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“I’m His Coach, Not His Father:” A Title IX Analysis of Sexual Harassment in College Sports

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“I’ve heard some of the horror stories out there. It’s astonishing what people can get by with. The policy was in the plan to look at down the road but maybe we need to look at it sooner,” stated the former director of the NCAA’s education department, Janet Justus, in 1999.1 Unfortunately for the victims of sexual harassment within the sports sphere “sooner” has yet to materialize a decade later.2

Sexual harassment within athletics is not a new phenomenon.3 Some suggest that the very nature of competitive male sports makes student-athletes more aggressive.4 Studies have estimated that, while male athletes only constitute a small percentage of the college community, they are responsible for nearly one-third of the sexual abuse crimes.5 Further, some scholars suggest that sexual harassment is more of a problem in “‘institutions characterized by hierarchical distributions of power,’ structures which are common in intercollegiate sport

2 Id. See also Jesse Mendelson, Sexual Harassment In Intercollegiate Athletics By Male Coaches of Female Athletes: What it is, What it means for the Future, and what the NCAA Should Do, 9 Cardozo Women’s L. J. 597 (2003).
3 Todd W. Crosset, Jeffrey R. Benedict, and Mark A. McDonald, Male Student-Athletes Reported For Sexual Assault: A Survey of Campus Police Departments and Judicial Affairs Offices, 19 J. Sport & Social Issues 126, 128 (1995). Note that sexual harassment on campus is not limited to the sports sphere; in fact, a recent poll suggests that almost two-thirds of college students believe they have been subject to a form of sexual harassment. Michael E. Buchwald, Sexual Harassment in Education and Student Athletics: A Case for Why Title IX Sexual Harassment Jurisprudence Should Develop Independently of Title VII, 67 Md. L. Rev. 672 (2008).
4 Crosset, et. al, supra note 3 at 128.
5 Some scholars believe “that a potent mix of alcohol, arrogance, and ignorance, as well as an inherent propensity towards violence, makes the male athlete a particularly dangerous creature.” Christopher M. Parent, Personal Fouls: How Sexual Assault by Football Players is Exposing Universities to Title IX Liability, 13 Fordham Intell. Prop. Media & Ent. L. J. 617, 636 (2003) (citing Carol Bohner & Andrea Parrot, SEXUAL ASSAULT ON CAMPUS: THE PROBLEM AND THE SOLUTION 22-23 (1993)).
The athletic field thus may be a breeding ground for sexual harassment. Regrettably, the Supreme Court has analyzed only three sexual harassment suits brought under Title IX, none of which addressed intercollegiate institutions or athletics.

The phrase “sexual harassment” is noticeably absent from the statutory language of Title IX, which states that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.”

Nonetheless, the Supreme Court has held that sexual harassment is a form of sex discrimination and is thus implicitly prohibited under Title IX of the Education Amendments (Title IX) of 1972. One circuit court proffered that Title IX encompasses sexual harassment

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7 DeFrancesco, supra note 6, at 1271; See Kimberly M. Trebon, There is No “I” in Team: The Commission of Group Sexual Assault by Collegiate and Professional Athletes, 4 DePaul J. Sports L. Contemp. Probs. 65, 76-78(2007) (internal citations omitted). Trebon details various incidents where college athletes raped female students. A few examples include four Duquesne University basketball players accused of raping a woman in their dorm (1985), five West Virginia basketball players accused of raping a woman in a campus dorm (1986), and five Southwest Michigan basketball team players charged with rape (1992).


9 20 U.S.C §1681 (2003); see also Grove City College v. Bell, 465 U.S. 573-574 (1984). In response to this case, Congress enacted the Civil Rights Restoration Act of 1987 which expanded the restrictive reading of “program” to make the institution as a whole subject to Title IX if any program (including athletics) within the institution receives federal funds.

10 Davis, 526 U.S. at 649-50 (1999); see also 20 U.S.C. §1681 (2003); “In passing Title IX, Congress sought to address the void in civil rights legislation concerning federal education programs.” Parent, supra note 5, at 625 (citing 118 Cong. Rec. 5803 (1972))
because sexual harassment is a “deprivation of ‘educational’ benefits,” and “[t]he Statute recognizes that loss of educational benefits is a significant injury, redressable by law.”

Title IX’s express enforcement schema is limited to the authority of the Department of Education’s Office for Civil Rights (OCR)\(^\text{12}\) to revoke federal funding from institutions not in accordance with the statute.\(^\text{13}\)

In an attempt to guide institutions’ application and adherence to Title IX, the OCR promulgated specific sexual harassment policies in 1997 and again in 2001.\(^\text{14}\) The OCR has never revoked funding from an institution for non-compliance.\(^\text{15}\)

While revocation of funding is the statutory remedy for a violation of Title IX, the Supreme Court has implied a private right of action for individual victims.\(^\text{16}\) In the absence of


\(^{12}\) “OCR was designed to be an inexpensive, efficient, and effective method of correcting Title IX violations.” Sudha Setty, Leveling the Playing Field: Reforming the Office for Civil Rights to Achieve Better Title IX Enforcement, 32 Colum. J.L. & Soc. Probs. 331, 333 (1999). If the OCR determines the complaint to be valid, an OCR investigation will ensue. They will assess the situation from an objective perspective, and design a compliance plan with the institution for the institution to follow. While this appears to be an efficient, ideal theory, some scholars have argued that the OCR has not fulfilled its potential. Id.; see also Julie Davies, Assessing Institutional Responsibility for Sexual Harassment in Education, 77 Tul. L. Rev. 387, 409 (2002) (“Private damages actions are what really give Title IX some teeth.”).

\(^{13}\) 20 U.S.C. §1682.

\(^{14}\) DOE Office of Civil Rights [OCR], Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (2001), http://www.ed.gov/offices/OCR/shguide. In its 2001 Guidance Policies, the OCR defined sexual harassment as “unwelcome conduct of a sexual nature.” The statute dictates—and the OCR policies suggest—that institutions are required to implement grievance procedures that respond to alleged violations of Title IX.

\(^{15}\) Many scholars argue this is so because revoking funding is such a draconian measure. Setty, supra note 12, at 411; See also The National Coalition for Women and Girls in Education (NCWGE), NCWGE Coalition Report on Title IX (2007), available at http://www.womenssportsfoundation.org/Content/Articles/Issues/Equity-Issues/N/NCWGE-Coalition-Report-on-Title-IX.aspx.
statutory standards, so the courts have looked to Title VI, Title VII, and the OCR policies\(^{17}\) for guidance.\(^{18}\)

The conflation of Title IX jurisprudence, sexual harassment, and intercollegiate athletics has effectively constructed a unique paradigm for courts and educational institutions, and, arguably, the NCAA.\(^{19}\) This article will delineate sexual harassment claims brought under Title IX, specifically focusing on student-athletes as the sexual harassers. The limited number of cases brought to the courts is significant; often the cases are handled internally, and the majority includes secrecy provisions in their settlement agreements.\(^{20}\)

Part I of this article will explain the impetus of a student’s private right to bring a sexual harassment claim under Title IX and lay the foundation for the elements necessary to establish a

\(^{16}\) Alexander, 631 F.2d at 180 (citing 45 C.F.R. §86.8(b)); Cannon v. Univ. of Chicago, 441 U.S. 677, 703 (1979) (woman claims she was denied admission to medical school solely because of her sex). “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.” see also Office for Civil Rights Policies, supra note 12.

\(^{17}\) OCI, supra note 12.

\(^{18}\) A main goal of Title VI is to eliminate racial discrimination through a “prohibition against exclusion in, denial of benefits of, and discrimination under federally assisted programs on ground of race, color, or national origin.” 42 U.S.C. 2000d (2003). It was not until 1991 that under Title VII one could recover monetary damages that were limited to the proportion of the size of the employer. “Title VII of the Civil Rights Act of 1964 makes it ‘an unlawful employment practice for an employer . . . to discrimination against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.’” Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277 (1998); see also 42 U.S.C. 2000e-2 (2003). For a thorough inquiry into the history of Title VII, see DeFrancesco, supra note 6 (citing Margaret A. Crouch, THINKING ABOUT SEXUAL HARASSMENT: A GUIDE FOR THE PERPLEXED (Oxford Institution Press 2001); Catherine MacKinnon, WOMEN’S LIVES, MEN’S LAWS 162-183 (2005); Reva B. Siegel, A SHORT HISTORY OF SEXUAL HARASSMENT, IN DIRECTIONS IN SEXUAL HARASSMENT 1, 1-26 (Catherine MacKinnon and Reva B. Siegel, eds. 2004).


\(^{20}\) Jesse Mendelson, supra note 2. Most of the jurisprudence in this area concerns middle and high school students. Reasons why these types of suits may not be brought to court include: fear, lack of courage, and not understanding what sexual harassment is. Thus, it is very important to recognize the limitations of research concerning sexual harassment within the sports sphere. See Duncan Mansfield, 33-Count Complaint Unveiled After Settlement; Trainer Rips UT Pranks, Lewd Talk, Chattanooga Free Press, Aug. 20, 1997, at A1.
prima facie case. Part II will focus on sexual harassment cases involving NCAA athletes as the alleged harassers.\textsuperscript{21} All of these cases involve the most severe form of sexual harassment – rape.\textsuperscript{22} The Ninth Circuit Court of Appeals has stated that “rape is unquestionably among the most severe forms of sexual harassment . . . being raped is, at a minimum, an act of discrimination based on sex.”\textsuperscript{23} I will examine three recent cases: Williams v. Board of Regents of University System of Georgia,\textsuperscript{24} J.K. v. Board of Regents of Arizona State,\textsuperscript{25} and Simpson v. University of Colorado Boulder.\textsuperscript{26} These harassment suits can have a devastating impact on the universities’ reputation and result in universities settling out of court with a heavy price.\textsuperscript{27}

Part III will suggest that Title IX jurisprudence is moving in a direction where the prior misconduct of a harasser gives an institution actual knowledge that an environment detrimental to students’ educations could exist. Part III will propose that the NCAA should include a provision in its recruiting bylaws requiring all institutions to implement background checks for admitted student-athletes, which some institutions have already imposed within their athletic

\textsuperscript{21}This article will focus on male to female sexual harassment, as there are no intercollegiate cases alleging sexual harassment by a female to a male student. See Mendelson, supra note 2. This paper will also only focus on football and basketball players.


\textsuperscript{23}Little v. Windermere Relocation, Inc. 301 F.3d 958, 967-77 (9th Cir. 2001).

\textsuperscript{24}Williams v. Bd. of Regents of Univ. Sys. of Ga., 477 F.3d 1282 (11th Cir. Ga. 2007).


\textsuperscript{26}Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170 (10th Cir. Colo. 2007).

\textsuperscript{27}Barbara Osborne & Clare Duffy, Title IX, Sexual Harassment, and Policies at NCAA Division IA Athletics Departments, 15 J. Legal Aspects of Sport 59 (2005). In 2002, the University of Tennessee paid $300,000 to a woman claiming thirty-three claims of harassment; the University of Rhode Island paid a $45,000 settlement to a former athletic program employee who claimed she was a victim of sexual harassment. It is important to remember that while these universities had to pay a large sum of money, it is difficult to put a price on what these victims (when the allegations are true) endure.
programs. I will argue that background checks should give substantial evidence that an institution had “actual knowledge” of sexual harassment, and that an institution’s reaction and handling of a student who has a known criminal background record speaks to the reasonableness of a universities’ response as a basis for imposing institutional liability.

I. Sexual Harassment Law under Title IX

A. The private right of action

Title IX, prohibiting sex discrimination, was passed pursuant to Congress’s legislative authority under the Constitution’s Spending Clause; thus, the recipients of federal funding must be provided with unambiguous notice of the conditions to which they are agreeing when accepting the funding. The statutory language establishes an administrative enforcement scheme where an individual can file a complaint with the Department of Education, which then has the authority to investigate. Although Title IX did not explicitly authorize a private cause of action, the Supreme Court found an implicit right of private action for an individual under the

\[\text{28} \text{ The Idaho state legislature and individual universities have instituted policies such as these. In Idaho, the legislature adopted a policy that barred admission for potential athletes if they were former felons without special approval from the college’s president. The University of Oklahoma has implemented a required background check policy for all transfer-athletes. Lindsay Potrafke, Checking Up on Student-athletes: a NCAA Regulation Requiring Background Checks, 17 Marq. Sports L. Rev. 427, 432 (2006).}\]

\[\text{29} \text{ Article I, § 8. Pursuant to its spending power, Congress generates legislation contractual in nature, so the actor agrees to comply with the federally imposed conditions in return for the receipt of funds. This explains why an institution must be given notice before funding is removed. See Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981). In Litman v. George Mason Institution, 186 F.3d 544, 551 (4th Cir. 1999), the court determined that Title IX “also conditions these funds on the recipient state’s consent to be sued in federal court for an alleged breach of the promise not to discriminate.”}\]

\[\text{30} \text{ Pennhurst, 451 U.S. at 17.}\]

\[\text{31} \text{ Ann Marie Harris and Kenneth Grooms, A New Lesson Plan for Educational Institutions: Expanded Rules Governing Liability Under Title IX of the Education Amendments of 1972 for Student and Faculty Sexual Harassment, 8 Am U.J. Gender Soc. Pol’y & L. 575 (2000). While individuals have an implied right of private action to sue for sexual harassment under Title IX, individuals have no standing to enforce the termination of funding to an institution. 20 U.S.C. §1682.}\]
protection of Title IX in *Cannon v. the University of Chicago*.

The Court further determined that a plaintiff does not have to exhaust administrative remedies prior to filing a private cause of action. More than a decade after its decision in *Cannon*, in *Franklin v. Gwinnett County Schools*, the Supreme Court considered its first sexual harassment case under Title IX. In this case a high school student alleged she was the victim of continuous sexual harassment by a coach/teacher at school who asked her sexually-charged questions, coerced her into intercourse, and called her at home. The school administrators knew about it, but took no action. The Court determined that it was not the intent of Congress to limit the available remedies in a suit under Title IX and determined that the availability of all remedies is presumed unless Congress denotes otherwise.

**B. The Standards Establishing a Sexual Harassment Claim under Title IX**

Since establishing a private right of action for sexual harassment claims in *Franklin*, the Supreme Court has decided two additional harassment cases under Title IX. In *Gebser v. Lago Vista Independent School District* and *Davis v. Monroe County Board of Education*, the Court focused specifically on the issue of institutional liability. It is helpful to analyze these two decisions in tandem so a brief synopsis of each case is given, followed by the Supreme Court’s analysis of the cases.

1. **Gebser v. Lago Vista Independent School District**

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33 Id. It is not necessary for a victim to exhaust administrative remedies (i.e. seek adjudication from the OCI) before filing a private claim. The *Cannon* court stated that the Department of Education (then HEW) “has apparently never taken the position that exhaustion [of administrative remedies] is required in every case, and that they were not persuaded that this was a necessary prerequisite of pursuing a private action.” 441 U.S at 688.

During the 1991-1992 academic year, Frank Waldrop was Alida Gebser’s ninth grade English teacher at Lago Vista High School. Waldrop initiated sexual conduct with Gebser in the spring of 1992 when he visited her at her home, knowing she was alone. The two engaged in a sexual relationship that lasted until January 1993 when a police officer caught them having intercourse. Gebser never reported this relationship, and she did not dispute the fact that there was no evidence that a school official knew of Waldrop’s sexual exploitation. Gebser filed a Title IX suit against Lago Vista School District in 1997. The district court granted summary judgment in favor of Lago Vista, which the Fifth Circuit Court of Appeals affirmed based on the Court’s application of agency theory, strict liability, and constructive notice.

2. Davis v. Monroe County Board of Education

Lashonda Davis was a fifth grader in Monroe County, Georgia during the 1992-1993 school year. In December 1992, a classmate (G.F.) allegedly harassed Davis by attempting to grab her breasts and genital area and making vulgar statements to Davis, such as “I want to get in

36 Id.
37 Id. Mr. Waldrop was fired from his job, and he was arrested.
38 Harris and Grooms, supra note 31 at 586.
40 Doe v. Lago Vista Indep. Sch. Dist., 106 F.3d 1223, 1224 (5th Cir. 1997). It is important to note that these are not the same standards the Supreme Court applied to determine whether or not an institution may be held liable for sexual harassment under Title IX.
41 Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999). This is the most recent Supreme Court case analyzing a sexual harassment claim brought under Title IX. However, in June 2008, the Supreme Court granted certiorari to a sexual harassment case involving peer to peer harassment in elementary school, granted by Fitzgerald v. Barnstable Sch. Comm., 2008 U.S. LEXIS 4737 (U.S. 2008). In this case, the parents of a female student brought claims that her skirt was lifted up whenever she wore one, and the First Circuit Court of Appeals found for the school, determining that the school did not have actual knowledge and responded reasonably when it learned of the harassment.
bed with you.” Davis told her mother and her teacher after each incident, and the teacher informed Davis’ mother that the principal was informed of the incident. The teacher did not move G.F from his seat next to Davis until three months of Davis’ consistent complaints.

Davis’ mother filed a lawsuit alleging a violation of Title IX against the school board, the district superintendent, and the principal. Her suit was dismissed for failure to state a claim upon which relief could be granted. The court determined that relief could be granted only when a plaintiff was subjected to discrimination under “any education program or activity receiving Federal financial assistance.” The court found that the behavior of a 5th grader was not part of a school activity, and thus the institution could not have proximately caused her stress. The Eleventh Circuit Court of Appeals reinstated her claim, finding that

Title VII encompasses a claim for damages due to a sexually hostile working environment created by co-workers and tolerated by the employer, and Title IX encompasses a claim for damages due to a sexually hostile educational environment created by a fellow student or students when the supervising authorities knowingly fail to act to eliminate the harassment.

3. The Supreme Court Analysis of Institutional Liability

The Supreme Court granted certiorari in Gebser and Davis, establishing the circumstances where a school can be held liable for the sexual harassment of a student by a

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42 Davis, 526 U.S. at 650.

43 Id.

44 After this continued harassment, Lashonda’s grades began to drop, and her father found a suicide note. Id.

45 Harris and Grooms, supra note 31, at 586.

46 Id.


48 Id. At 590.

49 See Davis v. Monroe County Bd. of Educ., 120 F.3d at 1193 (11th Cir. 1996). However, on a motion for a rehearing en banc, the full panel upheld the dismissal of the district court.
teacher or another student.\(^{50}\) In *Gebser*, the Court determined that the contractual nature of Title IX was modeled after Title VI’s framework, not after Title VII.\(^{51}\) The Court reasoned that Congress would have limited the availability of damages under Title IX had they addressed employer liability and constricted the statutory language of Title VII and Title IX.\(^{52}\) As a result, the Court concluded that the agency principle explicitly addressed in Title VII was not applicable to Title IX because “Title IX contains no comparable reference to an educational institution’s ‘agents,’ and so does not expressly call for application of agency principles.”\(^{53}\)

The Court, confirming the principle that Title IX is contractual in nature, concluded that a damages remedy will not be available for a sexual harassment lawsuit under Title IX unless (1) the institution is a federal funding recipient; (2) the sexual discrimination is “so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims’ educational experience, that the victims are effectively denied equal access to an institution’s

\(^{50}\) Id.

\(^{51}\) *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 276-77 (1998). Justice O’Connor, delivering the majority opinion of the Court, stated “it would ‘frustrate the purposes’ of Title IX to permit a damages recovery against a school district for a teacher’s sexual harassment of a student based on principles of respondeat superior or constructive notice, i.e. without actual notice to a school district official.” Id. O’Connor also determined the construction of the Title VII and Title IX statutes are different. The main purpose of Title VII was to make the victim whole after the fact while the purpose of Title IX is to protect students from being subject to sexual harassment. Buchwald, supra note 3 at 678.


\(^{53}\) *Gebser*, 524 U.S. at 278. This, Gebser had no claim of action under Title IX because she could not demonstrate that a school official had “actual knowledge.” The fact that Waldrop was an “agent” of the institution who knew of the harassment (because he was the harasser) was insufficient.
resources and opportunities; or (3) “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 and fails adequately to respond”55, and (4) that the institution’s response amounts to “deliberate indifference,”56 which “causes students to undergo harassment or make them liable or vulnerable to it.57

These standards created the nexus for students to recover monetary damages from an institution whose students or teachers were sexually harassing students, thereby depriving them of an educational benefit.58 While the circumstances amounting to institutional liability seem rather standardized, in reality lower courts have interpreted Gebser and Davis inconsistently.59 The most inconsistently interpreted elements that a victim must satisfy are the “actual


55 Gebser, 524 U.S. at 277.

56 Davis, 526 U.S. at 644. Of these requirements, the Court stated in Gebser “Under a lower standard, there would be a risk that the recipient would be liable in damages not for its own official decision but instead for its employees' independent actions.” Gebser, 524 U.S. at 291 (citing Board of Comm'rs of Bryan Cty. v. Brown, 520 U.S. 397 (1997)). If “an institution either fails to act, or acts in a way which could not have reasonably been expected to remedy the violation, then the institution is liable for what amounts to an official decision not to end discrimination.” Doe A. v. Green, 298 F. Supp.2d 1025, 1035 (D. Nev. 2004).

57 The Supreme Court upheld the dismissal of the lower court in Gebser because Gebser did not demonstrate that a school official had actual knowledge. Gebser, 524 U.S. at 277: The Supreme Court remanded Davis’ case because there was a material issue of fact as to whether the institution had actual knowledge and that their response (not moving Davis for three months after continuous complaints) amounted to deliberate indifference. Davis, 526 U.S. at 633.

58 Parent, supra note 5.

59 It is important to recognize that the elements set out in the lower courts are not elements like in a criminal offense. Circuit courts have applied at least four difference variations of what is necessary to establish a prima facie case of Title IX. This is because each circuit has interpreted the Supreme Court decisions in Gebser and Davis to create the “elements” of a Title IX claim adhering to the Supreme Court decision. See S.S. v. Univ. of Washington, 143 Wn. App. 75 88 (Wash App. 2008) (citing interpretations of the Gebser and Davis decision in the Sixth, Eleventh, and Fourth Circuit Courts of Appeals in addition to the Northern District Court of California).
knowledge,” and “deliberate indifference” prongs. In the following cases, each court analyzes these prongs in a slightly different manner on appeal from summary judgment for the defendant. Ultimately each court determines that a reasonable trier of fact could find for the plaintiff, and thus remands the cases to the lower courts for trial.

Part II: Recent Circuit Court Cases in the Intercollegiate Sports Sphere Applying Davis

A. Intercollegiate Athletes as Sexual Harassers

Statistics suggest that male athletes are more likely than the average male college student to commit a crime. A Federal Bureau of Investigation (FBI) report stated that the risk of a college athlete—primarily football and basketball players—committing a sexual assault is thirty-eight percent higher than that of an average male college student. Williams v. Bd. of Regents of

60 Scholars have argued that this is an insurmountable standard for relief to be granted, and that many students are not getting relief because they cannot overcome this heavy burden. See Rosenfield, supra note 22 at 408.

61 Little v. Windermere Relocation, Inc. 301 F.3d 958, 967-77 (9th Cir. 2001).

62 The cases I have chosen to elaborate on are by no means an exhaustive list of athletes committing sexual abuse. Similar incidents have occurred at universities nationwide. At the University of Alabama, a fifteen-year-old student stated she became about twenty football and basketball players’ “play thing.” The University asked the girl two times if she was engaging in sexual intercourse with football players, and she told them no. The court held that the University did not have actual knowledge because she would not disclose to them what was happening, and that their response was not deliberate indifference because they did try to investigate the rumors. A federal judge dismissed the case for failure to state a claim, but they settled before an appeal was filed. Benefield v. Bd. of Trustees of AL., 214 F. Supp. 2d 1212 (2002).

63 I want to preemptively caution that there could be valid reasoning why this number is so high, such as that athletes are the “targets of unfounded claims.” See Ellen E. Dabbs, Intentional Fouls: Athletes and Violence Against Women, 31 Colum J.L. & Soc. Probs. 167, 174 (1998). However, there are feasible reasons why male athletes might have committed more that are not reported (fear to report, lack of action taken on behalf of the school). Id.

64 See, e.g. Bohmer & Parrot, supra note 5, at 21; Thomas N. Sweeney, Closing the Campus Gates—Keeping Criminals Away from The Institution – the Story of a student-athlete Violence and Avoiding Institutional Liability for the Good of All, 9 Seton Hall J. Sport L. 226, 230 (1999); See also R. Jake Locklear, Policy Alone Is Not a Deterrent to Violence, THE NCAA NEWS (May 26, 2003), http://www.ncaa.org/wps/portal/ut/p/kxml/04 Sj9SPykss0xPLMnMz0vM0YQjzKLN4g3NPUESUGYHvqRaGLGphhCggRX483FR9b0A YLCtINClckdFACrZHxQ/delta/base64xml/L3dldyEvU0Ud3QndNQSEvNEIVRS82XzBFMTVL?New WCM Contexts=wps/wcm/connect/NCAA/NCAA+News/NCAA+News+Online/2003/Editoral/Policy+alone+is+not+a+deterrent+to+violence+-+4-26-03 (citing the 1993 Bennet-Cross study where out of 107 sexual assaults, male athletes accounted for 1/3 of the perpetrators); Dave Smith & Sally Stewart, Sexual Aggression and Sports Participation, 26
Univ. Sys. of GA\textsuperscript{65} and J.K. v. Bd. of Rgnts. of Arizona State,\textsuperscript{66} decided in the past year and a half, represent a new trajectory for the “actual knowledge” inquiry under Title IX. Both embrace the theory that accepting a student into an institution that has a history of abuse may create an issue of material fact as to whether the institution had actual knowledge that these students could commit sexual harassment. Simpson v. University of Colorado Boulder\textsuperscript{67} represents the dangers and risks of not reporting sexual crimes to the proper authorities, and demonstrates the failure of personnel to respond to sexual harassment claims may establish a policy of deliberate indifference.\textsuperscript{68}

1. \textit{Williams v. Bd. of Rgnts. of Univ. Sys. of GA: A Player with “Proclivity” to Harass}\textsuperscript{69}

On January 14, 2000, Tiffany Williams, a student at the University of Georgia (UGA), went to the room of Tony Cole, a UGA basketball player, in the main dormitory for athletes.\textsuperscript{70} After engaging in consensual sex with Williams, Cole went to the bathroom, slamming the door behind him.\textsuperscript{71} Brandon Williams, a UGA football player who had been hiding naked in the

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\textsuperscript{65} Williams v. Bd. of Regents of Univ. Sys. of GA., 477 F.3d 1282 (11th Cir. Ga. 2007).


\textsuperscript{67} Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170 (10th Cir. Colo. 2007).

\textsuperscript{68} Id.

\textsuperscript{69} Williams, 477 F.3d at 1282.

\textsuperscript{70} The Eleventh Circuit accepted all of Williams’ accusations as true because the district court granted the defendants’ motion to dismiss and reviewed this case de novo. Williams, 477 F.3d 1282 n.2 (2007); See Covad Commc’n Co v. Bellsouth Corp., 229 F.3d 1272, 1276, 1290 n. 2 (11th Cir. 2002). In order to grant a motion to dismiss, the movant must show “beyond doubt that the plaintiff can prove no sets of facts in support of his claim which would entitle him to relief.” Id (quoting Harper v. Blockbuster Entm’t Corp., 139 F.3d 1385, 1387).

\textsuperscript{71} Id.
closet, entered the room and began sexually assaulting Williams. While this was occurring, Cole called another basketball player and a football player, Steven Thomas and Charles Grant, telling them they were “running a train on” Williams. Once Thomas arrived, Cole allowed him to enter, and Thomas assaulted and raped Williams. After the assault was over, Williams returned to her dorm room.

The following day, after requesting that police reports be processed against Cole, (Brandon) Williams, and Thomas, (Tiffany) Williams withdrew from UGA. The police submitted a report to the Judicial Board approximately three months later, including interviews with the alleged harassers (within three months) to the University Judicial Board, yet the institution delayed an additional five months before holding a hearing and did not sanction Cole, (Brandon) Williams, or Thomas.

72 Id.
73 Running a train means gang rape. Id. at 1288 n.3. “Sexual assault is a felony, but gang rape cases involving athletes are rarely brought to trial and successfully prosecuted.” Trebon, supra note 7 at 72. Law enforcement officials can try to maintain a neutral stance by arresting and charging athletes with the crimes that are alleged against them; however, athletes are less likely to be convicted than “the average adult male.” Id.
74 Williams, 477 F.3d at 1288. Charles Grant declined to come over.
75 Id. In Jennings v. UN, the dissenting and concurring opinion both urged that withdrawing from a program (in that case quitting a sport) is not necessary to demonstrate that the harassment was “severe and pervasive” because then courts are, effectively, punishing survivors. Jennings v. UN, 482 F.3d 686 (4th Cir. 2007); However, the Third and Fifth Circuit Courts have stated that if one remains on a team, then the environment is not severe enough to deny her of any educational opportunities. See Drews v. Joint Sch. Dist. No, 393, 2006 WL 851118 (Idaho 2006); King v. Conroe Independent School District, No. 05-20988 (5th Cir. 2007).
76 A grand jury indicted them in early April 2002. A jury acquitted Brandon Williams, and the prosecutor dismissed charges against Cole and Thomas. Williams, 477 F.3d at 1289.
77 Williams, 477 F.3d at 1289. By that time two of the assailants were no longer attending the institution The Court rejected UGA’s arguments that the Judicial Board within UGA chose to wait for the results of the pending criminal trials against the assailants because it did not interfere with UGA’s ability to implement its own procedures, the criminal charges would not prevent future attacks, and the disciplinary proceedings were not initiated until four months after the acquittal and dismissal of charges. The three also faced criminal charges, but a jury acquitted Brandon Williams, and the prosecutor dismissed the charges against Cole and Thomas.
Williams brought a sexual harassment suit under Title IX against the Board of Regents and the UGA Athletic Association in June 2004. Williams alleged that the head basketball coach at the time, James Herrick, was aware of Cole’s past disciplinary and criminal problems. For instance, Cole was dismissed from the Community College of Rhode Island, a college that Coach Herrick had assisted Cole in gaining admission to following allegations that he sexually assaulted and threatened two women. In addition to knowing of Cole’s alleged previous sexual harassment, the coaches made special accommodations for him because he did not meet the academic standards required to gain admission at UGA. Coach Herrick contacted the President of the University, who had the sole discretion to admit him, and Cole was given a full scholarship.

Williams further alleged that other student-athletes suggested to UGA coaches that the coaches should inform their student-athletes about the sexual harassment policy applicable to them. She also alleged that despite UGA’s responsibility to ensure that student-athletes comply with UGA policy, no one informed student-athletes of such policy, and that the University also failed to enforce the policy against football and basketball players.

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78 Williams, 477 F.3d at 1290. She also brought a §1983 claim against the head basketball coach, the athletic director, and the president of UGA, but this claim was dismissed by the District Court and upheld by the Eleventh Circuit Court of Appeals. Aaron S. Glass, Recent developments in Sports Law, 18 Marq. Sports L. Rev. 341, 368 (2008). Her claim against the board of regents was properly dismissed, according to the 11th Circuit. Id.

79 Williams, 477 F.3d at 1290.

80 Glass, supra note 78, at 368. Cole was later dismissed from Wabash Valley College for disciplinary problems. Cole plead no contest to the criminal charges associated with the alleged assaults. Id.

81 Williams, 477 F.3d at 1290.

82 Rosenfield, supra note 19, at 410.

83 Williams, 477 F.3d at 1296.

84 Id. This analysis is limited to student-athletes, and the responsibility that coaches and the Athletic Department have for student-athletes as compared to the general student body.
The trial court dismissed Williams’ Title IX claim because the court determined that the institution did not act with deliberate indifference upon receiving knowledge of the alleged harassment. The Eleventh Circuit Court of Appeals reviewed the case de novo, thus accepting all Williams’ alleged facts as true. The court first concluded there was no dispute as to whether UGA was a federal funds recipient. Although the alleged incident occurred just one time, the court determined that the incident, coupled with the institution’s response to the harassment, constituted a “pervasive” and “severe” environment. This environment “effectively bar[red] [her] access to an educational opportunity or benefit.” The court next determined that the Athletic Director, Vincent Dooley, and President of the Institution, Michael Adams, were both “appropriate persons,” who had “actual knowledge,” of the discrimination Williams faced including (1) the recruitment of Tony Cole despite his criminal and disciplinary record; (2) the alleged rape; and (3) the discrimination Williams further endured as a result of UGA’s failure to respond to her allegations.

86 Id. The court noted that she voluntarily withdrew after the incident, and that “it is probable that she withdrew before action could be taken against her assailants. Moreover, the plaintiff further indicates that none of the three assailants is currently a student within the State of Georgia. Because none of three assailants currently attends the University of Georgia and because the plaintiff herself no longer attends the University, prospective relief affords her no remedy at all.” Id. at 6.
88 The court relied on a Western District of Michigan case, holding that an athletic department was a federally funding recipient and warning that if athletic departments were not included with the institution, then they could get away with sexual discrimination. See Cmty. for Equity v. Mich. High Sch. Athletic Ass’n, 80 F Supp. 2d 729, 733-34 (W.D.Mich.2000).
89 Id. at 1297 The court notes that in Davis the Supreme Court said that an institution might not be responsible to maintain the same level of control over its students as a primary or secondary school; the court here found that UGA exercised little to no control (citing Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 633 (1999)).
90 Id. (quoting Davis, 526 U.S. at 633).
91 Williams, 477 at 1297. The court argued that UGA knew of the potential for harassment, knew that the alleged rape had occurred, and knew that there was no immediate action taken after the rape.
In determining whether or not Williams had alleged facts sufficient to establish deliberate indifference, the court compared deliberate indifference in a Title IX context to deliberate indifference within the municipality liability context. The court stated that under the municipality liability context, deliberate indifference can be proven by showing that "the municipality knew of a need to . . . supervise in a particular area and the municipality made a deliberate choice not to take any action." The court determined that deliberate indifference included two components: it “causes [students] to undergo harassment,” and it occurs in response to the discrimination faced.

Viewing the evidence in the light most favorable to Williams, the court determined that UGA admitted Cole with knowledge of his “proclivities,” failing to inform the student-athletes about the sexual harassment policies, and that its failure to implement safeguards against these particular students amounted to deliberate indifference under the municipality liability standard. This court, however, stated that deliberate indifference under Title IX required more than failure to implement safeguards. The court went on to note that the institution’s response to

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92 Id. at 1296.

Prior to Gebser, the Court adopted the deliberate indifference standard when determining a municipality’s liability ‘for claims under 1983 alleging that a municipality's actions in failing to prevent a deprivation of federal rights was the cause of the violation.’. In adopting the deliberate indifference standard in Title IX cases that do not involve allegations of discrimination resulting from the Title IX recipient's official policy, the Gebser Court noted that "comparable considerations" - namely, to impose liability only for official decisions by the defendant not to remedy the violation and not for the independent actions of employees - supported the use of the deliberate indifference standard in both Title IX and 1983 municipality liability cases.


93 Id. at 1295. (quoting Gold v. City of Miami, 151 F.3d 1346, 1350-51 (11th Cir. 1998)). While the court noted that the plaintiff had a heavier burden under Title IX that under the municipal liability context, it found the municipality liability context as useful precedent for a fact scenario distinctively different from Gebser and Davis.

94 Id. (Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 644-45 (1999)).

96 Id.
the rape after it occurred did nothing to “assuage” Williams’ fears.\(^97\) Thus, the failure to take action in response to the incident in addition to satisfying the municipality liability standard amounted to deliberate indifference.\(^98\) The court held Williams alleged sufficient facts to withstand a motion to dismiss and reinstated her claim.\(^99\)

2. **J.K. v. Bd. of Rgnts. of Arizona St.: Deliberate Indifference is a Question for the Jury**\(^100\)

J.K. alleged that Darnel Henderson, a football player at Arizona State University (ASU), raped her while she was unconscious in her dormitory room on March 12, 2004.\(^101\) J.K told her roommate about the incident, who informed her Resident Assistant the following day.\(^102\) The Resident Assistant informed both the Department of Public Safety, who immediately dispatched an officer and the head of ASU Student Life and Judicial Affairs, Dr. Sullivan, who enforced the ASU Student Code of Conduct.\(^103\)

Nearly a month later, on April 4, 2005, Dr. Sullivan issued Henderson a written notice of charges, indicating that there was probable cause that Henderson had raped J.K.\(^104\) Henderson

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\(^{97}\) Id. at 1296.

\(^{98}\) Id. The court stated that the alleged harassers could have been removed from student housing, could have been suspended, or the university could have implemented a more protective harassment policy following the alleged incident. Because the institution failed to do any of this, it was certainly reasonable and understandable why Williams no longer attended UGA.

\(^{99}\) Id.


\(^{101}\) Id. at 4. The evidence did not state the reason that she was unconscious nor did they state whether or not she woke up during the alleged rape.

\(^{102}\) Id. at 8.

\(^{103}\) Id.

\(^{104}\) Id.
was told to move out of the dormitory and was suspended from the football program on the day he received the written notice. On May 10, 2004, Henderson was notified that he was expelled from the institution.\textsuperscript{105} The Department of Public Safety also concluded that Henderson had non-consensual intercourse with J.K., and the university did not deny that this incident occurred.\textsuperscript{106}

J.K. filed the complaint on March 10, 2006, alleging that ASU was in violation of Title IX for subjecting her to discrimination.\textsuperscript{107} Because this was a motion for summary judgment, the court accepted J.K’s facts as true. J.K. alleged that between June 18 and July 17, 2003, during the ASU Bridge Program,\textsuperscript{108} Henderson physically intimidated, made threatening remarks to, exposed his genitalia to, and inappropriately grabbed females on campus. The behavior was severe enough to leave several female staff members fearful that Henderson might physically or sexually assault them. As a result, at least one staff member quit and another female moved out of the dormitory where Henderson was residing.\textsuperscript{109}

The Director of Academic Success and Director of the Summer Bridge Program, Steve Rippon, whom the court found was an “appropriate authority,” spoke with Henderson about his inappropriate conduct.\textsuperscript{110} Henderson remarked that he wanted “to show [women] their place.” Rippon consequently expelled Henderson from the program but failed to report him to Student

\textsuperscript{105} Id.

\textsuperscript{106} Id. The court opinion did not state when the Department of Public Safety made its final determination nor did it state whether Henderson was subject to criminal charges as well.

\textsuperscript{107} Id. at 10.

\textsuperscript{108} J.K. was not a participant in the summer bridge program. He had not met her until the night he allegedly raped her. The ASU Summer Bridge Program is a program intended to help high school students transfer from high school to college. Id. at 3.

\textsuperscript{109} Id. at 3.

\textsuperscript{110} Id. at 26.
Judicial Affairs. On the day Henderson was expelled from the Summer Bridge Program, Jean Boyd, the assistant Athletic Director, sent an e-mail to Coach Koetter detailing the reasons for Henderson’s expulsion from the program.

In August 2003 Henderson was allowed to return to ASU, play football, and live in the same dormitory as he had during the summer program. Jean Boyd reported that Henderson was “the highest risk individual in the group [of freshman football players] both socially and academically.” Henderson’s joining the football program was supposed to be contingent “to a ‘three strikes’ or ‘zero tolerance’ plan, designed by Koetter, and recognized as necessary by the football program.” That plan never came to fruition.

Both parties agree that the harassment deprived J.K. of educational benefits. Despite the fact that he had never harassed J.K. until this incident, the court found that ASU had knowledge of his harassment over the summer and the authority to redress the misconduct. This was enough to satisfy the actual knowledge prong. In addition, Coach Koetter knew of the behavior and had the authority to implement corrective measures, further establishing the existence of actual knowledge. The defendants asserted they did not have actual knowledge of

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111 Id.
112 Id.
113 Id. at 6. The court did not state that coming to the university was contingent to this plan – just the joining the football team.
114 Id. at 7.
115 Id.
116 Id. at 40 (citing Soper v. Hoben, 195 F.3d 845, 855 (6th Cir. 1999) (stating that rape "obviously qualified as being severe, pervasive, and objectively offensive sexual harassment that could deprive [the victim] of access to the educational opportunities provided by her school").)
117 Id.
118 Id.
the harassment since Henderson’s prior conduct was not directed towards J.K., but “[t]he Davis court did not limit Title IX liability to a federal education funding recipient's knowledge of, and deliberate indifference to, the alleged harassment of a particular individual, but instead contemplated that Title IX claims could be based on the recipient’s knowledge of, and deliberate indifference to, a particular harasser's conduct in general.”119 Thus, because the defendants knew of a substantial risk of abuse to students based on Henderson’s prior misconduct, the actual knowledge prong was satisfied.120

This court based its decision on the deliberate indifference prong on whether the university’s response to the rape was “clearly unreasonable” in light of known facts.121 The J.K. court also looked to liability under the municipality standard when it noted that “[d]eliberate indifference’ is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his actions.”122 Although the defendants kicked Henderson out of the Summer Program, they invited him back, did not implement any policy to monitor or guide him, and allowed him to live in the same residence hall that he had been kicked out of that

119 Id. at 46 (citing Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 644-45 (1999); see also Escue v. Northern Oklahoma College, 450 F.3d 1146, 1153 (10th Cir. 2006) (stating that “because actual knowledge of discrimination in the recipient’s program is sufficient . . . harassment of persons other than the plaintiff may provide the school with the requisite notice to impose liability under Title IX); Delgado v. Stegall, 367 F.3d 668, 672 (7th Cir. 2004) (determining that that “in [Davis] the Court require knowledge only of ‘acts of sexual harassment’ by the harasser…not of previous acts directed against the particular plaintiff.”); Doe v. Green, 298 F. Supp. 2d 1025, 1033-34 (D.Nev. 2004) (stating that “actual knowledge of a substantial risk of abuse to students based on prior complaints by other students”)).

120 “The Supreme Court made clear in Davis that the focus of Title IX liability lies on the conduct of the harasser, not the victim, and the funding recipient’s knowledge of harassment and control over the harasser and the context in which the harassment occurs” Id. at 46; see also Johnson v. Galen Health Institutes, Inc., 267 F.Supp.2d 679, 688 (W.D.Ky. 2003) (“[T]he actual notice standard is met when an appropriate official has actual knowledge of a substantial risk of abuse to students based on prior complaints by other students.”).

121 J.K. at 47.

summer. The court, noting that the question of whether a defendant acted with deliberate indifference or not is best left to the jury, held that it could not be said the defendants’ response was clearly reasonable in light of known circumstances.

3. Simpson v. the Univ. of Co. Boulder: A Policy of Deliberate Indifference

The plaintiffs, then students at the University of Colorado Boulder (CU), alleged that they were sexually assaulted on December 7, 2001 by CU football players and high school recruits in one of the plaintiff’s apartments. The plaintiffs stated that a female tutor knew that they were having a “girls’ night in” and asked if a few football players and recruits could come to her apartment. Between sixteen and twenty players actually arrived at the apartment. The facts were described by the district court:

Many of the players and recruits had been drinking and smoking marijuana. . . About 30 minutes later, some of the players and recruits decided to leave the apartment. Player #2 who was preparing to leave was approached by the tutor.

123 Id. It is very important here to note here that the court did not require “something more” than satisfaction of liability under a municipality context as it did in Williams. Here, it is arguable that after the alleged rape, the University’s response was reasonable aside from the fact that Henderson was not removed from the dorm. Thus it appears the J.K. court focused more on what happened before the rape in addition to the belief that “deliberate indifference” is a better question for a jury than what occurred after the alleged rape.

124 Id. at 51, (citing Waugh v. Pearce, 954 F.2d 1470, 1478 (9th Cir. 1992) ("Whether a local government entity has displayed a policy of deliberate indifference is generally a question for the jury.").

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

126 CU had won the Big 12 Conference championship on December 1, 2001. Id.

127 Recruiting practices were an issue at a number of other schools during this time period, including the University of Miami where Willie Williams, after a recruiting trip to Miami, had a warrant out for his arrest (among the ten charges was a battery). The University of Miami admitted Williams and did not revoke his scholarship. Recruiting practice such as these influenced the NCAA to take action; in 2004, the NCAA created a task force to review recruiting practice and has thus implemented new recruiting rules. Mark Schlabach, NCAA Cracks Down on Recruiting Practices Division I Board of Directors Approves Rules Changes Banning Charter Flights, Extravagant Meals, Other Perks, The Washington Post, August 6, 2004 at D10.


129 Rosenfield, supra note 19, at 408.
The tutor told him that he should not leave because “it was about to go down.” Player #2 understood her comment to mean that female students would provide sexual favors to the players and the recruits.\textsuperscript{130}

Around this time, Simpson began to feel tired and went to her room. The next event she remembers is two recruits removing her clothes and the players and recruits standing around her bed while the recruits assaulted her.\textsuperscript{131}

Ms. Simpson filed her complaint in federal district court on December 8, 2003.\textsuperscript{132} The district court granted summary judgment in favor of the defendants on March 30, 2005, finding that no reasonable person could determine that "(1) CU had actual notice of sexual harassment of CU students by football players and recruits before the assaults or (2) that CU was deliberately indifferent to such harassment."\textsuperscript{133}

The appellate court prefaced its analysis with the determination that the actual notice and deliberate indifference components of a prima facie case of harassment under Title IX established in \textit{Davis} and \textit{Gebser} did not translate to the context of the plaintiffs’ case because in this case, the plaintiffs alleged that CU “sanctioned, supported, even funded a program (showing recruits a ‘good time’) that, without proper control, would encourage young men to engage in opprobrious acts.”\textsuperscript{134} The court drew from liability in the municipality context, recognizing that under § 1983 municipal liability, the “deliberate indifference” standard changes when the claim implicates official policy, even when the underlying principle, that an institution can only be


\textsuperscript{131} Id. The plaintiff’s allegations further stated that three other women were sexually harassed by players in the apartment and a fourth was forced to engage in sexual intercourse with two players after leaving the apartment.

\textsuperscript{132} \textit{Simpson v. Univ. of Colo. Boulder}, 500 F.3d 1170, 1173 (10th Cir. Colo. 2007). Ms. Simpson withdrew from CU, and Ms. Gilmore, the second plaintiff, eventually left CU for a year.

\textsuperscript{133} Rosenfield, supra note 19, at 418 (citing \textit{Simpson}, 500 F.3d at 1173).

\textsuperscript{134} \textit{Simpson}, 550 F.3d at 1177.
liable for its own acts, is maintained. Applying these principles, the court started its analysis with the determination that when an official policy causes a violation, the funding recipient can be held to have acted with deliberate indifference, and that the central question in plaintiff’s case was whether the risk of such an assault was obvious.

The court referenced plaintiffs’ allegations that included additional facts indicative of the program’s lack of supervision. In 1997, a fifteen year old girl was allegedly assaulted by CU recruits at a party hosted by CU football player in 1997. Following this incident, the local Assistant District Attorney met with top CU officials, advising them to develop practices to supervise their recruits. They did little to change their policies. Further, in 2000, the father of Katharine Hnida, a female player on the CU football team in 1999 told Coach Barnett and Athletic Director Richard Tharp "about multiple instances of sexual harassment of [his] daughter by CU football players, which the coaching staff had allowed to continue." In 2001, a female

135 The court noted that this differed from the analysis in *Gebser* and *Davis* where institutions would not be held liable unless they intentionally subjected the student to the harassment and deliberately decided not to remedy the situation. *Simpson*, 550 F.3d at 1117 (citing *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998)).

136 The court compared Coach Barnett to a police chief. "[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible (quoting *Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658, 694, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978))."

137 Id. at 1183.

138 Id. at 1173.

139 She specifically said “in no uncertain terms that if they did not straighten out what happens at these recruiting parties, we would take it very seriously if anything like this occurred again.” Mike Freeman, Using Sex to Sell Recruits, Milwaukee J. Sentinel, Nov. 24, 2002, at 1C (quoting Colorado District Attorney Mary Keenan).

140 Id.

141 Id. at 463; Affidavit of (Aff. of David Hnida). Barnett responded to a reporter's question by criticizing his former place-kicker's on-field performance, saying, "It was obvious Katie was not very good. She was awful. You know what guys do? They respect your ability. You can be 90 years old, but if you can go out and play, they'll respect you. Katie was not only a girl, she was terrible. O.K.? There's no other way to say it." Bill Pennington, *College Football; Colorado Puts Football Coach on Leave*, the N.Y. Times, February 19, 2004,
student trainer reported that a football player had raped her. A football department staff member arranged for her to meet with Coach Barnett, who the student felt tried to pressure her out of pursuing criminal charges. Coach Barnett responded by telling the student he was the player’s coach and “not his father;” thus, he would not punish him” and that he would “support the player.” Furthermore, in 2001, Coach Barnett hired an assistant coach with a record of assaulting women who had previously been banned from campus.

After Ms. Simpson’s assault was reported to the police, CU revoked spring-semester scholarships for four football players allegedly involved. However, Coach Barnett acknowledged that he urged admission of one of the recruits involved in the incident at hand despite his knowledge that the evidence against that particular recruit was “overwhelming.”

Applying the municipality liability schema, the Court found “(1) that CU had an official policy of showing high-school football recruits a ‘good time’ on their visits to the CU campus,” (2) that CU failed to adequately supervise and guide player-hosts whose priority was to show the football recruits a “good time,” and (3) that the probability that such misconduct would occur was so obvious that it amounted to deliberate indifference. The court thus determined that

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http://query.nytimes.com/gst/fullpage.html?res=9904E1D6133DF93AA25751C0A9629C8B63. Coach Barnett was placed on paid administrative leave by the CU President, Elizabeth Hoffman, following his comments. Id.

142 Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170, 1183 (10th Cir. Colo. 2007) (internal citations omitted).

143 Id.

144 The opinion did not indicate the day she reported the incident. Id. at 1184.

145 Id.

146 Id. at 1184.

147 Rosenfield, supra note 19 at 408. After the Tenth Circuit Court of Appeals reversed the federal judge, CU settled the case paying $2.5 million to Simpson and 350,000 to the other plaintiff. Allison Sherry, CU Settles Case Stemming From Recruiting Scandal, The Denver Post, (Dec. 6, 2007), http://www.denverpost.com/snowsports/ci7645722.
summary judgment was inappropriate and that plaintiff’s allegations should be submitted to a jury.¹⁴⁸

Part III: NCAA Required Background Checks & Implication for Title IX Jurisprudence

A. The NCAA has the Authority to Require Background Checks

The National College Athletic Association (NCAA)¹⁴⁹ is an unincorporated voluntary association comprised of several hundred member colleges and universities.¹⁵⁰ The primary purpose of the NCAA is to “establish programs to govern, promote, and further the purposes and goals of intercollegiate athletics.”¹⁵¹ Its members select representatives to promulgate and pass the NCAA bylaws,¹⁵² but the bylaws do not encompass or respond to violence committed by potential student-athletes.¹⁵³ As the authoritative body for its member institutions, the NCAA promulgates and amends any regulations necessary to accomplish its purposes, so long as Congress has not enacted legislation that effectively overturns the NCAA’s regulations.¹⁵⁴


¹⁴⁹ Trebon, supra note 7 at 79.

¹⁵⁰ National College Athletic Association v. Califano, 622 F.2d 1382, 1385 (1980). These members appoint representatives who promulgate and pass the NCAA bylaws.

¹⁵¹ NCAA, The On-Line Resource for the NCAA, Overview (2005), http://www.ncaa.org/wps/portal/ut/p/kcxml/04_Sj9SPykssy0xPLMnMz0vM0Y_QjzKLN4j3CQXJgFjGpvqRqCKOcAFv/luihPN_XuQD9gtrQiHJHRUUAJIRZxA1!delta/base64xml/L3dJdyEvUd3QndQSEvNEiVRS82XzBfTFU!%CON TENT_URL=http://www2.ncaa.org/portal/about_ncaa/overview/.

¹⁵² The NCAA has bylaws on issues like recruiting and eligibility. See e.g. NCAA Bylaw Article 13, Recruiting (2008); see also NCAA Bylaw, Article 14, Academic Eligibility and Requirements (2008). Potrafke, supra note 28 at 431.

¹⁵³ NCAA Bylaw Article. 2.3.2 (2008) (“The Association should not adopt legislation that would prevent member institutions from complying with applicable gender-equity laws, and should adopt legislation to enhance member institutions’ compliance with applicable gender-equity law.”)

¹⁵⁴ Potrafke, supra note 28 at 431.
In order to impose a new rule or regulation, an NCAA proposal to amend an existing bylaw or create a new bylaw must be submitted at a Division 1 member conference.\textsuperscript{155} The proposal must clearly identify the legislative rule or regulation of the current NCAA manual that it wishes to amend and explain the purpose of the proposal and its effects.\textsuperscript{156} This proposal is then submitted to the appropriate NCAA committee, and a decision is made.\textsuperscript{157}

The NCAA has existing regulations that increase an institution’s accountability for its student-athletes.\textsuperscript{158} For instance, the NCAA implemented an academic policy to fulfill a satisfactory academic progress and graduation rate.\textsuperscript{159} The NCAA requires a forty percent completion of degree by the end of his or her second year, sixty percent completed at the end of the third year, and eighty percent complete at the end of the fourth year.\textsuperscript{160} Failure to comport with these regulations can result in sanctions given to the institution, including scholarship reductions, limits on recruiting, and ineligibility for NCAA post-season competition.\textsuperscript{161}

The NCAA also oversees universities’ recruitment practices.\textsuperscript{162} The member institutions must design their own recruitment policies and get these policies approved by the president of


\textsuperscript{156} Id.

\textsuperscript{157} Potrafke, supra note 28 at 435.

\textsuperscript{158} Id.

\textsuperscript{159} Id.

\textsuperscript{160} NCAA Bylaw, Progress-Toward-Degree Requirements, Article 14.4.3.2 (2008).

\textsuperscript{161} Potrafke, supra note 28 at 434.

\textsuperscript{162} NCAA Bylaw, Student Host, Article 13.7.2.1.7(2008); see also NCAA Bylaw Institutional Policies, 13.6.1(2008).
the institution.¹⁶³ The policies must prohibit the use of alcohol, sex, and gambling and limit the amount of money spent on recruiting visits.¹⁶⁴ These recruitment bylaws are a preemptive safeguard to protect both the football recruits and students at NCAA member institutions.¹⁶⁵

Background checks are another preemptive measure that the NCAA could enforce in order to prevent student-athlete violence.¹⁶⁶ Background checks have similar underlying purposes as the recruitment and consent to drug testing bylaws: to reduce the incidents of violent crime among student-athletes and to create a safer environment for the athlete and the student body of the institution.¹⁶⁷

The NCAA is the ideal vehicle to implement these checks because it would codify a background check requirement bylaw to which all member institutions must conform, yet still permit an institution to retain its autonomy by treating the enforcement of these bylaws like the recruitment bylaws.¹⁶⁸ That is, the NCAA could delineate guidelines which a member institution must adhere to when it designs its own policy. This is significant for a number of reasons. First,


¹⁶⁴ Id; see also Press Release, Division I Management Council Endorses New Rules for Recruiting Student-Athletes, (July 20, 2004), http://www.ncaa.org/wps/portal/lul/p/kcxml/04/Sj9SPyksy0xPLMnMz0vM0Y QjzKLN4j3CQXJgFjGpqRqCK06AIYRAXnW9X4 83FSgKeKQskGk7akf6h ppOTh6BiakbGsaGIPMap0H0aOHiQgIAB65K11!delta/base64xml/L3dJdyEvd0ZNQyFzQUMvNEiVRS82XzBfTFU1!?C0 NTENT URL=http://www.ncaa.org/releases/divi/2004/2004072001d1.htm.

¹⁶⁵ Potrafke, supra note 28, at 427.

¹⁶⁶ Id. Although outside the scope of this paper, I would also suggest that the NCAA require schools to implement a code of conduct, a tiered system based on what “level of offense” they have committed. Sanctions for students would be proportionate to the offense, such as seeing a counselor for lesser offenses to expulsion for greater offenses. The code of conduct should explicitly and broadly enumerate the types of behavior that are expected of each student-athlete, such as compliance with all state and federal laws, all of the NCAA bylaws, and warn student-athletes that failure to comply with this code of conduct will result in disciplinary action. The NCAA should require that the institutions respond in a “reasonable period” of time. This might influence institutions to design procedures in response to complaints of crime by their athletes in the interest of avoiding sanctions from the NCAA. For a suggestion of what an NCAA Code of Conduct should look like, see Gutshall, supra note 155.

¹⁶⁷ Id.

¹⁶⁸ Id.
a uniform policy would not unfairly disadvantage a team who is “doing the right thing.”\textsuperscript{169} For instance, in the midst of the Simpson scandal, Coach Barnett was concerned that by reforming the recruitment policies, CU would lose its “competitive edge.”\textsuperscript{170} On the other hand, a few institutions and the Idaho State legislature, have already implemented background checks in an attempt to reduce student-athlete violence, so if these teams have lost their competitive edges, establishing a standard bylaw promotes fairness.\textsuperscript{171}

\textbf{B. A NCAA Bylaw Requiring a Background Check is Constitutional.}

Courts have reviewed NCAA bylaws in claims against both the NCAA and member institutions enforcing the NCAA bylaws.\textsuperscript{172} The courts have shown great deference to the

\textsuperscript{169}I am not trying to assert that “doing the right thing” is rejecting a potential student-athlete because of his or her record. A coach doing his homework and remaining vigilant when universities accept athletes with known records is, arguably, “doing the right thing.”

\textsuperscript{170}In response to the CU uproar, in addition to other recruitment programs across the country, the NCAA formed a task group to research and implement recruitment policies. Neill Woelk, NCAA Panel to Review Recruiting Regulations, February 12, 2004, http://www.dailycamera.com/bdc/buffzone_news/article/0,1713,BDC_2448_2652224,00.html.

\textsuperscript{171}The North Carolina University System, which includes sixteen colleges, began running background checks on certain students in 2006. Since its inception, 101 students have been denied admission based on their records. Potrafke, supra note 28 at 431; see Mary Beth Marklein, Should college applicants get background checks?, USA TODAY, 4/18/2007, http://www.usatoday.com/news/nation/2007-04-17-bcover_N.htm; The Idaho Legislature adopted a state policy restricting Idaho State, the University of Idaho, and Boise State in recruiting felons absent a waiver granted by the University President. IDAHO STATE BD. OF EDUC., POLICIES AND PROCEDURES MANUAL §3(5) (1995), http://www.boardofed.idaho.gov/policies/iii/t.asp; Lori Scott Fogleman, Student-athlete Task Force Releases Report, Recommendations, http://www.baylor.edu/pr/news.php?action=story&story=8145. The University of Oklahoma adopted a policy in 2004 to background check all of their incoming student-athletes. The athletic director, Joe Castiglione said, “[i]t's due diligence, and we think it helps us create a better profile on the prospective student-athletes [we are] bringing in. We're not going to catch every single thing . . . but if we don't do this, someday someone else is going to walk in to my office and say, 'Did you know about this? Did you check?'” William Lee Adams, Athletics: A Penalty Marker, Newsweek, Mar. 21, 2005, at 12. Fresno State also has a policy where students who have committed a felon are red-flagged and rejected from the university while students who have committed more minor crimes are yellow-flagged, and it is the discretion of the coaches and university personnel to accept him/her or not. CAL. STATE UNIV. FRESNO, STUDENT ATHLETE RECRUITMENT CODE (2001), http://www.csufresno.edu/aps/apm/410.pdf.

\textsuperscript{172}Potrafke, supra note 28 at 427. The Supreme Court has determined that the NCAA is not a state actor. National Collegiate Athletic Ass’n, v. Tarkanian, 488 U.S. 179 (1988). However, student-athletes have brought Constitutional claims against institutions which are state actors for their application of the NCAA bylaws. See Brennan v. Board of Trustees, 691 So. 2d 324 (La. Ct. App. 1997).
NCAA bylaws and the institutions that implement them.\textsuperscript{173} For example, the NCAA drug testing bylaw was held not be an invasion of the student-athlete’s privacy in \textit{Brennan v. Board of Trustees}.\textsuperscript{174} The court upheld the bylaw and determined that athletes already have a diminished expectation of privacy because of the nature of athletics, that they are given notice of the testing and must consent to such testing, and that the NCAA had a legitimate goal of protecting the safety of student-athletes.\textsuperscript{175} Students have also challenged NCAA bylaws claiming that they are arbitrary or capricious, and many courts have determined that, whether the NCAA bylaws are arbitrary or capricious depends on the rules being “fairly and honestly administered.”\textsuperscript{176} In \textit{Bloom v. NCAA}, the court found the NCAA was not inconsistently applying its rules and bylaws regarding amateur status to the plaintiff, and thus was not acting arbitrarily or capriciously.\textsuperscript{177}

In order for a NCAA Bylaw requiring a background check to withstand judicial review, the NCAA should: (1) satisfy the three privacy interest criteria in \textit{Brennan}; (2) apply the

\textsuperscript{173} See \textit{Brennan}, 691 So.2d 324; See \textit{Bloom v. NCAA Jorgensen Realty, Inc. v. Box}, 701 P.2d 1256, 1258 (Colo. App. 1985); \textit{Van Valkenburg v. Liberty Lodge No. 300}, 619 N.W.2d 604, 607 (Neb. App. 2000) (courts only intervene with the internal affairs of a voluntary association on limited grounds); \textit{Cole v. NCAA}, 120 F. Supp. 2d 1060, 1071-72 (N.D. Ga. 2000) (“challenges of student-athletes [against the NCAA] are entitled to considerable deference”); \textit{Jones v. National Collegiate Athletic Ass’n}, 679 So. 2d 381 (La. 1996) (“courts should not interfere with internal affairs of private association except in cases when affairs and proceedings have not been conducted fairly and honestly, or in cases of fraud, lack of jurisdiction, invasion of property or pecuniary rights, or when action complained of is capricious or arbitrary, or unjustly discriminatory.”).

\textsuperscript{174} \textit{Brennan}, 691 So. 2d 324, 330 (La. Ct. App. 1997) ; NCAA Bylaw, Drug-Testing Consent Form, Content and Purpose, Article 14.1.4 (2008); see also \textit{Hill v. National Collegiate Athletic Association}, 7 Cal.4th 1, 26 Cal.Rptr.2d 834, 865 P.2d 633 (Cal.1994) (holding that while drug testing is an imposition of privacy interest, the NCAA’s countervailing interests outweighed student’s invasion of privacy).

\textsuperscript{175} Potrafke, supra note 28 at 450; \textit{Brennan}, 691 So. 2d at 330.


\textsuperscript{177} \textit{Bloom}, 93 P.3d 621; see also \textit{NCAA v. Laesge}, 53 S.W. 3d 77, 83 (Ky. 2001) (“Cases involving challenges to a voluntary athletic association’s eligibility decisions involve difficult assessments of a plaintiff’s probability of succeeding on his or her claim and complex balancing of competing interests.” Relief will be granted when the athlete “can show a substantial probability that the athletic association’s ruling was arbitrary and capricious”); \textit{Hall v. NCAA}, 985 F. Supp. 782 (N. D. Ill. 1997). REMIND PROFESSOR TO GIVE ME CITE.
standard to all students consistently to avoid review for “arbitrarily and capriciously” enforcing the check; and (3) delineate guidelines to which an institution must adhere in creating policy.¹⁷⁸

1. Withstanding the Brennan Test

First, as to privacy interests, the NCAA has the authority to enforce a background check because, as the Brennan court said, athletes already have a reduced expectation of privacy.¹⁷⁹ Second, this expectation can be further diminished if the NCAA not only gives notice of the check, by amending Article 13 of its bylaws, but also require written consent of all potential recruits.¹⁸⁰ Furthermore, the NCAA could provide notice by stating what type of criminal activity the background search is seeking and how the information is to be used by universities in Article 13.¹⁸¹

Third, the NCAA must narrowly tailor the background check to a legitimate interest.¹⁸² The NCAA’s interest in protecting an institution’s student body from violence and preventing its member institution from the public relations nightmare exemplified in Simpson outweighs the invasion of privacy of students, who already have a diminished expectation of privacy.¹⁸³ In addition, because of the wide variation of state laws regarding juvenile files, the NCAA could limit checks to violent convictions and misdemeanors.¹⁸⁴ Although there is diversity in the

¹⁷⁸ Portrafke, supra note 31, at 437.
¹⁷⁹ Id.
¹⁸⁰ Id.
¹⁸¹ Id.
¹⁸² Brennan, 691 So. 2d 324.
¹⁸³ Portrafke, supra note 31, at 440.
¹⁸⁴ The State of Wisconsin has an “open records law,” allowing public access to public records, and, only under, “exceptional circumstances,” will such access be denied. A juvenile record constitutes an exceptional circumstance, as it can only be released if the juvenile was charged in an adult criminal system. See Portrafke, supra note 31 at
handling of juvenile criminal records by jurisdiction, many states have recently enacted laws that express intent to transfer juveniles into the adult criminal system, thereby making their records public.\(^{185}\)

2. Uniformly Administering Background Checks

All student-athletes, both transfers and incoming freshman, would be subject to this background check.\(^{186}\) This would withstand an arbitrary and capricious judicial review because the check is enforced upon all athletes. Thus, the NCAA would consistently apply the background check bylaw to all student-athletes.\(^{187}\)

3. NCAA Guidelines to Enforce Background Checks

A neutral third party\(^{188}\) should administer the background checks on every institution’s potential student-athlete to achieve uniformity in the results and to standardize the

\(^{185}\) Over 250,000 juveniles have been transferred. Portrafke, supra note 31 at 442(citing Campaign for Youth Justice, http://www.campaign4YouthJustice.ORG/index.html).

\(^{186}\) This is favorable to singling out only transfer students because doing so subjects them to a regulation that other student-athletes are not subject to. Id.

\(^{187}\) Bloom v. NCAA, 93 P.3d 621.

\(^{188}\) Seeking a third party would benefit both the institution and a potential student-athlete. It could eliminate potential prejudices and biases, and, because the only information sought is violent felony convictions, the third party would send a report to the institution only containing that type of activity, thus limiting the scope of the privacy interest invaded. Id.
methodology.\textsuperscript{189} The relevant findings\textsuperscript{190} from a background check should be submitted to the Athletic Director, forwarded to the Coach, and, if necessary, reviewed by the President of the Institution.\textsuperscript{191} The rules should not require the background check to be entirely dispositive on the admittance of a student. Instead, the NCAA should allow the institutions which are willing to accept a student with prior criminal activity to afford the student-athlete the opportunity to explain the record to the athletic staff.\textsuperscript{192} The NCAA should allow the coaches and member institutions to use their discretion in accepting the student-athlete despite knowledge of their conviction.\textsuperscript{193} However, the NCAA should expressly forbid an institution to admit a felon absent express approval from the institution’s President. This would allow for institutions like Fresno State, which has already used its discretion to implement a background check provision that expressly denies any student-athlete with a felony conviction, to maintain its current policy.\textsuperscript{194}

\textsuperscript{189} Background checks are cheap, especially if the NCAA finds one third party company to run the checks. This cost should be absorbed by the institution. It is an added expense, but is much cheaper than litigation, settlements, and public relations “clean up” after a violent incident occurs on campus. Portafke, supra note 31, at 428.

\textsuperscript{190} The relevant findings standard should depend on what an institution decides to implement. For instance, the institution could impose a strict policy where any criminal activity is forwarded to the institution. Because such a thorough background check can potentially limit an institution’s liability, it would be in the best interest of an institution to receive notice of all criminal activity (including misdemeanors and felonies) from the background checks.

\textsuperscript{191} This limits the scope of the privacy interest invaded. Id. at 428.

\textsuperscript{192} This, too would help safeguard against an arbitrary and capricious standard, but also could limit liability for institutions if there is a valid explanation for a criminal record and the institution accepted the student.

\textsuperscript{193} Some scholars suggest that this will help avoid disparately impacting minorities, who are more likely to have been convicted of violent crimes than non-minorities. Id. (citing U.S. DEP’T of Justice, Criminal Offenders Statistics (Sept. 6, 2006), available http://www.ojp.usdoj.gov/bjs/crimoff). As one professor stated, requiring the “athletic director and president to put their signatures on [questionable admissions]” requires them to claim accountability for the athletes they accept to represent its institution. Dan Le Batard, While Clarett Lost a Dear Friend, Ohio State Lost Some Perspective, Miami Herald, Jan. 1, 2003, at 1D.

\textsuperscript{194} Id. at 433 (citing Greg Auman, Background Checks Vary; Schools Fear Surprises, St. Petersburg Times Online, (Mar. 6, 2005), http://pqasb.pqarchiver.com/sptimes/access/803796601.html?dids=803796601:803796601&FMT=FT&FMTS=ABS:FT&date=Mar+6%2C+2005&author=GREG+A.
C. The Implication of Background Checks on Title IX Jurisprudence

It is important to be cognizant that both the proposed background check and Title IX are protective measures. A background check furthers the purpose of Title IX by providing preventive protection measures.

1. A Consistent Standard for “Actual Knowledge.”

The Tenth and Eleventh Circuit Courts of Appeals and the Arizona Federal District Court have recognized that knowledge of a student’s past sexual misconduct establishes “actual knowledge” under the *Davis* standards in an intercollegiate setting.\(^{195}\) The court's willingness to include this preexisting knowledge into its determination of Title IX institutional liability invites a required background check to fulfill the “actual knowledge” prong.\(^{196}\)

Lower courts differ on whether notice sufficient to trigger liability must include notice regarding current harassment to the current victim of the harassment, but many seem to be shifting in the direction where they believe that actual notice does not set the bar so high that a school district is not put on notice until it receives a clearly credible report of sexual abuse from the plaintiff-student. At some point . . . a supervisory school official knows . . . that a school employee is a substantial risk to sexually abuse children.\(^{197}\)

In addition, in a recent (secondary school) case, a student was arrested for allegedly raping a female student (“Doe”), but was allowed to go back to the same school as Doe after the arrest.\(^{198}\)


\(^{196}\) Required background checks for student-athletes are analogous to teachers/professors/coaches/principals being subjected to background checks before they are hired.


His friends harassed her, and the court determined that there was a triable issue of fact as to whether this arrest gave the school board “actual knowledge” of the harassment that followed the arrest even though Doe did not tell the school board about the harassment following the arrest.\textsuperscript{199}

However, while many lower courts appear to be amenable to knowledge of a “potential risk” triggering “actual knowledge,” the Fourth Circuit Court of Appeals continues to interpret this prong narrowly, requiring “a showing that school district officials possessed actual knowledge of the discriminatory conduct in question.”\textsuperscript{200} In \textit{Baynard v. Malone}, the middle school received rumors that a teacher abused children and that school employees observed “excessive physical contact” with one student in particular, including the teacher having him sit on his lap.\textsuperscript{201} The Fourth Circuit Court of Appeals determined that this was not actual knowledge that the abuse was occurring, and thus the student had no Title IX claim.\textsuperscript{202} This inconsistency demonstrates that while there appears to be a shift in accepting knowledge that a harasser has the propensity to sexually harass as “actual knowledge,” for some jurisdictions, the gap between what constitutes “actual knowledge” among many jurisdictions is further widened.

\textsuperscript{199} Id.

\textsuperscript{200} \textit{Baynard v. Malone}, 268 F.3d 228, 238 (4th Cir.2001) (stating that knowledge of “potential abuse” did not equal knowledge “in fact” that abuse was taking place and thus did not meet the court’s interpretation of \textit{Gebser} and \textit{Davis}). (“For actual notice to exist, an agent of the school must be aware of facts that indicate a likelihood of discrimination.”); \textit{Frederick v. Simpson College}, 149 F. Supp. 2d 826, 838 (S.D. Iowa 2001) (actual notice requires “actual notice . . . that [the] teacher was at risk of sexually harassing a student.”); \textit{Crandell v. New York College of Osteopathic Med.}, 87 F. Supp. 2d 304, 320 (S.D.N.Y. 2000) (“[T]he institution must have actual knowledge of at least some incidents of harassment in order for liability to attach . . . [and must have] possessed enough knowledge of the harassment that it reasonably could have responded with remedial measures to address the kind of harassment upon which plaintiff’s legal claim is based.”).

\textsuperscript{201} Id.

\textsuperscript{202} Id.
A consistent approach must be followed.\textsuperscript{203} The opportunity for the background check to create a uniformly applied standard is greatly beneficial in clarifying Title IX jurisprudence. If the courts were to determine that knowledge of any prior sexual misconduct equates to the “actual knowledge” prong of the Title IX claim, then institutions would be encouraged to either reject athletes who have demonstrated such conduct or design policies to inform the former harassers of sexual harassment policies and check in with the student-athlete occasionally.\textsuperscript{204}

2. Background Checks could be evidence of “Deliberate Indifference.”

The courts in Williams, J.K., and Simpson, all from different jurisdictions, articulated a standard of deliberate indifference based on a totality of the circumstances. Each court looked not only to the responses of the institutions to the sexual harassment, but also to the failure to implement safeguards before the harassment even took place, based on the knowledge that this type of conduct could occur.\textsuperscript{205} A background check, in this respect, is an efficient deterrent to admitting students with criminal records with no safeguards in place to prevent a recurrence, which will aid in furthering the goal of Title IX to protect students from the potential risk of

\textsuperscript{203} In 2002, a scholar analyzed lower court cases where the courts were responsible for interpreting and applying sexual harassment claims brought under Title IX to the Supreme Court. She found a “marked inconsistency” among district courts’ application of the Supreme Court standards. See Davies, supra note 12 at 387.

\textsuperscript{204} This is just due diligence and helps insulate the institution from the deliberate indifference prong. I am not suggesting that the athletic institution reinstate \textit{in loco parentis}. There is a happy medium between absolutely no supervision and \textit{in loco parentis}. Britton White, Student Rights: From In Loco Parentis to Sine Parentibus and Back Again? Understanding the Family Educational Rights and Privacy Act in Higher Education, 2007 BYU Educ. & L. J. 321 (2007).

\textsuperscript{205} “That the schools at Colorado University and the University of Georgia did nothing to ameliorate the risk that a privileged male athlete with a history of sexual predation would present to female students was a key factor in the appellate court’s opinion in each case.” Rosenfield, supra note 19 at 422.
Further, a preventative approach could safeguard an institution from liability even if it were to give a student a second chance.207

A good model for the courts to consider is the municipality liability context discussed in both Williams and Simpson.208 Under this analysis, “a plaintiff can prove deliberate indifference by demonstrating ‘the municipality knew of a need to . . . supervise in a particular area and the municipality made a deliberate choice not to take any action.’”209 Borrowing from principles of municipal liability, an institution can insulate itself from Title IX liability if it implements and maintains a sexual harassment policy that enumerates what sexual harassment is, what the potential punishment for sexual harassment is, and what steps will be taken if a sexual harassment claim is brought against a student-athlete. In addition to having such a policy, the university would be held responsible to ensure that its student-athletes are well-informed of the

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206 This is significant, especially, in jurisdictions that have determined “the starting point for measuring the adequacy of its response” is when the actual harassment is reported. This application is not as favorable to the students and requires the student must endure some form of harassment before a university even has the responsibility to take action.

207 Unfortunately, this could mean that admitting a student with a background record might always incur liability, but the point here is for the institution to implement measures. A court could find that the implemented measures were reasonable, and thus the institution would be safeguarded from liability.

208 Obviously a school would want to prevent this type of occurrence. Critics of Campus Judicial Boards are divided as to whether this serves a greater benefit to a victim athlete, or whether it seeks neutrality. There is little evidence to support either claim, however because of the closed nature of the agreements. Dabbs, supra note 63, at 189. Many institutions support closed campus judicial boards as opposed to public trials because of the greater control over public relations. See Id. 192.

209 Williams v. Bd. of Regents of Univ. Sys. of GA., 477 F.3d 1282 (11th Cir. Ga. 2007) (quoting Gold v. City of Miami, 151 F.3d 1346, 1350-51 (11th Cir. 1998)). The municipality liability schema is not without its imperfections. In this type of schema, a “good faith response” by the institution is required. Some courts have determined that an institution confronting an alleged harasser one time is reasonable enough to safeguard the institution from liability. For example, the Fifth Circuit Court of Appeals recently upheld a district court’s grant of summary judgment to a school district where a volleyball coach had a three year relationship with a female athlete. Upon hearing rumors that the coach was engaging in sexual relations with the student, the principal and vice-principal met with the coach one time. The court relied on the municipality context where a good faith response, even if not effective, does not rise to the level of deliberate indifference. The court never applies the reasoning of Davis or Gebser, and only cites to Gebser as a footnote. King v. Conroe Independent School District. No. 05-20988 (5th Cir. 2007).
policy. This deters from turning a blind eye to the behavior of student-athletes, and then claiming “we did not know, so we could not do anything.” If, for instance, Coach Koetter in J.K. had implemented a strict zero tolerance policy, impressed upon Henderson its importance, and monitored Henderson, then the court might not have found deliberate indifference. This does not set a bright line rule, but the demarcation between deliberate indifference and an institution’s attempts to proactively protect its students from a deprivation of education is a little clearer.

Conclusion

Title IX was enacted as a preventive statute to protect students from sexual discrimination in an educational setting. Applying a NCAA required background check implements a precautionary, protective measure. A student who is harassed or assaulted by a student-athlete with a criminal history can point to the background check to bolster her claim that the institution had “actual knowledge.” Thus, with courts moving in the direction of accepting preexisting knowledge of a harasser’s potential risk to students as actual knowledge, an institution will be encouraged to implement sexual harassment policies and impress upon its student-athletes the importance of compliance with such policies. Furthermore, the courts should be more amenable to applying the municipality standard, as it would encourage universities to implement and follow procedures before sexual harassment even occurs. It is axiomatic for a

\[210\] This appears to be a protective measure—implementing a policy and abiding by it. Many lower courts are already basing “deliberate indifference” both on an institution’s response before and after the harassment occurs, so this would just be codifying the standard.

\[211\] This is to say that there is a stronger case for the institution when they implemented procedural safeguards, and the student committed an assault despite their efforts. This would most likely be a question of fact for the jury. See J.K. v. Ariz. Bd. of Regents, 2008 U.S. Dist. LEXIS 83855 (AZ. D. 2008).

\[212\] However, creating a policy is not an automatic insulation because the court would have to find that the institution did more than just preparing a written policy and never addressing the athletes because is not reasonable.
student to endure sexual harassment and wait to see what the university’s response is under Title IX’s protective schema because “there is no such thing as a one free rape rule” in the context of Title IX.\footnote{S.S. v Alexander, 143 Wn. App. 75, 103 (Wash App. 2008).}