Winning at All Costs: An Analysis of a University's Potential Liability for Sexual Assaults Committed by its Student Athletes

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COMMENT

WINNING AT ALL COSTS: AN ANALYSIS OF A UNIVERSITY’S POTENTIAL LIABILITY FOR SEXUAL ASSAULTS COMMITTED BY ITS STUDENT ATHLETES

INTRODUCTION

On December 29, 2005, just four days before he was supposed to suit up for the Florida State Seminoles in the FedEx Orange Bowl, senior linebacker A.J. Nicholson sat in a Hollywood, Florida police station and was questioned about allegedly sexually assaulting a nineteen-year-old woman.1 On January 27, 2005, star University of Iowa basketball player Pierre Pierce threatened the life of a former girlfriend, forcibly disrobed her, held her at knifepoint, and vandalized her apartment.2 In February 2004, three Virginia Tech football players, including quarterback Marcus Vick, were charged with at least ten misdemeanors arising from an incident where they gave alcohol to three fifteen-year-old girls, took pictures of them, and had sex with at least one of the girls.3 Are all three of these sexually violent acts isolated incidents, or is

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2. Tom Witosky, Charges against Pierce upgraded; Former U of I Star Could Face Up to 56 years in Prison, DES MOINES REGISTER, Feb. 19, 2005, at 1B. In 2002, Pierce had previously been charged with third degree sexual assault for an attack on a female basketball player at the University of Iowa; Pierce served one year probation and two hundred hours of community service and was allowed to remain on the Iowa basketball team after the first assault. Id. In August 2005, Pierce pled guilty to third-degree burglary, a felony, and assault with intent to commit sexual abuse, false imprisonment and fourth-degree criminal mischief, all misdemeanors. Pierre Pierce Gets Two-Year Sentence for Assault, ESPN.COM, Oct. 28, 2005, http://sports.espn.go.com/ncb/news/story?id=2206787. In October 2005, he was sentenced to a five-year suspended sentence on the burglary charge, a two-year sentence on the assault charge, and one year each for false imprisonment and criminal mischief. Those sentences are to be served concurrently. Id.
3. Welch Suggs, Brawls, Sex and Money: Another Routine Year in College Sports, CHRON. OF HIGHER EDUC., Dec. 17, 2004, at 43; Mark Berman, Vick Might Start Season On the Field, ROANOKE TIMES & WORLD NEWS (Roanoke, Va.), June 29, 2004, at C1. Vick and his two teammates were found guilty during a jury trial in May 2004, but the verdict was eventually overturned on appeal and all three men plead no contest to one misdemeanor count of contributing to the delinquency of a minor. Shay Barnhart, Imoh Expected to Plead No Contest, ROANOKE TIMES & WORLD NEWS
there a nationwide epidemic of high profile male college athletes sexually assaulting female students?

Statistics show that male athletes are more likely than the average male college student to commit sexual assaults. According to one study, athletes commit one in three college sexual assaults. In another study of sexual assaults at ten Division I schools between 1991 and 1993, male athletes made up only 3.3% of the entire male college population but were involved in 19% of the reported sexual assaults on campus. Finally, a Federal Bureau of Investigation (FBI) report stated the rate of committing sexual assaults is thirty-eight percent higher among college basketball and football players than the average male college student.

Furthermore, considering these staggering statistics, a university must be aware of any potential liability that it could incur when a recruited male athlete sexually assaults a female student on the university’s campus. This is particularly important considering that only thirty of the eighty-two Division I-A schools have formal policies on how to handle athletes who are accused of committing crimes, such as sexual assaults.

This comment will address the potential liability a university may face under Title IX for recruiting athletes with violent criminal histories or keeping athletes on campus after they commit criminally violent acts, specifically

(Roanoke, Va.), Sept. 15, 2004, at C1. Vick was eventually kicked off the Virginia Tech football team and suspended from the University for the fall semester before he pled guilty to the crimes involving minor girls, when he pled guilty to reckless driving and possession of marijuana. Week in Review, ROANOKE TIMES & WORLD NEWS (Roanoke, Va.), Sept. 19, 2004, at NRV8. However, Vick was reinstated on the Virginia Tech football team after he completed drug education counseling and was allowed to re-enroll at Virginia Tech in January 2005; he was the team’s starting quarterback when the 2005-2006 season began on September 4 against North Carolina State. Erik Brady, Prodigal Son Returns Home, USA TODAY, Aug. 19, 2005, at 1C. Vick was kicked off the Virginia Tech football team for a second time in January 2006 for a laundry list of indiscretions including intentionally stomping on the leg of an opponent during the Gator Bowl. Virginia Tech Kicks Marcus Vick Off Football Team, ESPN.COM, Jan. 7, 2006, http://sports.espn.go.com/espn/wire?section=ncf&id=2283440.


5. Id.


athletes who have been sexually violent towards female students. In order to better understand if there would be any liability for a university, the following areas will be examined: (1) the two sources of potential liability under Title IX, (a) the Office of Civil Rights guidelines pertaining to sexual harassment and (b) Title IX case law; (2) the most recent real life example of a Title IX case based on sexual assaults by student-athletes; and (3) the information that athletic departments need to know about sexual harassment after the most recent court decision concerning Title IX and sexual harassment.

**Sources of Title IX Interpretation**

Title IX of the Education Amendments of 1972 was passed by Congress to "protect[] people from discrimination based on sex in education programs or activities which receive federal financial assistance." Title IX applies to all local and state agencies that receive federal funding from the Department of Education, including "approximately 16,000 local school districts, 3,200 colleges and universities, and 5,000 for-profit schools . . . ." The statute, which states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance," is enforced in part by a series of regulations promulgated by the Office for Civil Rights ("OCR") and in part by private civil lawsuits filed by individuals. This section of the comment will discuss the development of both of these avenues of enforcement.

*Administrative Regulations from the Office for Civil Rights*

The OCR, under the authority of the Department of Education, has the primary responsibility of enforcing Title IX's prohibition on sex discrimination within federally funded programs. This is done principally through the investigation and resolution of complaints alleging sex discrimination. However, the OCR also provides guidance to the large number of federally funded entities subject to Title IX's regulations by publishing and distributing information and guidances to help these entities

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10. Id.
12. OFFICE FOR CIVIL RIGHTS, supra note 9.
13. Id.
voluntarily comply with Title IX.\textsuperscript{14}

The OCR finds its power to promulgate regulations in § 1682 of the Act, which allows any federal department or agency in charge of distributing federal funds to create rules, provisions and guidelines for enforcing the prohibitions on sex discrimination established by Title IX.\textsuperscript{15} As a result, the OCR has created a number of guidelines for the enforcement of Title IX, including guidelines in regard to intercollegiate athletics policy, equal opportunity in intercollegiate athletics, teenage pregnancy issues, and sexual harassment.\textsuperscript{16} This comment will focus only on the application of the sexual harassment guidelines established by the OCR as applied to harassment by other students or third parties.

The most recent OCR guidelines concerning sexual harassment under Title IX, the \textit{Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students and Third Parties} ("Guidance"), were published in 2001.\textsuperscript{17} The Guidance includes a variety of standards and definitions to help schools maintain voluntary compliance with Title IX’s prohibition on sexual harassment.\textsuperscript{18}

However, it should initially be noted that the OCR only has the ability to withdraw federal funding from any institution that fails to comply with Title IX’s prohibitions on sex discrimination.\textsuperscript{19} The OCR’s main job is to ensure that each federally funded institution has a procedure in place for handling cases of sexual discrimination and that these procedures are fair and effective.\textsuperscript{20} What the OCR does not have is the power to award damages to the individual victims of sex discrimination.\textsuperscript{21} If an individual victim wants monetary compensation from the university, he or she must take private action against that institution; this approach will discussed below.

\textsuperscript{14} \textit{Id.}


\textsuperscript{17} 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 (2001), \textit{available at} http://www.ed.gov/offices/OCR/archives/pdf/shguide.pdf. Prior to the 2001 publication of the Revised Sexual Harassment Guidance, the OCR had published a set of guidelines in 1997, which outlined many of the same principals. However, after the Supreme Court issued several important decisions including \textit{Gebser v. Lago Vista Indep. Sch. Dist.}, 524 U.S. 274 (1998) and \textit{Davis v. Monroe County Bd. of Educ.}, 526 U.S. 629 (1999), the OCR reissued the Guidance and incorporated many of the key components of \textit{Gebser} and \textit{Davis}. \textit{Id.} at i.

\textsuperscript{18} See generally \textit{Id.}

\textsuperscript{19} See generally 34 C.F.R. § 106 (2005).

\textsuperscript{20} \textit{Id.}

\textsuperscript{21} \textit{Id.}
Types of Sexual Harassment

The Guidance defines sexual harassment as "unwelcome conduct of a sexual nature."22 There are two distinct forms of sexual harassment, quid pro quo harassment and hostile environment sexual harassment.23 Quid pro quo harassment occurs when "a teacher or other employee conditions an educational decision or benefit on the student's submission to unwelcome sexual conduct."24 In contrast, hostile environment sexual harassment is defined as conduct that "does not explicitly or implicitly condition a decision or benefit on submission to sexual conduct...[and which,] requires a further assessment of whether or not the conduct is sufficiently serious to deny or limit a student's ability to participate in or benefit from the school's program based on sex."25 Both types of sexual harassment are considered violations of Title IX.26 Because of their position of power over students, teachers and other school employees are able to engage in both quid pro quo and hostile environment sexual harassment.27 However, because fellow students are generally unable to condition educational benefits on submission to unwelcome sexual advances, students can engage only in hostile environment sexual harassment.28 For that reason, this comment will primarily address hostile environment sexual harassment.

An Individual School's Responsibilities Under Title IX

After defining the two distinct types of sexual harassment, the Guidance goes on to address an individual school's responsibilities for maintaining compliance with Title IX, including (1) whether the harassment is sufficiently serious as to deny or limit a student's ability to participate in or benefit from an educational program, (2) the nature of the school's responsibility to address sexual harassment, (3) the notice that the school is required to have of the harassment, and (4) the role of the school's grievance procedures in the process.29 An individual school's responsibilities under each of these categories are the same for both quid pro quo sexual harassment and hostile environment sexual harassment, except that quid pro quo is assumed to be

23. Id at 5.
24. Id.
25. Id.
26. See generally id.
27. Id.
28. Id.
29. See generally id.
sufficiently serious so as to deny a student’s ability to participate in an educational program.\textsuperscript{30} Thus, this first step does not need to be addressed when dealing with quid pro quo sexual harassment.\textsuperscript{31}

\textit{Does the Harassment Deny or Limit a Student’s Ability to Participate in or Benefit from an Educational Program?}

When determining if sexual harassment denies or limits a student’s ability to participate in or benefit from an educational program, the OCR requires two things: (1) that the conduct be “sufficiently severe” and (2) that the conduct be “unwelcome.”\textsuperscript{32} First, regarding conduct that is sufficiently severe to create a hostile environment, the \textit{Guidance} requires that the behavior in question be examined from both a subjective and objective point of view, and that all relevant circumstances be considered.\textsuperscript{33} Factors that schools should consider when determining the severity and pervasiveness of the conduct include: the degree to which the conduct affected one or more students’ education; the type, frequency, and duration of the conduct; the identity of and relationship between the alleged harasser and the subject of harassment; the number of individuals involved; the age and sex of the alleged harasser and subject of harassment; the size of the school, location of incidents, and context in which they occurred; other incidents at the school; and incidents of gender-based, but nonsexual harassment.\textsuperscript{34} Specifically, looking at the “type, frequency and duration of conduct” factor, a single act, such as a sexual assault, can create a hostile environment even though it only occurred once because the single act of sexually assaulting another student is so severe.\textsuperscript{35} However, if a male student were to comment on a female student’s physical appearance or ask her for sexual favors, this behavior would probably not create a hostile environment if it were an isolated incident, but it would create a hostile environment if it were repeated behavior or done in a threatening or intimidating manner.\textsuperscript{36} The \textit{Guidance} emphasizes that the totality of the circumstances should always be considered, and school administrators should use common sense when evaluating the severity of the conduct.\textsuperscript{37}

In addition to conduct that is sufficiently serious so as to create a hostile

\begin{itemize}
  \item 30. \textit{Id.} at 5.
  \item 31. \textit{Id.}
  \item 32. \textit{See generally} \textit{Id.} at 5-9.
  \item 33. \textit{Id.} at 5.
  \item 34. \textit{Id.} at 5-7.
  \item 35. \textit{Id.} at 6.
  \item 36. \textit{Id.}
  \item 37. \textit{Id.} at 7.
\end{itemize}
environment and deprive an individual of his or her education, the conduct must also be unwelcome. The Guidance defines conduct as unwelcome "if the student did not request or invite it and 'regarded the conduct as undesirable or offensive.'"\(^{38}\) A lack of resistance to the conduct or failure to complain does not necessarily mean that the conduct was welcome because the inaction may have had valid motivations.\(^{39}\) For example, a female student may be unwilling to immediately report a sexual assault by a star athlete for a number of valid reasons such as fear of retaliation from the alleged assaulter, fear of retaliation from the athletic community, or shame because of the nature of the attack. In addition, the fact that a student had willingly participated in the conduct on a previous occasion does not mean that the student welcomed the conduct on later occasions.\(^{40}\)

When there is an issue of whether the conduct was welcome or not, as occurs in many college sexual assault cases, schools should consider the following factors: statements by any witnesses of the alleged incident, evidence about the relative credibility of the allegedly harassed student and the alleged harasser, evidence that the alleged harasser has been found to have harassed others, evidence of the allegedly harassed student's reaction or behavior after the alleged harassment, evidence of whether the allegedly harassed student filed a complaint or took other action to protest the conduct soon after the alleged incident, and other contemporaneous evidence such as the allegedly harassed student's diary or personal conversations with family or friends.\(^{41}\)

What is the Nature of School's Responsibility to Address Sexual Harassment?

After addressing what conduct qualifies as sexual harassment, the Guidance turns its attention to the nature of the school's responsibility to address sexual harassment and divides this area into two categories: (1) harassment by teachers and other employees and (2) harassment by other students or third parties. Since this comment addresses sexual assault by male athletes of female students, only the standards for harassment by other students or third parties will be addressed in depth.

When examining the responsibility of the school for peer-on-peer sexual harassment, the school will only be held responsible

if a student sexually harasses another student and the harassing

\(^{38}\) Id. at 7-8 (internal citations omitted).

\(^{39}\) Id. at 8.

\(^{40}\) Id.

\(^{41}\) Id. at 9.
conduct is sufficiently serious to deny or limit the student’s ability to participate in or benefit from the program, and if the school knows or reasonably should know about the harassment, [and] the school [fails to take] immediate effective action to eliminate the hostile environment and prevent its recurrence.\(^{42}\)

Thus, the school is not being held responsible for the harasser’s actions, but rather for its own reaction to knowledge of the harassment. By failing to correct the harassment, the school can create a hostile environment for the victim.\(^{43}\) As long as the school takes reasonable and prompt steps to stop the sexual harassment that is causing the hostile environment as soon as the school has actual or constructive notice of the harassment, then the school will not be held responsible under the OCR guidelines.\(^{44}\)

**How Much Knowledge Must the School Have of the Sexual Harassment?**

Next, the Guidance addresses the notice that the school is required to have of the sexual harassment in order to be held responsible under the OCR guidelines. Specifically, “a school has notice if a responsible employee ‘knew, or in the exercise of reasonable care should have known,’ about the harassment.”\(^{45}\) Further, a responsible employee is “any employee who has the authority to take action to redress the harassment, who has the duty to report to appropriate school official sexual harassment or any other misconduct by students or employees, or an individual who a student could reasonably believe has this authority or responsibility.”\(^{46}\) Notice does not have to be direct notice, such as a complaint by the affected student.\(^{47}\) Schools may receive notice of sexual harassment in a variety of ways including personal observation, notification by a concerned parent or teacher, rumors, or media coverage.\(^{48}\) The school is required to use “reasonably diligent inquiry” to determine if there are any incidents of sexual harassment.\(^{49}\) In addition, if a school has actual or constructive knowledge of the harassment, it is required to take appropriate action even if the affected student or students did not follow the proper grievance procedures outlined by the school.\(^{50}\)

\(^{42}\) *Id.* at 12.

\(^{43}\) *Id.*

\(^{44}\) *Id.*

\(^{45}\) *Id.* at 13 (internal citations omitted).

\(^{46}\) *Id.*

\(^{47}\) *Id.*

\(^{48}\) *Id.*

\(^{49}\) *Id.*

\(^{50}\) *Id.* at 14.
What is the Role of Schools' Grievance Procedures in the Process?

Finally, under the category of determining the school’s responsibilities, the Guidance addresses the role of an individual school’s grievance procedure in the resolution of sexual harassment cases. Specifically, all schools receiving federal funds are required to create and distribute grievance procedures that provide “for prompt and equitable resolution of sex discrimination complaints, including complaints of sexual harassment” and to create and distribute a policy against sexual discrimination. A school is in violation of Title IX simply by failing to adopt and publish a policy, even if sexual harassment does not occur. These steps are required because without a grievance policy in place and disseminated to students, victims of sexual harassment do not know how to report and to whom to report. Furthermore, these grievance procedures create a system where responsible employees receive notification of any potential sexual harassment as soon as possible, thus preventing the school from claiming that it had no actual or constructive notice of the alleged sexual harassment. On the flipside, schools cannot claim that they had no knowledge of the harassment if they did not have a grievance procedure in place that would have provided that notification.

An Individual School’s Response to Sexual Harassment

After outlining the school’s responsibilities to determine if conduct qualifies as sexual harassment, the Guidance then addresses the school’s response to discovering that sexual harassment has occurred. The school must “take immediate and appropriate steps to investigate . . . [as well as] take prompt and effective steps reasonably calculated to end any harassment, eliminate a hostile environment . . . and prevent harassment from occurring again.” Furthermore, what is considered a reasonable response depends on the circumstances of each individual case of alleged sexual harassment.

In the case of sexual assaults by male athletes on female students at universities, the most realistic type of notification of this behavior is via an

51. Id.
52. Id.
53. Id. at 19.
54. Id. at 14.
55. Id.
56. Id.
57. Id. at 15.
58. Id.
59. Id.
individual student or parent reporting the assault rather than through personal observation by a school official. However, regardless of the type of notification, the school must promptly, thoroughly, and impartially investigate the allegations, taking into consideration the following factors: "the nature of the allegations, the source of the complaint, the age of the student or students involved, [and] the size and administrative structure of the school[.]

Once the school has determined that sexual harassment has occurred, it must take steps that are "reasonable, timely, age-appropriate, and effective" and are "tailored to the specific situation." The response to each situation will be different based on its specific facts, and things that should be considered include disciplinary steps against the harasser, separation of the harasser and the harassed, special training about sexual harassment to repair the educational environment, and new policy statements about sexual harassment. When determining the proper response to any act of sexual harassment, the school must also take into consideration whether the student who reported the harassment wishes to remain anonymous. The student who reports sexual harassment may want to keep her name confidential for a number of reasons, including prevention of future retaliatory actions against her. However, a student who wishes to keep her identity secret should be informed that this might limit the school's response to the sexual harassment. The student should also be told that since Title IX prohibits retaliatory conduct, the school is able to take steps to prevent retaliation and take strong responsive steps if retaliation occurs.

Thus, looking at the definitions of sexual harassment and the standards established in the Guidance for holding a school responsible for the sexual harassment of another student, an individual, such as a female student who is sexually assaulted by a male student-athlete, would have to prove three things to succeed in holding a school accountable for sexual harassment under Title IX. First, the harassed student must prove that the male athlete's sexual assault of her created a hostile environment because the sexual assault was both unwelcome and "sufficiently severe" so as to impede her ability to enjoy

60. Id. These factors are not exclusive.

61. Prior to determining that sexual harassment has occurred, it may still be appropriate for the school to take interim actions while investigating the complaint. For example, if one student sexually assaults another student, it may be appropriate to house the students in separate dormitories immediately, even before the investigation is complete. Id. at 16.

62. Id.

63. Id. at 16-17.

64. Id. at 17.

65. Id.

66. Id.
any educational benefits. Second, the harassed student must prove that the school knew or should have known about her sexual assault. Third, the harassed student must prove that the school failed to take immediate and appropriate corrective action after she was sexually assaulted.

Furthermore, once all of these things have been proven during an OCR investigation arising from the individual harassed student’s complaint, it is the OCR’s policy to offer the university an opportunity to voluntarily remedy the situation by disciplining the student-athlete in question prior to the OCR disciplining the school. This is because Title IX’s primary purpose is to ensure that all institutions that receive federal funding are environments that are free of sexual discrimination. The purpose is not to punish these institutions by taking away their federal funding without providing an opportunity to remedy the situation via the creation of an appropriate sexual harassment policy that includes a grievance process.

Thus, while the OCR is willing to hold a university responsible for its inaction in discovering and remedying any alleged sexual assaults by male athletes upon female students, there will be no financial rewards to the victims of these sexual assaults. Instead, the OCR will only force an offending school to create a more viable process for handling future sexual assaults and harassment on campus.

**TITLE IX CASE LAW AND A PRIVATE RIGHT OF ACTION**

In addition to establishing a system for the promulgation of guidelines for handling sexual discrimination, Title IX has also been interpreted by courts to create a private right of action for monetary damages for individuals who have been sexually harassed by either a teacher or another student. This private right of action is separate and distinct from the grievance process available through the OCR; however, similar tests and terms are used in both. There are four United States Supreme Court cases that create and clarify the standards for an individual’s private right of action against a federally funded institution that is in violation of Title IX: *Cannon v. University of Chicago*, *Franklin v. Gwinnett County Public Schools*, *Gebser v. Lago Vista Independent School District*, and *Davis v. Monroe County Board of Education*.

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67. *Id.* at iii-iv.
68. *Id.* at iv.
69. *Id.*
70. 441 U.S. 677 (1979).
72. 524 U.S. 274.
Initially, in *Cannon*, the Supreme Court held that an individual plaintiff had the ability to enforce Title IX’s prohibition on intentional discrimination by filing a civil suit against an offending institution.\(^{74}\) In *Cannon*, the plaintiff alleged that she was denied admission to medical school because of her gender.\(^{75}\) At the time that she applied for admission to medical school, the University of Chicago had a policy of not admitting any individuals over the age of thirty unless the individual had an advanced degree.\(^{76}\) The plaintiff, a thirty-nine year old woman, argued that the age and advanced degree policy disproportionately affected women because “the incidence of interrupted higher education is higher among women then men . . . [thus,] exclud[ing] women from consideration even though the criteria was not valid predicators of success in medical schools. . . .”\(^{77}\) As a defense, the University of Chicago alleged that Title IX did not apply because there was no private right of action provided under the federal statute.\(^{78}\)

The Supreme Court held that although the statute did not explicitly provide a private right of action,\(^{79}\) there is a right of action under Title IX as long as a plaintiff could show that (1) that she was discriminated against because of her gender and (2) the organization that is discriminating receives federal financial assistance.\(^{80}\) The Court reasoned that when Congress passed Title IX in 1972, it was modeled after Title VII of the Civil Rights Act of 1964,\(^{81}\) which had already been interpreted to allow a similar private right of action.\(^{82}\) Thus, the Court held that a woman who was intentionally discriminated against because of her gender can privately bring a cause of action against a federally funded institution to force that institution to comply with Title IX.

Once a private right of action was established in *Cannon*, the Court further clarified the issue by addressing whether an individual could recover

\(^{73}\) 526 U.S. 629.

\(^{74}\) *Cannon*, 441 U.S. at 680.

\(^{75}\) *Id.*

\(^{76}\) *Id.* at 680 n.2.

\(^{77}\) *Id.*

\(^{78}\) *Id.* at 688.

\(^{79}\) According to the federal statute, “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681.

\(^{80}\) See *Cannon*, 441 U.S. at 680.

\(^{81}\) 42 U.S.C. § 2000(d) (2000). “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”

\(^{82}\) *Cannon*, 441 U.S. at 696-97.
compensatory damages for violations of Title IX.\textsuperscript{83} In \textit{Franklin}, a female high school student filed a Title IX action against the school district, alleging that her teacher and sports coach, Andrew Hill, had continually subjected her to sexual harassment and abuse.\textsuperscript{84} The plaintiff was a high school sophomore when Hill began having conversations with her that were sexually oriented, including asking her about "sexual experiences with her boyfriend and whether she [ever] consider[ed] having sexual [relations] with an older man."\textsuperscript{85} During the plaintiff's junior year, Hill had her excused from class three times in order to coerce her into having sexual intercourse in his private office.\textsuperscript{86} The plaintiff argued that the school district was aware of this sexual harassment because the school had investigated allegations of sexual harassment by Hill against the plaintiff and other female students.\textsuperscript{87} Allegedly, the school took no action to stop the harassment and even discouraged the plaintiff from pressing charges against Hill.\textsuperscript{88} Hill eventually resigned on the condition that all pending matters against him be dropped, and the school closed its investigation.\textsuperscript{89}

Nonetheless, the plaintiff filed a Title IX lawsuit against the school district, asking the court for compensatory damages.\textsuperscript{90} The school district argued that since Congress had not expressly allowed for such damages in the statutory structure of Title IX, these damages were impermissible.\textsuperscript{91} The Court held that even though Congress did not expressly state the ability to collect monetary damages within the text of Title IX, such a right does exist.\textsuperscript{92} Relying primarily on precedent from \textit{Bell v. Hood}\textsuperscript{93} and \textit{Kendall v. United States ex rel. Stokes},\textsuperscript{94} the Court held that "[w]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."\textsuperscript{95} Furthermore, the court reasoned that a right without a corresponding remedy would amount to a "monstrous absurdity in a well

\begin{thebibliography}{99}
\bibitem{83} \textit{Franklin}, 503 U.S. 60.
\bibitem{84} \textit{Id.} at 63.
\bibitem{85} \textit{Id.}
\bibitem{86} \textit{Id.}
\bibitem{87} \textit{Id.} at 64.
\bibitem{88} \textit{Id.}
\bibitem{89} \textit{Id.}
\bibitem{90} \textit{Id.} at 62.
\bibitem{91} \textit{See id.} at 68.
\bibitem{92} \textit{Id.} at 66.
\bibitem{93} 327 U.S. 678 (1946).
\bibitem{94} 37 U.S. 524 (1838).
\bibitem{95} \textit{Franklin}, 503 U.S. at 66 (quoting \textit{Bell}, 327 U.S. at 684).
\end{thebibliography}
organized government." Thus, the Court held that individuals who had been discriminated against because of their gender could not only bring a private right of action against the federally funded institution, but those individuals could also seek monetary damages for intentional violations of Title IX’s prohibition on sexual discrimination.

The next case that the Court dealt with concerning Title IX, Gebser, addressed what standard should be applied in determining whether an individual school could also be held liable for sexual harassment. The Court specifically held that a school could not be liable for sexual harassment of a student by a teacher “unless an official of the school district who at a minimum had authority to institute corrective measures . . . had actual notice of, and was deliberately indifferent to, the teacher’s misconduct.”

The plaintiff, an underage high school student, had an ongoing sexual relationship with her English teacher that began after her teacher made suggestive sexual comments during class, kissed her, and fondled her. The relationship continued during the summer after her freshman year and throughout her sophomore year of high school. The plaintiff never reported the relationship to school officials, who did not learn about it until a police officer discovered the student and teacher engaged in sexual intercourse and thus arrested the teacher. The school district did not have an official grievance procedure for handling sexual harassment claims but immediately fired the teacher and the state revoked his teaching license. The plaintiff and her mother then sued the school district and the teacher under Title IX and a variety of state laws.

The plaintiff urged the Court to adopt one of two standards of liability that would hold the school district responsible for the teacher’s sexual harassment: respondeat superior liability or constructive notice liability. Respondeat superior liability would hold the school district liable in damages under Title IX where a teacher is “‘aided in carrying out the sexual harassment of students by his or her position of authority with the institution,’” irrespective of

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96. Id. at 67 (quoting Kendall, 37 U.S. at 624).
97. Id. at 76.
98. 524 U.S. 274.
99. Id. at 277.
100. Id. at 277-78.
101. Id.
102. Id. at 278.
103. Id.
104. Id. at 278-79.
105. Id. at 282.
whether the school district officials had any knowledge of the harassment and irrespective of their response upon becoming aware.\textsuperscript{106}

This theory of liability was lifted directly from the 1997 Policy Guidance, which was later updated by the 2001 Policy Guidance, which is referred to extensively above.\textsuperscript{107} This theory would allow a victim to recover from the school district whenever the teacher used his or her position of authority to facilitate the harassment.\textsuperscript{108}

In the alternative, the plaintiff argued that the theory of constructive notice liability should apply.\textsuperscript{109} Under this theory of liability, the school district would be liable for sexual harassment of a student when the school district knew or should have known about the harassment.\textsuperscript{110} This theory of liability was again taken from the OCR Policy Guidance.\textsuperscript{111}

The Court refused to hold the school district liable for any sexual harassment of which the district did not have actual knowledge.\textsuperscript{112} The Court reasoned that the private right of action under Title IX was judicially implied rather than an express right of action, and thus, the Court had more latitude in shaping the remedial scheme to make it in sync with the statute.\textsuperscript{113} The Court further held that allowing an individual victim to collect monetary damages for sexual harassment that the school district did not know about, and did not have an opportunity to correct, would "'frustrate the purposes' of Title IX."\textsuperscript{114} The Court reasoned that since the administrative agencies that enforce Title IX require that there be notice and an opportunity to voluntarily correct the discrimination prior to starting enforcement proceedings, the judicially created cause of action could not reasonably require a more stringent standard.\textsuperscript{115}

Thus, the Court held that a school district could be held liable only for "deliberate indifference to discrimination" because a lower liability standard, such as respondeat superior, would create a situation where the school was liable not for its own independent decisions but rather for the independent actions of its employees.\textsuperscript{116} Therefore, school districts can only be held liable

\textsuperscript{106} Id.
\textsuperscript{107} Id.
\textsuperscript{108} Id.
\textsuperscript{109} Id.
\textsuperscript{110} Id. at 282.
\textsuperscript{111} Id.
\textsuperscript{112} Id.
\textsuperscript{113} Id. at 284.
\textsuperscript{114} Id. at 285.
\textsuperscript{115} Id. at 288.
\textsuperscript{116} Id. at 290-91.
for sexual harassment and be exposed to monetary damages under Title IX when (1) a person with authoritative power (2) has actual knowledge of sexual harassment, and (3) fails to act to stop the discrimination in such manner as to be described deliberate indifference. Thus, the standard for a private right to action is higher than the standard outlined for administrative relief through the OCR.

After determining the standard of liability for schools violating Title IX in the context of teacher-on-student sexual harassment, the Court addressed the standard of liability for a school if student-on-student sexual harassment occurs in violation of Title IX. In Davis v. Monroe County Board of Education, the Court held that schools could be held liable only for its institutional response to student-on-student sexual harassment and not for the direct act of student-on-student sexual harassment. Using the same standard outlined above in Gebser, the Court held that when an institution is deliberately indifferent to a student’s complaints of sexual harassment committed by another student, the school district risks depriving the victim of the educational opportunities of the institution, and thus could violate Title IX’s prohibitions on sex discrimination.

The plaintiff in Davis, a female fifth grade student, was the alleged victim of a long pattern of sexual harassment by a fellow fifth grade student. The sexual harassment included attempts to touch her breasts and genital areas, as well as inappropriate statements directed at the plaintiff such as “I want to get in bed with you” and “I want to feel your boobs.” The plaintiff told her mother and teacher about these incidents and was assured by her teacher that the principal had been notified of her classmate’s behavior. However, the school took no disciplinary action against the offending student, and his pattern of behavior continued for several months, during which time several other teachers witnessed or were informed of his offensive behavior. The sexual harassment stopped only after the offending student pled guilty to sexual battery for his inappropriate behavior; no disciplinary action was ever taken against the student by the school.

117. Id. at 277.
118. 526 U.S. 629.
119. Id. at 652.
120. Id.
121. Id. at 633.
122. Id.
123. Id. at 633-34.
124. Id. at 634.
125. Id. at 634-35.
The plaintiff filed a Title IX lawsuit against the school board alleging that the persistent sexual advances and harassment by the student . . . interfered with [the plaintiff’s] ability to attend school and perform her studies and activities . . . [and] the deliberate indifference by [the school administrators] to the unwelcome sexual advances . . . created an intimidating, hostile, offensive and abusive school environment in violation of Title IX.126

In an en banc decision, the United States Court of Appeals for the Eleventh Circuit originally held that the petitioner failed to state a cause of action for monetary and injunctive relief against respondent school district because “student-on-student,” or peer, harassment provided no grounds for a private cause of action under Title IX.127

On appeal, the Supreme Court reversed and held that, while peer sexual harassment was less likely to violate Title IX guarantees than teacher-student sexual harassment,128 it is still a violation of Title IX’s promise of equal access if the school’s response or its lack of response to the sexual harassment is “deliberately indifferent” and therefore, clearly unreasonable given the allegations of pervasive and continued sexual harassment.129 Furthermore, in order for the school to be held liable under Title IX, the harassment must be “so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect.”130 Thus, schools will only be held liable for peer-on-peer sexual harassment in extreme cases where the harassment is severe, the school has actual knowledge of the harassment, and the school’s response is indifferent to the point that it deprives female students the opportunity to participate in and receive the full benefits of an educational system.

Thus, according to these four Supreme Court cases, colleges can only be held liable for two different types of hostile environment sexual harassment: teacher-on-student sexual harassment and student-on-student sexual harassment. However, to be held liable and be susceptible to possible monetary damages, colleges must (1) have actual knowledge of the sexual harassment and (2) remain “deliberately indifferent” to the sexual harassment. These requirements must be met for either teacher-on-student or student-on-student sexual harassment before a college can be held liable. Finally, the

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126. Id. at 636 (citations omitted).
127. Davis v. Monroe County Bd. of Educ., 120 F.3d 1390 (11th Cir. 1997), rev’d, 526 U.S. 629.
128. Davis, 526 U.S. at 653.
129. Id. at 648.
130. Id. at 652.
major differences between the OCR regulations and the private right of action is that under the private right of action the school must have actual knowledge of the alleged sexual harassment rather than actual or constructive knowledge.

Looking specifically at student-on-student sexual harassment, a college can only be held liable for its reaction to a student-athlete’s sexual assault of a female student and only if that reaction is deliberately indifferent. For example, if a recruited male football player sexually assaults a female student while both are attending an on-campus party, the college cannot be held liable for the individual football player’s actions because the school had no control over the player’s action. However, the school could be held liable for its own reaction to the sexual assault if that reaction is found to be deliberately indifferent. In order to better understand how the courts have started to interpret this standard in the context of college athletics, the district court’s decision from Simpson v. University of Colorado\textsuperscript{131} will be examined below.

**REAL LIFE APPLICATION OF TITLE IX LIABILITY TO SEXUAL ASSAULTS: THE UNIVERSITY OF COLORADO SEX SCANDAL**

In order to better demonstrate how courts have applied the concept of Title IX liability to universities for violent sexual assaults by student-athletes on college campuses, the civil lawsuit arising from the highly publicized alleged sexual improprieties of the University of Colorado’s football team will be examined.\textsuperscript{132} Because there is no published OCR investigation concerning the liability of the University of Colorado under the guidelines, that analysis will be hypothetical. However, since two female students\textsuperscript{133} did file a Title IX action against the University of Colorado (“Colorado”) in early 2004 claiming that the university deprived them of an equal education by allowing a pattern of sexual harassment to go unchecked within the football-recruiting program, the District Court for the District of Colorado’s decision in Simpson v. University of Colorado\textsuperscript{134} will be examined in depth concerning the private right of action.\textsuperscript{135}

\textsuperscript{131} 372 F. Supp. 2d 1229 (D. Colo. 2005).

\textsuperscript{132} See e.g., Jim Hughes, Accuser Says CU Retaliating for Suit Misstatements Cited; Lisa Simpson Seeks to Amend Her Lawsuit Alleging Rape at a Party Attended by Football Players; CU Officials Deny Acting Improperly, DENY. POST, Sept. 15, 2004, at B3.

\textsuperscript{133} A third student, ex-University of Colorado soccer player Monique Gillaspie, had originally been part of this suit against the university, but she dropped the case in December 2004 after what she described at legal ‘guerilla warfare’ was employed against her by the university. Ex-Soccer Player Fed Up with Legal ‘Guerilla Warfare’, Dec. 13, 2004, ESPN.COM, http://sports.espn.go.com/ncf/news/story?id=1945583.

\textsuperscript{134} 372 F. Supp. 2d 1229.

\textsuperscript{135} Id. at 1231-32.
Following the structure laid out in by the 2001 OCR Guidance, the following issues need to be addressed in relation to the allegations of sexual harassment at the University of Colorado: (1) what type of sexual harassment is at issue; (2) what was the university’s responsibility concerning sexual harassment on its campus; and (3) what was the university’s response to the allegations of sexual harassment. More specifically, within the issue of the university’s responsibilities under Title IX, the following questions need to be answered: (1) does the harassment limit the student’s ability to benefit from an educational program; (2) what is the nature of school’s responsibility to address the harassment; (3) what knowledge did the school have of the sexual harassment; and (4) what role did the school’s grievance procedure play.

Types of Sexual Harassment

Looking at the two types of defined sexual harassment established by the Guidance, the behavior that the female students at Colorado are alleging is clearly hostile environment sexual harassment. The two female students alleged that several Colorado football players and recruits sexually assaulted them while attending a party at Ms. Simpson’s apartment in December 2001.136 According to Ms. Simpson — one of the female students who was sexually assaulted — towards the end of the evening, she felt intoxicated and tired, so she went into her bedroom to lie down.137 Shortly thereafter, two football players and two football recruits went into Ms. Simpson’s room and disrobed her while she was passed out on her bed.138 The recruits then sexually assaulted Ms. Simpson as the two players stood by and watched.139

Afterward, additional Colorado football players demanded sexual favors of Ms. Simpson who attempted to resist but was unable to “because she was terrified and surrounded by at least five large football players and recruits.”140 At the same time that Ms. Simpson was being sexually assaulted, Ms. Gilmore, the other complainant in this case, was being sexually assaulted in the same room by at least three other men who were either Colorado football players or football recruits.141 This behavior is hostile environment sexual

136. Id.
137. Id. at 1232.
138. Id.
139. Id.
140. Id.
141. Id.
harassment because students or third parties committed it and because an educational benefit was not contingent on submission to the sexual harassment.\textsuperscript{142}

The University’s Responsibilities Under Title IX

After determining that the alleged conduct should be analyzed as hostile environment sexual harassment, the OCR would then determine the severity of the harassment, the university’s responsibilities under Title IX to address the harassment, the university’s knowledge of the harassment, and the role the university’s grievance procedure played in handling the sexual harassment allegations.

Limitations on Educational Benefits

First, the OCR would examine the nature of the sexual harassment and determine if it is sufficiently serious so as to deny or limit the student’s ability to participate in or benefit from the program. Using all the factors laid out in the \textit{Guidance}, the OCR would probably find that the behavior is sufficiently serious. This is because while the conduct only occurred one time, a sexual assault is the most serious type of sexual discrimination that can create a hostile environment.\textsuperscript{143}

In addition to being sufficiently severe, the OCR must determine if the conduct limits or denies the complaining students’ ability to receive an education.\textsuperscript{144} An individual can be detrimentally affected by the sexual harassment in a variety of ways including lower grades, physical or emotional distress, or forced withdrawal from school.\textsuperscript{145} In this case, Ms. Simpson did withdraw from Colorado after being sexually assaulted and Ms. Gilmore, who remained a Colorado student, suffered emotional damage because she was forced to attend school with individuals who had sexually assaulted her.\textsuperscript{146} Based on the criteria outlined in the \textit{Guidance}, these injuries are the type of injuries that illustrate that Ms. Simpson and Ms. Gilmore were unable to enjoy the benefits of the university’s educational program because of the sexual harassment.

Finally, the OCR must also determine if the behavior was unwelcome.\textsuperscript{147}

\textsuperscript{142} U.S. DEP’T OF EDUC., \textit{supra} note 17, at 5.
\textsuperscript{143} \textit{Id.} at 6.
\textsuperscript{144} \textit{Id.}
\textsuperscript{145} \textit{Id.}
\textsuperscript{146} \textit{Simpson}, 372 F. Supp. 2d at 1245.
\textsuperscript{147} U.S. DEP’T OF EDUC., \textit{supra} note 17, at 7.
Based on Ms. Simpson's and Ms. Gilmore's statements that several large men forcibly disrobed them while they were too intoxicated to protest,\textsuperscript{148} it appears that this behavior was unwelcome. However, before completing its investigation, the OCR would have to further investigate this issue to determine if the conduct was actually unwelcome. The OCR would investigate by examining the circumstances surrounding the alleged sexual assault including the victims' reactions, statements by any witnesses, and any other contemporaneous evidence such as a letter or diary entry by the victim.\textsuperscript{149} In this case, one of the victims, Ms. Simpson, did keep a diary on a regular basis.\textsuperscript{150} Thus, the examination of her entries immediately following the alleged sexual assault could be extremely helpful in determining the validity of her claims.

The OCR, after examining all the facts, would probably find that the sexually harassing conduct alleged in this case would be sufficiently serious and unwelcome so as to deny or limit the student's ability to participate in or benefit from the program.

\textit{Nature of University’s Responsibility to Address the Sexual Harassment}

In this case, because the sexual harassment is hostile environment sexual harassment rather than quid pro quo, the university can only be held responsible for its reaction after learning about the sexual harassment. The university cannot be held liable for the direct actions of the football players or recruits because it had no control over their actions. The entirety of the school's responsibility is to make sure that it takes "corrective actions to stop the sexual harassment, prevent its recurrence, and remedy the effects on the victim that could reasonably have been prevented had the school responded promptly and effectively."\textsuperscript{151}

\textit{University’s Knowledge of the Sexual Harassment}

According to the OCR guidelines, a school will be responsible for violating Title IX's prohibition on sexual discrimination if the school knew or should have known about a hostile environment on campus.\textsuperscript{152} In this case, 

\textsuperscript{148} Simpson, 372 F. Supp. 2d at 1232.
\textsuperscript{149} U.S. DEP’T OF EDUC., supra note 17, at 9.
\textsuperscript{150} Simpson v. Univ. of Colorado, 220 F.R.D. 354 (D. Colo. 2004) (holding that the University of Colorado could compel Ms. Simpson to turn over portions of her diary as part of the discovery for a Title IX claim of sexual harassment against the school).
\textsuperscript{151} U.S. DEP’T OF EDUC., supra note 17, at 13.
\textsuperscript{152} Id. at 13.
the plaintiffs provided a list of seven incidents that allegedly provided notice to the school concerning an environment of sexual harassment in the school’s football recruiting programs: (1) a 1997 sexual assault of high school girls attending an off-campus party hosted by football players and recruits; (2) Head Football Coach Gary Barnett’s arrival on campus and notification of the previous sexual assaults; (3) three separate incidents of football players and coaches pleading guilty to assaults against women; (4) a 1999 recruit who told Barnett that he would not attend the university because of improprieties during his recruiting visit; (5) Katharine Hnida’s allegations of sexual harassment and sexual assault by her former football teammates; (6) a 2001 sexual assault of a student trainer by a football player; and (7) prior sexual assault claims against two player-hosts who were at Ms. Simpson’s apartment with recruits on the night she was sexually assaulted.153

Under the standard of actual or constructive notice, it is possible that the OCR could have examined this extensive list of sexual indiscretions and held that the university should have investigated the situation further to determine if there was a pattern of sexual harassment and sexual assault within the football recruiting program.

The University’s Grievance Procedure

In order to be in compliance with Title IX, Colorado must have in place a procedure for dealing with all sexual harassment claims, and this procedure must be publicized to the students. In March 2004, the Chancellor at the University of Colorado commissioned an investigation of Colorado’s “policies, practices, and protocols related to responding to incidents of sexual harassment and sexual misconduct.”154 While this report was completed after Ms. Simpson’s and Ms. Gilmore’s December 2001 sexual assaults, it is still helpful because it provides a detailed analysis of Colorado’s current and previous administrative response to sexual harassment.155

Specifically, the report outlines the type of conduct that would qualify as sexual harassment under the Student Code of Conduct.156 This prohibited conduct includes both quid pro quo and hostile environment sexual harassment.157 In addition to listing the school’s three Title IX compliance officers along with their specific duties, the report also lists the offices on

155. *Id.*
156. *See generally id.*
157. *Id.*
campus with the responsibility of disseminating and enforcing the sexual harassment policy.\textsuperscript{158} These offices and resources include the Sexual Misconduct Case Management Team, which coordinates investigation and adjudication procedures if sexual harassment is alleged, and the Student Outreach program, which educates students on sexual harassment.\textsuperscript{159}

Based on everything that is outlined in this report, the OCR will probably find that Colorado had in place a grievance procedure for sexual harassment that complied with Title IX. However, this does not mean that Colorado will automatically be in compliance with Title IX because it has a grievance procedure. Colorado can still be in violation of Title IX if it failed to utilize its grievance procedure; this question will be addressed in the next subsection.

The University's Response to the Sexual Harassment

After examining all of Colorado's responsibilities under Title IX and determining that the university had appropriate knowledge of the alleged risk of sexual harassment arising from the university's football recruiting system, the OCR would then examine Colorado's response to the sexual harassment to determine if it is responsible for violating Title IX. Specifically, the OCR would look at the university's initial investigative steps and at how the university disciplined those involved in the sexual harassment. The standard that the OCR would use to determine if Colorado violated Title IX is whether Colorado "t[ook] immediate and appropriate steps to investigate . . . [as well as] t[ook] prompt and effective steps reasonably calculated to end any harassment, eliminate a hostile environment . . . and prevent harassment from occurring again."\textsuperscript{160}

In this case, the complaining students are alleging that Colorado failed to properly discipline and curtail previous acts of sexual harassment, thus creating a hostile environment that ultimately resulted in their sexual assaults.\textsuperscript{161} The women are not alleging that the school failed to properly react to their complaints of sexual assault, but they are alleging that the football team used a pattern of "sex and alcohol . . . as recruiting tools in the football recruiting program."\textsuperscript{162} Because of these allegations, the OCR would investigate whether Colorado properly investigated and disciplined all previous allegations of sexual harassment to determine whether Colorado

\textsuperscript{158. Id.}  
\textsuperscript{159. Id.}  
\textsuperscript{160. U.S. DEP'T OF EDUC., supra note 17, at 15.}  
\textsuperscript{161. Simpson, 372 F. Supp. 2d at 1232.}  
\textsuperscript{162. Id. at 1232-33.}
created a hostile environment.

Specifically looking at each of the seven listed incidents by the complaining students, the OCR would analyze Colorado's response to each incident to determine if it was reasonable under all circumstances. For example, in the first cited incident, a 1997 sexual assault of a high school student by a football recruit, the school responded by instituting a zero-tolerance policy for the use of alcohol and sex as recruiting tools at both on- and off-campus parties.\[163\] In another cited incident, Colorado hired a football coach who had been convicted of assaulting his wife and kept a player who had also been convicted of assaulting his wife on the team; after learning about these convictions, Colorado did nothing to dismiss these individuals for the football team.\[164\] Next, concerning Katharine Hnida's allegations that her teammates routinely sexually harassed her while she played for Colorado, it appears that Coach Barnett took no formal steps to discipline any students through Colorado's formal Title IX grievance policy.\[165\] Finally, concerning a sexual assault of a female student trainer by a football player, a football department official obtained assistance for the female trainer by arranging a meeting for the student with Coach Barnett and other officials in the football program.\[166\] However, after meeting with Coach Barnett, the female student "felt that Barnett had intimidated her into not pressing criminal charges against the football player."\[167\]

Based on this information, the OCR could reasonably find that if Colorado had actual or constructive knowledge in all of the above listed incidents, then Colorado did not take immediate, appropriate, and effective steps to deal with the allegations of sexual harassment. This standard, which is not the same as the "deliberate indifference" standard that will be discussed below, does not require the school to take specifically defined steps to end the harassment.\[168\] This standard only requires that the school act promptly and impartially both during the investigation and during the disciplinary process.\[169\]

Conclusion of OCR Investigation

Thus, by failing to further investigate and further discipline the individuals

\[163\] Id. at 1237-38.
\[164\] Id. at 1238-39.
\[165\] Id. at 1239-40.
\[166\] Id. at 1240.
\[167\] Id.
\[168\] U.S. DEP’T OF EDUC., supra note 17, at 15-17.
\[169\] Id. at 15-16.
involved in these alleged indiscretions, OCR could find that the University of Colorado failed to abide by Title IX. However, even if the OCR found the university liable, it would not impose damages for the individual victims; instead, it would only require that the university take appropriate corrective actions to remedy the problem. Appropriate actions could include suspending or expelling the players who committed sexually violent acts against female students, suspending or firing the coaches and administrators who were given the task of supervising the recruiting process or requiring the university to create and enforce a more restrictive and better supervised football recruitment program. What is important to note is that even if the university was found to be in violation of Title IX, it would not be liable to any of the victims for damages and would only risk the possibility of losing federal funding if it refused to remedy the hostile environment within the football recruiting program.

*University of Colorado Football Recruiting Sex Scandal and the Private Right to Action Under Title IX*

Turning now to the actual civil court decision in Simpson, the civil case against Colorado never survived the university’s summary judgment motion because the plaintiff’s were unable to prove each of the five elements that the court outlined:

(1) that the University had *actual* knowledge of sexual harassment of female CU students by football players and recruits as a part of the football recruiting program[170]; (2) that the University was deliberately indifferent to this known sexual harassment . . . (3) that the plaintiffs were subjected to severe, pervasive and objectively offensive sexual harassment caused by the University’s deliberate indifference to known sexual harassment; (4) that the harassment occurred in the context of an educational activity; and (5) that the harassment had the systemic effect of depriving plaintiffs of access to educational benefits or opportunities.171

The differences between this test and the three-element test outlined by the *Guidance*172 are that the *Simpson* court (1) included the legal concept of

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170. The pattern of sexual harassment in this case is specifically limited to the action that occurred during the University’s recruitment of future players because both plaintiffs in this case allege that they were raped by football players and football recruits during official recruiting visits. *Simpson,* 372 F. Supp. 2d at 1231-32.

171. *Id.* at 1234 (emphasis added).

172. The *Guidance* requires that the harassed student must prove (1) the sexual harassment created a hostile environment because the conduct was both unwelcome and “sufficiently severe” so
“deliberate indifference,” which was derived from Davis, (2) required that actual knowledge of the harassment be demonstrated according to Davis, (3) required that the sexual harassment be in the context of an educational activity, and (4) divided the OCR’s requirement of “sufficiently severe” sexual harassment that impedes a victim’s ability to enjoy educational benefits into two separate steps. Some of these differences are merely cosmetic and do not affect the analysis under the test. However, the added requirement of actual knowledge and the use of the legal term “deliberate indifference” had a significant impact on how this court chose to analyze the facts as opposed to how the OCR would have analyzed the facts. It is important to keep these differences in mind when examining the court’s analysis of the facts because it can be helpful to explain any possible differences in decisions between the court and the hypothetical OCR investigation.

Turning to the substance of the Simpson decision, as mentioned above in Gebser and Davis, in order for a school to be held liable for the sexual harassment of another student, “an official of the school . . . who at a minimum has authority to institute corrective measures on the [school’s] behalf” must have actual notice of the harassment. Thus, before the court could determine if the University had actual knowledge, it had to determine which officials in the university had “authority to institute corrective measures” over the football program. If these school officials had actual knowledge of the sexual harassment, then the University could be held liable for the harassment. After examining the power structure within the University, the court held that Head Football Coach Gary Barnett, Athletic Director Richard Tharp, and University Chancellor Richard Byyny “generally had control over the rules established for the football program, and control over the enforcement of those rules within the football program.” With this established, the court then determined the scope of the sexual harassment that the individuals were required to have actual knowledge of to be held liable under Title IX. The court held the scope of the harassment to be the potential risk that “football players and recruits would sexually assault female University students as part of the recruiting program . . . [and] the risk of those

as to impede her ability to enjoy any educational benefits; (2) the school knew or should have known about the sexual harassment; and (3) the school failed to take immediate and appropriate corrective action after she was sexually assaulted. See generally U.S. DEP’T OF EDUC., supra note 17.

174. Id.
175. Simpson 372 F. Supp. 2d at 1235.
176. Id.
177. Id. at 1235.
178. Id. at 1235-36.
assaults would be aided or exacerbated by excessive alcohol use by players, recruits, and female students.”

Thus, the University could only be liable under Title IX if the above named administrators had actual knowledge of the specific potential risk for sexual harassment.

Next, the court examined the list of events cited by the plaintiffs that allegedly illustrated a pattern of sexual harassment to determine whether (1) these previous events were within the scope of the alleged sexual harassment so as to provide notice of future events, and (2) whether these previous events were even known to the appropriate administrative authorities.

The events cited by the plaintiffs that allegedly provided notice to the University included: (1) a 1997 sexual assault of high school girls attending an off-campus party hosted by football players and recruits; (2) Barnett’s arrival on campus and notification of the previous sexual assaults; (3) three separate incidents of football players and coaches pleading guilty to assaults against women; (4) a 1999 recruit who told Barnett that he would not attend the university because of improprieties during his recruiting visit; (5) Katharine Hnida’s allegations of sexual harassment and sexual assault by her former football teammates; (6) a 2001 sexual assault of a student trainer by a football player; and (7) prior sexual assault claims against two player-hosts who were at Simpson’s apartment with recruits on the night she was sexually assaulted.

Based on these events, the court held that there was no actual knowledge of a pattern of sexual harassment because the prior events, while all involving violent acts against women, did not involve the narrowly drawn risk and specific threat of sexual assaults by football players and recruits during formal recruiting weekends and with the assistance of both alcohol and other female students.

Thus, the University did not have actual knowledge of a pattern of sexual harassment, and therefore, the first element of the five-part test was not met.

After deciding that Colorado could not be held liable for violating Title IX because it did not have actual knowledge of any risk of sexual harassment, the court continued its discussion of the remaining four elements of its test. Concerning the second element of “deliberate indifference,” the court held that Colorado had not been deliberately indifferent to any previous or current allegations of sexual assaults committed by its football players or recruits.

179. Id. at 1237.
180. Id. at 1237-40.
181. Id.
182. Id. at 1241-42.
183. Id.
184. Id. at 1242-45.
The court reasoned that deliberate indifference was such a high standard that it was essentially equivalent to an intentional violation of Title IX. Furthermore, the court reasoned that even though the university rejected zero tolerance policies concerning alcohol and sexual contacts during football recruiting visits when they were initially proposed in 1997 after the first sexual assaults by football players and recruits, the school was not deliberately indifferent because its handbook included sections on date rape and restrictions on alcohol use. In addition, the court held that Coach Barnett’s actions, which included allegedly attempting to dissuade a female student from reporting a sexual assault by a football player and only verbally reprimanding a player who sexually harassed Katharine Hnida, were not deliberately indifferent. The court reasoned that the deliberate indifference standard does not require a school to devise, adopt, and enforce the most effective possible policies once the school becomes aware of [the] risk. Rather, the burden is on [the] plaintiff to demonstrate that the school’s failure to exercise its control over the relevant risk was so clearly unreasonable that the failure demonstrates a conscious or intentional decision to permit the risk to continue, causing the plaintiff to suffer discrimination.

Concerning the third element of its test, that the alleged sexual harassment “be severe, pervasive and objectively offensive” and be “caused by the University’s deliberate indifference to known sexual harassment,” the court held that the alleged sexual assaults were “severe and objectively offensive.” However, since the court had already held that Colorado had not been deliberately indifferent, the sexual harassment could not be the result of Colorado’s deliberate indifference.

Finally, concerning the fourth and fifth elements of its test, the court held that there were genuine issues of material fact concerning the plaintiffs’ allegations. However, the court did not address either of these elements in depth and only refuted Colorado’s claim that the plaintiffs had failed to bring forth any evidence to support these elements of the test.

After examining the entirety of the plaintiffs’ allegations, the court ruled in favor of Colorado and granted its request for summary judgment. The

185. Id. at 1242.
186. Id. at 1243.
187. Id. at 1243-44.
188. Id. at 1244.
189. Id. at 1234.
190. Id. at 1245.
191. Id.
lion’s share of the court’s decision was based on its finding that Colorado did not have actual knowledge of the risk of sexual harassment by its football players and recruits through the recruiting program, and that even if Colorado had knowledge of this risk, it had not been deliberately indifferent to the potential risk of sexual harassment.

WHAT DO ATHLETIC DEPARTMENTS NEED TO KNOW ABOUT SEXUAL HARASSMENT AFTER SIMPSON?

The Simpson case is an example of how one court has interpreted peer-on-peer sexual harassment since the Supreme Court ruling in Davis. What can athletic departments take from this ruling?

Most importantly, when a victim is unable to show that the school had actual knowledge of the sexual harassment, courts will most likely find that the university is not liable for violating Title IX. Furthermore, when a victim is able to show that the school had actual knowledge, he or she will still fail at holding the school liable under Title IX if he or she is unable to show that the school was deliberately indifferent.

Actual Notice

In the context of recruited male athletes sexually assaulting female students, no court has yet held exactly how much a school official must know before it is willing to find that the school has actual knowledge of the risk of sexual harassment. For example, if while attending an on-campus party, a recruited male athlete sexually assaulted a female student who immediately reported the alleged incident to campus security, would the university have actual notice of sexual harassment? In this situation, the school would almost certainly have actual notice of the sexual harassment.

However, what if the female student who was sexually assaulted waited several days and the reported the assault to a campus counselor and not campus security? What if the female student never reports the sexual assault, but an assistant college football coach overhears numerous football players talking in the locker room about how they “scored” with a girl who was so intoxicated that she was unconscious? These latter situations are not as clear-cut as the first situation and would probably require a court to examine the administrative structure in each of these situations to determine if the appropriate school officials with the power to discipline students ever actually learned about these sexual assaults.

In addition, according to the Simpson court, a school must have actual notice of a very specific threat or risk of sexual harassment. For example, if a
school has actual notice that several football players have made derogatory sexual remarks to cheerleaders at their games, this does not mean that the school had actual notice of the risk that a basketball recruit might sexually assault a student at an off campus party. There must be a connection between actual notice and impending risk of sexual harassment.

**Deliberate Indifference**

Next, no court has held exactly what behavior constitutes "deliberate indifference" in the context of sexual assaults on college campuses by recruited male athletes. While the *Simpson* court held that a university's conduct must be "so clearly unreasonable that [it] demonstrates a conscious or intentional decision to permit the risk to continue, causing the plaintiff to suffer discrimination," it was the first court to create such a high standard. The term deliberate indifference was first used in the context of Title IX in *Gebser* when the Court held that a school could not be liable for sexual harassment of a student by a teacher unless "an official of the school district who at a minimum ha[d] authority to institute corrective measures . . . ha[d] actual notice of, and [was] deliberately indifferent to, the teacher's misconduct." However, because the Court held that the school did not have actual notice of the sexual harassment, it did not further address what conduct would constitute deliberate indifference. The Court again addressed deliberate indifference in *Davis*. The *Davis* Court provided very little additional insight into what type of behavior would or would not constitute deliberate indifference. The Court held that the particular behavior in *Davis* — failing to take any disciplinary steps against the individual who was sexually harassing a student after repeated pleas by the harassed child and her mother — was deliberate indifference. While this does provide insight if a similar situation would occur, it does not establish any upper or lower boundaries for what type of reaction would or would not constitute deliberate indifference. Deliberate indifference is a legal term created by the civil courts and it is not found in the OCR guidelines. Because of this and the fact that this is such a newly developed term, the OCR guidelines provide very little assistance in helping determine the boundaries of deliberate indifference.

192. *Id.* at 1244.
194. See *id.* at 292-93.
195. See generally *Davis*, 526 U.S. 629.
196. *Id.* at 653-54.
With little guidance from the civil courts concerning the boundaries of its potential liability under Title IX, what can athletic departments do to ensure that they do not potentially run afoul of Title IX’s prohibition on sex discrimination and sexual harassment?

Since universities could potentially be liable for their reaction to sexual assaults under Title IX, they need to focus particular attention to sexual harassment training and disciplinary systems that are in place for handling student-athletes after any alleged sexual assaults or harassment. First, sexual harassment training is necessary for all student-athletes, coaches, and administrators so that all individuals are clear as to what type of behavior will not be tolerated as well as how to notify the proper officials if this inappropriate behavior does occur. Next, disciplinary systems need to be in place to ensure the victims of sexual assaults that immediate and appropriate corrective action will be taken by the school. Universities need to take responsibility by educating athletes about the impact and dangers of sexual assault as part of the Title IX required sexual harassment policy.

By ensuring that their athletes and coaches are properly educated about the nature of sexual harassment as well as how to report any potential instances of sexual harassment, a university rests easier when dealing with any potential allegations that it violated Title IX. Furthermore, by ensuring that it has developed an impartial and efficient disciplinary system to handle any and all allegations of sexual discrimination, the university can be fairly confident that it will not be held liable for violating Title IX either through an OCR complaint or a civil action by a private individual.

CONCLUSION

Title IX was passed in 1972 in order to ensure that federally funded institutions did not discriminate on the basis of sex. Nowhere within the text of the statute is there any mention of athletics, sexual harassment, or sexual assault; yet, because of the manner in which the courts have interpreted this law, it has become an important tool in ensuring that victims of sexual harassment and sexual assault are treated with respect and dignity. Through the OCR administrative proceedings and the civil right of action, developed in Cannon, Franklin, Gebser, and Davis, standards have been developed that all federally funded institutions must comply with in handling sexual harassment and sexual assault claims brought by their students.

In order to comply with these standards athletic departments must remain up to date on all issues and cases involving sexual harassment and take
measures, such as sexual harassment training and effective disciplinary systems, to ensure further compliance. By creating effective disciplinary systems to provide immediate and appropriate corrective action as soon as the university finds out about any sexual harassment, colleges and universities can ensure that they will continue to comply with Title IX’s prohibitions on sexual discrimination and thus avoid any civil liability.

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