“Stakeholders also expressed concern that the actual knowledge standard enables a recipient to ignore sexual harassment simply because allegations of harassing conduct were not reported to the right employee.”).

160. *Id.* at 41,428-31.

161. *Id.* at 41,428.

162. Jones, *supra* note 157.

163. 34 C.F.R. § 106.44(a) (2022); *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 645-50 (1999).

164. *See Marsh & Hall, supra* note 60.

indifferent if they mismanage their Esports programs. As of now, there has been no cases involving claims of sexual harassment arising out of one's participation on a collegiate Esports team. Because there is no case law, a hypothetical situation will be utilized to analyze a case of sexual harassment involving a collegiate Esports program under the U.S. Court of Appeals for the Tenth Circuit standard outlined in *Simpson*.

III. HYPOTHETICAL

Universities should provide adequate training, supervision, and guidance on sexual harassment in Esports and online gaming for university-funded Esports programs because insufficient training, supervision, or guidance can result in the university being found deliberately indifferent under the standard outlined in *Simpson*. Take the following hypothetical as an example.

A. *The Facts*

Green Mountain State University (GMSU), a recipient of federal funds, decided to build an Esports gaming center to attract more applicants.¹⁶⁵ The center is open to all students but is mainly used by the varsity, club, and intramural players. The University provides the games, such as *League of Legends*, and does not allow players to upload or bring their own games. The University also provides headsets that players can use while gaming to communicate with others in the gaming center. In order to use the gaming center, students only have to scan their University ID card at the door. Furthermore, the University posted a code of conduct on a wall that students can see as they enter the gaming center. The code of conduct simply states: "Harassment based on any part of an individual's identity will not be tolerated. In addition, behaviors that contradict the University's policies or mission will not be tolerated." In order to enforce the center's code of conduct, the University employs a student moderator at all times. Additionally, the University requires employees and students to go through mandatory online training related to sexual misconduct every year. The training is a broad

165. Numerous sources have found that *Esports* programs are popular among prospective students and provide institutions with a return on their investment by increasing applications to the school. *E.g.*, Patricia Washburn, *For the Win: Esports Facilities Generate Attention for Higher Education*, TRADELINE (Apr. 14, 2021), <https://www.tradelineinc.com/reports/2021-4/win-educational-institutions-get-attention-esports-facilities>; Paige Lyman, *The College Esports Scene is Ready For a Boom in 2022*, DIGIT. TRENDS (Jan. 9, 2022), <https://www.digitaltrends.com/gaming/college-esports-2022/>; Brandon Byrne, *How Esports Can Save Colleges*, TECHCRUNCH (Nov. 16, 2020, 2:52 PM), <https://techcrunch.com/2020/11/16/how-esports-can-save-colleges/>.

overview of sexual misconduct on campus and ways to prevent it. Significantly, the training neither discusses Esports nor online behavior related to Esports.

Jane Doe, a student at GMSU, joined an intramural Esports team. On numerous occasions, Jane Doe is sexually harassed by other GMSU student gamers while playing *League of Legends* in the gaming center during intramural Esports competitions. The harassments became so unbearable that Jane left and never used the gaming center again.¹⁶⁶ Jane reported the harassments to the Dean of Students Office using the proper forms, filed a formal complaint, and went through the grievance process required by the Title IX regulations implemented by DeVos. Even after going through the grievance process, Jane feels she was not made whole. After talking with her parents, Jane decided to bring an action under Title IX against GMSU for the sexual harassment she experienced while playing intramural Esports. Jane filed her suit in the United States District Court for the District of Colorado.¹⁶⁷ The following section analyzes whether GMSU was deliberately indifferent under the standard outlined in *Simpson*.

B. Analysis

Again, under *Simpson*, a federal funding recipient is deliberately indifferent when the violation is caused by the recipient's failure "to provid[e] adequate training or guidance that is obviously necessary for implementation of [the] specific policy or program."¹⁶⁸ For *Simpson* to apply, Jane must first show that the allegations arose from an official university program.¹⁶⁹ As mentioned before, a program is a "deliberate" or "conscious" decision by the educational institution.¹⁷⁰ Here, GMSU's Esports program, including its intramural Esports league, is a program of the University under *Simpson* because it was a deliberate and conscious choice by the University to have the program. Further supporting the determination that it was a deliberate and conscious choice is that GMSU added the program to increase the pool of

166. Studies have found that "[t]wenty-three percent of online multiplayer gamers who have been harassed avoid certain games due to a game's reputation for having a hostile environment while 19 percent have stopped playing certain games altogether as a result of in-game harassment." *Free to Play? Hate, Harassment, and Positive Social Experiences in Online Games*, ANTI-DEFAMATION LEAGUE (July, 18, 2019), <https://www.adl.org/free-to-play> [hereinafter *Free to Play?*].

167. For the purposes of this hypothetical, GMSU is located in Colorado.

168. *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1178 (10th Cir. 2007).

169. *Id.* at 1174.

170. *City of Canton v. Harris*, 489 U.S. 378, 389 (1989).

applicants who apply to the University, like the recruitment program at CU was used to attract high-level recruits.¹⁷¹ Next, Jane must demonstrate that the likelihood of sexual misconduct within the Esports program was so obvious that GMSU was deliberately indifferent because it failed to provide the Esports program with adequate training, supervision, and guidance.

After reviewing the facts of Jane's case, the court will most likely find GMSU was deliberately indifferent because GMSU failed to provide participants of the Esports program with adequate training, supervision, or guidance that was obviously necessary for the implementation of the Esports program.

To begin, the court will most likely find that sexual harassment in Esports has been a matter of public concern for many years,¹⁷² like the *Simpson* court found sexual misconduct was a concern with college football programs for many years.¹⁷³ Specifically, sexual harassment in Esports has been the topic of discussion several times in mainstream news publications.¹⁷⁴ Also, there have been numerous studies¹⁷⁵ and scholarly articles written¹⁷⁶ regarding sexual harassment in online games. A weakness of Jane's claim is that there have been only a few examples of sexual harassment in collegiate Esports,¹⁷⁷ and none of the publications have focused explicitly on GMSU. Conversely, in *Simpson*, there had been several articles about football players at CU involved in sexual assault cases.¹⁷⁸ Moreover, there had been articles about other collegiate football teams involved in sexual misconduct and sexual misconduct

171. *Simpson*, 500 F.3d at 1179-80.

172. E.g., Jay Castello, *Foul Play: Tackling Toxicity and Abuse in Online Video Games*, GUARDIAN (Aug. 17, 2018, 4:00 PM), <https://www.theguardian.com/games/2018/aug/17/tackling-toxicity-abuse-in-online-video-games-overwatch-rainbow-seige>.

173. *Simpson*, 500 F.3d at 1181.

174. E.g., Castello, *supra* note 172; Taylor Lorenz et al., *Dozens of Women in Gaming Speak Out About Sexism and Harassment*, N.Y. TIMES (June 23, 2020), <https://www.nytimes.com/2020/06/23/style/women-gaming-streaming-harassment-sexism-twitch.html>; See also Stoeberl, *supra* note 67, at 897 (discussing "Gamergate" in 2014).

175. E.g., Maeve Duggan, *Online Harassment*, PEW RSCH. CTR., (Oct. 22, 2014), <http://www.pewinternet.org/2014/10/22/online-harassment/>.

176. Jesse Fox & Wai Yen Tang, *Women's Experiences with General and Sexual Harassment in Online Video Games: Rumination, Organizational Responsiveness, Withdrawal, and Coping Strategies*, 19 NEW MEDIA & SOC'Y 1290, 1291 (2016); Wai Yen Tang & Jesse Fox, *Men's Harassment Behavior in Online Video Games: Personality Traits and Game Factors*, 42 AGGRESSIVE BEHAV. 513, 514, 518 (2016).

177. E.g., DiSanto, *supra* note 1.

178. *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1181 (10th Cir. 2007) ("A 1989 *Sports Illustrated* article on unlawful conduct by CU football players reported a number of cases of sexual assault by the players.").

in collegiate football in general.¹⁷⁹ However, the court will most likely not give much weight to the fact that there have been only a few examples of sexual harassment in collegiate Esports and no publications specifically focusing on harassment in Esports at GMSU because of how new Esports is on campuses throughout the country.¹⁸⁰ In contrast, collegiate football had been around for one hundred and thirty-two years when the assaults in *Simpson* occurred.¹⁸¹ Instead, the court will most likely focus on the fact that sexual harassment in Esports, in general, has been a concern of the public for numerous years and how frequent sexual harassment is in Esports.

In addition, the court will likely find that there was a high probability that a university student would be severely sexually harassed while participating in collegiate Esports. In particular, one study found that five out of six adults between the ages of eighteen and forty-five experienced harassment in online gaming.¹⁸² Furthermore, the study found that severe harassment is common in online gaming, finding that seventy-one percent of adult online multiplayer gamers were severely abused online.¹⁸³ In contrast, around the time the plaintiffs in *Simpson* were assaulted, the National Institute of Mental Health found that thirty-three percent of the sexual attacks on college campuses involved student-athletes.¹⁸⁴ GMSU could argue that the statistics are misleading because the *Simpson* case used statistics based on college athletes and not adults in general. However, the court will most likely find that argument unpersuasive. Notably, a study conducted by the Pew Research Center found that online harassment is particularly more common among young adults, those under thirty, compared to those between thirty and forty-nine years old.¹⁸⁵ Furthermore, as discussed above, collegiate Esports is new, and thus, there will likely not be studies specifically focused on collegiate Esports yet. For those reasons, the court will probably find that there was a

179. *Id.*

180. Sean Morrison, *List of Varsity Esports Programs Spans North America*, ESPN (Feb. 11, 2019, 2:51 PM), https://www.espn.com/esports/story/_/id/21152905/college-esports-list-varsity-esports-programs-north-america.

181. See Spencer Parlier, *College Football History: Notable Firsts and Milestones*, NCAA (June 30, 2022), <https://www.ncaa.com/news/ncaa/article/2020-01-31/college-football-history-notable-firsts-and-milestones>.

182. *Hate is No Game: Harassment and Positive Social Experiences in Online Games 2021*, ANTI-DEFAMATION LEAGUE (May 3, 2022), <https://www.adl.org/hateisnogoame> [hereinafter *Hate is No Game*].

183. *Id.*

184. *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1181 (10th Cir. 2007).

185. Emily A. Vogels, *The State of Online Harassment*, PEW RSCH. CTR., (Jan. 13, 2021), <https://www.pewresearch.org/internet/2021/01/13/the-state-of-online-harassment/>.

high probability that a university student would be severely sexually harassed while participating in collegiate Esports.

GMSU could argue that they should not be liable because this is the first time a student has brought to its attention harassment during the Esports intramural league and that it was only a “one-time” thing. However, the United States Supreme Court in *Harris* left open the possibility that a municipality could be liable for a single violation if the municipality failed to train its employees how to properly manage a reoccurring situation that presents an obvious potential for a violation of one’s rights.¹⁸⁶ Again, a study found that five out of six adults between the ages of eighteen and forty-five experienced harassment in online gaming.¹⁸⁷ Moreover, the study found that seventy-one percent of adult gamers were severely abused online.¹⁸⁸ In addition, another study found that young adults were more likely to experience some form of online harassment.¹⁸⁹ Based on the research done by various organizations thus far, the court will most likely find that harassment in gaming is a reoccurring situation and failure to adequately train students and employees on how to handle harassment in Esports presents an obvious potential for a violation of one’s rights. Therefore, the court will most likely find GMSU’s argument unpersuasive based on guidance from *Harris*.

Additionally, GMSU could argue that having the code of conduct visible in the gaming center in addition to the sexual harassment training students and employees were required to complete was adequate training and guidance. Because the training GMSU provided is similar to the training CU gave to all its students described in *Simpson*, the court will likely not be persuaded by this argument.¹⁹⁰ Although GMSU has an actual sexual harassment training program, it is applied to all the students and mentions nothing about Esports, similar to CU’s sexual harassment policy described in *Simpson*.¹⁹¹ Moreover, even though the policy on the wall mentions harassment in gaming, whereas the handbook in *Simpson* mentioned nothing about sexual misconduct in the recruitment program,¹⁹² the policy on the wall does not provide students guidance on how to handle harassment or what constitutes appropriate

186. Bd. of the Cnty. Comm’rs of Bryan Cnty., Okla. v. Brown, 520 U.S. 397, 398 (1997); see *City of Canton v. Harris*, 489 U.S. 378, 390 (1989).

187. *Hate is No Game*, *supra* note 182.

188. *Id.*

189. Vogels, *supra* note 185.

190. *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1182 (10th Cir. 2007).

191. *Id.*

192. *Id.* at 1182-83.

behavior. Consequently, the court will probably not be persuaded by this argument, despite GMSU having a more developed sexual harassment training program than CU.

Furthermore, relying on *Harris*, GMSU could argue that it is not enough to merely show that an accident or injury could have been avoided if one had more or better training because that can be said about any accident or injury. However, the court will likely find that this argument is unpersuasive. The United States Supreme Court in *Harris* was merely asserting that the training has to be so inadequate that it was obvious a violation would result from the inadequate training.¹⁹³ The *Harris* Court wanted to narrow its holding to only egregious examples of insufficient training and not allow the slippery slope of any insufficiencies in training to lead to liability.¹⁹⁴ Instead, the *Harris* Court wanted to stop the slope from ever beginning by narrowing its holding to only atrocious examples of inadequate training of reoccurring situations that results in an obvious violation of one's rights.¹⁹⁵ Based on the discussion so far, the United States District Court for the District of Colorado will likely find this argument unpersuasive. Instead, given the high probability of being sexually harassed in Esports, the court will most likely find this case to be an example of inadequate training that meets the bar set in *Harris*.

Lastly, GMSU could argue that the United States Supreme Court in *Harris* determined that an institution cannot be held liable for a few bad actors.¹⁹⁶ As with the rest of GMSU's arguments, the court will likely find this argument unpersuasive. The standard set forth by the *Simpson* court is not focused on the people being trained in the program.¹⁹⁷ Instead, the standard set forth by the *Simpson* court focuses on the adequacy of the training program in relation to the particular task one has to perform, like the United States Supreme Court's standard set forth in *Harris*.¹⁹⁸ Hence, it does not matter that there were a few bad actors because it is the program in general that a court using the *Simpson* standard would consider. Thus, the court will likely find this argument unpersuasive because the standard outlined in *Simpson* focuses on the training program and not on the specific actors.

In conclusion, the United States District Court for the District of Colorado will most likely determine that the need for different or more training of

193. *City of Canton v. Harris*, 489 U.S. 378, 390-92 (1989).

194. *See id.*

195. *Id.* at 391-92.

196. *Id.* at 390-91.

197. *See id.*

198. *Id.*

participants in the Esports program, including the intramural Esports league, was so obvious that GMSU can reasonably be said to have been deliberately indifferent to that need.

The U.S. Supreme Court would most likely agree with the *Simpson* court's deliberate indifference standard and the result of the hypothetical above. In *Gebser*, the Court suggested that when dealing with issues involving Title IX, courts can find guidance in civil rights cases involving municipal liability under 42 U.S.C. § 1983.¹⁹⁹ In fact, the Court adopted the deliberate indifference standard using guidance from cases involving municipal liability under 42 U.S.C. § 1983.²⁰⁰ Notably, the Court cited *Harris* when it adopted the deliberate indifference standard.²⁰¹ Furthermore, the Court limited its conclusion in *Gebser* to cases "that do not involve [an] official policy of the recipient"²⁰² Thus, because the Court has looked to cases involving municipal liability under 42 U.S.C. § 1983 for guidance when analyzing Title IX cases²⁰³ and expressly limited its holding in *Gebser* to only cases that do not involve an official policy of the recipient,²⁰⁴ the Court would most likely affirm the *Simpson* court's deliberate indifference standard for Title IX sexual harassment violations that arise from an official school policy.

C. Proactive Steps Universities Can Take

While there will likely always be a few bad actors in the gaming world, there are proactive steps universities can take to help reduce the likelihood that a gamer will be sexually harassed while participating in collegiate gaming.

To begin, universities should require students to take specific sexual harassment courses related to Esports and online gaming before allowing them to participate in the Esports program.²⁰⁵ The adverse side effects of online harassment are not always apparent.²⁰⁶ This is especially true for gamers who mistakenly categorize harassment as a form of trash talk that is a part of gaming.²⁰⁷ Studies have found that educating gamers on the adverse side

199. See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290-91 (1998).

200. *Id.*

201. *Id.* at 291.

202. *Id.* at 290.

203. *Id.* at 290-91.

204. *Id.* at 290.

205. The district attorney made a similar suggestion to CU regarding its recruitment program. *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1182 (10th Cir. 2007).

206. Stoever, *supra* note 67, at 929.

207. *Id.*

effects individuals experience after being harassed while playing video games can mitigate harassment.²⁰⁸ In addition, this training will help players identify what types of speech and behaviors constitute harassment, which can also help further decrease harassment.²⁰⁹ Moreover, the courses should include a segment on bystander skills and ways to intervene.²¹⁰ This will help students appropriately respond to sexual harassment in a context-appropriate and nonviolent way.²¹¹

Furthermore, universities should create an honor and tribunal system, like the one Riot Games created in 2012 for *League of Legends*.²¹² The honor system Riot Games instilled in *League of Legends* allowed players to praise each other for strategy, teamwork, and overall positivity.²¹³ In addition, the tribunal system gave players the chance to vote on what behaviors they considered unacceptable and the appropriate punishment for offenders.²¹⁴ Because of the honor and tribunal system, ninety-one percent of players who received a penalty for negative acts changed their behavior and never committed another violation.²¹⁵ Additionally, verbal abuse decreased by more than forty percent.²¹⁶ Similarly, Blizzard Entertainment added an endorsement function in *Overwatch* that allows players to complement each other for teamwork, sportsmanship, and leadership.²¹⁷ The gaming company also implemented a “looking for group” feature to help players create more balanced teams.²¹⁸ As a result of these additions to *Overwatch*, Blizzard reported that abusive chatting decreased between fifteen and thirty percent.²¹⁹

Lastly, universities should implement severe punishments for those who violate the university’s Esports program rules. This idea was one of the

208. Charlotte Diehl et al., *Face the Consequences: Learning About Victim’s Suffering Reduces Sexual Harassment Myth Acceptance and Men’s Likelihood to Sexually Harass*, 40 *AGGRESSIVE BEHAV.* 489, 497-98 (2014).

209. *See id.*

210. Stoever, *supra* note 67, at 929.

211. *See* Kelly P. Dillon & Brad J. Bushman, *Unresponsive or Un-Noticed?: Cyberbystander Intervention in an Experimental Cyberbullying Context*, 45 *COMPUTS. HUM. BEHAV.* 144, 148-49 (2015).

212. Castello, *supra* note 172.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

suggestions made by the district attorney in *Simpson*.²²⁰ Having clear guidelines and enforcing those guidelines will signal to the students involved that the university is serious about this matter.²²¹ In addition, it will likely decrease the number of offenses because students would most likely be more mindful of their conduct in order to avoid putting their Esports privileges at risk.

Overall, universities need to apply the lessons from *Simpson* and take sufficient steps to ensure that students are adequately trained, supervised, and guided on appropriate behavior when participating in any university-sponsored Esports activity.

CONCLUSION

Esports is one of the fastest-growing markets in the sports and entertainment world due to its overwhelming popularity among Millennials and Generation Z.²²² With the majority of youth playing video games and with interest in gaming rapidly increasing during the COVID-19 pandemic, educational institutions are investing in Esports to maintain and attract students.²²³ However, universities must be cautious of the various legal challenges of having an Esports program. One of those legal challenges is Title IX. While most universities will be focused on closing the Esports roster and scholarship gaps between males and females,²²⁴ universities should also be proactive in training and guiding students on appropriate behavior when participating in Esports. As discussed above, inadequate training, supervision, or guidance of the Esports program about online sexual harassment can lead to a university being found deliberately indifferent under the standard set forth in *Simpson*. Thus, universities should take proactive steps and provide ample guidance and training to students on sexual harassment in Esports to avoid potential liability and, more importantly, create a welcoming, inclusive, and safe environment for all.

220. *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1182 (10th Cir. 2007) (suggesting CU adopt a zero-tolerance policy).

221. *See id.*

222. Holden et al., *supra* note 10, at 509, 512.

223. Stoever, *supra* note 67, at 931.

224. Jake Seiner, *AP Study: Nearly 90% of Esports Scholarships Going to Men*, AP NEWS (Mar. 12, 2021), <https://apnews.com/article/esports-gender-inequality-scholarships-men-1823321276db40fea37dc8d9e5410643> (“Male gamers held 90.4% of roster spots and received 88.5% of scholarship funds in a sample of 27 public American schools surveyed by the AP during this school year.”).