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## POWER IMBALANCES IN COLLEGE ATHLETICS AND AN EXPLOITED STANDARD: IS TITLE IX DEAD?

*Without a doubt, Title IX has opened the doors of opportunity for generations of women and girls to compete, to achieve, and to pursue their American Dreams.<sup>1</sup>*

### I. INTRODUCTION

Since 1972, a long line of decisions by federal courts has watered down Title IX so that it no longer serves the purpose for which it was designed. The courts have failed to enforce Title IX in accordance with its legislative goals, and the hierarchical power imbalances existing in college athletics increase the danger of an exploited standard. These problems hinder efforts aimed at preventing sexual harassment, and merge to expose vulnerable athletes to a risk of harassment with no feasible contacts to whom they can report such harassment. To illustrate, consider the following:

A college junior secures her position again as the star pitcher on her successful college softball team. Most likely, the majority of the coaches and other personnel are male. After a tough loss for the star pitcher, the head coach confronts her, explaining to her that in order to retain her position, she needs to meet with him privately for personal pitching lessons. The young woman agrees, sensing that if she refused she would find herself at the end of the bench. During these lessons, the coach makes suggestive comments, asks increasingly vulgar questions about her sexual history, and begins to suggestively touch her. She tries to make clear to her coach that she is there only for softball, but the coach disregards her objections and continues his harassment.

The pitcher is worried about playing time, so she does not want to report her coach to anyone. Even if she did want to report him, she is not sure where she would go. The pitcher finally goes to the assistant athletic director to report the inappropriate behavior. The assistant athletic director listens to the pitcher and advises her to stop encouraging the coach, who is one of the best coaches in the country.

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<sup>1</sup> U.S. Secretary of Education Rod Paige, June 2002 *"Open to all": Title IX at Thirty*, The Secretary of Education's Commission on Opportunity in Athletics, U.S. Department of Education, Washington D.C. (Feb. 23, 2003), <http://www.ed.gov/about/bdscomm/list/athletics/title9report.doc> (last visited Oct. 10, 2007) (emphasis in original). See also David S. Cohen, *Limiting Gebser: Institutional Liability for Non-Harassment Sex Discrimination Under Title IX*, 39 WAKE FOREST L. REV. 311, 312 (2004). The Secretary of Education's report was reflective of the general public's view that Title IX is synonymous with sports because President Bush limited the Commission's focus to athletics equity. *Id.*

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The athletic director relays these comments to the coach in the form of an informal verbal warning.

At the end of the season, the star pitcher is emotionally distraught and decides against playing summer ball for the coach, in effect ending her dream of playing professionally. She brings a Title IX claim for sexual harassment against the school. The trial court grants summary judgment for the school district because the assistant athletic director was not the proper person to receive notice, and because the warning issued showed that the school was not indifferent. The very legislation that was enacted to foster equality in athletics and education has been watered down, consequently allowing the harassment of this young pitcher because she is at the bottom of a dangerous power hierarchy.

Because of the distorted way in which the Court has interpreted Title IX and the power imbalances inherent in the college athletic world, schools are able to dodge legal liability by promulgating reactive regulations that meet minimal national requirements. According to the Supreme Court, Title IX can give rise to a private right of action for monetary damages against a recipient of federal funds.<sup>2</sup> However, the Court has held that damages are only recoverable if the victim can establish the school had actual notice of, and was deliberately indifferent to, harassment that is so pervasive, severe, and objectively offensive that it deprives the student or athlete of her educational benefits or activities.<sup>3</sup> In addition, college athletic teams are marked by power imbalances, with players at the bottom of the power structure.<sup>4</sup> As a result, Title IX does not prevent sexual harassment in the hierarchical college athletic world.

This power structure makes the athletic team an environment ripe for sexually harassing behavior that goes unreported. This weakened standard under Title IX and the power imbalance inherent in college athletics allow many schools to avoid liability in the face of clear sexual harassment, especially in the close-knit world of college athletics.<sup>5</sup> Schools are allowed to adopt purely reactive measures; consequently, not enough attention is given to the development of proactive policies to

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<sup>2</sup> See *infra* Parts II.A–B (articulating the legal test for federal funds recipient liability).

<sup>3</sup> See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998) (setting forth the actual notice and deliberate indifference standard); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999) (explaining the severe, pervasive, and objectively offensive requirement).

<sup>4</sup> See *infra* Part III.B (exploring the depth of the power imbalance between a coach and player, as well as other members of the athletic staff and the athlete).

<sup>5</sup> See *infra* Part III.C (discussing the interplay between a weak legal standard and the power imbalances in college athletics that lead to legal loopholes schools may use to circumvent liability for sexual harassment).

prevent this harassment from ever occurring.<sup>6</sup> The purpose of this Note is to show that the judicially created standard for determining school liability for sexual harassment under Title IX distorts the congressional intent behind the statute and should be modified to accurately reflect the true intent underlying Title IX. In addition, school policies must be changed in order to reflect the obstacles presented by the inherent power structure of college athletics.

Part II of this Note explores the complicated legislative and judicial history of Title IX, with special emphasis on its use in the world of college athletics.<sup>7</sup> Part III analyzes the inherent power imbalances in college athletics and the easily twisted standard for school liability, which encourages the formulation of merely reactive institutional procedural safeguards.<sup>8</sup> Part IV presents several proposed changes to the standard and suggests additions to the existing regulations implementing and enforcing Title IX that will create a strong set of community standards and help prevent sexual harassment in college athletics.<sup>9</sup>

## II. BACKGROUND OF TITLE IX

In order to understand the importance of Title IX, one must first understand its complicated history. Part II.A of this Note provides background information regarding the birth of the bill and general legislative history behind its passage.<sup>10</sup> Part II.B analyzes the pertinent Supreme Court cases that have established a private cause of action with the right to damages within Title IX.<sup>11</sup> Part II.C explains the specific test

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<sup>6</sup> See 34 C.F.R. § 106.9 (2003) (explaining regulatory requirements promulgated by the Department of Education Office for Civil Rights); § 106.31(b) (2003) (discussing the corrective measure a school is to take upon receiving notice that sexual harassment has occurred).

<sup>7</sup> See *infra* Part II (discussing the history of Title IX, from Senator Bayh's original idea to the most recent cases interpreting liability of a school under Title IX).

<sup>8</sup> See *infra* Part III (explaining that the existence of power imbalances on a college athletic team, in conjunction with the exploited *Gebser* standard, effectively eliminates the prevention and reporting of sexual harassment in college athletics).

<sup>9</sup> See *infra* Part IV (proposing several changes to the standard and several additional regulations the Department of Education should promulgate to encourage creating an institution that values preventing sexual harassment on its athletic teams).

<sup>10</sup> See *infra* Part II.A (examining the origins of Title IX and the administrative regulations that followed, and demonstrating the intent of Title IX and the widening class of persons and harms covered by Title IX).

<sup>11</sup> See *infra* Part II.B (tracking the interpretation of Title IX through several Supreme Court cases).

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that has evolved for use in sexual harassment cases and examines specific examples of when this standard has been applied.<sup>12</sup>

A. *The Legislative Promise of Title IX*

In 1971, Senator Birch Bayh introduced the first version of the bill that would become Title IX.<sup>13</sup> Senator Bayh, in his efforts to get the bill passed, denounced the prevalence of sex discrimination in education: “[O]ne of the great failings of the American educational system is the continuation of corrosive and unjustified discrimination against women.”<sup>14</sup> On June 23, 1972, Congress enacted a law that would forever change the face of public education.<sup>15</sup> Prior to the enactment of Title IX, many educational institutions were free to discriminate against women and girls.<sup>16</sup> Title IX was enacted as part of the 1972 Education Amendments, and provides the following protection:

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

<sup>12</sup> See *infra* Part II.C (discussing the standard put forward in *Gebser*, and clarified in *Franklin*, that has diverged from Congress’s intent behind the language of Title IX).

<sup>13</sup> 117 Cong. Rec. 30,399 (1971) (noting that the original amendment to the Education Act focused on increased access to higher and graduate education).

<sup>14</sup> 118 Cong. Rec. 5802-03 (1972). Senator Bayh continued, “It is clear to me that sex discrimination reached into all facets of education—admissions, scholarship programs, faculty hiring and promotion, professional staffing, and pay scales.” *Id.* Available statistics supplement Senator Bayh’s statement: in 1972, fewer than 32,000 women competed in intercollegiate athletics. Department of Health, Education, and Welfare, Policy Interpretation, 45 C.F.R. pt. 86 (1979); see also Eldon E. Snyder & Elmer Spreitzer, *Participation in Sport as Related to Educational Expectations among High School Girls*, 50 BOWLING GREEN ST. UNIV. SOCIOLOGY OF EDUC. 47, (1977). Even as early as 1968, researchers established that athletic participation is positively related to academic achievement and to educational expectations. *Id.* According to the National Collegiate Athletic Association, Title IX has had a positive impact on the number of college women participating in competitive athletics; it is now nearly five times the pre-Title IX rate. NATION COLLEGIATE ATHLETIC ASSOCIATION (NCAA), 1981-82-2005-06 NCAA SPORTS SPONSORSHIP AND PARTICIPATION RATES REPORT 76 (May 2007), available at <http://www.ncaapublications.com/Uploads/PDF/ParticipationRates20084232c5b7-6441-412c-80f1-7d85f3536a51.pdf>. In 2005-06, a record number of 170,526 women competed, representing 42% of college athletes nationwide. *Id.*

<sup>15</sup> Education Amendments of 1972, 20 U.S.C. § 1681 (2000). Title IX was enacted as part of the Education Amendments of 1972, that, as a whole, dealt with rising educational costs, increased student enrollment, and the changing work world. *Id.* § 1681.

<sup>16</sup> “*Open to All*,” *supra* note 1. This report attributes the remarkable increase in female participation since Title IX to both the legislation and changing ideas about women’s “proper” role in society. *Id.*

education program or activity receiving Federal financial assistance[.]<sup>17</sup>

Sexual harassment was not itself mentioned in the congressional debates or text of Title IX because Title IX was originally intended only to combat sexual discrimination.<sup>18</sup> However, since the passage of Title IX, administrative regulations promulgated by the Department of Education's Office for Civil Rights ("OCR") have further defined sexual discrimination, clarified exactly which classes of individuals are protected, and indicated that the scope of behavior Title IX was intended to remedy includes sexual harassment.<sup>19</sup> In order to continue receiving federal funds, a school must comply with Title IX and the Department of

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<sup>17</sup> 20 U.S.C. § 1681. This statute continues to describe groups and settings where discrimination is allowed, for example, religious organizations with contrary religious tenets, military training schools, public schools with continuing traditions of only admitting one sex, social fraternities or sororities, voluntary youth organizations, Boy or Girl conferences, mother-daughter or father-son activities, beauty pageants, or situations involving statistical evidence of imbalance. *Id.* § 1681(a)(2)-(9). See 118 Cong. Rec. at 5803. The sponsor of the bill, Senator Bayh, described the bill, stating that "[Title IX] is broad . . . [T]he heart of this amendment is a provision banning sex discrimination in educational programs receiving Federal funds. The amendment would cover such crucial aspects as admissions procedures, scholarships, and faculty employment, with limited exceptions." *Id.* See also Recognizing the Contributions of Patsy Takemoto Mink, Pub. L. No. 107-255, 116 Stat. 1734 (2002) (indicating that Title IX may be called the Patsy Takemoto Mink Equal Opportunity in Education Act).

<sup>18</sup> Cohen, *supra* note 1, at 314. See 34 C.F.R. § 106.40 (2003). Instead, the Department of Health, Education and Welfare concentrated on the classes of people eligible for protection from discrimination. *Id.* See also Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 74 (1992). Indeed, it took two decades for the Supreme Court to recognize the application of Title IX to sexual harassment. *Id.*

<sup>19</sup> See Cohen, *supra* note 1, at 313; see also 34 C.F.R. §106.40 (2007) (Title IX includes protection against discrimination based on pregnancy and marital status); 34 C.F.R. §100.7 (2003) (incorporating the following retaliatory language taken from Title VII: "No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege . . . because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part."). See also 34 C.F.R. §106.41 (2007). As the following excerpt demonstrates, discrimination can extend to the availability of certain sports to each gender:

[A] recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors . . . no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of . . . [these Title IX regulations], contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

*Id.*

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Education's Title IX regulatory implementation scheme.<sup>20</sup> The regulations establish procedures that are important for the prevention or correction of sexual harassment, including establishment of a public policy against sex discrimination,<sup>21</sup> adoption and publication of grievance procedures addressing sex discrimination and harassment,<sup>22</sup> and designation of at least one employee responsible for Title IX compliance.<sup>23</sup> Unfortunately, many colleges and universities have focused on enacting reactive measures that allow the school to avoid

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<sup>20</sup> Revised Sexual Harassment Guidance [hereinafter Revised Guidance]: Harassment of Students by School Employees, Other Students or Third Parties: Title IX, Department of Education Office for Civil Rights, Jan. 19, 2001, <http://www.ed.gov/about/offices/list/ocr/docs/shguide.pdf> (last visited Jan. 20, 2008). See 20 U.S.C. § 3413 (2000). Since the passage of Title IX, Congress created a separate federal agency responsible for education, the Department of Education, with an enforcement division—the Office of Civil Rights. *Id.* Congress transferred all educational responsibilities, which had belonged to the Department of Health, Education, and Welfare to the newly created agency. *Id.* § 3441.

<sup>21</sup> 34 C.F.R. § 106.9 (2006). Such a policy must be publicly disseminated through magazines, newspapers, and other memoranda distributed to students, teachers, coaches, and other staff members. *Id.* This section of the C.F.R. states in part as follows:

Each recipient shall implement specific and continuing steps to notify applicants for admission and employment, students and parents of elementary and secondary school students, employees, sources of referral of applicants for admission and employment, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, that it does not discriminate on the basis of sex in the educational program or activity which it operates, and that it is required by title IX and this part not to discriminate in such a manner.

*Id.* 106.9(a)(1).

<sup>22</sup> 34 C.F.R. § 106.8(b) (2006). As the following section sets forth, a federal funds recipient must designate a specific employee responsible for coordinating Title IX compliance and provide formalized grievance procedures:

(a) Designation of responsible employee. Each recipient shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to such recipient alleging its noncompliance with this part or alleging any actions which would be prohibited by this part. The recipient shall notify all its students and employees of the name, office address and telephone number of the employee or employees appointed pursuant to this paragraph.

(b) Complaint procedure of recipient. A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part.

*Id.* § 106.8(a)–(b).

<sup>23</sup> *Id.* § 106.8(a). See *supra* note 22; *infra* Part IV (discussing the OCR recommendations in comparison with this Note's suggested additions).

legal liability; however, these procedures are inadequate because they do not take into account the existing power imbalances.<sup>24</sup> The Department of Education is the agency responsible for the enforcement of Title IX, including enforcement in the hierarchical world of college athletics.<sup>25</sup>

In 2001, the Assistant Secretary of the OCR issued a Revised Guidance providing standards for compliance that the OCR applies in investigating Title IX sexual harassment claims and enforcing Title IX.<sup>26</sup> This Guidance is intended to inform educational employees and officials how to identify sexual harassment of a student and take steps to address it.<sup>27</sup> Finally, the Guidance provides ideal standards to be applied when investigating or attempting to resolve a sexual harassment claim.<sup>28</sup> In 1979, seven years after Title IX was passed, the Supreme Court first held that like Title VII, Title IX could give rise to a private right of action.<sup>29</sup>

### *B. Broken Promises: Early Jurisprudential Interpretation of Title IX*

#### 1. A Private Right of Action Extended to Sexual Harassment

In 1979, in *Cannon v. University of Chicago*, the Supreme Court first held that Title IX created a private right of action for sexual

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<sup>24</sup> See *infra* Part III.C (explaining the way in which the exploited *Gebser* standard combines with a power imbalance in college athletics to allow institutions to enact reactive policies that do not advance the purpose of Title IX).

<sup>25</sup> 20 U.S.C. §§ 3413, 3441.

<sup>26</sup> Revised Guidance, *supra* note 20.

<sup>27</sup> *Id.* The Guidance also gives a helpful description of the real purpose behind preventing harassment:

Through its enforcement of Title IX, OCR has learned that a significant number of students, both male and female, have experienced sexual harassment, that sexual harassment can interfere with a student's academic performance and emotional and physical well-being, and that preventing and remedying sexual harassment in schools is essential to ensure nondiscriminatory, safe environments in which students can learn.

*Id.*

<sup>28</sup> See Revised Guidance, *supra* note 20. In explaining harassment by teachers and other employers, the Revised Guidance states, "Schools are responsible for taking prompt and effective action to stop the harassment and prevent its recurrence." *Id.* at V.B.1. The Court limited the liability standards established in *Gebser* and *Davis* to private actions for monetary damages. See, e.g., *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 284 (1998) (setting the standard for school liability in private litigation); *Davis v. Monroe County Bd. Of Educ.*, 526 U.S. 629, 639 (1999) (clarifying the standard). Administrative enforcement standards reflected in the 1997 and 2000 Revised Guidance remain valid in OCR enforcement actions. Guidance, *supra* note 20, at Preamble.

<sup>29</sup> See *infra* Parts II.B.1–2 (discussing several of the Supreme Court cases to first interpret Title IX).



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discrimination.<sup>30</sup> The Court reasoned that Title IX had two related, yet separate, objectives.<sup>31</sup> First, Congress wanted to avoid using federal monies to support discrimination.<sup>32</sup> Second, Congress aimed to protect individuals against sexual discrimination.<sup>33</sup>

The next pertinent decision in the Title IX line of cases is *Franklin v. Gwinnett County Public Schools*, a case considering the application of Title

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<sup>30</sup> *Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979). In *Cannon*, Justice Stevens wrote for the majority and held that a woman who was denied admission to medical school at two private universities had a private right of action under Title IX for sex-based discrimination. *Id.* at 680, 717. The Court reasoned that Congress's failure to specify a private right to action did not mean that it did not intend for there to be such a remedy available to the persons protected by Title IX. *Id.* at 717. In fact, all of the surrounding circumstances that the Court has previously identified as supportive of an implied remedy were present in this case, and the Court therefore found that the woman could maintain her suit, even though the private right of action was not specifically enumerated in Title IX. *Id.*

<sup>31</sup> *Id.* at 704. U.S. Dept. of Justice, Civil Rights Division, Coordination and Review Section, <http://www.usdoj.gov/crt/cor/coord/titleix.htm> (last visited Jan. 20, 2008). The United States Department of Justice states that "[t]he principle objective of Title IX is to avoid the use of federal money to support sexually discriminatory practices in education programs such as sexual harassment and employment discrimination, and to provide individual citizens effective protection against those practices." *Id.*

<sup>32</sup> *Cannon*, 441 U.S. at 704. See U.S. Dept. of Justice, Civil Rights Division, Coordination and Review Section, <http://www.usdoj.gov/crt/cor/coord/titleix.htm> (last visited Jan. 20, 2008). The administrative regulations further this goal as well, as Verna Williams, Vice President and Director of Educational Opportunities at the National Women's Law Center, pointed out: "The new regulation is key to making the promise of Title IX a reality. It provides the executive branch agencies with the tool they need to reach the persistent problems that make gender equity elusive—like disparities in career education programming and sexual harassment, for example." *Id.*

<sup>33</sup> *Cannon*, 441 U.S. at 704. This was very similar to the reasons put forth for the private cause of action in Title VI. *Id.* When speaking about Title VI, Representative Lindsay commented,

Everything in this proposed legislation has to do with providing a body of law which will surround and protect the individual from some power complex. This bill is designed for the protection of individuals. When an individual is wronged he can invoke the protection to himself, but if he is unable to do so because of economic distress or because of fear then the Federal Government is authorized to invoke that individual protection for that individual[.]

110 Cong. Rec. 1540 (1964). This should be compared with the following Title IX comments made by Representative Mink regarding women as individuals with rights:

Any college or university which has [a] ... policy which discriminates against women applicants . . . is free to do so under [Title IX] but such institutions should not be asking the taxpayers of this country to pay for this kind of discrimination. Millions of women pay taxes into the Federal treasury and we collectively resent that these funds should be used for the support of institutions to which we are denied equal access.

177 Cong. Rec. 38252 (1971).

IX to sexual harassment.<sup>34</sup> In *Franklin*, teachers and administrators were aware of student harassment by a teacher-coach but did nothing to stop it, and even went so far as to discourage the victim from pursuing legal remedies against the perpetrator.<sup>35</sup> The Court framed the issue as whether a high school student could seek monetary damages under Title IX for alleged intentional gender-based discrimination in connection with sexual harassment and abuse by a teacher-coach.<sup>36</sup> The Court held in the affirmative.<sup>37</sup> Justice Scalia joined in the Court's analysis of *Franklin*, but wrote that when rights of action are judicially implied, "categorical limitations . . . may be judicially implied as well."<sup>38</sup> *Franklin*,

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<sup>34</sup> *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992). Christine Franklin was a high school student subjected to continual sexual harassment beginning in the fall of her sophomore year by Andrew Hill, an athletics coach and teacher at the school. *Id.* at 63. The case states that "Franklin avers that Hill engaged her in sexually-oriented conversations in which he asked about her sexual experiences with her boyfriend and whether she would consider having sexual intercourse with an older man." *Id.* Franklin also alleged that "Hill forcibly kissed her on the mouth in the school parking lot," and that he called her at home to ask her on a date. *Id.* Finally, the allegations included three occurrences during Franklin's junior year, in which Hill interrupted her class, requested that the teacher excuse her, and forced Franklin to have sex with him in a private school office. *Id.* Although other teachers and administrators had notice of, and in fact had already begun the investigation of Hill, they did nothing to stop his sexual harassment and actually "discouraged Franklin from pressing charges against Hill." *Id.* at 64. Hill resigned from his position, and the school thereupon closed its investigation. *Id.*

<sup>35</sup> *Id.* The teacher-coach resigned, and the school dropped all investigation into the matter. *Id.* Both the district and appeals courts dismissed charges before the Supreme Court accepted certiorari from the Eleventh Circuit in 1992. *Id.* at 64-65. The Court found that the damages available should not be limited to back-pay and prospective relief because such remedies would be inadequate as the student no longer attended the school and the teacher-coach no longer was employed at that school. *Id.* at 75-76.

<sup>36</sup> *Id.* at 62-63. The *Franklin* majority repeatedly referred to the sanctioned relief as "monetary damages[.]" *Id.* at 76. Although the Court did not define this term, it did specifically reject limiting Title IX monetary relief to that which is equitable in nature, such as compensation for back-pay. *Id.*

<sup>37</sup> *Id.* at 62. The Court relied on established cases to hold that all appropriate remedies should be available unless Congress has indicated otherwise. *Id.* at 66; *see also* *Marbury v. Madison*, 5 U.S. 137 (1803); *Bell v. Hood*, 327 U.S. 670, 684 (1946). In *Marbury*, Chief Justice Marshall noted that this government "has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Marbury*, 5 U.S. at 163. This idea dates back to English common law. *See* WILLIAM BLACKSTONE, 3 COMMENTARIES 23 (1783); *see also* *Ashby v. White*, 1 Salk. 19, 21, Eng.Rep. 808, 816 (1702). In addition, the reasoning used in *Bell* was nothing new, as from the earliest years of the judiciary, the power to award damages to redress injuries in federal court has existed. *Franklin*, 503 U.S. at 66. "As *Bell* indicates, "[W]here legal rights have been invaded, . . . federal courts may use any available remedy to make good the wrong done." *Bell*, 327 U.S. at 684.

<sup>38</sup> *Franklin*, 503 U.S. at 77-78 (Scalia, J., concurring). However, the Rehabilitation Act Amendments of 1986 serve as an implicit acknowledgment that damages are available and must be read "as a validation of *Cannon's* holding[.]" *Id.* at 72 (quoting the majority). *See*

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when taken as a whole, stands for the proposition that “a damages remedy is available for an action brought to enforce Title IX.”<sup>39</sup> *Franklin* was a precursor to *Gebser v. Lago Vista Independent School District*, decided eight years later, which announced a stiff standard to determine institutional liability for sexual harassment in school or school-sponsored extracurricular activities such as athletics.<sup>40</sup>

## 2. *Gebser v. Lago Vista Independent School District* Sets the Standard for Liability

*Gebser* was the next step in the Supreme Court’s Title IX jurisprudence regarding when an institution may be held liable for damages for an implied right of action under Title IX for sexual harassment of a student by one of the institution’s teachers.<sup>41</sup> The sexual

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42 U.S.C. § 200d-7(a)(2). See also *Franklin*, 503 U.S. at 72. Justice Scalia points out that Congress abrogated the States’ Eleventh Amendment immunity under Title IX, Title VI, § 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975. *Id.* It is on this basis that Chief Justice Rehnquist and Justice Thomas concur in the final disposition of the majority. *Id.* at 76. See *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575–76 (1979); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 18, 23, *Franklin*, 503 U.S. at 72. See also *Thompson v. Thompson*, 484 U.S. 174, 191 (1988) (asserting that the Court perhaps should abandon the whole idea of implied rights of action).

<sup>39</sup> *Franklin*, 503 U.S. at 76. See *supra* note 28 and accompanying text (discussing the difference between OCR agency enforcement and the standard for liability in private litigation).

<sup>40</sup> Cohen, *supra* note 1, at 328. See Revised Guidance, *supra* note 20. While the line of cases addressed in this Note is concerned with monetary damages and injunctive relief for the plaintiff, the Department of Education regulations have a slightly different purpose: “In contrast, the process of administrative enforcement requires enforcement agencies such as OCR to make schools aware of potential Title IX violations and to seek voluntary corrective action before pursuing fund termination or other enforcement mechanisms.” *Id.* at Preamble.

<sup>41</sup> See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998). As a thirteen-year-old, Alida Star Gebser participated in a book discussion club led by local high school teacher Waldrop. *Doe v. Lago Vista Indep. Sch. Dist.*, 106 F.3d 1223, 1224 (5th Cir. 1997). Gebser was a student at Lago Vista middle school, while Waldrop was a teacher at the Lago Vista high school. *Gebser*, 524 U.S. at 277. Gebser participated in these book discussions because she was intellectually ahead of her class and Waldrop’s wife was her eighth grade teacher, who suggested she meet with her husband’s group. *Doe*, 106 F.3d at 1223. During the course of these meetings, Waldrop made sexually suggestive comments to the group of students. *Gebser*, 524 U.S. at 277. The next fall, when Gebser had Waldrop as a teacher, he continued to make sexually suggestive comments to the class, and to Gebser in particular when they were alone in his classroom. *Id.* at 77–78. Waldrop initiated actual sexual contact with Gebser in the spring, kissing her and fondling her while at her house under the pretense of returning a book. *Id.* at 278. The two had sexual intercourse a number of times over the remainder of that year, the summer, and into the next school year. *Id.* They often had sex during class time, although never on school property. *Id.* at 279–80. The focus of the *Gebser* decision was which standard should be applied in determining liability in teacher-student harassment cases. *Id.* The topic of student sexual harassment has also

harassment at issue in this case took place in the context of book discussions and was reported by several classroom parents to the school guidance counselor, but not to the superintendent who was also the Title IX coordinator.<sup>42</sup> A few months later, a police officer discovered the teacher in question and a student having sex; the teacher was arrested and Lago Vista terminated his employment.<sup>43</sup>

The Fifth Circuit Court of Appeals held that school districts are not liable for a Title IX violation unless an employee with supervisory power over the offending employee actually knew of the abuse, had the power to end it, and failed to do so.<sup>44</sup> At that time, there were many different existing methods for assessing a school district's liability under Title IX for a teacher's abuse of a student; however, this was one of the most restrictive methods.<sup>45</sup>

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been extensively discussed in scholarly works and cases. See, e.g., *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006 (5th Cir. 1996); *Doe v. Petaluma City Sch. Dist.*, 54 F.3d 1447 (9th Cir. 1995); Daniel B. Tukel, *Student Versus Student: School District Liability for Peer Sexual Harassment*, 75 MICH. BAR J. 1154 (1996).

<sup>42</sup> *Gebser*, 524 U.S. at 278. Gebser did not report this activity to school officials, stating that she did not want to lose Waldrop as a teacher. *Id.* Later that year, two parents of other students complained to the high school principal about Waldrop's comments during class. *Id.* Waldrop was reprimanded by school officials and apologized to the parents, saying he did not think he had said anything offensive but promised it would not happen again. *Id.* See Revised Guidance, *supra* note 20, at IX. The Guidance given by the Department of Education indicates that each school system should have Title IX Coordinator, responsible for implementing and overseeing any Title IX programs. *Id.* See *infra* Parts III.C (analyzing existing policies); Part IV.B (proposing additional procedures and proactive measures).

<sup>43</sup> *Gebser*, 524 U.S. at 278. As the dissent emphasized, this case presents a clear example of abuse that was made possible, effectuated, and repeated over a prolonged period because of the powerful influence that Waldrop had over Gebser by reason of the authority that the school district had delegated to him. *Id.* at 299 (Stevens, J., dissenting). See *infra* Part II.B (discussing power structures in athletics).

<sup>44</sup> *Doe v. Lago Vista Indep. Sch. Dist.*, 106 F.3d 1223 (5th Cir. 1997). The *Lago Vista Indep. Sch. Dist.* Court's reasoning regarding liability was based on *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648 (5th Cir. 1997). *Lago Vista Indep. Sch. Dist.*, 106 F.3d at 1225-26. In affirming the District Court's grant of summary judgment for the school district, the Fifth Circuit held that neither a vicarious agency liability theory nor a strict liability theory was the proper standard for determining a school's liability for teacher-student harassment. *Id.* See also *Canutillo Indep. Sch. Dist. v. Leija*, 101 F.3d 393, 399 (5th Cir. 1996) (the Fifth Circuit held a school district is not absolutely liable because strict liability is not part of the Title IX contract). The court continued, in opposition to a strong dissent and contrary to OCR policy, that a school district was not liable for the sexual molestation of a second grade student by one of her teachers because the student and her mother only reported the harassment to the student's homeroom teacher. *Id.* It further determined that notice to the teacher was not notice to the school—notwithstanding the fact that a school handbook instructed students and parents to report complaints to the child's homeroom teacher. *Id.*

<sup>45</sup> Cohen, *supra* note 1, at 328; see also *Kinman v. Omaha Public Sch. Dist.*, 94 F.3d 463, 468-69 (8th Cir. 1996) (summarizing the four standards of Title IX liability used by various

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The United States Supreme Court granted certiorari in *Gebser*, and Justice O'Connor wrote for the majority in a five to four decision.<sup>46</sup> The Court affirmed the lower court's decision and laid out the applicable standard, holding that "damages may not be recovered in those circumstances unless an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct."<sup>47</sup> The majority reaffirmed that, in Title IX jurisprudence, the private right of remedy is judicially implied and there is no expressed legislative intention on the scope of remedies available.<sup>48</sup> Therefore, a court has a measure of latitude in deciding these issues.<sup>49</sup>

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district courts in 1996: "(1) agency principles of negligence or recklessness; (2) knowledge or direct involvement by the school district; (3) Title VII's 'knew or should have known' standard; and (4) strict liability."). See generally *Smith v. Metro. Sch. Dist. Perry Twp.*, 128 F.3d 1014 (7th Cir. 1997) (in which the Seventh Circuit refused to impute a teacher's actions to a School District or School Board, applying an actual knowledge standard); *Kracunas v. Iona Coll.*, 119 F.3d 80, 88 (2d Cir. 1997) (noting that both actual and constructive notice requirements exist for purposes of imposing Title IX liability on a college or university for sexual harassment); *Doe v. Claiborne County*, 103 F.3d 495, 513-15 (6th Cir. 1996) (discussing the supervisory liability standard used in dismissal of Title IX claims).

<sup>46</sup> *Gebser*, 524 U.S. at 284. See Richard L. Wiener & Linda A. Hunt, *Clarifying Cases of Sexual Harassment*, 29 AM. PSYCHOLOGICAL ASS'N MONITOR ONLINE at 12, (Dec. 1998), available at <http://www.apa.org/monitor/dec98/jnotehtml>. See also U.S. Dept. of Justice, Civil Rights Division Title IX Legal Manual, Jan. 11, 2001, Pt. IV.D.2. In one term, the United States Supreme Court held that employers were strictly liable for supervisors who committed sexual harassment, while at the same time narrowed the protection available for students who file similar claims. *Id.* As civil rights law has evolved, the definition of sexual harassment has remained largely the same under Title VII and Title IX, but the legal standards for determining liability for monetary damages under the two statutes are different. *Id.* Under Title IX, a school must be deliberately indifferent in the face of actual knowledge of the harassment in order to be liable. *Id.* In contrast, under Title VII, an employer may be liable for money damages, under certain circumstances, for a supervisor's harassment of a subordinate, even without notice. *Id.* Cf. *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57, 72 (1986) (holding that absence of notice to an employer does not insulate the employer from liability).

<sup>47</sup> *Gebser*, 524 U.S. at 277 (emphasis added). In addition, "[w]here a school district's liability rests on actual notice principles, however, the knowledge of the wrongdoer himself is not pertinent to the analysis." *Id.* at 291. But see *Gebser*, 524 U.S. at 299 (Stevens, J., dissenting) ("The fact that he did not prevent his own harassment of Gebser is the consequence of his lack of will, not his lack of authority."); see also RESTATEMENT (SECOND) OF AGENCY § 280 (The Court seems to leave the door open for Congress to act, proclaiming, "Until Congress speaks directly on the subject, however, we will not hold a school district liable for damages under Title IX for a teacher's sexual harassment of a student absent actual notice and deliberate indifference.") (citing *Gebser*, 524 U.S. at 292-93); see *infra* Part IV (proposing changes to the standard for liability under Title IX).

<sup>48</sup> *Gebser*, 524 U.S. at 284.

<sup>49</sup> *Id.* This scope of remedies includes monetary damages. *Id.* The dissent takes issue with this proposition, writing that to take "a measure of latitude" is to warp the Court's duty to interpret the law. *Id.* at 293 (Stevens, J., dissenting). Justice Stevens was joined in

The Court looked to the language of the statute and put great emphasis on the contractual structure of Title IX as compared to Title VII.<sup>50</sup> Whereas Title VII concentrates on making individuals whole after past discrimination, the Court recognized that Title IX aims to protect individuals from discriminatory practices carried out by federally funded educational programs.<sup>51</sup> However, the Court reasoned that there must be a limit to liability because when a school accepts federal funds, it agrees to not discriminate on the basis of sex; however, the court also held that it is unlikely that a school agrees to be liable if one of its employees discriminates.<sup>52</sup> The *Gebser* Court held that Congress did not intend to imply an enforcement scheme that would allow “greater liability without comparable conditions.”<sup>53</sup>

In the absence of any further direction from Congress, the Court interpreted Title IX’s implied damages remedy as it did the express remedy, by holding that both are predicated upon notice to an appropriate person who has an opportunity to end the discrimination:

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his dissent by Justices Souter, Ginsburg, and Breyer. *Id.* These Justices found that the Court should not be involved in revising Congressional legislation. *Id.* The dissent continues to quote *Cannon*, “[We have no doubt that Congress intended to create Title IX remedies comparable to those available under Title VI and that it understood Title VI as authorizing an implied private cause of action for victims of the prohibited discrimination[.]” *Id.* at 293–94 (quoting *Cannon*, 441 U.S. at 694–98). Because an implicit Congressional command has the same legal effect as an explicit one, and Title IX has been construed as having an implicit right to private cause of action, the Court should seek guidance from the text of the statute rather than from its own ideas of public policy. *Id.* at 296.

<sup>50</sup> *Id.* at 286.

<sup>51</sup> *Id.* at 287. In addition, Title IX is a Spending Clause statute, and Congress would not have envisioned a federal funds recipient to be liable based on a concept as abstract as constructive notice or respondeat superior for an employee’s (teacher, coach, administrator) act of sexually harassing a student. *Id.*

<sup>52</sup> *Rosa H. v. San Elizario Ind. Sch. Dist.*, 106 F.3d 648, 654 (5th Cir. 1997). This reasoning highlights the different standards used to ascertain liability under Title VII. *See supra* note 45 (discussing different possible standards used to determine school liability).

<sup>53</sup> *Gebser*, 524 U.S. at 290. However, Justice Ginsburg composed a dissent that focused on enforcement and highlighted the importance of a school’s sexual harassment prevention policy. *Id.* at 306–07. She drew from the tort doctrine of avoidable consequences in writing:

I would recognize as an affirmative defense to a Title IX charge of sexual harassment, an effective policy for reporting and redressing such misconduct. School districts subject to Title IX’s governance have been instructed by the Secretary of Education to install procedures for “prompt and equitable resolution” of complaints, 34 CFR § 106.8(b) (1997), and the Department of Education’s Office of Civil Rights has detailed elements of an effective grievance process, with specific reference to sexual harassment, 62 Fed.Reg. 12034, 12044–12045 (1997).

*Id.*

[W]e hold that a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond.<sup>54</sup>

In addition, this failure to respond must be an attitude of "deliberate indifference" to the discrimination at hand.<sup>55</sup>

In *Gebser*, the teacher's conduct was clearly intentional and it "occurred during, and as a part of, a curriculum activity in which he wielded authority over . . . [the student] that had been delegated to him by . . . [the school district]."<sup>56</sup> While the majority did not deny that *Gebser* alleged an intentional violation as laid out in *Franklin*, the Court still held that the law did not provide a damages remedy for the Title IX violation alleged by *Gebser* because, while the guidance counselor was notified of the harassment, the appropriate officials did not have actual notice of Waldrop's behavior.<sup>57</sup> The dissent disagreed with the

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<sup>54</sup> *Gebser*, 524 U.S. at 290. On the other hand, the *Gebser* dissent written by Justice Stevens references the earlier *Franklin* decision in comparing sexual harassment of a subordinate by a supervisor, to that of the harassment of a student by a teacher. *Id.* at 297. (Stevens, J., dissenting). This reasoning has been used in numerous instances since *Gebser*. Justice Stevens argued in his dissent that Title IX places the duty on a school not to discriminate, and when a supervisor harasses a subordinate because of his or her sex, that is discrimination based on sex. *Id.* (citing *Franklin v. Gwinnett Cty, Pub. Sch.*, 503 U.S. 60, 75 (1992)). The dissent emphasizes that the same rule should apply when a teacher sexually harasses or abuses a student. *Id.* The dissent continues, "Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe." *Id.* (quoting *Franklin*, 503 U.S. at 75). Therefore, for the dissent, *Franklin* stands for the proposition that by accepting the federal funds, the school district assumes a duty to not discriminate on the basis of sex, and that sexual harassment of a student by a teacher violates that duty. *See id.*

<sup>55</sup> *Id.* at 290 (majority opinion). Comparable considerations led to the adoption of a deliberate indifference standard for claims under § 1983 against municipal entities. *See, e.g., Bd. of Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397 (1997); *Canton v. Harris*, 489 U.S. 378, 388-92 (1989); *Collins v. Harker Heights*, 503 U.S. 115, 123-24 (1992). *See* 42 U.S.C. § 1983 (2000), a civil rights statute providing a civil action for deprivation of rights. *But see Gebser*, 524 U.S. at 304 n.13 (Stevens, J., dissenting) ("The only decisions the Court cites to support its adoption of such a stringent standard are cases arising under a quite different statute, 42 U.S.C. § 1983.").

<sup>56</sup> *Gebser*, 524 U.S. at 298. The curriculum was partially funded with federal funds. *Id.*; *see also infra* note 71 (discussing an instance in which a high school soccer coach abused the authority that the school had delegated to him).

<sup>57</sup> *Gebser*, 524 U.S. at 298. The appropriate official would be one with "authority to institute corrective measure on the district's behalf[.]" *Id.* *See infra* Part III.A.1 (examining who is the appropriate official in the context of athletics to receive notice that harassment is occurring).

majority's reasoning and pointed out that Waldrop was empowered by the school and was able to continue his abuse of Gebser because of his school-sanctioned authority over the students.<sup>58</sup> This initial establishment of the standard for institutional liability under Title IX was further elucidated in *Davis v. Monroe County Board of Education*.<sup>59</sup>

C. *Davis v. Monroe County Board of Education Clarifies the Standard*

*Davis v. Monroe County Board of Education* did not deal with harassment by an employee of the school, but rather with student-on-student harassment.<sup>60</sup> The Supreme Court held that when a teacher or coach sexually harasses a student, that employee discriminates on the basis of sex in violation of Title IX.<sup>61</sup> Justice O'Connor wrote for the majority and emphasized in her background that the hierarchical power structure at the school influenced the harassment liability.<sup>62</sup> The Court held for the petitioner and clarified the standard put forth in *Gebser*.<sup>63</sup>

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<sup>58</sup> *Gebser*, 524 U.S. at 299. The dissent emphasizes a conflict with agency law, under which the school is responsible for Waldrop's misconduct because of the existence of the agency relationship between Waldrop and the school that aided him in accomplishing the tort. *Id.* See also RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1957) (discussing agency law). Waldrop exercised a great amount of control because he was a secondary teacher. *Gebser*, 524 U.S. at 299. Waldrop's misuse of the authority given to him by the school allowed him to abuse the trust of his young student. *Id.* See generally *infra* Part III.C (discussing the intense power imbalance that exists in athletics).

<sup>59</sup> *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999).

<sup>60</sup> *Id.* Petitioner filed suit on her daughter's behalf, claiming that the continued sexual harassment had interfered with her daughter's education and that the school officials' deliberate indifference had created a hostile environment in violation of Title IX. *Id.* at 636. In *Monroe County Board of Education*, the petitioner was a fifth grade girl who had been harassed by a classmate over an extended period of time. *Id.* at 633. On separate occasions, the student and the mother reported the harassment to the student's teacher. *Id.* at 634. The teacher allegedly assured the mother that this behavior had been reported to the school principal, but no disciplinary actions were taken, and the harasser was not separated from the victim, which allowed the harasser to continue harassing the female student over the course of several months. *Id.* At the time of these events, the Monroe County School Board had not established a policy on sexual harassment. *Id.* at 635. In fact, the school board had given no instruction to its personnel on how to respond to or report peer sexual harassment. *Id.*

<sup>61</sup> *Id.* at 660. This Note deals, in general, with hostile environment sexual harassment; another theory is quid pro quo harassment that occurs when some benefit or punishment depends upon the satisfaction of sexual demands. See, e.g., *Wills v. Brown Univ.*, 184 F.3d 20 (1st Cir. 1999) (quid pro quo sexual harassment claim). See *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). Both forms of sexual harassment are now accorded similar treatment under federal law. See *id.*

<sup>62</sup> *Davis*, 526 U.S. at 646. The Court described the power structure by stating, "In these circumstances, the recipient retains substantial control over the context in which the harassment occurs. More importantly, however, in this setting the Board exercises significant control over the harasser." *Id.* See *infra* Part III.B (exploring the ways power



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The strict standard for sexual harassment liability is clear: only when a recipient of federal funding had *actual notice of* and was *deliberately indifferent to* sexual harassment is that recipient liable for monetary damages.<sup>64</sup> In addition, the harassment must be “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 school.”<sup>65</sup> This is a difficult standard, especially given that additional limitations are imposed, for example, recipients of federal funds may be held liable under Title IX for their own actions.<sup>66</sup>

The *Davis* Court recognized that the standard set by *Gebser* was an exacting one by commenting that it “sought to eliminate any ‘risk that the recipient would be liable in damages not for its own official decision but instead for its employees’ independent actions.’”<sup>67</sup> In addition, recipients can be held liable only when their deliberate indifference to harassment effectively caused the discrimination.<sup>68</sup>

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imbalances contribute to the development of an environment vulnerable to sexual harassment).

<sup>63</sup> *Davis*, 526 U.S. at 654.

<sup>64</sup> Cohen, *supra* note 1, at 336. Cohen discusses this standard in reference to its application to sexual discrimination that is not necessarily harassment. *Id.*

<sup>65</sup> *Davis*, 526 U.S. at 650. A dissent, written by Justice Kennedy, expressed concern that this standard is not sufficient to distinguish student-student harassment cases from simple childish teasing (even based on gender) and actionable sexual harassment. *Id.* at 676 (Kennedy, J., dissenting). Justice Kennedy cautions that in student-student harassment cases this standard may “stigmatize children as sexual harassers[.]” *Id.* at 674 (quoting Brief for Respondents 12-13).

<sup>66</sup> *Id.* at 640. Here, petitioner was attempting to hold the school liable for its *inaction* because it was aware of and did nothing to punish the student perpetrator or to protect the victim. *Id.* See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (holding that a recipient of federal education funds may be held liable for teacher-student harassment if the recipient was deliberately indifferent to the sexual harassment). See generally *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (requiring that funding recipients have notice of their potential liability for monetary damages); *Guardians Ass. v. Civil Serv. Comm’n of New York City*, 463 U.S. 582, 597-98 (1983) (concluding that *Pennhurst* does not bar a Title VII private damages action when the federal funding recipient intentionally engages in conduct that violates Title VII).

<sup>67</sup> *Davis*, 526 U.S. at 643 (quoting *Gebser*, 524 U.S. at 290-91). See *Farmer v. Brennan*, 511 U.S. 825 (1994). Interestingly, a few years earlier, the Supreme Court considered what type of conduct constituted deliberate indifference in the prison context when an inmate brought suit based on a prison official’s violation of his Eighth Amendment rights. *Id.* The Court determined that a school district may escape liability if it can show “that [it] did not know of the underlying facts indicating a sufficiently substantial danger and that [it was] therefore unaware of a danger, or that [it] knew the underlying facts but believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or nonexistent.” *Id.* at 843-44.

<sup>68</sup> *Davis*, 526 U.S. at 642 (citing *Gebser*, 524 U.S. at 291). See also *City of Canton v. Harris*, 489 U.S. 378 (1989) (recognizing liability under § 1983 only if the municipality itself causes the violation).

1. Elements Needed to Prove Institutional Liability: Deliberate Indifference

A funding recipient's deliberate indifference to sexual harassment must be a part of the theory of liability under Title IX when the federally funded institution has control over the harassment situation.<sup>69</sup> For the recipient to have control over the situation, the harassment must take place in a context subject to the school district's control.<sup>70</sup> In addition, to be liable under Title IX the recipient must have the authority to take remedial action to address the harassment.<sup>71</sup> The deliberate indifference standard means that, at a minimum, the school's inaction must cause students to undergo sexual harassment or make them vulnerable to it.<sup>72</sup>

The dissent in *Davis* cautioned that there must be a limitation to what type of third party conduct could be attributed to the school.<sup>73</sup> It questioned the majority's line of reasoning, which posited the idea that "one causes discrimination when one has some 'degree of control' over the discrimination and fails to remedy it."<sup>74</sup> This idea of causation could

<sup>69</sup> *Davis*, 526 U.S. at 644. BLACK'S LAW DICTIONARY 788 (8th ed. 2004). BLACK'S LAW DICTIONARY defines deliberate indifference as "[t]he careful preservation of one's ignorance despite awareness of circumstances that would put a reasonable person on notice of a fact essential to a crime." *Id.*

<sup>70</sup> *Davis*, 526 U.S. at 645. When the misconduct occurs during the school day and happens on school grounds, the harassment is taking place under the operation of the recipient of funding. *Id.* In *Davis*, the school had control not only over the general situation under which the harassment occurred but also over the harasser. *Id.*

<sup>71</sup> *Id.* at 644. See, e.g., *Henderson v. Walled Lake Consol. Sch.*, 469 F.3d 479 (6th Cir. 2006). Although Title IX was enforceable through a private cause of action for sexual harassment, the court held that the plaintiffs failed to establish that the school or the administrators had actual notice or were deliberately indifferent to the coach's sexual harassment of the girls' high school soccer team as required for monetary remedies. *Id.* The court held that even though a group of parents had complained to the assistant principal, who held a meeting with the coach, the athletic director, and the principal, the administration did not have actual notice. *Id.* at 484-85. In a case against the University of Georgia Board of Regents, a claim against the Board of Regents was dismissed because the plaintiff failed to allege that the president-elect had authority to take action to change the policies of the Board. *Williams v. Bd. of Regents of Univ. Sys. of Geor.*, 477 F.3d 1282, 1293-95 (11th Cir. 2007). However, in a claim against the University of Georgia Athletic Association, the court held that the same president-elect, who was serving as president of the athletic association, was the appropriate person to receive notice. *Id.*

<sup>72</sup> *Davis*, 526 U.S. at 645. This is similar to the deliberate indifference standard the Supreme Court adopted in section 1983 claims that allege that the cause of the violation was the state's failure to prevent the deprivation of rights. *Gebser*, 524 U.S. at 290. See *Bd. of Comm'rs of Bryan County v. Brown*, 520 U.S. 397 (1997); *Canton v. Harris*, 489 U.S. 378, 388-92 (1989); see also *Collins v. Harker Heights*, 503 U.S. 115, 123-24 (1992) (examining a section 1983 claim).

<sup>73</sup> *Davis*, 526 U.S. at 662 (Kennedy, J., dissenting).

<sup>74</sup> *Id.* at 662. The dissent continues to label the majority's test an exercise in "arbitrary line-drawing." *Id.*

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lead to unbalanced results when comparing liability between teacher-student harassment and student-student harassment.<sup>75</sup>

Many lower courts have looked to *Davis* to clarify what exactly the deliberate indifference standard means.<sup>76</sup> In addition to the aforementioned elements, the federal funds recipient must make an official decision to not remedy the situation.<sup>77</sup> The next prong of the standard implicates the power hierarchy in college athletics, as an appropriate official must receive "actual notice."<sup>78</sup>

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<sup>75</sup> *Id.* at 679. In his dissent in *Davis*, Justice Kennedy puts forward an intriguing hypothetical that demonstrates the disjuncture between student-student harassment and teacher-student harassment:

In the context of teacher harassment, the *Gebser* notice standard imposes some limit on school liability. Where peer harassment is the discrimination, however, it imposes no limitation at all. In most cases of student misbehavior, it is the teacher who has authority, at least in the first instance, to punish the student and take other measures to remedy the harassment. The anomalous result will be that, while a school district cannot be held liable for a teacher's sexual harassment of a student without notice to the school board (or at least to the principal), the district can be held liable for a teacher's failure to remedy peer harassment. The threshold for school liability, then, appears to be lower when the harasser is a student than when the harasser is a teacher who is an agent of the school. The absurdity of this result confirms that it was neither contemplated by Congress nor anticipated by the States.

*Id.* at 679–80.

<sup>76</sup> See, e.g., *Hart v. Paint Valley Local Sch. Dist.*, 2002 WL 31951264 (S.D. Ohio 2002) (quoting *Davis*, 526 U.S. at 648) (the Southern District of Ohio has noted that, per *Davis*, in order to satisfy the deliberate indifference standard, a plaintiff must show that the school district's response was "clearly unreasonable" in light of the situation).

<sup>77</sup> *Gebser*, 524 U.S. at 290. The Court explains that the standard of deliberate indifference has a rough parallel in an "administrative enforcement scheme [that] presupposes that an official who is advised of a Title IX violation refuses to take action to bring the recipient into compliance." *Id.* The Court compares the deliberate indifference standard to a lower standard, where there would be the danger that a federal funds recipient could be held liable for not only its own official decisions and actions, but also for its employees' independent actions. *Id.*

<sup>78</sup> *Id.* at 299. In *Simpson v. University of Colorado Boulder*, university officials were aware of several incidents of sexual assaults and sexual harassment by specific football players over four years. 500 F.3d 1170 (10th Cir. 2007). The District Court ruled that this did not constitute adequate notice that females faced a risk of harassment or assault by the football team at recruiting parties and granted summary judgment for the University of Colorado Boulder. *Id.* The Tenth Circuit Court of Appeals reversed the grant of summary judgment, but also held that the actual notice standard did not apply because it was a question of an official policy. *Id.* See also *Rost v. Steamboat Springs RE-2 Sch. Dist.*, 2008 U.S. App. Lexis 177 (Jan. 4, 2008) (citing *Gebser*, 524 U.S. at 282) (on these facts, to impose liability on the school district would effectively hold it responsible for what it "should have known" about harassment but failed to uncover and eliminate). See *Davis*, 526 U.S. at 650. That is not the duty Congress intended to impose by Title IX, which was enacted solely to respond to sexual harassment about which school officials have "actual knowledge[.]" *Id.*

2. Elements Needed to Prove Institutional Liability: Actual Notice

A school district cannot be held liable for a teacher's or coach's sexual harassment of a student unless an official of the school, with a minimal level of authority to institute remedial measures, has "actual notice" of the misconduct.<sup>79</sup> In his dissent to the decision in *Davis*, Justice Kennedy found it "telling" that the majority did not explicitly lay out which school officials qualify to receive this notice.<sup>80</sup> Since the Court issued its decision in *Gebser*, courts have applied this standard differently.<sup>81</sup> In fact, many courts have looked to pre-*Gebser* cases to determine who, within a school or school district, ought to qualify as the appropriate person to receive actual notice in order to trigger school liability.<sup>82</sup>

The majority in *Gebser* reasoned that "Title IX contains important clues that Congress did not intend to allow recovery in damages where liability rests solely on principles of vicarious liability or constructive notice."<sup>83</sup> In addition, the majority found that it would actually

<sup>79</sup> *Davis*, 526 U.S. at 647. In addition, 20 U.S.C. § 1682 establishes that the federal government may not terminate funding until it has "advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means." 20 U.S.C. § 1682.

<sup>80</sup> *Davis*, 526 U.S. at 679 (Kennedy, J., dissenting). See also *Rosa H. v. San Elizario Ind. Sch. Dist.*, 106 F.3d 648 (5th Cir. 1997) (a pre-*Gebser* case that formulated a standard similar to *Gebser* in that it required actual notice to a school official who was invested by the school board with supervisory power over the offending employee).

<sup>81</sup> Thomas Keefe, Annotation, *Right of Action Under Title IX of Education Amendments Act of 1972* (20 U.S.C.A. § 1681) *Against School or School District for Sexual Harassment of Student by Student's Teacher or Other School District Employee*, 197 A.L.R. Fed. 289 § 2(b) (2004). Compare *Floyd v. Waiters*, 831 F.Supp. 867, 876 (M.D.Ga.1993) ("This court finds no basis for plaintiffs' Title IX claim. Assuming that [the school security guard's] assaults on plaintiffs constitute discrimination based upon sex, the Board had no part in this discrimination."), with *Rosa H.*, 106 F.3d at 659 (positing the idea that liability might arise whenever any school employee is aware of the harassment).

<sup>82</sup> Keefe, *supra* note 81, at § 2(b). *Rosa H.* finds a middle ground, balancing the meaningful tort liability envisioned by the earlier decisions with the accepted interpretation that Title IX only provides for liability for an intentional act. 106 F.3d at 659-60. That court held that a school district may be held liable for teacher-student Title IX harassment "only if a school official who had actual knowledge of the abuse was invested by the school board with the duty to supervise the employee and the power to take action that would end such abuse and failed to do so." *Id.* at 660. This standard would exclude from liability other teachers, coaches, and janitors unless they have been specifically assigned a supervisory role with the power to halt abuse. *Id.* This standard mirrors the Title VII standard for when an employer's knowledge of workplace harassment subjects an employer to liability. *Id.*

<sup>83</sup> *Gebser*, 524 U.S. at 288. The Court looked to Title VII legislation, which provided for an express right of action but did not include recovery for monetary damages; instead the legislation limited recovery to injunctive and equitable relief. *Id.* at 289. See also 42 U.S.C. § 2000a-3(a) (1970 ed.); § 2000e-(b), 5(e), (g) (1970 ed., Supp. II). Even though Congress did

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“frustrate the purposes” of Title IX to allow recovery for damages under a theory of respondeat superior or constructive notice; thus, actual notice to an official is required.<sup>84</sup> Therefore, the Court restricted the opportunities for recovery and hindered the ultimate goal of Title IX under the guise of protecting the purpose of Title IX.<sup>85</sup>

*Simpson v. University of Colorado Boulder* was a recent occurrence in which a court restricted the idea of notice; in *Simpson*, several women alleged that University of Colorado officials were aware of the football program creating an atmosphere during parties for recruits that involved harassing women.<sup>86</sup> The circuit court found the *Gebser* notice standard did not apply to the University of Colorado because the issue was not whether notice was received by the institution; rather, it was whether the claim involved official policy that encouraged the harassment.<sup>87</sup> However, the Court of Appeals of the Tenth Circuit repeated the underlying principle that liability should be restricted to only intentional actions made by the institution.<sup>88</sup> Here, the court narrowly construed the issue and determined that actual notice does not include the existence of

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provide for damages when it amended Title VII in 1991, it limited recovery according to the size of the employer. *Id.* at §2000e- (b); see also *Gebser*, 524 U.S. at 285–86; *Rosa H.*, 106 F.3d at 660. The agency theory and Title VII’s constructive-notice theory were also rejected because both violated the established principle that penalties for a failure to comply with conditions on the disbursement of Spending Clause funds are contractual in nature. *Rosa H.*, 106 F.3d at 660; see *Davis*, 526 U.S. at 640 (“[P]rivate damages actions are available only where recipients of federal funding had adequate notice that they could be liable for the conduct at issue[.]”); *Pennhurst*, 451 U.S. at 17 (“There can . . . be no knowing acceptance [of the terms of the contract] if a State is unaware of the conditions [imposed by the legislation on its receipt of funds].”).

<sup>84</sup> *Gebser*, 524 U.S. at 285. Title IX is fundamentally different than Title VII because while Title VII is intended to “compensate victims of discrimination, Title IX focuses more on ‘protecting’ individuals from discriminatory practices carried out by recipients of federal funds.” *Id.* at 287.

<sup>85</sup> See also *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 165 (1996) (a decision by the Fifth Circuit Court of Appeals holding that a school is not liable under Title IX even if it is on notice of peer-to-peer sexual harassment and ignores it or fails to remedy it, unless it responds differently based on the sex of the alleged victim).

<sup>86</sup> *Simpson v. University of Colorado Boulder*, 500 F.3d 1170, 1173 (10th Cir. 2007). See *supra* note 78 (discussing in further detail the facts of *Simpson*).

<sup>87</sup> *Simpson*, 500 F.3d at 1178 (citing *Gebser*, 524 U.S. at 290). Cf. *Smith v. Metro. Sch. Dist. Perry Twp.*, 128 F.3d 1014, 1022–27 (noting that the notice standard for schools in Title IX sexual harassment claim is higher than the notice standard for employers under Title VII).

<sup>88</sup> *Simpson*, 500 F.3d at 1178. This was a disappointment to Title IX activists, as some felt that “‘if the overall environment at a school can serve as actual notice (of sexual harassment), that would be new.’” Erik Brady, *Colorado Scandal Could Hit Home to Other Colleges*, USA TODAY, May 5, 2004, available at [http://www.usatoday.com/sports/college/football/big12/2004-05-26-colorado-cover\\_x.htm](http://www.usatoday.com/sports/college/football/big12/2004-05-26-colorado-cover_x.htm).

an official policy.<sup>89</sup> Specifically, even if the appropriate official has actual notice and is not deliberately indifferent, the harassment in question must also rise to a particular level before a Title IX claim will be allowed.

3. Harassment That Is Severe, Pervasive, and Objectively Offensive—*Jennings* Demonstrates the Standard in Athletics<sup>90</sup>

Whether gender-oriented sexual harassment amounts to actionable (severe or pervasive) Title IX discrimination “depends on a constellation of surrounding circumstances, expectations, and relationships.”<sup>91</sup> Courts examine all circumstances, including the positions of the harasser and the victim, the ages of both, whether the harassment was severe, frequent, physically intimidating, or humiliating, and whether it deprived the student of educational or athletic opportunities.<sup>92</sup> Courts

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<sup>89</sup> *Simpson*, 500 F.3d at 1178. Interestingly, a pre-*Gebser* case was prophetic in predicting the position the courts would take on what constitutes proper notice. *See Rosa H. v. San Elizario Ind. Sch. Dist.*, 106 F.3d 648 (5th Cir. 1997) There, the Fifth Circuit Court held that the fifteen-year-old student whose karate instructor had repeatedly initiated sexual intercourse with him was sexually harassed, but that a school district is only liable if a school official, who had actual knowledge of abuse, was vested by the school board with the duty to supervise the instructor and the power to take action that would end such abuse and failed to do so. *Id.*

<sup>90</sup> *See Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999). Just as *Jennings* presents the standard for severe harassment in athletics, the Court in *Davis* envisions an example of this standard in the classroom. *See id.* A clear example of student-student harassment that would trigger a damages claim under this standard would be one involving the overt, physical deprivation of access to school resources. *Id.* An example used by the *Davis* court involves boys in a class making fun of and threatening girls everyday, thereby preventing the girls from using a certain computer lab. *Id.* at 651. If the district administrators are aware of the boys’ conduct, yet do nothing, their inaction would be considered pervasive enough to establish an actionable claim. *Id.* However, actual physical exclusion from an educational resource is not necessary; instead, actionable harassment can be any harassment that is so severe that it detracts from the victims’ education so that they are denied equal access to institutional resources. *Id.* The broad purpose of Title IX is to equalize opportunities for both sexes in education and educational extracurricular activities. *See supra* Part II.A (discussing the legislative intent behind Title IX).

<sup>91</sup> *Jennings v. Univ. of N.C.*, 482 F.3d 686, 696 (4th Cir. 2007) (quoting *Davis*, 526 U.S. at 651). *Jennings* emphasizes the importance of power imbalance in making a determination about whether a claim is actionable. *Id.* *See also supra* Part III.B (investigating the power imbalance).

<sup>92</sup> *Jennings*, 482 F.3d at 696. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 19 (1993). *Harris* is a Title VII case in which the Court held that while the Civil Rights Act of 1964 prohibited conduct that would seriously affect a reasonable person’s psychological well-being, the statute was not limited to such conduct. *Id.* The Court held that as long as the environment could reasonably be perceived as hostile or abusive, it did not have to inflict psychological injury. *Id.* at 23. In addition, whether an environment is hostile or abusive can be determined only by looking at all the existing circumstances. *Id.* This can include, but is not limited to “the frequency of the discriminatory conduct; its severity; whether it is

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also consider whether the harassment creates an “environment that a reasonable person would find hostile or abusive” and that the victim herself feels is abusive.<sup>93</sup> However, a hostile environment may exist even without obvious tangible injury to the student.<sup>94</sup> For example, while the Supreme Court has not decided the issue, the OCR has held that a student may be able to remain on a sports team, despite feeling humiliated or angered by harassment.<sup>95</sup> Regardless of the OCR’s holding, harassing conduct of this type alters the student’s educational environment on the basis of sex and therefore violates Title IX.<sup>96</sup> An athletic environment is highly susceptible to becoming hostile because of the physical and emotional closeness it involves.<sup>97</sup>

In fact, “there is ‘little doubt that the enactment was aimed, in part, at creating a more level playing field for female athletes;]’” therefore it is also necessary to examine player-coach relationships within this

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physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” *Id.*

<sup>93</sup> *Jennings*, 482 F.3d at 696 (quoting *Davis*, 510 U.S. at 21). Courts should use common sense and an appropriate sensitivity to the social context to differentiate between behavior as either sexual harassment or just “[s]imple teasing, offhand comments, [or] isolated incidents[.]” *Id.* (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998)).

<sup>94</sup> *See Harris*, 510 U.S. at 22 (holding that tangible harm is not required for the harassment to rise to the level of severity sufficient to induce institutional liability).

<sup>95</sup> Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, n.51 (1997), available at <http://www.ed.gov/about/offices/list/ocr/docs/sexhar01.html> (last visited Jan. 20, 2008) (citing to Summerfield Schools, OCR Case No. 15-92-1029).

<sup>96</sup> Notice of Publication of Guidance, 62 Fed. Reg. 12034, 12041 (1997). Behavior that, outside of the athletic environment, might be objectionable may not rise to the level of sexual harassment on a sports team. *See Jennings*, 482 F.3d at 698 (“A male coach might use sexual slang in front of his women players, and the players might do the same in front of the coach. Title IX is not a civility code for the male coach who coaches women, and it is not meant to punish such a coach for off-color language that is not aimed to degrade or intimidate.”).

<sup>97</sup> *See infra* Part III.B (examining the power imbalance). *Davis*, 526 U.S. at 678 (Kennedy, J., dissenting). Justice Kennedy’s dissent in *Davis* criticized the utility of this prong of the standard. *Id.* Justice Kennedy pointed out that the Court’s reliance on the impact on the victim’s education suggests that the objective offensiveness of a comment is to be judged by reference to a reasonable child or other young person, a standard that is likely to be quite expansive. *Id.* This standard also gives juries no real guidance, but instead requires them to attempt to gauge the sensitivities of an average child. *Id.* *See Wiener, supra* note 46. In addition, the psychological community found the standard to be appalling; one commentator noted “[a]pparently, the Court assumed that young girls and boys are mature and thoughtful enough to expose sexual misconduct to high-ranking school authorities.” *Id.* *See Jennings*, 482 F.3d at 716 (Niemeyer, J., dissenting). On the other hand, many courts have held that this standard is not intended to be a “general civility code.” *Id.*; *see also Faragher*, 524 U.S. at 788.

context.<sup>98</sup> *Jennings v. University of North Carolina* illustrates how a coach created an environment that was hostile to his female athletes.<sup>99</sup> The coach allegedly made sexually charged comments to the team, questioned team members about their sex lives in graphic detail, and made explicit sexual references to several players' anatomical features.<sup>100</sup> The Fourth Circuit Court of Appeals, en banc, held that the plaintiff had proffered facts that were sufficient for a jury to find that the coach's sexually harassing conduct was degrading and pervasive enough to create a hostile environment and therefore denied the school's motion for summary judgment.<sup>101</sup> Thus, the case was a victory in the Fourth Circuit for Title IX advocates, but the Supreme Court denied certiorari; therefore, the Court missed an opportunity to establish national precedent for institutional liability under Title IX.<sup>102</sup> In sum, the Court failed to contemplate that its Title IX holdings would "render inutile

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<sup>98</sup> Karen Fadulto, *Can the Concept of "Good Coaching" Be Quantified for the Purposes of Title IX Sex Discrimination Claims?* 3 DEPAUL J. SPORTS & CONTEMP. PROBS. 220, 225 (2006) (quoting *Cohen v. Brown Univ.*, 991 F.2d 888, 894 (1st Cir. 1993)). Fadulto indicates that Congress's use of the language "any education program or activity" in Title IX has been interpreted as showing Congress's intent to use Title IX to improve equality in athletics. *Id.* at 224 (citing *Haffer v. Temple Univ. of Commonwealth System of Higher Educ.*, 678 F.Supp. 517, 541 (D. Pa. 1988)).

<sup>99</sup> *Jennings*, 482 F.3d at 686. See also *infra* Part III.B (discussing the ubiquitous power imbalance that exists in college athletics on both male and female teams).

<sup>100</sup> *Jennings*, 482 F.3d at 697. Specifically, one player testified that her coach's comments made her "fe[el] dirty'" and "made [her] skin crawl'" and another stated that she felt pressured because of his excessive intrusion into all of the players' sex lives. *Id.* The coach's comments allegedly carried overtones of vulgarity and promiscuity. *Id.* at 692-94.

<sup>101</sup> *Id.* at 698-99. Judge Niemeyer issued a scathing dissent in the *Jennings* case, stating that the majority had actually interpreted *Davis* incorrectly. *Jennings*, 482 F.3d at 718-19 (Niemeyer, J., dissenting). Judge Niemeyer claimed the majority ignored the requirement of Title IX liability that the conduct in question "deprive a plaintiff of 'equal access to an institution's resources and opportunities.'" *Id.* at 718 (quoting *Davis*, 526 U.S. at 651). Contrary to the majority's reading of *Davis*, the dissent contended that the Supreme Court has held many times that Title IX's discrimination requirement is satisfied "only where [the harassment is so severe or pervasive] that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." *Jennings*, 482 F.3d at 718 (emphasis in original) (quoting *Davis*, 526 U.S. at 654). Niemeyer continued to blast the majority in its interpretation of the standard. *Id.* Instead of utilizing the correct standard, Niemeyer claims the majority used a watered down "negative impact" test and therefore found that the coach's conduct may have caused a negative impact of some sort. *Id.* at 719 (showing the difficulty and variety of ways the standard has been interpreted by different courts).

<sup>102</sup> See also *Simpson*, 500 F.3d. 1170. Several women alleged that Colorado University was aware that the football team's recruiting program created an atmosphere that involved harassing women during parties for its recruits, but the court found this was insufficient notice. *Id.* at 1173.



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causes of action authorized by Congress [by deciding] that *no* remedy is available."<sup>103</sup>

### III. ANALYSIS OF THE INHERENT POWER IMBALANCES AND THE EASILY TWISTED STANDARD, WHICH ENCOURAGE THE FORMULATION OF MERELY REACTIVE INSTITUTIONAL PROCEDURAL SAFEGUARDS

Since 1972, numerous decisions by federal court judges have twisted Title IX so that it no longer serves the purpose that Senator Bayh envisioned.<sup>104</sup> Unfortunately, it seems that the *Gebser* dissent was prophetic when it foretold that few Title IX plaintiffs who were victims of intentional discrimination or harassment would be able to recover damages under the exceedingly high standard established by the majority decision.<sup>105</sup> The *Gebser* standard has been distorted to allow

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<sup>103</sup> *Franklin*, 503 U.S. at 74 (emphasis in original). See *Gebser*, 524 U.S. at 306 (Ginsburg, J., dissenting). Justice Ginsburg wrote a dissent in *Gebser* that focused on an affirmative defense for schools. *Id.* Justices Souter and Breyer joined Ginsburg in this dissent, in which Ginsburg noted that she would accept an effective policy for reporting and redressing Title IX sexual harassment as a defense. *Id.* at 307. The dissent pointed out that school districts that receive federal funding have already been instructed to prepare procedures for prompt and equitable resolution of complaints. See *id.*; 34 C.F.R. § 106.8(b) (1997). The Department of Education has also issued regulations on the dissemination of such procedures. See 34 C.F.R. § 106.9 (1997). See also Sexual Harassment Guidance, *supra* note 95 at n.56. The Office for Civil Rights of the Department of Education issued a policy stating that a school district is liable under Title IX if one of its teachers "was aided in carrying out the sexual harassment of students by his or her position of authority with the institution." *Id.* See 34 C.F.R. § 106.8 (2007). The Department of Education has also promulgated the elements of what an effective grievance process looks like, with specific reference to sexual harassment. *Id.* In her dissent in *Gebser*, Justice Ginsburg wrote that, under such a scheme, the burden would be on the school district to show that these types of procedures were easily available and would have redressed the injury at hand. *Gebser*, 524 U.S. at 307 (Ginsburg, J., dissenting). Following that, if the student failed to utilize these remedial and preventative measures, she would not qualify for Title IX relief. *Id.* See *infra* Part III.C (discussing various protocol and the shortcomings of relying on reactive procedures).

<sup>104</sup> See *supra* Part II.B (discussing *Canton*, *Franklin*, *Gebser*, and *Davis*); *supra* note 17 (discussing Bayh's vision).

<sup>105</sup> *Gebser*, 524 U.S. at 304. Several alternative remedies are available outside of Title IX, but these approaches have led to varied results. See generally *Knackert v. Estes*, 926 F. Supp. 979 (D. Nev. 1996) (applying Nevada law) (a Nevada District Court held that the school district was liable for a teacher's sexual harassment of a student under the doctrine of respondeat superior); *Ada D. v. City of New York*, 190 A.D.2d 356 (1st Dep't 1993), *order aff'd*, 638 N.E.2d 962, (1994) (a school may be negligent in hiring or supervising an employee with a propensity to engage in sexual misconduct); *P.L. v. Aubert*, 545 N.W.2d 666 (Minn. 1996) (the Minnesota Supreme Court ordered dismissal of a student's negligent supervision action against a school, for injuries sustained during a sexual relationship with a teacher because the court determined that the district's supervision of the teacher had been adequate, and that closer attention would not have prevented or revealed the relationship); *Godar v. Edwards*, 588 N.W.2d 701 (Iowa 1999) (the Iowa Supreme Court affirmed a directed verdict for the school district in an action brought by a student to

insufficient procedural safeguards and excessive power imbalances to effectively prevent instances of sexual harassment in college athletics from being investigated and prosecuted, especially when committed in a team setting.<sup>106</sup>

As athletics become more competitive at all levels, coaches gain power and prestige that could be used to harm players.<sup>107</sup> In addition to the difficulty in creating adequate procedural safeguards to address sexual harassment, the power structure of a team creates an environment conducive to harassment, consequently forming additional obstacles to utilizing procedural measures.<sup>108</sup>

Schools and athletic programs have attempted to address sexual harassment by enacting various procedural measures, although the success of the measures is questionable.<sup>109</sup> These procedures tend to be reactive, utilized only after harassment has occurred and the damage has been done to the athlete.<sup>110</sup> Institutions need to take interest in

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recover damages for years of sexual harassment by school curriculum director under vicarious liability standard because the director's sexual abuse was not of the same basic nature as his duties as curriculum director); *States Get Tough on Classroom Sexual Misconduct*, CNN, Jan. 28, 2008, <http://edition.cnn.com/2008/US/01/27/teacher.sex.abuse.ap/index.html> (last visited Jan. 28, 2008) (new Missouri legislation would eliminate statute of limitations for sexual misconduct).

<sup>106</sup> See *supra* Part II.C.3 (noting that *Jennings* is a well known case in which both the trial and appellate courts found that the coach's actions did not rise to the level of sexual harassment and that it was only after the appellate court re-heard the case en banc that the judges found in favor of Jennings).

<sup>107</sup> See *supra* Part II.C.3 (discussing the *Jennings* case). See also *Jennings*, 444 F.3d at 283. Coach Dorrance was the most successful women's soccer coach in history, having won 18 of the 23 championships held before 2004. *Id.* He also coached the women's U.S. National Team, and many girls stated they would "cut off their right arm" to play for him. *Jennings*, 482 F.3d. at 696.

<sup>108</sup> See *supra* Part II.C.3 (using *Jennings* as an example of an instance when a coach used his position and power to create an environment in which he could manipulate and harass female players).

<sup>109</sup> See *infra* Part III.C.A. See Robin Finn, *Out of Bounds – A Special Report: Growth in Women's Sports Stirs Harassment Issue*, N.Y. TIMES 11, March 7, 1999. The New York Times report discussed the circumstances surrounding an increase in harassment:

[T]he rise in reports of harassment by male coaches is acknowledged to be an unanticipated byproduct of a landmark victory for women: Title IX, the 1972 law barring sexual discrimination at schools that receive Federal money. As participation in organized women's athletics has rocketed from 300,000 to 3 million student-athletes in the wake of Title IX, creating a need for thousands of new coaches, the share of those coaches who are women has dropped dramatically: at the college level, the percentage of female head coaches of women's teams has fallen to 47.4 percent, from 90 percent in 1972.

*Id.*

<sup>110</sup> See *supra* note 103 (discussing the OCR's Guidance, which suggests specific grievance procedures but only briefly reviews proactive preventative measures).

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preventing harm to their students by instituting measures to prevent sexual harassment that go beyond merely avoiding legal liability.<sup>111</sup>

Part III.A analyzes how the *Gebser* standard has been exploited so as to allow weak policies to interact with the existing power imbalances, leading to an environment especially vulnerable to sexual harassment.<sup>112</sup> Part III.B considers what impact the inherent power imbalance plays in creating an environment vulnerable to harassment, as well as impeding the prevention and reporting of sexual harassment in these environments.<sup>113</sup> Finally, Part III.C uses the interplay between the twisted standard and inherent power imbalances to show why institutions tend to concentrate on reactive measures at the expense of preventative procedures, and focuses on the shortcomings typically present in these reactive policies that betray the intent of Title IX.<sup>114</sup>

A. *The Gebser Standard Leads to Poorly Formulated Policy and Exacerbates Existing Power Imbalances*

Under the *Gebser* standard, only when a federal funding recipient has actual notice of, and was deliberately indifferent to, sexual harassment can the recipient be held liable for monetary damages.<sup>115</sup> The Supreme Court's decisions have made it difficult for college athletes to succeed because the actual notice and deliberate indifference prongs provide an institution with loopholes that allow it to avoid liability.<sup>116</sup>

<sup>111</sup> See *Cannon*, 441 U.S. at 677. The passive language of the statute demonstrates the focus on the well-being of the benefited class. *Id.* ("No person in the United States shall, on the basis of sex, be excluded . . ." 20 U.S.C. § 1681).

<sup>112</sup> *Infra* Part III.A (discussing the language of the *Gebser* standard and the way it can, and has, been twisted to reduce schools' liability under Title IX, concentrating on who the "appropriate person" is to receive notice and the ways a school can avoid liability if its actions merely surpass an attitude of "deliberate indifference" to sexual harassment); see also *States Get Tough on Classroom Sexual Misconduct*, CNN, Jan. 28, 2008, <http://edition.cnn.com/2008/US/01/27/teacher.sex.abuse.ap/index.html> (last visited Jan 28, 2008) ("When abuse happens, administrators too often fail to let others know about it, and too many legal loopholes let offenders stay in the classroom.").

<sup>113</sup> *Infra* Part III.B (examining the power hierarchy inherent in college athletics, and the manner in which it restricts an athlete's opportunities to report sexual harassment while, at the same time, increasing the risk that a sexually hostile environment will develop).

<sup>114</sup> *Infra* Part III.C (exploring the suggested OCR policies and the reactive policies generally enacted by schools and athletic programs that, when combined with power imbalances inherent in college athletics, results in reduced school responsibility and difficulty in preventing sexual harassment).

<sup>115</sup> See *supra* Part II.C. See *Davis*, 526 U.S. at 651. The harassment must also be so severe and pervasive that it creates a hostile environment. *Id.* The power imbalance discussed earlier is one component of creating a hostile environment and is one of the "constellation" of factors considered by the courts. *Id.* See also Part III.B (analyzing the power imbalance).

<sup>116</sup> See *supra* Parts II.B.3-C.2 (offering an examination and criticism of the idea of actual notice).

Ideally, an institution has received notice when it “knew or, in the exercise of reasonable care, should have known” about the ongoing harassment.<sup>117</sup> Difficulty in determining liability results because it is often unclear who the appropriate official to receive notice is, and it is also unclear what the notice must consist of in the athletic environment.<sup>118</sup> There is no set standard specifically for athletics,<sup>119</sup> but analogies can be drawn between examples given by the OCR Guidance for schools and the corresponding situations in athletics.<sup>120</sup>

<sup>117</sup> See Revised Guidance *supra*, note 20, at V.B1; see also Notice of Publication of Guidance, 59 Fed. Reg. 11450 (discussing different ways a school can receive notice). See *infra* note 120. This is an optimistic view of notice, as the Department of Education is a government body committed to pursuing and treating sexual harassment aggressively. See *infra* note 120.

<sup>118</sup> Kristen M. Galles, *Filling the Gaps: Women, Civil Rights and Title IX*, AM. BAR ASS'N SECTION OF INDIVIDUAL RIGHTS & RESPONSIBILITIES, HUMAN RIGHTS (Summer 2004), <http://www.abanet.org/irr/hr/summer04/gaps.html> (last visited Jan. 28, 2008). Ironically, the court in *Gebser* actually refused to adopt a more lenient standard such as the one used in employee-employer harassment cases in Title VII, where the employer can be held liable if it should have known of the harassment. *Id.*

<sup>119</sup> Viv Bernstein, *Sex Harassment Faces Title IX Test*, WOMEN'S ENEWS, Sept. 23, 2007, <http://www.womensenews.org/article.cfm?aid=3323> (last visited Jan. 28, 2008). See *cf. Jennings*, 482 F.3d at 725 (Niemeyer, J., dissenting). Interestingly, the dissent here seems to suggest that the environment of college athletics is naturally more demanding and more hostile, and therefore the same standard should not be applied to athletics as is applied in the classroom or courtroom. *Id.* at 725. The dissent concluded that

In the context of this case, Title IX presents the narrow issue of whether a player—in this case Jennings—was denied the benefits of the soccer team because of Coach Dorrance's comments. It is crystal clear that she did not think so until after she was cut from the team. From her anger and disappointment in being cut—concededly not because of sexual discrimination—she pursues this unfortunate lawsuit to complain about vulgar language that surely did offend her, and rightfully so. But Title IX requires more.

*Id.*

<sup>120</sup> See Revised Guidance *supra* note 20, at V.C:

A student, parent, or other individual may have contacted other appropriate personnel, such as a principal, campus security, bus driver, teacher, affirmative action officer, or staff in the office of student affairs. A teacher or other responsible employee of the school may have witnessed the harassment. The school may receive notice about harassment in an indirect manner, from sources such as a member of the school staff, a member of the educational or local community, or the media.

*Id.* Dear Colleague letter from Kenneth L. Marcus, Office for Civil Rights, TITLE IX GRIEVANCE PROCEDURES, ELEMENTARY AND SECONDARY EDUCATION, (Apr. 26, 2004), [http://www.ed.gov/about/offices/list/ocr/responsibilities\\_ix.html](http://www.ed.gov/about/offices/list/ocr/responsibilities_ix.html). This is a bit of an optimistic list because it comes from the Department of Education, who is “committed to enforcing Title IX aggressively.” *Id.*

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In the groundbreaking *Gebser* case, the school principal knew of the ongoing sexual harassment, but was not considered the appropriate school official to trigger school liability.<sup>121</sup> He or she apparently did not have the authority to institute “corrective measures” on the district’s behalf.<sup>122</sup> This is comparable to claiming that the athletic director of a school did not have the authority to institute changes in the athletic department.<sup>123</sup> While the “notice” standard in athletics has not been considered by the Supreme Court, there is a slight trend, at least at the appellate level, to find that if the abuse was reported to a member of the school staff, an appropriate person did have notice.<sup>124</sup> However, many lower courts have still been reluctant to hold institutions liable, refusing to be what some call “polite police” for coaches, or fearing that Title IX is becoming a “general civility code.”<sup>125</sup>

Sexual harassment in the classroom has been litigated much more than harassment on the playing field, so it is beneficial to examine who was considered the appropriate official by the courts in those cases.<sup>126</sup> Lower courts have held that giving notice to a guidance counselor,<sup>127</sup> a school principal,<sup>128</sup> or a director of a university department<sup>129</sup> does not always trigger institutional liability because these are not the appropriate

<sup>121</sup> See *supra* Part II.C (articulating the “actual notice” test).

<sup>122</sup> See *supra* Part II.B. *Gebser*, 524 U.S. at 290. “[A] damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the [funding] recipient’s behalf has actual knowledge of discrimination” and is deliberately indifferent to it. *Id.* See also *Jennings*, 444 F.3d 255. In *Jennings*, both the trial and appellate courts found that, although the student athlete reported her harassment to the university’s counsel and an official responsible for fielding sexual harassment claims, the school did not have notice. *Id.* It was only after a rehearing en banc that the court held that this did, in fact, constitute notice. *Id.* The en banc hearing resulted in three circuit court judges finding for the athlete and two judges dissenting in favor of the defendant. *Id.*

<sup>123</sup> See also *infra* Part III.B. At larger universities, one must wonder what the chances are for a freshman on the volleyball team, or a red-shirted member of the wrestling team, to meet privately with the athletic director to report sexual harassment. See *infra* Part III.B (further exploring the difficulty in reporting that exists because of power imbalances issues).

<sup>124</sup> See, e.g., *Jennings*, 482 F.3d 686 (abuse reported to a member of the administration). But see *Simpson*, 500 F.3d 1170 (overall environment does not constitute notice).

<sup>125</sup> Bernstein, *supra* note 119 (quoting Nancy Hogshead-Makar, professor at Florida Coastal Law School and a Title IX expert). See also *Jennings*, 482 F.3d at 716; *supra* Part II.C.3 (examining the level of abuse necessary to rise to the level required for a claim under Title IX).

<sup>126</sup> See *supra* Part II (discussing several ground-breaking Title IX cases).

<sup>127</sup> *Good v. Reading Sch. Dist.*, 268 F.3d 163 (3d Cir. 2002).

<sup>128</sup> *Baynard v. Malone*, 268 F.3d 228 (4th Cir. 2001).

<sup>129</sup> *Liu v. Striuli*, 36 F. Supp. 2d 452 (D.R.I. 1999). See also *Floyd v. Waiters*, 133 F.3d 786 (11th Cir. 1998) (it was not sufficient that the supervisor of a school security guard knew of the assault).

officials.<sup>130</sup> Specifically, the language of *Gebser* requires that an official with power to “institute corrective measures” must have notice.<sup>131</sup> This requirement allows institutions to jump through a loophole because the official with this power is most likely so high up the hierarchy that athletes have no real access to him.<sup>132</sup> The class of persons that actually has the authority to “institute corrective measures” is likely a very small group; only few people can institute measures against a popular, successful coach.<sup>133</sup> A further problem is that if student-athletes do have access to this official, the athlete may not feel comfortable going to the individual because there is no pre-existing relationship with that person or the official is a friend of the harassing coach.<sup>134</sup> Therefore, the requirement of notice to a particular person hinders reporting, and has remained a loophole available for institutions to avoid liability.<sup>135</sup>

An additional element in the *Gebser* standard is that after the appropriate official receives actual notice, the institution must be “deliberately indifferent” to the sexual harassment.<sup>136</sup> Deliberate indifference “is an official decision by the recipient not to remedy the

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<sup>130</sup> See also *Canutillo Indep. Sch. Dist. v. Leija*, 101 F.3d 393, 398–400 (5th Cir. 1996). *Canutillo* held, contrary to the Department of Education’s policy, that a school district was not liable when a teacher sexually molested a second grade student because the student and her mother reported the harassment only to the student’s homeroom teacher. *Id.* Even though the school handbook instructed students and parents to report sexual harassment grievances to a child’s homeroom teacher, the court held that notice must be given to “someone with authority to take remedial action[.]” *Id.* at 402. But see *Morse v. Regents of the Univ. of Colorado*, 154 F.3d 1124 (10th Cir. 1998) (the Tenth Circuit Court found that the institution could be sued because the university affirmative action officer and a dean had notice of the harassment).

<sup>131</sup> *Gebser*, 524 U.S. at 277.

<sup>132</sup> *Id.* at 284. See *infra* Part III.B for a discussion of how the power structure prevents athletes from feeling comfortable reporting their coaches or other officials.

<sup>133</sup> See *Jennings*, 444 F.3d at 283. Coach Dorrance was the most successful women’s soccer coach in history. *Id.* See also Part IV.B (emphasizing the need to have appropriate officials available outside the athletic office as well).

<sup>134</sup> See *supra* Part IV.B (proposing new regulations that would provide athletes with more outlets to report sexual harassment and would encourage a community standard).

<sup>135</sup> See *infra* Part IV.B (suggesting a legal standard more in line with the Department of Education’s standard for agency enforcement).

<sup>136</sup> See *supra* Part II. The deliberate indifference standard becomes chillingly high when coupled with the requirement that the harassment must rise to a level that limits or denies “a student’s ability to participate in or benefit from a school program[.]” Revised Guidance *supra* note 20, at V.B.1. The opportunity to be a part of an athletic team is clearly an educational benefit that would be denied if a student-athlete lost a scholarship, had their playing time reduced, or was cut from the team because of reporting a coach or other school official for sexual harassment. Clare Williams, *Sexual Orientation Harassment and Discrimination: Legal Protection for Student Athletes*, 17 J. OF LEG. ASPECTS OF SPORT 253, 275 (Summer 2007).

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violation[]” or a refusal to take action to comply with Title IX.<sup>137</sup> At a minimum, if an institution takes “timely and reasonable measures to end the harassment, it is not liable under Title IX.”<sup>138</sup> For a school to reach the level of deliberate indifference that will result in liability, it must either completely ignore the harassment or take actions that could not be expected to remedy the violation.<sup>139</sup>

This standard leads to problems because it allows—even encourages—simply addressing the harassment after it has already occurred; there is no real requirement for the institution to prevent harassment.<sup>140</sup> Some federal judges have even suggested that because sports are naturally competitive, the standard should be higher.<sup>141</sup> If a college athletic department fails to prevent the sexual harassment of a student, the school is not liable under Title IX unless it had a systematic institutional policy of being indifferent.<sup>142</sup> On the other hand, if, after the proper person receives actual notice, the athletic department or the school as a whole refuses to address the known sexual harassment violations, the school can be held liable under Title IX.<sup>143</sup> Therefore, institutions avoid legal liability by implementing sufficient measures so that they cannot be seen as being “deliberately indifferent” to the

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<sup>137</sup> *Gebser*, 524 U.S. at 290. *See supra*, Part II.C.1 (explaining that deliberate indifference occurs when the institution takes steps that are “clearly unreasonable[]”).

<sup>138</sup> *Gebser*, 524 U.S. at 290–91. *See also* *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1034 (9th Cir. 1998) (explaining that a school district must be deliberately indifferent to its students’ right to an education free of hostility and discrimination).

<sup>139</sup> *Gebser*, 524 U.S. at 290–91.

<sup>140</sup> *See infra* Part III.C. *See also* *Gebser*, 524 U.S. at 288. The court provided a legal standard for recovery of damages, but did not even address equitable relief such as an injunction against schools who refuse or are negligent in adopting preventative measures. *Id.* *See* Wiener, *supra* note 46:

The theories of liability that the Supreme Court applies in Titles VII and IX appear indifferent to the common experience of workers and students. That is, the courts assume a great deal about the effects of different reporting standards without knowledge of the impact of those standards on the behavior of workers, teachers and students.

Psychologists can assist the courts in clarifying the distinction between Title VII and IX liability by investigating the impact of victim reporting requirements on the perceptions of safety, control and comfort in students and workers.

*Id.*

<sup>141</sup> *See Jennings*, 482 F.3d at 719. Judge Niemeyer took issue with the majority’s position in his dissent to *Jennings*, calling the test it used a watered down “negative impact” test. *Id.*

<sup>142</sup> AM. JUR. 2D *Civil Rights* § 339 (2007).

<sup>143</sup> *Id.* *See infra* Part III.C (discussing OCR-recommended and already existing policies).

harassment, which becomes problematic when sexual harassment continues to occur in the powerful hierarchy of college athletics.<sup>144</sup>

*B. The Power Imbalances Inherent in Athletics*

The above-mentioned harassment nearly always takes place in either a school or an athletic setting where power imbalances are rampant.<sup>145</sup> Federal funding recipients retain control over the environment in which the harassment occurs, and more importantly, in many settings, the school board will exercise significant control over the actual harasser.<sup>146</sup> Sexual harassment tends to be more rampant “in institutions characterized by hierarchical distributions of power” —structures that are common in intercollegiate sports environments.<sup>147</sup>

There are a multitude of definitions of sexual harassment and many of them include an element of power imbalance.<sup>148</sup> Coaches and teachers

<sup>144</sup> See *infra* Part III.B. The resulting problem of institutions relying on reactive measures, rather than focusing on preventing the harm from ever being inflicted, will be addressed in depth in Part III.C. See generally *infra* Part III.C.

<sup>145</sup> See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995). It is relevant to examine power structure because the Supreme Court has observed “that the nature of [the State’s] power [over public schoolchildren] is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults.” *Id.* See also *Davis*, 526 U.S. at 674 (Kennedy, J., dissenting) (citing Brief for Independent Women’s Forum as *Amicus Curiae* 19) (“questioning whether ‘at the primary and secondary school level’ it is proper to label ‘sexual misconduct by students’ as ‘sexual harassment’ because there is no power relationship between the harasser and the victim”). See also Finn, *supra* note 109, at 11. Researchers commented that “[t]here’s no such thing as consensual anything when one person has that much control over another.” *Id.*

<sup>146</sup> *Davis*, 526 U.S. at 646. See also *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969) (demonstrating that the Supreme Court recognizes the importance of school officials’ “comprehensive authority” consistent with fundamental constitutional safeguards to prescribe and control conduct in the schools).

<sup>147</sup> Karin A.E. Volkwein, Frauke I. Schnell, Dennis Sherwood & Anne Livezey, *Sexual Harassment in Sport: Perceptions and Experiences of American Female Student-Athletes*, 32 INT’L REV. FOR THE SOCIOLOGY OF SPORT 283 (1997). See also *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 81 (1998). The Court explained,

A professional football player’s working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field—even if the same behavior would reasonably be experienced as abusive by the coach’s secretary (male or female) back at the office.

*Id.*

<sup>148</sup> See 29 C.F.R. § 1604.11 (2007). The Equal Employment Opportunity Commission defines sexual harassment as follows:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment, (2) submission to or rejection of such conduct by an



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operating within an institution are automatically placed in positions with more power than students.<sup>149</sup> The status of the persons involved is important.<sup>150</sup> One university's policy explicitly states that "[s]exual harassment has more to do with power than with sex."<sup>151</sup> Although students and faculty may conduct themselves in the same harassing manner, faculty members are less likely than students to be aware of the effects of their power and the fact that their positions of power make them more likely to be perceived as harassers.<sup>152</sup>

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individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

*Id.* See Fla. St. Univ. Student Conduct Code, available at <http://askew.fsu.edu/current/doctoral/studentpolicies.html>.

Florida State University's doctoral program states:

The key elements of sexual harassment are that (a) there is a power imbalance between the faculty member and the student, with the faculty member taking advantage of this institutional authority and (b) there is emphasis in one way or another on the sexual identify [sic] of the harassed. What is violated is not only a relationship of authority but also one of trust.

*Id.* See also MASS. COMMISS'N AGAINST DISCRIMINATION, MODEL SEXUAL HARASSMENT POLICY, <http://www.mass.gov/mcad/harassment.html>.

The legal definition in Massachusetts for sexual harassment is as follows:

"[S]exual harassment" means sexual advances, requests for sexual favors, and verbal or physical conduct of a sexual nature when:

(a) submission to or rejection of such advances, requests or conduct is made either explicitly or implicitly a term or condition of employment or as a basis for employment decisions; or,

(b) such advances, requests or conduct have the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, humiliating or sexually offensive work environment.

*Id.* See also Univ. of Neb., Affirmative Action/Equal Opportunity, <http://www.unk.edu/offices/aaeo/index.php?id=1524>. University of Nebraska, Kearny adds: "Sexual harassment differs from ordinary flirting because it occurs in the context of a power imbalance allowing one person to intimidate another person." *Id.*

<sup>149</sup> U.C.L.A. Student Psychological Services, *Sexual Harassment Brochure*, [http://www.sps.ucla.edu/brochures\\_sexaulharssment.html](http://www.sps.ucla.edu/brochures_sexaulharssment.html) (last visited Jan. 28, 2008). See also Sophia Jowett & David Lavalley, SOCIAL PSYCHOLOGY IN SPORT 4 (Human Kinetics, 2007). The authors, Jowett and Lavalley, stress that "[t]he coach-athlete relationship is characterized by high levels of interdependence that can have positive or negative ramifications depending on how interdependence is experienced." *Id.* at 4.

<sup>150</sup> Ellen Sekreta, *Sexual Harassment, Misconduct, and the Atmosphere of the Laboratory: The Legal and Professional Challenges Faced by Women Physical Science Researchers at Educational Institutions*, 13 DUKE J. GENDER L. & POL'Y 115, 120 (Spring 2006). The status of the harasser can even affect what he perceives to be harassing behavior. *Id.*

<sup>151</sup> Univ. of Neb., Affirmative Action/Equal Opportunity, <http://www.unk.edu/offices/aaeo/index.php?id=1524>.

<sup>152</sup> Sekreta, *supra* note 150, at 121.

## 1. Coaches' Control over Players

Sexual harassment tends to be more rampant in hierarchical institutions with an unequal distribution of power among the parties; this is the typical structure of a college athletic team.<sup>153</sup> The opportunity to harass is created by differences in power and position, leading the more powerful individual to extort various types of sexual gratification.<sup>154</sup> An age disparity between the alleged harasser and the victim is also relevant in establishing whether a power imbalance exists that may add to a sexually hostile environment.<sup>155</sup> For example, the majority of college coaches are men, and these men hold significant power over female athletes regarding scholarships, playing time, and team membership.<sup>156</sup> The special relationship between coach and athlete

<sup>153</sup> See generally Volkwein et al., *supra* note 147. This type of sexual harassment is also present in the classroom, where teachers have the power and control over the student's grades. See Guidance (1997), *supra* note 95, at Introduction (introducing the different types of harassment that may present in the classroom). If a teacher or other employee uses the authority he was given to force a student into a sexual situation, the employee "'stands in the shoes'" of the school and the school should be liable for the use of its authority by the teacher or coach. *Id.* at Liability of a School for Sexual Harassment.

<sup>154</sup> See Sekreta *supra* note 150, at 121. A U.S. Department of Education pamphlet published in September 2008 notes that "[i]t is difficult to say 'no' to a . . . coach. . . . A person who complains about sexual harassment is often rejected . . . and labeled a troublemaker." DEPARTMENT OF EDUCATION, OFFICE FOR CIVIL RIGHTS, CODE 16: SEXUAL HARASSMENT: IT'S NOT ACADEMIC 1997, <http://www.ed.gov/about/offices/list/ocr/docs/ocrshpam.html> (last visited Jan. 28, 2008).

<sup>155</sup> *Davis*, 526 U.S. at 651. See also *Jennings*, 482 F.3d at 697. Coach Dorrance also was much older than his players and wanted them to view him as a "father figure," which would enhance their trust in him, and, in the end, further exacerbated the power imbalance. *Id.* At first, the district court did not appreciate the importance of this power imbalance and granted the school summary judgment. *Jennings*, 444 F.3d at 255. The plaintiff in *Jennings* also felt increased pressure because of the age difference between her and her coach. *Jennings*, 482 F.3d at 697. She recounted a story: "I was 17 when he asked me ['Who are you fucking?'] in a dark hotel room, knee-to-knee, bed not made, sitting at one of those tiny tables." *Id.* See also Rhonda Reaves, "There's No Crying in Baseball": Sports and the Legal and Social Construction of Gender, 4 J. GENDER RACE & JUST. 283, 297-98 (2001) (commenting that usually when a plaintiff brings a Title IX hostile environment claim against a coach, the harasser is older than the victim and the age gap exacerbates a coach's already powerful position over his younger athletes).

<sup>156</sup> Volkwein, et al., *supra* note 147, at 285-86. The Women's Sports Foundation's position is that "[c]oaches exercise power over athletes, whether in giving them praise or criticism, evaluating them, making recommendations that further their athletic goals or conferring any other benefits on them." Melanie Bennett, et al., *Sexual Harassment - Sexual Harassment and Sexual Relationships between Coaches, Other Athletic Personnel and Athletes: The Foundation Position*, Issues and Actions, Oct. 1, 2007, <http://www.womenssportsfoundation.org/cgi-bin/iowa/issues/coach/article.html?record=575>. See also *Henderson*, 469 F.3d at 484. Here, a high school coach made it known to his female players that complaints about coaching would result in a loss of playing time. *Id.* His coaching style also included obscenities, as he addressed his players in "demeaning and vulgar terms." *Id.* After

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is “all about emotions, about trust and about the body.”<sup>157</sup> Coaches have significant control over the intimate details of an athlete’s life, such as their overall health, relationships, and sexual behavior; this demonstrates that coaches have even more control over an athlete than a professor would have over a student.<sup>158</sup> The *Jennings* court pointed out that “[a] typical college coach is going to have much more informal, casual, one-on-one contact with a student-athlete than a typical university instructor will have with a student.”<sup>159</sup> Coaches also exert power through praise and criticism of the athlete and by imposing restrictions on the athlete’s personal life.<sup>160</sup> These factors combine and make athletes particularly susceptible to a coach’s abuse of power and control.<sup>161</sup>

In *Jennings*, the coach in question was the most successful women’s soccer coach in history and had tremendous power over the players.<sup>162</sup>

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pursuing a relationship with one of his high school players, the coach “threatened the entire team with ‘consequences’ if anyone disclosed his relationship with [her].” *Id.* Another player testified she knew that the player being pursued by the coach was uncomfortable with his advances. *Id.* In addition, the player testified that behavior exhibited by the coach, including fondling, kissing, and hugging, was unwelcome and offensive to the targeted player. *Id.* The threatened loss of playing time not only impeded reporting but also magnified the already-present power imbalance. See also *infra* Part III.C (discussing the result when power imbalances and a weak standard combine in the college athletic environment).

<sup>157</sup> Finn, *supra* note 109, at 11 (quoting Don Sabo, a sociology professor at D’Youville College in Buffalo, who has developed harassment workshops for coaches).

<sup>158</sup> Volkwein, et al., *supra* note 147, at 285. See also Finn *supra* note 109, at 11. A person Finn interviewed commented, “When you put a male in a position of power where he can manipulate something of real meaning to an athlete, such as playing time or a scholarship, then add in the possibility of a young girl who may have a crush, you’ve got an extremely dangerous mix.” *Id.*

<sup>159</sup> *Jennings*, 444 F.3d at 274. See also R.V. Acosta & L.J. Carpenter, *Women in Intercollegiate Sport: A Longitudinal Study – Twenty-Nine Year Update, 1977-2006*, in EQUAL PLAY: TITLE IX AND SOCIAL CHANGE 169 (Andrew Zimbalist & Nancy Hogshead-Makar, eds., 2007). Statistics show the grim reality of Title IX: in 2006 only 42.4% of women’s teams (and less than 2% of men’s teams) were led by a female head coach—the lowest level of representation ever, down from more than 90% when Title IX was enacted. *Id.*

<sup>160</sup> Nancy Hogshead-Makar & Sheldon Elliot Steinbach, *Intercollegiate Athletics’ Unique Environments for Sexual Harassment Claims: Balancing the Realities of Athletics with Preventing Potential Claims*, 13 MARQ. SPORTS L. REV. 173, 174 (2003).

<sup>161</sup> Deanna DeFrancesco, *Jennings v. University of North Carolina at Chapel Hill: Title IX, Intercollegiate Athletics and Sexual Harassment*, 15 J. L. & POL’Y 1271, 1293–94 (2007). CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 1 (1979). For example, according to noted scholar Catherine MacKinnon, sexual harassment is the “unwanted imposition of sexual requirements in the context of a relationship of unequal power.” *Id.*

<sup>162</sup> *Jennings*, 482 F.3d at 696. See *Jennings*, 444 F.3d at 274. The district court in *Jennings* also elaborated on the unusual role of a coach:

The disparity in power between the coach and his players “trapped players into responding to his questions and enduring the environment.”<sup>163</sup> The coach controlled everything, from team membership to scholarship eligibility.<sup>164</sup> Any type of power imbalance must be examined in an allegation of sexual harassment because “[i]f the court does not perceive a power imbalance, it may weigh strongly against a finding of harassment.”<sup>165</sup> These types of power imbalances are not restricted to coaches—any member of the athletic personnel staff may have some type of power over the athlete.

## 2. Other Positions of Power over Players

Not only do coaches exercise a substantial amount of control over their players, but athletic trainers, the athletic director, and other administrative officials also have power over the student-athletes.<sup>166</sup> Athletic directors, along with the coach, control the scholarship dollars, practice times, game publicity, equipment purchases, and many other day-to-day details in the athlete’s life.<sup>167</sup> The athletic trainers are

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College sports often involve long daily practice sessions, overnight travel, . . . and the need for a coach to discuss issues associated with academic performance, athletics performance, and health . . . . Additionally, . . . a college coach is much more likely to demonstrate an athletic move with a hands-on demonstration. . . . Likewise, some coaches will use profanity, slang, sarcasm, or hamhanded humor. . . .to make a point, or to motivate.

*Id.*

<sup>163</sup> *Jennings*, 482 F.3d at 697. See *Crandell v. N.Y. Coll. of Osteopathic Med.*, 87 F.Supp.2d 304, 319 (S.D. N.Y. 2000) (denying summary judgment because the unequal power relationship between harasser and victim could feasibly support a jury finding of the establishment of a sexually hostile environment).

<sup>164</sup> *Jennings*, 482 F.3d at 697. Interestingly, even before matriculation, the plaintiff was a walk-on and was never recommended for a scholarship. *Id.* at 709.

<sup>165</sup> DeFrancesco, *supra* note 161, at 1295.

<sup>166</sup> See *supra* Part III.B (discussing power imbalances). Hogshead-Makar, *supra* note 160, at 184.

The identity of and relationship between the alleged harasser and the subject or subjects of the harassment [will be considered by the OCR in investigating allegations of sexual harassment] . . . For example, due to the power a professor or teacher [or coach] has over a student, sexually based conduct by that person toward a student is more likely to create a hostile environment than similar conduct by another student.

*Id.*

<sup>167</sup> See *supra* Part II.A. Revised Guideline, *supra* note 20, at V.A.1. The OCR Revised Guidance specifically gives the existence of a power imbalance (the “identity of and relationship between the alleged harasser and the subject or subjects of the harassment[.]”) as a factor to be considered, especially in cases involving allegations of sexual harassment of a student by a school employee. *Id.*

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responsible for the athlete's health and wellness; this includes clearing the player to play after an injury.<sup>168</sup> The power to tell an athlete when he or she can play again with the team is indeed a great power.<sup>169</sup> Other administrative officials within the athletic office at a university may also exhibit great power over the athletes regarding ticketing for games, class schedules, and perhaps most importantly, act as a direct pipeline to the coach himself.<sup>170</sup> Student-athletes clearly are at the bottom of the power structure.

This power imbalance therefore creates a hierarchical structure fraught with opportunities for harassment.<sup>171</sup> In addition, the "appropriate official" who needs to receive notice of harassment typically is a powerful official with whom the athlete may not be familiar, such as an administrator who is not in the gym or on the playing field everyday.<sup>172</sup> Most likely, the power imbalance between the student victim and the official is great, which makes it unlikely that an athlete would report the incident.<sup>173</sup> It is unrealistic to expect the athlete

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<sup>168</sup> This is an immense power over an athlete, as clearing a player to play is usually a judgment call, perhaps made based on some physical tests, but in the end the power to play lies with the trainer. The level of competitiveness within the team for playing time is also quite high: an extended period of sitting out for an injury could have a serious detrimental effect on the athlete's career. See Barbara Osborne, *Principles of Liability for Athletic Trainers: Managing Sport-Related Concussion*, 36 J. ATHL. TRAIN. 316 (July-Sept. 2001); Gerald Eskenazi, *ATHLETE AND HEALTH: MANY AT RISK*, *New York Times*, March 11, 1990 at sec. 8, p. 1 (discussing the pressure to clear athletes as soon as possible). See also Benito J. Velasquez, *Sexual Harassment: A Concern for the Athletic Trainer*, 33 J. Athl. Train. 171, 172, 174 (June 1998). *Id.* Sexual harassment is of grave concern for athletic trainers in such a pressure-filled position. *Id.*

<sup>169</sup> See *supra* note 166. Many schools have both professional and student athletic trainers on staff. See *supra* note 166 (discussing power imbalance, which can also exist between students, as a factor to be considered in sexual harassment cases).

<sup>170</sup> See generally *supra* note 156. See *Davis*, 526 U.S. at 653 ("The relationship between the harasser and the victim necessarily affects the extent to which the misconduct can be said to breach Title IX's guarantee of equal access to educational benefits[.]"); Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp. 1288, 1297 (1993) (commenting that the "'grave disparity in age and power' between harasser and victim contributed to the creation of a hostile environment"); Sexual Harassment Guidance, *supra* note 95 at n.57 ("'impact of the . . . remarks was heightened by the fact that the coach is an adult in a position of authority'"). See also note 150 (faculty may not realize their behavior is harassing).

<sup>171</sup> See Jowett & Lavalley, *supra* note 149, at 42. "[C]oaches and parents often have power over the athlete to dictate behavior and access to valued resources." *Id.*

<sup>172</sup> See *supra* text accompanying note 71 (showing that, at a minimum, the official must have the power to enact corrective measures).

<sup>173</sup> See *supra* Part II.C (explaining the notice standard and that one of the clearest ways of receiving notice is through a report). See also Press Release, Committee on Education and Labor, U.S. House of Representatives, *While Progress Has Been Made, More Must Be Done to Strengthen and Enforce Title IX* (June 19, 2007), available at [http://www.house.gov/apps/list/speech/edlabor\\_dem/RelJune19.html](http://www.house.gov/apps/list/speech/edlabor_dem/RelJune19.html). "[I]n many cases, female students . . . do not

to report her coach—who holds the power of her scholarship, her playing time, and her social life—to an “appropriate official” who has a close working relationship with the coach.<sup>174</sup> Because of the typical tightly-knit atmosphere in the field of athletics, it is likely that the coach, the athletic director, and others in the office are friendly with each other, making the prospect of reporting a coach or other staff member for sexual harassment especially difficult.<sup>175</sup> The power structure inherent on a team can impede the successful use of procedural safeguards implemented to address sexual harassment.<sup>176</sup>

As discussed above, *Jennings* provides an example of how the extreme power imbalance that exists between a coach and a player may enable sexual harassment.<sup>177</sup> In *Jennings*, the athlete was worried she would lose her playing time or place on the team if she refused her coach’s demands to discuss sexual issues.<sup>178</sup> Just as importantly, the power imbalance impeded her intentions of reporting the harassment.<sup>179</sup> The player was not comfortable confronting her coach, and the power

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report Title IX complaints to their schools because they are either unaware of the law’s protections or they fear retaliation.” *Id.*

<sup>174</sup> It is difficult, then, to determine who the courts would find to be an “appropriate official” in harassment cases in athletics. See *Gebser*, 524 U.S. at 277. According to *Gebser*, it must be an official “who at a minimum has authority to institute corrective measures on the district’s behalf[.]” *Id.*

<sup>175</sup> See *supra* Part II. According to the Women’s Sports Foundation, sexual relationships between coaches and athletes are inappropriate because the coach has professional responsibility for the athlete. It also makes the atmosphere uncomfortable for others within the program and tends to increase the chances for a coach to abuse his power. See, e.g., Bennett, *supra* note 156 (discussing the power coaches have over their players).

<sup>176</sup> See *supra* Part III.B (discussing the power imbalance and other problems inherent in the existing reporting structures).

<sup>177</sup> See *supra* Part III.B (discussing the power imbalance between Coach Dorrance and a college soccer player).

<sup>178</sup> *Jennings*, 444 F.3d. at 293. See also *Turner v. McQuarter*, 79 F.Supp.2d 911 (N.D. Ill. 1999). A player at Chicago State University engaged in a sexual relationship with her coach, which she alleged she would not have done except she was afraid that her refusal to do so would have adverse consequences for her regarding her playing time, difficult practice conditions, and even her “ability to graduate[.]” *Id.* at 913–14.

<sup>179</sup> *Jennings*, 444 F.3d at 293. Jennings went to the university’s legal counsel and reported the harassment and her feelings of discomfort, but the counsel brushed it off by telling Jennings that her coach was a “great guy” and to “work it out” with the coach. *Id.* The university counsel then “shov[ed] [Jennings] out the door.” *Id.* This is an example of the university community being very tight knit, making it difficult and perhaps pointless for an athlete to report sexual harassment to a friend of the person who harassed her. *Jennings*, 444 F.3d at 693. Sending Jennings back to her coach to deal with this issue was clearly an unreasonable method of dealing with her harassment because her coach exerted a great deal of power over her life and because his actions were the very problem she was reporting. See *id.*; see also *infra* Part IV (proposing alternatives reporting mechanisms that could avoid that problem).

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structure impeded any attempt at reporting the harassment.<sup>180</sup> In this case, the power structure precluded Jennings from having a person to whom she could realistically report the harassment and be taken seriously. Similarly, the power imbalance inherent in college athletics creates an atmosphere specifically conducive to sexual harassment, and then impedes reporting because the coach or other official is either the very person to whom the athlete is expected to report or has a close working relationship with that person.<sup>181</sup> This example demonstrates how the requirement of actual notice in the hierarchical environment of college athletics allows sexual harassment to continue, unfettered.<sup>182</sup>

C. *Betraying Title IX: The Weakened Gebser Standard and Existing Power Imbalances Allow Institutions to Form Procedures Which Merely React to Sexual Harassment*

Unfortunately, “[d]espite the public attention that sexual harassment in athletics has received lately, few institutions have thoroughly addressed whether general institutional sexual harassment policies are effective and suitable in the context of intercollegiate athletics.”<sup>183</sup> While much attention has been given to the tests for determining compliance in funding and providing equal athletic opportunities, a great weakness in the Title IX regulatory scheme is that procedures and tests for compliance with sexual harassment regulations have not received similar attention.<sup>184</sup> This is especially apparent in the world of collegiate athletics—a complicated environment where an unbalanced power

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<sup>180</sup> Jennings commented that she did not feel comfortable talking to her coach about his behavior, and clearly talking with the school’s legal counsel did not help either, as the counsel was not willing to take the complaint seriously because she thought the coach was a “‘great guy.’” *Jennings*, 444 F.3d at 293–94. See also *infra* Part IV (suggesting amendments to the OCR regulations that would address the issues created by power imbalances).

<sup>181</sup> To compound this matter, these are usually also the same officials that must have notice in order for the school to be liable. See *supra* Part III.B.

<sup>182</sup> See *infra* Part III.C (exploring the depth of the dangerous relationship between the *Gebser* standard and power imbalances in college athletics).

<sup>183</sup> Hogshead-Makar, *supra* note 160, at 174.

<sup>184</sup> See *infra* note 212 (articulating the three prong test used to determine equality in athletic funding). See also 20 U.S.C. §§ 3413, 3441 (2000). The OCR is responsible for enforcement of Title IX. *Id.* See also *supra* note 12 and accompanying text for an example of regulations passed to enforce Title IX. The OCR has also issued a series of letters, guidances, and regulations to assist in enforcing Title IX. See, e.g., Revised Guidance, *supra* note 20; Dear Colleague letter April 26, *supra* note 120; USDOJ Coordination & Review, *supra* note 31; SEXUAL HARASSMENT: IT’S NOT ACADEMIC, *supra* note 154. See *infra* Part III.C (analyzing certain OCR recommendations).

structure leaves the athlete especially vulnerable to sexual harassment, yet without adequate avenues to pursue procedural safeguards.<sup>185</sup>

Prevention was an important goal of Title IX, as demonstrated by the focus in the text of the statute on the benefited class rather than on the perpetrator.<sup>186</sup> However, the jurisprudence interpreting *Gebser* has exploited the standard so as to provide many loopholes for institutions to avoid legal liability.<sup>187</sup> The answers to questions regarding who the appropriate school official is and what constitutes actual notice remain unclear.<sup>188</sup> A school, to avoid legal liability, needs to take only those reactive measures that do not exhibit deliberate indifference to sexual harassment. In fact, many schools do just that.<sup>189</sup> Technically, a school can allow its vulnerable athletes to be injured, so long as appropriate measures are taken later to protect the school from legal liability.<sup>190</sup> Even though the OCR has implemented several regulations indicating the need for greater protection for athletes, schools have not been held to these requirements.<sup>191</sup> In the end, athletes are still vulnerable to powerful coaches and other officials.<sup>192</sup> Taken together, the power imbalance and the poorly-constructed standard result in institutions

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<sup>185</sup> See *supra* Part III.B (discussing the power imbalances existent in postsecondary athletics).

<sup>186</sup> *Cannon*, 441 U.S. at 677.

<sup>187</sup> See *supra* Part III.A (analyzing the watered down interpretation of the standard).

<sup>188</sup> See *supra* Part II.C.2 (discussing actual notice).

<sup>189</sup> *Supra* at Part II.C. In *Porto v. Town of Tewksbury*, 488 F.3d 67, 73 (1st Cir. 2007), the school talked to the boy involved and separated the victim's desk from the harasser, but the harassment continued for some time. The court found that "a claim that the school system could or should have done more is insufficient to establish deliberate indifference[.]" *Id.* The court emphasized that the actions the school takes need to be clearly unreasonable. *Id.* (quoting *Davis*, 526 U.S. at 648). In conclusion, the circuit court found that "[t]he test for whether a school should be liable under Title IX for student-on-student harassment is not one of effectiveness by hindsight." *Id.* at 74.

<sup>190</sup> See *supra* Part III.A (discussing the legal requirements to avoid liability).

<sup>191</sup> See Frequently Asked Questions about Sexual Harassment, Department of Education, Office for Civil Rights, last modified Jan 26, 2006, <http://www.ed.gov/about/offices/list/ocr/qa-sexharass.html> (last visited Jan. 20, 2008). OCR investigates and resolves complaints alleging that educational institutions that are recipients of federal funds have failed to protect students from harassment based on sex. *Id.* "Complaints are often resolved by agreements requiring schools to adopt effective anti-harassment policies and procedures, train staff and students, address the incidents in question, and . . . take other steps to restore a nondiscriminatory environment." *Id.* See *Canutillo*, 101 F.3d at 398-400; *Rosa H. v. San Elizario Ind. Sch. Dist.*, 106 F.3d 648 (5th Cir. 1997). In at least two decisions, *Canutillo* and *Rosa H.*, the Fifth Circuit Court of Appeals applied Title IX law in a manner inconsistent with OCR's longstanding policy and practice. See *Canutillo*, 101 F.3d at 398-400; *Rosa H.*, 106 F.3d 648.

<sup>192</sup> See *supra* Parts III.B.1-2 (discussing the different types of power that coaches, athletic trainers, athletic directors, and other athletic personnel have over the athlete, who relies on this group of people for his or her well-being).



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concentrating on reactive procedures that hinge on inefficient reporting mechanisms that apply only after the damage has already been done to the student.<sup>193</sup>

### 1. Few Strengths and Many Weaknesses of Current Policies

The Revised Sexual Harassment Guidance provides direction as to investigation techniques, appropriate measures, and proper restitution after sexual harassment is discovered.<sup>194</sup> Preventative measures, which are few, have generally been poorly implemented and have fallen short of achieving any meaningful goal.<sup>195</sup> Although the Supreme Court has not yet ruled on what constitutes appropriate remedial or preventative measures, some schools have adopted some type of program regarding sexual harassment.<sup>196</sup>

One of the most comprehensive Title IX plans includes a definition of sexual harassment, detailed procedures regarding dissemination of the policy, designated reporting protocol, formal requirements for investigating sexual harassment claims, and enforcement information.<sup>197</sup> In reporting sexual harassment, the online brochure lists several people available for receiving reports, including various supervisors, managers,

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<sup>193</sup> Preventative measures are needed because writing a check to an athlete after sexual harassment has occurred cannot really redress the injury already done. *See generally* Liza H. Gold, SEXUAL HARASSMENT: PSYCHIATRIC ASSESSMENT IN EMPLOYMENT LITIGATION (2004). “[E]xpert testimony that establishes the existence of a psychological injury and a casual connection between the emotional distress and the defendant’s conduct can be crucial in the assessment of liability in sexual harassment cases.” *Id.* at 172.

<sup>194</sup> *See supra* Parts II.A, III.C (discussing OCR regulations).

<sup>195</sup> *See infra* Part III.C.2 (comparing the lack of preventative measures in athletics with those that are standard in the workplace where training seminars, informative articles, brochures, and power point presentations are all a part of preventing harassment from ever occurring). *See, e.g.,* AM. JUR. 2D *Job Discrim.* § 858 (2007) (including prevention as an important tool to fight harassment); Martha Neil, *Tips for Preventing Sexual Harassment*, ABA JOURNAL: LAW NEWS NOW, Oct. 15, 2007, [http://www.abajournal.com/news/tips\\_for\\_preventing\\_sexual\\_harassment/](http://www.abajournal.com/news/tips_for_preventing_sexual_harassment/) (same).

<sup>196</sup> *See* Guidance *supra* note 20, at IX (noting that schools are not required to create a sexual harassment policy as long as its non-discrimination policy and procedures for handling discrimination complaints are effective in eliminating all types of sex discrimination, including sexual harassment). *See also* *Gebser*, 524 U.S. at 306 (Stevens, J., dissenting). Justice Stevens, in his dissent in *Gebser*, would reserve the issue of “whether a district should be relieved from damages liability if it has in place, and effectively publicizes and enforces, a policy to curtail and redress injuries caused by sexual harassment.” *Id.* Justice Ginsburg commented that she would accept an effective policy for reporting and redressing sexual harassment as an affirmative defense to a Title IX claim for damages. *Id.* at 307 (Ginsburg, J., dissenting).

<sup>197</sup> *Infra* note 211 (the policy referenced is that of University of California Berkeley). *See supra* Parts II.A, III.C (discussing the Guidance).

a Title IX Compliance Officer, and other designated employees.<sup>198</sup> This is a very strong policy that includes many key elements recommended by the OCR, elements integral to preventing sexual harassment from ever occurring.<sup>199</sup>

For example, widely disseminating a policy against harassment establishes an overall community atmosphere that refuses to accept or condone harassment as a natural part of the environment; this goes a long way toward prevention.<sup>200</sup> It is also important to clearly state which individuals are available to receive reports of grievances.<sup>201</sup> The most obvious limitation to a plan like this is that it was clearly written with the *Gebser* standard as a reference point, that is, focusing on avoiding legal liability.<sup>202</sup> A possible weakness with this type of plan is that with a narrowing interpretation, courts could determine that school officials absent from the list do not qualify as persons who can legally receive “actual notice” in order to trigger school liability.<sup>203</sup> A school could remedy this dilemma by adding language that the persons able to receive notice include, but are not limited to, those names on the list.

Finally, another flaw in most of these plans may not be in the written policy itself but in the implementation of the policy.<sup>204</sup> It is one thing to write an appropriate policy, but the policy must also be followed, established, and made known to coaches, athletic directors, other

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<sup>198</sup> See *infra* note 211 (discussing the University of California Berkeley’s Title IX policy which directs students to the correct person for reporting harassment on campus).

<sup>199</sup> Clearly, this is the institution’s ultimate goal. See SEXUAL HARASSMENT: IT’S NOT ACADEMIC, *supra* note 154. The OCR comments that a school may “conduct periodic sexual harassment awareness training for all school staff, including administrators, teachers, and guidance counselors[.]” *Id.*

<sup>200</sup> See Hogshead-Makar *supra* note 160, at 177. “Sexual harassment guidelines that prohibit romantic relationships encourage prevention by firmly admonishing the entire athletic community that the athletes are not an acceptable group of candidates from which coaches are to draw their intimate partners.” *Id.*

<sup>201</sup> See, e.g., Revised Guidance *supra* note 20. The Guidance states that “providing students with several avenues to report sexual harassment is a very helpful means for addressing and preventing sexually harassing conduct in the first place.” Guidance (1997) *supra* note 103, at n.64.

<sup>202</sup> See Finn *supra* note 109, at 11 (the director of the NCAA education department seemed to be resigned to litigating sexual harassment, instead of preventing it: “‘The policy was in the plan to look at down the road, but maybe we need to look at it sooner. For now, the final recourse for athletes is litigation: the issue of harassment is so complex, so laden with people’s own biases and blind spots, that the law and liability may be the only way to catch their attention.’”).

<sup>203</sup> See *supra* Part II.C (explaining the clarified standard).

<sup>204</sup> See generally *supra* Part III.B (emphasizing the difficulty with which any reporting procedure could be implemented in an athletic office if the athletes are expected to report incidents to one of the coach’s close acquaintances).

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officials, and, most importantly, athletes.<sup>205</sup> This additional practice will assist in preventing sexual harassment from being a problem.<sup>206</sup> In addition, the policy must be publicly disseminated.<sup>207</sup> An additional obvious weakness is the absence of educational training seminars as hands-on training.<sup>208</sup> The OCR discusses these types of seminars that, while standard practice in the workplace, are absent in post-secondary athletics.<sup>209</sup>

2. The Department of Education's Office for Civil Rights' Recommended Regulations

The Department of Education requires schools that receive federal funds to monitor third parties for discrimination and to refrain from particular forms of interaction with outside entities that are known to discriminate.<sup>210</sup> Most schools also have their own policies on sexual discrimination, while a smaller number have policies dealing directly with sexual harassment.<sup>211</sup>

<sup>205</sup> See P. Solomon Bandy, *Colorado Reinstates Barnett, Plans Changes to Athletic Department*, USA TODAY, May 27, 2004, [http://www.usatoday.com/sports/college/football/big12/2004-05-27-colorado-barnett-announcement\\_x.htm](http://www.usatoday.com/sports/college/football/big12/2004-05-27-colorado-barnett-announcement_x.htm). This was the case at Colorado University which, after allegations of rape and sexual assault at recruiting parties, implemented a "'sweeping' overhaul of the athletics department intended to boost oversight, clamp down on its autonomy and place a new emphasis on academic achievement." *Id.* Some of the changes were initiated by the academic faculty, including having the athletics department report to the top campus academics overseer, rather than a separate chancellor. *Id.* See also *Simpson*, 500 F.3d 1170.

<sup>206</sup> See *Kracunas*, 119 F.3d at 88. Incidental inconveniences caused to colleges and universities by efforts to educate faculty and staff about sexual harassment and to implement effective sexual harassment policies are justified in light of colleges' legitimate goal, under Title IX, of eradicating sexual harassment. *Id.*

<sup>207</sup> See *infra* Part IV.B (suggesting an amended regulation to increase implementation of preventive sexual harassment policies).

<sup>208</sup> See, e.g., Finn *supra* note 109, at 11. "'Maybe it takes something like [the *Jennings* case] before people's consciousness gets raised and policies get enforced,' [head soccer coach at the University of Virginia] Heinrich said. 'I think institutions have a responsibility to educate their coaches.'" *Id.* Interestingly, Heinrich played for Dorrance at North Carolina. *Id.*

<sup>209</sup> See *supra* note 195 (discussing standard preventative measures taken in the workplace).

<sup>210</sup> See, e.g., 34 CFR §§ 106.31(b)(6), 106.31(d), 106.37(a)(2), 106.38(a), 106.51(a)(3) (1998) (regulations specifying groups covered by Title IX and articulating sexually harassing behavior prohibited as a manner of sexual discrimination).

<sup>211</sup> See, e.g., University of Wyoming Guidelines to Prevent Sexual Harassment, [http://uwadmnweb.uwyo.edu/EmploymentPractices/guidelines\\_to\\_prevent\\_sexual\\_har.htm](http://uwadmnweb.uwyo.edu/EmploymentPractices/guidelines_to_prevent_sexual_har.htm) (last visited Oct. 12, 2007); University of Colorado at Boulder Sexual Harassment Policy and Procedures, <https://www.cu.edu/policies/Personnel/sexharass.html> (last visited Oct. 12, 2007); Valparaiso University Employment Requirements, <http://www.valpo.edu/finaid/beforework.htm> (last visited Oct. 12, 2007) (All new

The Office for Civil Rights has promulgated a Guidance and issued several “Dear Colleague” letters with recommended standards for investigating and enforcing sexual harassment claims in an educational setting.<sup>212</sup> However, these standards are not mandatory, and the Guidance serves merely as guidance.<sup>213</sup> The Office has also published a pamphlet that provides school administrators, teachers, students, and parents with basic information to assist them in recognizing and addressing sexual harassment under Title IX.<sup>214</sup>

The Guidance explains that an educational institution’s responsibilities, as a condition of receiving federal financial assistance, are to take “immediate and effective steps to end sexual harassment when it occurs, *prevent its recurrence*, and remedy its effects.”<sup>215</sup> Title IX regulations require post-secondary recipients to designate a Title IX Coordinator, adopt and disseminate a public nondiscrimination policy, and enact grievance procedures to address complaints of discrimination

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employees are required to take a training course entitled Sexual Harassment Prevention as part of their employment at Valparaiso University); Boston University Sexual Harassment Policy, <http://www.bu.edu/handbook/policies/hr/harassment.html> (last visited Oct. 12, 2007); University of Berkeley Campus Climate and Compliance: Title IV & Title IX (Aug. 2005) <http://ccac.berkeley.edu/titleix.shtml> [hereinafter Berkeley]. See also *Waters v. Metro. St. Univ.*, 91 F.Supp.2d 1287, 1293 (D. Minn. 2000), stating that:

In the absence of a statutory prohibition on such behavior [a professor or coach dating a student], the Court would hope that colleges and universities would take steps to police such activities internally, to set higher standards than those required by law so as to insure an academic environment which is devoted utterly to the goals of learning and education rather than to the amorous pursuit[.]

*Id.*

<sup>212</sup> See Revised Guidance, *supra* note 20; Dear Colleague Apr. 26, *supra* note 120; SEXUAL HARASSMENT: IT’S NOT ACADEMIC, *supra* note 154. This Guidance provides a strong starting point for analysis. Title IX Legal Manual, *supra* note 46. In addition, the Guidance provides institutions with a three prong test to determine whether they are in compliance with Title IX in regards to athletic programs: first, the intercollegiate participation opportunities for male and female students are “substantial[ly] proportion[ate]” to their respective undergraduate enrollments; second, the school has a “history and continuing practice of program expansion” for the underrepresented sex; and third, the school “fully and effectively” accommodates the underrepresented sex. Dear Colleague letter from Gerald Reynolds, Assistant Secretary for Civil Rights, to Colleague, FURTHER CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE REGARDING TITLE IX COMPLIANCE (July 11, 2003) <http://www.ed.gov/about/offices/list/ocr/title9guidance/Final.html> (last visited Jan. 15, 2008).

<sup>213</sup> *Id.* See *supra* notes 20–23 (discussing specific requirements promulgated in the Code of Federal Regulations).

<sup>214</sup> SEXUAL HARASSMENT: IT’S NOT ACADEMIC, *supra* note 154.

<sup>215</sup> Dear Colleague letter from Stephanie Monroe, Assistant Secretary for Civil Rights (Jan. 25, 2006) <http://www.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html> (emphasis added).

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on the basis of sex in educational programs and activities.<sup>216</sup> The OCR has specifically stated that a policy against sex discrimination is one of the most effective tools for preventing sexual harassment.<sup>217</sup> Such a policy informs students, parents, and employees that sexual harassment will not be tolerated.<sup>218</sup> Therefore, while the courts have not emphasized the importance of prevention, the Department of Education has recently identified prevention as one goal (however minor) of Title IX.<sup>219</sup>

However, it is extremely unfortunate that even the Revised Guidance makes clear that there are ways for schools to avoid legal liability when it states, "If the school takes these steps, it has avoided violating Title IX."<sup>220</sup> The focus on reactive measures in the Guidance continues, "[B]ecause a school will have the opportunity to take reasonable corrective action before OCR issues a formal finding of violation, a school does not risk losing its Federal funding solely because discrimination occurred."<sup>221</sup> Another problem with the OCR's guidelines, recommendations, and other advice is that failure to comply with these regulations does not establish the actual notice or deliberate indifference needed for legal liability.<sup>222</sup> The OCR has reviewed Title IX compliance within the post-secondary school system and has discovered that many recipients have not complied with all of the requirements of

<sup>216</sup> 34 C.F.R. § 106.9, 34 C.F.R. § 106.8(a), 34 C.F.R. § 106.8(b). See also Dear Colleague letter Apr. 26, *supra* note 120; Dear Colleague letter from Kenneth L. Marcus, Office for Civil Rights, Title IX GRIEVANCE PROCEDURES, POSTSECONDARY EDUCATION, (Aug. 4, 2004), [http://www.ed.gov/about/offices/list/ocr/responsibilities\\_ix\\_ps.html](http://www.ed.gov/about/offices/list/ocr/responsibilities_ix_ps.html) (last visited Jan. 20, 2008) (while aimed at pure discriminatory behavior, other Title IX regulations can provide direction for sexual harassment grievance procedures).

<sup>217</sup> Revised Guidance, *supra* note 20, at VIII. It is unfortunate that roughly 75% of the Guidance focuses on reaction to harassment but has a mere three sentences in the "Prevention" section. *Id.* It does, however, imply that more prevention is needed: "Further, training for administrators, teachers, and staff and age-appropriate classroom information for students can help to ensure that they understand what types of conduct can cause sexual harassment and that they know how to respond." *Id.*

<sup>218</sup> SEXUAL HARASSMENT: IT'S NOT ACADEMIC, *supra* note 154.

<sup>219</sup> See *supra* Part II.A (discussing the original goal of Title IX). See generally Policy Interpretation-Title IX and Intercollegiate Athletics, 45 C.F.R. pt. 26 (1979). The Department of Education has interpreted Title IX provisions as they apply to traditional educational institutions. *Id.*

<sup>220</sup> Revised Guidance, *supra* note 20, at V.B.1.

<sup>221</sup> Revised Guidance, *supra* note 20, at VI. The Guidance continues, "If the school has taken, or agrees to take, each of these steps, OCR will consider the case against the school resolved and will take no further action, other than monitoring compliance with an agreement, if any, between the school and OCR." *Id.* Clearly, the focus is on acting after the fact. See *id.*

<sup>222</sup> *Gebser*, 524 U.S. at 292. One option is for the Department of Education to enforce the regulation administratively: "Agencies generally have authority to promulgate and enforce requirements that effectuate the statute's nondiscrimination mandate[.]" *Id.* (citing 20 U.S.C. § 1682).

the Title IX implementing regulations.<sup>223</sup> Examples of missing requirements included a general failure to designate and train at least one school official to be the Title IX Coordinator, a failure to have and publicly disseminate notice of the nondiscrimination policy, and a failure to adopt and publish Title IX grievance procedures to address sex discrimination claims.<sup>224</sup> These deficiencies directly correlate to the weakened *Gebser* standard because, clearly, schools are focusing on reacting instead of preventing.<sup>225</sup>

It is much easier for schools to concentrate on reacting properly to sexual harassment allegations rather than preventing them, as the Supreme Court has said that the school shall not be deliberately indifferent once it has notice of harassment.<sup>226</sup> However, these reactive measures are insufficient because the athlete has already been injured.<sup>227</sup> The purely reactionary system relies on the athlete reporting the harassment to a person with whom she may not be comfortable because of the power imbalance.<sup>228</sup> It is not being claimed that reactive measures are an evil; to the contrary, remedial measures are needed if discrimination is discovered.<sup>229</sup> However, post-secondary schools need

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<sup>223</sup> Dear Colleague letter Aug 4, 2004, *supra* note 216. See Revised Guidance, *supra* note 20, at VI. Normally, the OCR does not become involved until a complaint is filed:

If OCR is asked to investigate or otherwise resolve incidents of sexual harassment of students, including incidents caused by employees, other students, or third parties, OCR will consider whether—(1) the school has a disseminated policy prohibiting sex discrimination under Title IX and effective grievance procedures; (2) the school appropriately investigated or otherwise responded to allegations of sexual harassment; and (3) the school has taken immediate and effective corrective action responsive to the harassment, including effective actions to end the harassment, prevent its recurrence, and, as appropriate, remedy its effects.

*Id.*

<sup>224</sup> Revised Guidance, *supra* note 20, at VI. Even under OCR's optimistic administrative enforcement scheme, "recipients always receive actual notice and the opportunity to take appropriate corrective action before any finding of violation or possible loss of federal funds." *Id.*, at V.B.1.

<sup>225</sup> See *supra* Part III.C (discussing school policies; schools with reactive policies and concrete grievance procedures are considered to be at the forefront of the battle against sexual harassment).

<sup>226</sup> See *Gebser*, 524 U.S. at 274 (noting that this is disappointing, considering that the majority in *Gebser* found that Title IX focuses on protecting individuals from recipients of federal funds rather than on compensating victims of discrimination).

<sup>227</sup> A damages check cannot fully repair the athlete if he or she has been sexually harassed.

<sup>228</sup> See *supra* Part III.B (examining the power imbalances inherent in college athletics and detailing the way in which this power imbalance can impede reporting mechanisms).

<sup>229</sup> See 28 C.F.R. §54.110 (2000). The common rule provides:

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to pay more attention to complying with the preventative measures described by the OCR.<sup>230</sup> Schools should take interest beyond preventing legal liability and should seek to give their athletes the educational opportunity Title IX was intended to protect by preventing sexual harassment on athletes.<sup>231</sup>

In particular, as discussed earlier, the athlete is especially vulnerable because of her position at the bottom of the power hierarchy.<sup>232</sup> Reactive measures will not make the athlete whole again.<sup>233</sup> This is why it is important for athletic offices to establish a strongly worded sexual harassment policy that will "communicate a set of institutional values and a code of behavior that [will] go a long way towards preventing an environment of sexual harassment."<sup>234</sup> A change in the Title IX standard would increase a school's interest in stopping sexual harassment, and additional OCR regulations would promote prevention and facilitate reporting of sexual harassment in the athletic environment.<sup>235</sup>

## IV. CONTRIBUTION

The enforcement of Title IX in athletics is impeded by a two-part problem of an exploited interpretation of the *Gebser* standard and the inherent power structure that exists in athletics.<sup>236</sup> When these two problems combine, the result is that institutions form the bare minimum in reactive measures and do not prevent sexual harassment.<sup>237</sup> Until athletic offices promulgate a proactive sexual harassment policy and are

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(a) Remedial action[:]. If the designated agency official finds that a recipient has discriminated against persons on the basis of sex in an education program or activity, such recipient shall take such remedial action as the designated agency official deems necessary to overcome the effects of such discrimination.

*Id.*

<sup>230</sup> See *supra* notes 20–23 (describing OCR regulations).

<sup>231</sup> See generally Finn, *supra* note 109, at 11 (drawing attention to the new risks presented because of the increased number of women participating in sports). "There's more opportunity for female athletes than ever before, but the flip side is that there's more risk to those athletes because we haven't developed policies, legislation and screening processes to keep up with the social progress made by Title IX." *Id.*

<sup>232</sup> See *supra* Part III.B (discussing the power hierarchy).

<sup>233</sup> See *infra* Part IV (suggesting changes in the OCR regulations to focus on preventing the harassment).

<sup>234</sup> Hogshead-Makar, *supra* note 160, at 173–74.

<sup>235</sup> See *infra* Part IV.A (suggesting the Court adopt a new standard for school liability); Part IV.B (proposing amendments to OCR regulations).

<sup>236</sup> See *supra* Part III.A (discussing the *Gebser* interpretation) and Part III.B (exploring the power imbalance).

<sup>237</sup> See *supra* Part III.C (explaining how the power imbalance and the *Gebser* language result in weakened policies).

held to it by the OCR, sexual harassment on the playing field and in the locker room will continue to be a danger for athletes.<sup>238</sup>

Sexual harassment should not be the price an athlete is required to pay to play his or her sport of choice at a highly competitive level.<sup>239</sup> Even the OCR's Revised Guidance does not provide enough focus on proactive measures to prevent sexual harassment.<sup>240</sup> In addition, while compliance with these measures is a "requirement" for federally funded schools, the reality is that this is not enforced until there is a problem, so that the Department of Education is merely putting out fires instead of educating about and preventing harassment.<sup>241</sup> A college should be required to enact strict policies against sexual harassment and player-coach sexual relationships, publicly disseminate these policies, thoroughly screen coaches before hiring them, and provide athletes with easily accessible personnel outside of the power sphere of the coaches to which they may report harassment.<sup>242</sup>

*A. Proposed Department of Education Regulations to Prevent Sexual Harassment*

The Department of Education's regulatory requirements are insufficient to prevent sexual harassment. The OCR agency enforcement scheme must lead the way in amending school liability for sexual harassment in college athletics.<sup>243</sup> While the OCR regulations must not go beyond Title IX language, they may further the congressional intent behind Title IX.<sup>244</sup> In addition, by adopting these regulations, schools and athletic officials will demonstrate the school's set of values, which will prevent an environment of sexual harassment from developing.<sup>245</sup>

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<sup>238</sup> See *supra* Part II.A (exploring the OCR's administrative regulations intended to clarify Title IX).

<sup>239</sup> See *supra* Parts II.D, III.B (discussing the *Jennings* case, in which the women endured sexual harassment, believing it was the only way to further their soccer careers). See also *Henderson*, 469 F.3d at 479 (in which a coach threatened that if the players complained about him, their playing time would be cut).

<sup>240</sup> See *supra* note 111 (emphasizing the passive voice of Title IX, indicating the focus on the benefited class).

<sup>241</sup> See *supra* Part III.C (analyzing the details of the OCR's responsibility under the Guidance).

<sup>242</sup> See generally Revised Guidance, *supra* note 20.

<sup>243</sup> See *Jennings*, 482 F.3d 686 (4th Cir. 2007), *cert denied*, 128 S. Ct. 247 (2007) (the Supreme Court refused to decide the issue of actual notice in athletics).

<sup>244</sup> See *supra* Part II.A (explaining the legislative intent of Title IX and the role of the OCR in enforcing the statute).

<sup>245</sup> See *supra* Part III.C.2 (discussing the current recommendations made by the OCR and the weaknesses inherent in any policy that focuses on reaction rather than prevention).



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Proposed amendment to 34 C.F.R. 106.9:<sup>246</sup>

(a) Notification of policy. (1) Each recipient shall implement specific and continuing steps to notify applicants for admission and employment, students and parents of elementary and secondary school students, employees, *extracurricular activity directors or coaches*, sources of referral of applicants for admission and employment, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, that it does not discriminate on the basis of sex in the educational program or activity which it operates, *it does not permit sexual harassment of its students by employees or by other students*, and that it is required by Title IX and this part not to discriminate *or permit harassment* in such a manner. Such notification shall contain such information, and be made in such manner, as the Assistant Secretary finds necessary to apprise such persons of the protections against discrimination *or harassment* assured them by Title IX and this part, but shall state at least that the requirement not to discriminate *or harass* in the education program or activity extends to employment therein, and to admission thereto unless Subpart C does not apply to the recipient, and that inquiries concerning the application of Title IX and this part to such recipient may be referred to the employee designated pursuant to § 106.8, or to the Assistant Secretary. . . . (3) *In addition to the aforementioned notification required in paragraphs (a)(2) and (b) of this section, following the distribution of the sexual harassment publication to every student and employee of such recipient, the Title IX coordinator for each recipient shall hold a seminar in which students, athletes, teachers or professors, coaches, and other employees are notified of specific individuals on staff who are qualified to receive reports of discrimination or harassment and provide guidance to students who are victims of sexual harassment or discrimination. At this seminar, the Title IX coordinator shall also conduct sexual harassment awareness training for all*

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<sup>246</sup> The language in regular font is taken from 34 C.F.R. 106.9. The proposed additions, italicized, are the contributions of the author.

*staff. In addition, informal meetings shall be held at the start of every athletic season for the team, coaches, and other involved personnel regarding the unacceptability of player-coach sexual relationships and the reporting procedure available in the event inappropriate sexual behavior is experienced or witnessed. There shall be at least two (2) persons available who are outside the athletic office to receive such reports; these persons shall be made well-known to the athletes. These persons shall also have their names and availabilities published and distributed to students, athletes, teachers, and other staff members. All of this information shall be available in writing as well as imparted to the student-athletes during the seasonal meeting.*

#### *Commentary*

The OCR is charged with enforcing Title IX against recipients of federal funds.<sup>247</sup> The proposed additions and modifications to the OCR regulations address both the insufficient reporting mechanisms and the power imbalance inherent in athletics.<sup>248</sup> First, by explicitly mentioning sexual harassment as a prohibited behavior, it encourages the establishment of institutional values and public awareness of the issue that will prevent the establishment of an environment vulnerable to sexual harassment.<sup>249</sup> The proposed amendments also point to coaches and extracurricular directors as responsible parties for preventing sexual harassment.<sup>250</sup> The wide-spread dissemination regarding the relevant parties to whom the student-athletes may report harassing behavior will accomplish the two-fold purpose of encouraging an environment focused on prevention and increasing the accessibility of officials for reporting purposes.<sup>251</sup> Finally, by mandating training and information seminars, the Title IX coordinator will ensure that the school community understands what harassment is, that it will not be accepted, and how to prevent it.<sup>252</sup> This increased effort on the part of the OCR, and in turn by individual schools, will work in conjunction with the second proposal of

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<sup>247</sup> See *supra* Part II.A (articulating the administrative regulations the OCR has passed in its attempts to enforce Title IX).

<sup>248</sup> See *supra* Part III.B (exploring the power imbalance); Part III.C (reviewing existing and OCR-recommended policies).

<sup>249</sup> See *supra* Part III.C (discussing the Revised Guidance).

<sup>250</sup> See *supra* Part II.C (explaining the creation of the actual notice standard); Part II.D (establishing the appropriate person to receive notice prong of the current standard).

<sup>251</sup> See *supra* Part III.B (exploring the power imbalances which can impede reporting mechanisms).

<sup>252</sup> See *supra* note 217 (the OCR suggests that a school *may* conduct training sessions).

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this Note: modifying the legal standard for establishing school liability in private litigation.

B. *Restoring Faith in Title IX: Proposed Test for Determining School Liability*

This Note proposes the following modified test for school liability:<sup>253</sup>

Only when a federal funding recipient *knew, or in the exercise of reasonable care should have known*, and was deliberately indifferent to sexual harassment is that recipient liable for monetary damages. In addition, the harassment must be so severe, pervasive, ~~and~~ or objectively offensive that it can be said to deprive the victims of access to, *or significantly reduce the victim's access to*, the educational opportunities or benefits provided by the school.

*Commentary*

The current *Gebser* standard for private litigation, as discussed above in Part II.B, utilizes an “actual notice” test that, when used in the athletics environment, precludes many reports of sexual harassment from triggering school liability for monetary damages.<sup>254</sup> The proposed amended test, which should be adopted by the Supreme Court, incorporates the notice language used by the OCR in its Revised Standard.<sup>255</sup> The standard for private litigation should be brought into line with the OCR agency enforcement scheme. This adoption would impose on courts an obligation under Title IX to protect student-athletes from sexual harassment.<sup>256</sup> Courts could then begin to interpret the law to ensure that federal funds recipients take reasonable steps to protect against and prevent sexual harassment. OCR interprets its regulations to ensure that recipients take reasonable action to address, rather than neglect, reasonably obvious discrimination.<sup>257</sup>

Next, the proposed standard states that significantly depriving a student-athlete of access to an educational opportunity is sufficient to trigger school liability. A court's final decision should not rest on

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<sup>253</sup> The language in regular font is taken from *Gebser*, 524 U.S. at 290 and *Davis*, 526 U.S. at 650. The proposals are the contributions of the author. Specifically, proposed additions are italicized and proposed deletions are struck through.

<sup>254</sup> See Parts III.B–C (analyzing the power imbalances in college athletics and the way in which this power structure inhibits direct reporting).

<sup>255</sup> See Revised Guidance, *supra* note 20.

<sup>256</sup> See *supra* Part II.A (discussing the original intent behind the passage of Title IX).

<sup>257</sup> See *supra* Parts III.B–C (examining the OCR regulations).

whether an athlete's educational benefits have been completely denied or simply reduced.<sup>258</sup> This is in line with the original goal of Title IX—to provide equal access and equal educational opportunities, regardless of gender.<sup>259</sup>

In addition to these changes, the pool of persons that is to receive notice should be enlarged to include regular teachers, coaches, and other reasonable staff members. Again, the guidelines given by the Department of Education provide a helpful starting point. Under the Revised Guidance, the idea of who is a “responsible employee” is broader than the legal requirement of who is to receive notice.<sup>260</sup> That is, even if a responsible employee is not empowered with the authority to address the discrimination and take corrective action, she still has an obligation to report it to the school officials with that power.<sup>261</sup> Who a responsible employee is or whether it would be reasonable for a student-athlete to believe that employee is responsible will vary depending on the type of position held by the employee, the relationship between the athlete and the employee, and school practices and procedures.<sup>262</sup> This proposed change in the notice standard and in the severity of treatment needed to trigger school liability would remedy the weak *Gebser* standard so that it will be able to fulfill the original intent of Title IX as articulated by Senator Bayh.<sup>263</sup>

#### V. CONCLUSION

Title IX has the potential to be a powerful tool to fight sexual harassment in college athletics. However, courts have fashioned a standard in determining liability that simply does not accomplish what the legislature intended Title IX to do. The power imbalances that exist in a college athletic department make the environment vulnerable to harassment and foster an environment in which it is difficult to find the proper person to whom harassment may be reported. Because of these two problems, schools have focused on adopting reactive measures that comply with the Department of Education's bare minimum regulations.

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<sup>258</sup> See *supra* Part II.C.3 (using specific cases to demonstrate the level of harassment that currently fulfills the *Gebser* standard).

<sup>259</sup> See *supra* Part II (tracking the betrayal of the original goal of Title IX).

<sup>260</sup> See Revised Guidance, *supra* note 20, at IV.C.

<sup>261</sup> See *supra* Part III (analyzing the problems the current version of the *Gebser* standard has created with the “actual notice” standard, in that it eliminates most of the school staff—to whom an athlete is likely to report sexual harassment—from being able to receive notice).

<sup>262</sup> See Revised Guidance, *supra* note 20, at n.74.

<sup>263</sup> See *supra* Part II.A (discussing legislative intent of Title IX); Part II.C (articulating the current *Gebser* standard); Part II.D (clarifying the standard in *Davis*).

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Colleges and universities need to take a more active role in preventing sexual harassment, in protecting their athletes, and in informing the entire community of a general intolerance for any form of sexual harassment. In addition, the standard should be relaxed, and the Department of Education should promulgate additional regulations for the prevention of sexual harassment. Title IX is not dead, it just needs a little breath of fresh air.

Let us return to the star softball pitcher introduced in Part I of this Note, who has been left alone to deal with her injuries. With the proposed improvements and additions to Title IX, our pitcher would be secure in knowing to whom she should report her coach's harassing behavior. In addition, and perhaps most importantly, this improved sexual harassment prevention plan would stop the coach from ever harassing her because the team would exist in a community where it is clear that sexual harassment will not be tolerated. Finally, if all preventative measures fail, our pitcher could receive an injunctive order from the court, and the school would be liable to our pitcher for monetary damages because it had notice of the harassment and failed to act. Courts have watered down Title IX, and when that weakened standard combines with the power imbalances inherent in the college athletic world, schools are able to dodge legal liability by promulgating minimal reactive regulations. Additional regulations are needed, and school prevention plans should be required so that Title IX may once again protect student athletes.

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