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Simpson v. University of Colorado: Title IX Crashed the Party in College Athletic Recruiting

Wes R. McCart

SIMPSON V. UNIVERSITY OF COLORADO: TITLE IX CRASHES THE PARTY IN COLLEGE ATHLETIC RECRUITING

INTRODUCTION

On December 7, 2001, visiting high school recruits and football players at the University of Colorado sexually assaulted three female students, propelling the school into national headlines.[1] The fact that the alleged assaults occurred as a result of a university-sanctioned program amplified the reprehensible nature of the incidents.[2] Later investigation revealed that the Colorado football program had a policy of appointing player-hosts to show recruits "a good time" while they were on campus, which usually meant providing alcohol and opportunities for sex.[3] Not only did the University essentially sanction this behavior, but it was also aware of similar abuses and previous sexual assaults within the program.[4] The assaults placed the University at the heart of a scandal, spawned an extensive investigation of athletic department policies, triggered the ouster of numerous University officials, and exposed the University to substantial liability when two of the sexually assaulted students filed suit under Title IX.[5]

Initially, it appeared that University officials could breathe a sigh of relief. The Colorado district court granted summary judgment to the University,[6] and the ongoing public relations nightmare seemed to be coming to a close.[7] In September 2007, however, in *Simpson v. University of Colorado Boulder*, the Tenth Circuit overturned the lower

1. Erik Brady, *Colorado Scandal Fallout: Title IX Lawsuit that Led to Probes Could Have Wide Implications*, USA TODAY, May 26, 2004, at 1C.

2. Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170, 1174 (10th Cir. 2007).

3. *Id.* at 1175, 1179 n.3.

4. *Id.* at 1180–84.

5. Kevin Vaughan, *No Settlement on CU's Radar*, ROCKY MTN. NEWS, Sept. 8, 2007, at 4. Title IX is the federal statute prohibiting discrimination based on sex in educational programs and activities that receive federal funding. Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688 (2000).

6. Simpson v. Univ. of Colo., 372 F. Supp. 2d 1229, 1246 (D. Colo. 2005), *rev'd sub nom.* Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170 (10th Cir. 2007).

7. Christine Reid, *CU Officials Don't Expect Backlash After Revival of Women's Lawsuit*, DAILY CAMERA, Sept. 9, 2007, at A1 (noting University officials' relief after the district court's favorable ruling).

court's decision and held that the plaintiffs could attempt to prove at trial that the University was liable under Title IX.[8]

The question of whether the University could face liability under Title IX for its official recruitment policies has drawn the attention of university athletic administrations nationwide.[9] While the lower court looked to U.S. Supreme Court precedent, which sets a high threshold for notice and deliberate indifference requirements under Title IX,[10] the Tenth Circuit focused instead on the University's "official policy" of showing recruits a good time.[11]

Though university athletic program directors and plaintiff advocates disagree over the meaning of the Tenth Circuit's opinion, both sides agree that the opinion frames Title IX liability in a novel way.[12] Critics argue that the ruling expands Title IX's reach beyond what Congress intended,[13] while supporters claim that the decision "is not a departure from—but an effectuation of—the purposes of Title IX."[14] Since its initial ruling, the Tenth Circuit denied requests to rehear the matter en banc, and the University reluctantly decided to settle the lawsuit for nearly three million dollars.[15]

The *Simpson* decision has serious implications for all university athletic programs that receive federal funding.[16] But does it unnecessarily extend Title IX liability simply to overcome the injustice that would otherwise occur if the statute's interpretation remained restricted to its previous confines?[17] This Note focuses on how the court interpreted Title IX to provide a remedy for instances of sexual misconduct in academic settings. Specifically, this Note argues that *Simpson* is consistent with Supreme Court precedent and the legislative intent of Title IX. Part II establishes the framework from which Title IX emerged and describes how courts have interpreted the legislation

8. *Simpson*, 500 F.3d at 1185.

9. Brady, *supra* note 1.

10. *See infra* notes 77–102 and accompanying text.

11. *See infra* notes 103–117 and accompanying text.

12. *See* Brittany Anas, *CU Appeals Title IX Ruling*, DAILY CAMERA, Oct. 10, 2007, at 3A.

13. Vaughan, *supra* note 5 ("We are looking at a new legal standard, never previously applied .... We are in uncharted legal waters that I think will cause grave problems for every university in the United States.").

14. Anas, *supra* note 12.

15. Allison Sherry, *CU Settles Case Stemming from Recruit Scandal*, DENVER POST, Dec. 6, 2007, at A-01. University president Hank Brown stated that the University reached its decision in light of the prospect of the case dragging on for years, resulting in soaring legal costs. *Id.*

16. *See* Vaughan, *supra* note 5.

17. *See* Simpson v. Univ. of Colo., No. 02-CV-2390-REB-CBS, 2007 WL 1217173, at *10 (D. Colo. Apr. 24, 2007) ("[A] cry for justice 'does not mean that Title IX should be expanded to provide justice simply because the cry for justice has not been answered otherwise.'").

over the past three decades.[18] Part III summarizes the district court's and Tenth Circuit's opinions in *Simpson*.[19] Part IV examines both opinions from perspectives of law and policy, in an attempt to determine which approach better comports with the spirit of Title IX.[20] Finally, Part V predicts *Simpson*'s impact on educational institutions and how the Supreme Court might resolve the case if it were to examine it today.[21]

II. BACKGROUND

Judicial interpretation of Title IX has evolved significantly since Congress passed the original legislation over thirty-five years ago. Section A provides an overview of the goal of Title IX and describes how courts have interpreted the statute to provide a remedy for sexual harassment.[22] Section B examines the Supreme Court's interpretation of Title IX in recent years.[23]

A. Title IX: Overview

Congress enacted Title IX in 1972 to promote equal opportunities for female students in schools receiving federal funding.[24] The statute provides, in relevant part, that "[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[25] Though Title IX has been on the books for over thirty-five years, courts' interpretation of the statute has changed substantially, particularly in the area of sexual harassment.[26]

In the past, plaintiffs most commonly invoked Title IX to ensure equal representation and funding for female students in interscholastic athletics.[27] Title IX protections, however, extend beyond the ath-

18. *See infra* notes 22–74 and accompanying text.
19. *See infra* notes 75–117 and accompanying text.
20. *See infra* notes 118–197 and accompanying text.
21. *See infra* notes 198–236 and accompanying text.
22. *See infra* notes 24–37 and accompanying text.
23. *See infra* notes 38–74 and accompanying text.
24. *See* 20 U.S.C. § 1681(a) (2000).
25. *Id.*
26. *See* Diane Heckman, *Is Notice Required in a Title IX Athletics Action Not Involving Sexual Harassment?*, 14 MARQ. SPORTS L. REV. 175, 179 (2003); 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, 626 (2003).
27. *See* MARK JONES, A PRACTICAL HANDBOOK FOR UNDERSTANDING SEXUAL HARASSMENT UNDER TITLE IX 4 (2006), *available at* http://educationlawconsortium.org/forum/2006/papers/Jones2006_1.pdf.

letic arena. Today, the statute impacts nearly every aspect of equal access to educational opportunities, including protection against sexual harassment.[28] The Supreme Court has recognized that Title IX prohibits sexual harassment in private and public educational institutions receiving federal funding.[29] In *Cannon v. University of Chicago*, shortly after the legislation's enactment, the Court recognized the possibility of private lawsuits under the statute.[30] Later, in *Franklin v. Gwinnett County Public Schools*, the Court expanded Title IX's possible remedies by making compensatory and punitive damages available.[31]

The Office of Civil Rights, the Department of Education's Title IX compliance agency, defines sexual harassment as unwelcome sexual conduct, which includes "unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature."[32] This broad definition includes severe incidents of harassment, such as sexual assault, as well as offenses such as unwelcome flirtation and comments.[33]

Following Title IX's inception, courts divided sexual harassment under the statute into two distinct categories: quid pro quo and hostile environment.[34] Quid pro quo harassment involves a teacher or employee who conditions a benefit upon a student's accession to un-

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28. *Id.*

29. *See* Diane Heckman, *Deconstructing Title IX Sexual Harassment Matters Involving Students and Student-Athletes in the Post*-Davis *Era*, 206 EDUC. L. REP. 469, 470 (2006) (citing Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 75 (1992)).

30. 441 U.S. 677, 702–03 (1979) (noting the language of the original bill and its amendments did not mention the prohibition of such suits). Prior to this decision, an individual could not legally enforce Title IX claims and would instead have to file an in-house or OCR (Office of Civil Rights) complaint. LINDA JEAN CARPENTER & R. VIVIAN ACOSTA, TITLE IX 21–26 (2005).

31. CARPENTER & ACOSTA, *supra* note 30, at 124; *see* Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 74–75 (1992) (finding that Title IX permits a private action for damages in cases in which the plaintiff alleges intentional discrimination). Because courts allow individuals to collect monetary damages, plaintiffs have a newfound incentive to bring lawsuits, and schools must be more proactive in complying with Title IX.

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

33. *See* Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 175 (2005) ("'Discrimination' is a term that covers a wide range of intentional unequal treatment; by using such a broad term, Congress gave [Title IX] a broad reach.").

34. Deanna DeFrancesco, Jennings v. University of North Carolina at Chapel Hill: *Title IX, Intercollegiate Athletics, and Sexual Harassment*, 15 J.L. & POL'Y 1271, 1276–79 (2007) (explaining how Title VII, 42 U.S.C. § 2000e to e-3 (2000), was used to lay a foundation for sexual harassment claims, which courts later translated into promotion of equal protection under Title IX).

welcome sexual conduct.[35] Hostile environment harassment involves third-party harassment so serious that it "den[ies] or limit[s] a student's ability to participate in or benefit from the school's program based on sex."[36] Schools will typically face hostile environment liability by ignoring ongoing peer-on-peer harassment, thereby creating an environment not conducive to academic success as a result of constant fear and subjugation.[37]

B. Supreme Court Decisions Interpreting Sexual Harassment under Title IX

After the Supreme Court created the possibility of private causes of action for violations of Title IX,[38] the standard for holding a school or educational program liable under the statute remained unclear.[39] Between 1998 and 1999, the Court issued two opinions attempting to further clarify the contours of Title IX liability.

1. Gebser v. Lago Vista Independent School District*: Teacher-on-Student Harassment*

In *Gebser v. Lago Vista Independent School District*, the Supreme Court considered a claim for monetary damages by a victim of teacher-student sexual harassment.[40] *Gebser* involved a male high school teacher who sexually harassed a female student over a two-year period.[41] The harassment included inappropriate comments and touching, which eventually led to a sexual relationship between the two parties.[42] Though the victim never reported the incidents to school officials, the parents of other students complained to the principal about inappropriate comments the teacher made during class.[43] The principal responded by warning the teacher about his inappropriate classroom comments.[44] After police discovered the teacher and victim engaging in sexual intercourse, the victim and her mother filed

35. SEXUAL HARASSMENT GUIDANCE, *supra* note 32, at 5.

36. *Id.*

37. *Id.* at 12–14.

38. Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 76 (1992); Cannon v. Univ. of Chi., 441 U.S. 677, 702–03 (1979).

39. *See* Parent, *supra* note 26, at 628.

40. 524 U.S. 274 (1998).

41. *Id.* at 277–78.

42. *Id.*

43. *Id.* at 278.

44. *Id.*

suit against the school district under Title IX, seeking compensatory and punitive damages.[45]

Writing for the Court, Justice O'Connor explained that because a private right of action under Title IX was a judicial creation, the Court possessed "a measure of latitude [in] shap[ing] a sensible remedial scheme that best comports with the statute."[46] In doing so, the Court cautioned against frustrating the purposes of Title IX by allowing liability based on respondeat superior or constructive notice.[47] Instead of adopting an overly broad approach, the Court held:

> [I]n cases like this one that do not involve official policy of the recipient entity . . . a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has *actual* knowledge of discrimination in the recipient's programs and fails adequately to respond.[48]

Gebser also addressed what constitutes an improper response to claims of sexual harassment once a school has actual notice. The school would be liable if it responded to the harassment with deliberate indifference, which means that the school officially decided to ignore the violation.[49] Because the school in *Gebser* had actual notice of only the inappropriate comments and not the sexual encounters, the Court found that the victim's claims did not satisfy the notice and deliberate indifference requirements for a private suit under Title IX.[50]

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45. *Id.* at 278–79. The original complaint included a claim under 42 U.S.C. § 1983, a state negligence law claim, and other claims under state law, but the plaintiffs only appealed the Title IX claim. *Id.* at 279.

46. *Gebser*, 524 U.S. at 284.

47. *Id.* at 285. In particular, the Court feared creating a situation in which schools would be liable not only for their own actions but also for the independent actions of their employees, thus creating the possibility of unavoidable, crushing liability. *Id.* at 290 ("[A]n award of damages in a particular case might well exceed a recipient's level of federal funding."); *see also* Jennie E. Spies, Comment, *Winning at All Costs: An Analysis of a University's Potential Liability for Sexual Assaults Committed by Its Student Athletes*, 16 MARQ. SPORTS L. REV. 429, 443 (2006).

48. *Gebser*, 524 U.S. at 290 (emphasis added). Here, the Court looked to the language of Title IX, in particular 20 U.S.C. § 1682, which states that an agency cannot take action until it "has advised the appropriate person or persons of the failure to comply with the requirement." *Id.* at 288 (quoting 20 U.S.C. § 1682).

49. *Id.* at 290–91 (comparing this standard to that found in § 1983 claims, which bases the violation on a municipality's failure to prevent a deprivation of federal rights).

50. *Id.* at 291–92.

2. Davis ex rel. LaShonda D. v. Monroe County Board of Education: *Peer-on-Peer Harassment*

The Supreme Court further refined its Title IX analysis in *Davis ex rel. LaShonda D. v. Monroe County Board of Education*.[51] In addressing a claim of student-on-student harassment, the Court held that a plaintiff may bring a private Title IX damages action only if the educational institution has actual knowledge of the discrimination, is deliberately indifferent to it, and the discrimination is so severe and offensive that it deprives the victim of access to educational opportunities and benefits.[52]

In *Davis*, the parents of a female elementary school student sued the school district under Title IX, alleging a "prolonged pattern of sexual harassment" by one of her classmates.[53] The harassment allegedly included inappropriate touching and comments, which the victim and her parents reported to the school's teachers and principal.[54] Despite those reports, the harassment continued, and as a result, the victim's grades suffered and eventually she became suicidal.[55] The victim's parents claimed that the school's response was inadequate because it failed to stop the harassment.[56]

Writing the majority opinion for a divided Court, Justice O'Connor carefully clarified that an educational institution may face liability only for its own misconduct.[57] Still, the Court observed that the school district could face liability for student-on-student harassment, which was markedly different from the traditional quid pro quo approach seen in previous cases.[58] The opinion discussed a school's potential liability for ignoring a hostile environment that is exacerbated by the school's official decision to "remain idle in the face of known student-on-student harassment."[59]

In reaffirming the actual notice and deliberate indifference standards articulated in *Gebser*,[60] Justice O'Connor's opinion included two additional considerations. First, a school district is deemed delib-

51. Davis *ex rel.* LaShonda D. v. Monroe County Bd. of Educ., 526 U.S. 629 (1999).
52. *Id.* at 650.
53. *Id.* at 632–33.
54. *Id.* at 633–34.
55. *Id.* at 634.
56. *Id.* at 635.
57. *Davis*, 526 U.S. at 640–41.
58. *Id.* at 652–53. Previously, courts interpreting Title IX found that Title IX only addressed instances of teacher-student harassment and did not apply if a school employee was not directly involved. *See, e.g.*, Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998); Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992).
59. *Davis*, 526 U.S. at 641, 643.
60. *Gebser*, 524 U.S. at 274.

erately indifferent only when its response to student-on-student harassment "is clearly unreasonable in light of the known circumstances."[61] Additionally, private damage actions under Title IX are limited to situations in which the harassment is "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school."[62]

Though the majority allowed private damage suits alleging peer-on-peer sexual harassment under Title IX, the Court made clear that liability is limited to situations where the school "exercises substantial control over both the harasser and the context in which the known harassment occurs."[63] Because the school district controlled both the circumstances and the harasser in *Davis*, the Court found that the school district could be liable under a deliberate indifference theory.[64]

Even though the majority set a high threshold for liability in these situations, Justice Kennedy's lengthy dissent predicted a flood of liability as a result of the majority's approach.[65] In particular, he focused on the lack of clarity regarding a school's liability under the statute.[66] Justice Kennedy further reasoned that Congress never anticipated Title IX liability in situations of peer-on-peer sexual harassment.[67] According to Justice Kennedy, by granting federal enforcement power over these situations, schools will divert scarce resources from educating children and instead invest in measures to align school procedures with the federal guidelines imposed by the Department of Education.[68]

3. *The Current State of the Law*

A private plaintiff seeking damages under Title IX must prove four factors in order to prevail: (1) the school or educational institution

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61. *See Davis*, 526 U.S. at 648. Justice O'Connor also noted that "courts should refrain from second-guessing the disciplinary decisions made by school administrators." *Id.* (citing New Jersey v. T.L.O., 469 U.S. 325, 342 n.9 (1985)).

62. *Id.* at 650. According to the Court, the decision of whether the student's sexual harassment is actionable under Title IX "depends on a constellation of surrounding circumstances, expectations, and relationships." *Id.* at 651 (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 92 (1998)).

63. *Id.* at 645.

64. *Id.* at 654.

65. *Id.* at 657 (Kennedy, J., dissenting) ("The fence the Court has built is made of little sticks, and it cannot contain the avalanche of liability now set in motion.").

66. *Id.* at 656–57.

67. *Davis*, 526 U.S. at 656–57.

68. *Id.* at 657–58.

must receive federal funding;[69] (2) the institution must have actual—not constructive—notice of the discrimination;[70] (3) the institution must be deliberately indifferent to the discrimination;[71] and (4) the discrimination must be so severe that it denies the plaintiff an educational benefit.[72] Though the *Gebser* and *Davis* decisions have attempted to construct a framework for dealing with private damage suits under Title IX, subsequent courts have interpreted these opinions inconsistently.[73] In particular, courts have struggled to define what constitutes proper notice, how hostile an environment must become, and how deliberate the defendant's indifference must be before a court may find an educational institution liable under the statute.[74]

III. SUBJECT OPINION: *SIMPSON V. UNIVERSITY OF COLORADO BOULDER*

The *Simpson* case began in the U.S. District Court of Colorado. Section A discusses the district court's opinion, which granted the University's motion for summary judgment.[75] Section B then considers the plaintiffs' appeal to the Tenth Circuit Court of Appeals, which reversed the district court.[76]

A. The District Court's Decision

Plaintiffs Lisa Simpson and Anne Gilmore brought suit under Title IX against the University of Colorado (CU), alleging that they were sexually assaulted by CU football players and recruits during a party at Ms. Simpson's apartment on December 7, 2001.[77] A CU football player and an athletic department tutor organized the party, which was allegedly part of an informal recruiting event organized to provide visiting high school recruits an opportunity to drink and have sex with female CU students.[78] A number of players and recruits visited

69. 20 U.S.C. § 1681(a) (2000).

70. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1997).

71. *Id.*

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

73. Heckman, *supra* note 29, at 474.

74. *Id.*

75. Simpson v. Univ. of Colo., 372 F. Supp. 2d 1229, 1246 (D. Colo. 2005), *rev'd sub nom.* Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170 (10th Cir. 2007); *see infra* notes 77–102 and accompanying text.

76. Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170, 1185 (10th Cir. 2007); *see infra* notes 103–117 and accompanying text.

77. *Simpson*, 372 F. Supp. 2d at 1231–32.

78. *Id.* CU's recruiting process involved bringing up to sixty-two high school students on campus during football season. *Simpson*, 500 F.3d at 1180. Each of these recruits was paired with a team "ambassador," who was usually female, to escort the recruit around campus during his

Ms. Simpson's apartment that evening, and Ms. Simpson eventually went to bed intoxicated.[79] Later that night, when she awoke in her bedroom, she found two recruits sexually assaulting her while other CU football players surrounded the bed.[80] At the same time, players and recruits were assaulting Ms. Gilmore just a few feet away.[81] Both women claimed they were too intoxicated or terrified to resist.[82]

The plaintiffs claimed that their alleged assaults were part of a pattern of which the University had actual knowledge and to which it remained deliberately indifferent.[83] The district court, however, found that the plaintiffs did not establish a genuine issue of material fact about whether there was either actual notice or deliberate indifference.[84] The court therefore granted the University's motion for summary judgment.[85]

1. The Notice Requirement

The plaintiffs alleged that University officials, including Coach Gary Barnett, the head coach of the football program, knew that similar events had occurred in the past.[86] Plaintiffs offered evidence of a string of similar reported incidents and argued that these incidents put University officials on notice of the risk that CU football players and recruits presented to female students.[87] First, the plaintiffs identified a 1997 off-campus party in which a CU football recruit sexually assaulted a female, who was not a CU student.[88] The Boulder County District Attorney's Office investigated the incident and advised University officials to implement a zero-tolerance policy regarding alcohol

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visit. *Id.* Recruits were also given a "player-host" during their visit, and coaching staff often chose these hosts "because they knew how to 'party' and how 'to show recruits a good time.'" *Id.*

79. *Simpson*, 372 F. Supp. 2d at 1232.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 1235.

84. *Id.* at 1234–35.

85. *Simpson*, 372 F. Supp. 2d at 1234–35. In arriving at its decision, the court did not dispute findings that the sexual assaults were "severe and objectively offensive sexual harassment" or that CU's football coach, Gary Barnett, had the requisite control over the football program. *Id.* Additionally, the court found that Athletic Director Richard Tharp and the University Chancellor Richard Byyny also possessed the requisite control over the program. *Id.* at 1235.

86. *Id.* at 1235.

87. *Id.* at 1237–40.

88. *Id.* at 1237. The court found that this incident did not provide per se notice because the victim was not a CU student and the assault occurred off campus; however, the court recognized that the incident could have provided some notice that CU students faced the same risk. *Id.* at 1238.

and sex in the recruiting program.[89] When Coach Barnett came to CU two years later, the University notified him of the accusations.[90] The plaintiffs also pointed to three separate incidents involving charges of non-sexual assault brought against two members of the coaching staff and a former player.[91]

In another incident, a former recruit, in vague terms, informed Coach Barnett of the improprieties he witnessed during his recruiting visit to CU.[92] The plaintiffs also alleged that a female football player, Katherine Hnida, claimed to have been a victim of sexual harassment while playing on Coach Barnett's team.[93] Additionally, in 2001, the plaintiffs claimed that a CU football player sexually assaulted a female student trainer just months before the players sexually assaulted the plaintiffs.[94] Finally, the plaintiffs pointed out that two CU players at the party that evening had been accused of previous sexual assaults, though there was no record that any CU officials were aware of these accusations.[95]

Throughout its opinion, the district court discounted generalized risks and closely focused on the particularized risks that football players and recruits would sexually assault female students as part of the recruiting program, and that alcohol use would aid or exacerbate those assaults.[96] The court found that only the 1997 assault, the Katherine Hnida harassment, and the 2001 assault provided notice to CU officials.[97] According to the district court, however, these incidents did not "constitute a constellation of relevant events that provide[d] sufficient notice of the broad risk of sexual harassment and assault."[98]

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89. *Id.* at 1238.

90. *Id.*

91. *Simpson*, 372 F. Supp. 2d at 1238–39. The court concluded that these incidents had little relevance to the concentrated risk of CU football players and recruits sexually assaulting female students. *Id.*

92. *Id.* at 1239. The judge also found this information irrelevant, because the player did not inform Coach Barnett of the risk to female students. *Id.*

93. *Id.* at 1239–40. These allegations were dismissed as "only obliquely relevant to" the risk at hand because they involved player-on-player harassment. *Id.* at 1240.

94. *Id.* at 1240. Allegedly, Coach Barnett persuaded the trainer not to press charges. *Id.* Nonetheless, the district court avoided making a "stereotypical generalization" regarding all football players on the CU team and found that this incident merely provided notice regarding the one player involved. *Id.*

95. *Id.* Because of the lack of knowledge, the judge also found this information irrelevant. *Id.*

96. *Id.* at 1237–41.

97. *Simpson*, 372 F. Supp. 2d at 1240–41.

98. *Id.* at 1241.

2. *Deliberate Indifference*

Assuming that the University had actual notice of the specific risk involving football players and recruits, the district court went on to find that the plaintiffs failed to demonstrate that the University acted with deliberate indifference.[99] The court recognized that even though the University's efforts, in hindsight, could have been more effective at combating possible harassment,[100] Title IX does not require the University to implement the most effective policies, so long as its existing policies are "not clearly unreasonable."[101] Therefore, the court found that the University's response to the previous incidents did not amount to deliberate indifference, and it granted the University's motion for summary judgment.[102]

B. The Tenth Circuit's Decision

In September 2007, the Tenth Circuit reversed the district court's ruling and found that the plaintiffs had presented sufficient evidence to survive the University's motion for summary judgment.[103] Instead of focusing on notice and deliberate indifference, the Tenth Circuit's decision looked at the program's "official policy of showing high-school football recruits a 'good time' on their visits to the CU campus."[104]

The Tenth Circuit thoroughly examined the analytical framework laid out in *Gebser* and *Davis*, but found that it was an imperfect framework for analyzing the plaintiffs' claims.[105] In particular, the court noted that those decisions did not address situations in which the educational institution approved of or encouraged the harassment.[106] According to the court, the actual notice standards established in prior decisions did not apply in *Simpson* because the

99. *Id.* at 1242.

100. *Id.* at 1244. As remedial measures, the University refused to admit the recruits involved in the 1997 assault, suspended the player involved, developed new recruiting guidelines, and implemented sexual harassment training. *Id.* at 1242–43.

101. *Id.* at 1244 (citing Davis *ex rel.* LaShonda D. v. Monroe County Bd. of Educ., 526 U.S. 629, 643–49 (1999)).

102. *Id.* at 1246.

103. Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170, 1185 (10th Cir. 2007).

104. *Id.* at 1173. A question remains about the adequacy of the University's response after it became aware of the assaults. The plaintiffs claimed that University officials did not take immediate corrective action against those involved, that individuals associated with the University obstructed the investigation, and these individuals continued to resist to recruiting reforms. *See id.* at 1174. The post-assault incidents, however, are not relevant in determining if the University had actual knowledge of the risk involved with its recruiting program.

105. *Id.* at 1174–78.

106. *Id.* at 1177.

previous decisions did not involve official policies of educational institutions.[107] In determining the meaning of the phrase "involve official policy," the court considered *Gebser*'s reliance on § 1983 claims against municipalities.[108] Specifically, the Tenth Circuit focused on *City of Canton v. Harris*, in which the Supreme Court found a municipality liable under § 1983 for failing to properly train its police officers.[109]

The Tenth Circuit's opinion incorporated *Gebser*'s analogy between Title IX claims and § 1983 claims to articulate a hybrid standard of liability for Title IX claims involving a school's official policy.[110] The appellate court concluded that an educational institution intentionally acts in clear violation of the statute "when the violation is caused by official policy, which may be a policy of deliberate indifference to providing adequate training or guidance that is obviously necessary for implementation of a specific program or policy of the recipient."[111] The court further explained that training could be obviously necessary regardless of knowledge of previous incidents, especially when the nature of the program itself provides notice of additional necessary measures.[112] In the court's view, a jury could find that the University had more than sufficient notice of the need for revised training and guidance within its football recruiting program.[113] The court also considered general articles and reports filed in amicus briefs, which highlighted the increased risk of sexual misconduct with male student athletes,[114] as well as the specific incidents involving harassment and assault at CU detailed in the lower court's decision.[115]

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

108. *Id.* at 1176 ("Comparable considerations led to our adoption of the deliberate indifference standard 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." (internal citations omitted) (quoting *Gebser*, 524 U.S. at 290–91)).

109. 489 U.S. 378 (1989). The Court in *Harris* found that a municipality's failure to adequately train its officers amounted to deliberate indifference to the rights of those with whom the police had contact. *Id.* at 390 ("[T]he need for more or different training [may be] so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.").

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

111. *Id.*

112. *See id.* at 1178.

113. *Id.* at 1184.

114. *Id.* at 1181.

115. Simpson v. Univ. of Colo., 372 F. Supp. 2d 1229, 1237–40 (D. Colo. 2005), *rev'd sub nom.* Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170 (10th Cir. 2007). In particular, the Tenth Circuit focused on the University's failure to institute meaningful changes to its recruiting program after the 1997 incident despite pressure from three Boulder County district attorneys. *Simpson*, 500 F.3d at 1181–83. The court also directed its attention to Coach Barnett's failure to properly prescribe the limits of recruiting in his player handbook, his retaliation against Kathe-

After adopting this new standard, the court concluded that although Coach Barnett had general and specific knowledge of the risk of sexual harassment within CU's recruiting program, he maintained an unsupervised program with a policy of showing visiting recruits a good time.[116] Thus, the court held that a jury could find "the need for more or different training [of player-hosts] so obvious, and the inadequacy so likely to result in [Title IX violations], that [Coach Barnett could] reasonably be said to have been deliberately indifferent to the need."[117]

IV. ANALYSIS

The Tenth Circuit's opinion in *Simpson v. University of Colorado Boulder* effectively addressed the gross improprieties that occurred within the University of Colorado football recruiting program.[118] At the same time, the court's decision reinterpreted Title IX liability for sexual harassment by allowing for damages when the substantive violation is the proximate result of an educational institution's official policy.[119] In doing so, the Tenth Circuit claims to have abandoned the *Gebser* and *Davis* precedent regarding actual notice standards in favor of the liability standard of § 1983 claims involving a funding recipient's official policy.[120]

The Tenth Circuit's approach raises many questions and may establish a new avenue of liability under Title IX. Section A addresses how *Simpson* differs from the Supreme Court's Title IX opinions.[121] Section B examines the Tenth Circuit's reliance on § 1983 precedent and determines that this reliance was proper.[122] Section C considers what constitutes an official policy of a school receiving federal funding.[123] Section D reexamines the Tenth Circuit's application of this new standard of liability to the facts of the *Simpson* case.[124] Section E ques-

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rine Hnida after she complained of harassment, and his insufficient response to the 2001 sexual assault allegations of the female trainer. *Id.* at 1182–83.

116. *Simpson*, 500 F.3d at 1184.

117. *Id.* at 1184–85 (modifications in original) (quoting City of Canton v. Harris, 489 U.S. 378, 390 (1989)).

118. Anas, *supra* note 12.

119. *See* Vaughan, *supra* note 5 ("Universities are being asked to monitor conduct of students and non-students at levels they've never been asked to before." (quoting CU's attorney, Larry Pozner)).

120. *See Simpson*, 500 F.3d at 1177 (finding the *Gebser* and *Davis* framework imperfect); *supra* notes 105–109 and accompanying text.

121. *See infra* notes 127–134 and accompanying text.

122. *See infra* notes 135–146 and accompanying text.

123. *See infra* notes 147–164 and accompanying text.

124. *See infra* notes 165–171 and accompanying text.

tions the Supreme Court's and the Tenth Circuit's notion that actual notice standards do not apply to situations involving official policy.[125] Finally, Section F argues that the Tenth Circuit's opinion is not inconsistent with the language or purpose of Title IX or with Supreme Court precedent.[126]

A. *How Does* Simpson *Differ from Other Title IX Cases?*

As the district court emphasized, it could not find the University of Colorado liable under the actual notice and deliberate indifference standards established in *Gebser* and *Davis* because the plaintiffs could not prove that the University had actual notice of the harassment.[127] The lower court's decision illustrates how the facts of the *Simpson* case differ uniquely from those in typical Title IX sexual harassment cases. Title IX cases typically involve an identified harasser and an identified victim who remain constant throughout the period of harassment.[128] However, the facts in *Simpson* show that the parties involved had no contact other than the assaults that occurred on December 7, 2001.[129] Therefore, the University could not possibly have had notice of this particular harassment prior to its occurrence. The plaintiffs attempted to present studies showing that male athletes are more likely to commit sexual assaults,[130] but this propensity could not reasonably be imputed to all Colorado football players.[131] Nonetheless, the University's continued failure to supervise a program known to create an environment where sexual exploitation and assault were likely to occur seems contrary to Title IX's purposes.[132]

The Tenth Circuit's opinion, by focusing on the recruiting program itself, overcomes the high notice standard required by Supreme Court precedent. The Court's statement in *Gebser* that the actual notice requirement applies only to "cases . . . that do not involve official policy

125. *See infra* notes 172–186 and accompanying text.

126. *See infra* notes 187–197 and accompanying text.

127. Simpson v. Univ. of Colo., 372 F. Supp. 2d 1229, 1242 (D. Colo. 2005), *rev'd sub nom.* Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170 (10th Cir. 2007).

128. *See, e.g.*, Davis *ex rel.* LaShonda D. v. Monroe County Bd. of Educ., 526 U.S 629 (1999); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998); Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992); Murrell v. Sch. Dist. No. 1, Denver, 186 F.3d 1238 (10th Cir. 1999).

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

130. In its amicus brief, the Women Sports Foundation cited numerous articles noting that male student athletes were "more prone to commit sexual assault than other male students." *Id.* at 1181.

131. Brady, *supra* note 1.

132. Congress enacted Title IX to prevent federal resources from being used "to support discriminatory practices." Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979).

of the recipient entity" was especially useful.[133] Focusing on this language from *Gebser*, the Tenth Circuit opened up a new realm of liability that had yet to be clearly defined.[134]

B. Is the Comparison of Title IX to § 1983 Municipal Liability Proper?

The Supreme Court first addressed the idea that a deficient policy may subject a recipient of federal funding to statutory liability in *Monell v. Department of Social Services*.[135] In that case, the Court found that a funding recipient may actually "cause" a violation of constitutional rights through its policy or custom.[136] When later articulating the Title IX standard for deliberate indifference, the Supreme Court borrowed from its § 1983 precedent of municipal liability claims.[137] In *Simpson*, the Tenth Circuit also compared § 1983 claims of municipal liability with Title IX sexual harassment claims,[138] but the Tenth Circuit's opinion took its analysis further than both *Davis* and *Gebser*. This comparison is appropriate considering the goals of both pieces of legislation.

Initially, Title IX and § 1983[139] were distinct in that Title IX created substantive rights—but no private right of action—for students attending educational institutions receiving federal funding, while § 1983 provided a means to redress a state actor's deprivation of fed-

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

134. *See* William A. Kaplin, *A Typology and Critique of Title IX Sexual Harassment Law After* Gebser *and* Davis, 26 J.C. & U.L. 615, 632 (2000) ("If a complaint were to allege harassment based on the institution's official policy . . . apparently some liability standard other than *Gebser-Davis* would apply."); Brian A. Snow, *The Problem of Identifying Title IX Liability*, 154 EDUC. L. REP. 1, 16–17 (2001) (finding the Court's reference to official policy in *Gebser* "curious" and recognizing that the Court did not determine whether or how a school might be held liable for claims involving official policy).

135. 436 U.S. 658 (1978) (involving a § 1983 claim).

136. *Id.* at 694.

137. *See Gebser*, 524 U.S. at 290–91. The Court found "comparable considerations" between Title IX and § 1983 claims, both of which involve a recipient of federal funding that refuses to remedy violations of federal rights. *Id.*

138. Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170, 1177 (10th Cir. 2007).

139. 42 U.S.C. § 1983 reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (2000).

erally protected rights.[140] However, the Court eventually implied a private right of action under Title IX, making the comparison to § 1983 more tenable.[141] Just as Congress intended to provide remedies for violations of federal rights falling under the Equal Protection Clause in § 1983, courts have interpreted Title IX as a remedial scheme to establish gender equality in educational institutions.[142] In fact, many courts are divided on whether Title IX and § 1983 claims preempt each other because of their similarity.[143] In light of this similarity, *Gebser*'s "comparable considerations" to § 1983 claims and the Tenth Circuit's extension of these comparisons are judicially sound.

In particular, the Supreme Court and the Tenth Circuit compared Title IX to § 1983 claims involving municipal liability. A municipality and an educational institution—both state actors because they receive federal funding[144]—may be liable when their official decisions, policies, or customs result in discrimination.[145] Like § 1983, Title IX liability is not based on the theory of respondeat superior, and a court will hold an educational institution liable only for its own actions or official policy.[146]

C. What Constitutes an Official Policy or Custom?

The language of Title IX is unhelpful in defining what constitutes an official policy.[147] Clearly, disparate allocation of funding and discriminatory eligibility guidelines are policies covered under Title IX, be-

140. *See generally* Debora A. Hoehne, *Assessing the Compatibility of Title IX and § 1983: A Post-*Abrams *Framework for Preemption*, 74 FORDHAM L. REV. 3189, 3193–203 (2006).

141. *Gebser*, 524 U.S. at 283–84 (citing Cannon v. Univ. of Chi., 441 U.S. 677, 717 (1979)).

142. Melanie Hochberg, Note, *Protecting Students Against Peer Sexual Harassment: Congress's Constitutional Powers to Pass Title IX*, 74 N.Y.U. L. REV. 235, 275 (1999) ("Even if Title IX reaches beyond the protection granted by the Equal Protection Clause, it is consistent with the Court's constitutional commitments, namely establishing gender equality, and within Congress's Fourteenth Amendment power.").

143. *See generally* Hoehne, *supra* note 140.

144. Liability under Title IX is based on a "contract" between the government and the school receiving federal funds; by accepting funding, the school promises not to discriminate. *See Gebser*, 524 U.S. at 286–87.

145. An educational institution only faces liability under Title IX for its "own official decision[s]" and not "its employees' independent actions." *See Gebser*, 524 U.S. at 291. Similarly, "it 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 under § 1983." Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170, 1178 (10th Cir. 2007) (quoting Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978)).

146. *Simpson*, 500 F.3d at 1175.

147. "[T]he term 'program or activity' and 'program' mean *all of the operations* of . . . a college, university, or other postsecondary institution, or a public system of higher education . . . ." 20 U.S.C. § 1687(2)(A) (2000) (emphasis added).

cause the school sanctions and exercises control over these activities.[148] Recruiting practices, however, present a more difficult issue. Though a university may generally authorize an athletic program and its legitimate goals,[149] it is unreasonable to assume that the university thereby sanctions any abuse that may occur within the program. Therefore, such abuse seemingly cannot be considered the official policy of the university. According to the Office of Civil Rights, however, the lack of a sexual harassment policy within an educational institution's program is a de facto policy.[150] Essentially, by not acting to prevent the harassment, the school gives tacit approval to such harassment.[151] The Tenth Circuit followed this approach in determining that CU had a policy, though not a deliberate one, of allowing sexual harassment to occur.[152]

To understand the Tenth Circuit's finding that CU had a policy of ignoring the risk of sexual harassment, it is necessary to understand the court's reliance on *City of Canton v. Harris*,[153] which was cited in both *Davis* and *Gebser*.[154] In *Harris*, the Supreme Court found that a municipality could be liable under § 1983 for the constitutional violations of its agents if the violations resulted from inadequate training, to which the municipality remained deliberately indifferent.[155] The primary inquiry is whether there is a direct causal link between the failure to adequately train and the violation.[156] Allegations that the municipality's agent committed a violation concerning a matter for which the municipality trained its officials are not sufficient.[157] In-

148. *See generally* 34 C.F.R. § 106.41 (2007).

149. Heckman, *supra* note 26, at 218 ("[P]resumably the conduct of the athletics department involves an official policy of the recipient of federal funds[.]").

150. SEXUAL HARASSMENT GUIDANCE, *supra* note 32, at 19 ("Schools are required by the Title IX regulations to adopt and publish a policy against sex discrimination . . . . Accordingly, regardless of whether harassment occurred, a school violates this requirement of the Title IX regulations if it does not have those procedures and policy in place.").

151. *Id.*; *see also* Bd. of the County Comm'rs v. Brown, 520 U.S. 397, 419 (1997) (Souter, J., dissenting) ("Deliberate indifference is thus treated . . . as tantamount to intent, so that inaction by a policymaker deliberately indifferent to a substantial risk of harm is equivalent to the intentional action that setting policy presupposes.").

152. Surprisingly, the Tenth Circuit's opinion is the first to conclude that harassment may have occurred because of an official school policy. *See* Heckman, *supra* note 29, at 488.

153. 489 U.S. 378 (1989).

154. Davis *ex rel.* LaShonda D. v. Monroe County Bd. of Educ., 526 U.S. 629, 642–43 (1999); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 291 (1998).

155. *Harris*, 489 U.S. at 388. The facts of *Harris* alleged that officers were not given training to determine when to seek medical care for an injured detainee, a situation that was almost inevitably faced by detention officers. *Id.* at 382.

156. *Id.* at 385. "[F]or liability to attach in this circumstance the identified deficiency in [the] training program must be closely related to the ultimate injury." *Id.* at 391.

157. *Id.* at 389.

stead, a § 1983 plaintiff must show that the training was obviously inadequate in light of a known risk that accompanies such a failure to train.[158] The Court stressed that liability in these situations rested on a clear showing of deliberate indifference; otherwise, every person alleging a violation due to inadequate training could point to something that the municipality could have done to avoid the incident.[159]

Recognizing that the Supreme Court has found municipal liability under § 1983 to be a comparable framework for analyzing Title IX cases, the Tenth Circuit correctly applied *Harris* to the facts in *Simpson*. By substituting the educational institution for the municipality, it becomes clear how inadequate training within an educational institution program may lead to Title IX liability. Instead of police officers, the University's agents are the player-hosts in charge of showing recruits a good time.[160] Though it may seem that the University did not control player-hosts and recruits in the same way that a municipality controls police officers, the player-hosts in *Simpson* were, in fact, operating as University representatives because the University delegated supervisory responsibilities to these individuals.[161]

As the Court made clear in *Gebser* and *Brown*, an educational institution cannot be held liable for the actions of its agents under a theory of respondeat superior.[162] The Tenth Circuit, however, found that these player-host agents could expose the University to Title IX liability if a court determined that it was negligent in training or supervising its agents regarding the implementation of the University's official recruiting policy.[163]

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158. *Id.* at 390 (recognizing that "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers . . . can reasonably be said to have been deliberately indifferent to the need").

159. *Id.* at 392. This would result in "de facto respondeat superior liability," which the Court has rejected in previous decisions. *Id.* (citing Monell v. Dep't of Soc. Servs., 436 U.S. 658, 693–94 (1978)).

160. *See* Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170, 1173 (10th Cir. 2007).

161. The coaching staff assigned hosts to recruits during their visits based on common interest. INDEP. INVESTIGATIVE COMM'N, FINAL REPORT TO THE UNIVERSITY OF COLORADO BOARD OF REGENTS 9 (2004), *available at* http://web.dailycamera.com/pdf/cu/iic_final_report.pdf. The Code of Federal Regulations addresses Title IX liability based on the actions of agents by stating that Title IX does not shelter educational institutions from liability if the institution delegates the provision of student benefits and services to third parties who engage in gender discrimination in administering what is, in effect, the institution's program. *See* 34 C.F.R. § 106.51(a)(3) (2007).

162. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 285 (1998); Bd. of the County Comm'rs v. Brown, 520 U.S. 397, 403 (1997).

163. *Simpson*, 500 F.3d at 1184–85. An examination of general agency principles is also helpful: "A principal who conducts an activity through an agent is subject to liability for harm to a third party caused by the agent's conduct if the harm was caused by the principal's negligence in selecting, training, retaining, supervising, or otherwise controlling the agent." RESTATEMENT (THIRD) OF AGENCY § 7.05(1) (2006).

Under the Tenth Circuit's analysis, the focus shifts away from questions as to whether CU had actual notice of the harassment. Instead, the inquiry hinges on whether the University had notice that its training or supervision was inadequate in light of a known risk that was substantially certain to materialize if not addressed. Under those circumstances, the challenge of establishing a Title IX violation is more surmountable.[164]

D. Application to the Simpson *Case*

The *Simpson* facts indicate that the University first became aware of sexual misconduct within its recruiting program when a high school student alleged that recruits sexually assaulted her at a 1997 off-campus party.[165] After this incident, two Boulder County district attorneys met with University officials to express their concern that women were being made available to recruits for sex.[166] During this meeting, the district attorneys also suggested that the University implement a zero-tolerance policy regarding alcohol use and sex during recruiting visits.[167] A subsequent investigation revealed that the changes made after this meeting were minor and the coaching staff still did not provide specific instructions or training to player-hosts regarding recruit supervision.[168]

The totality of these incidents suggests a strong case that the University knew of the risk of sexual assault during recruiting visits.[169] This knowledge should have been sufficient to alert University officials to the necessity of providing better training and guidelines to its player-hosts in order to prevent the risk of harassment from materializing.[170] The Tenth Circuit correctly held that a jury could infer that the risk of sexual assault and the need for more or different training was so obvious, and the University's response so inadequate, that the University was deliberately indifferent.[171]

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164. Diane Heckman, *Tracing the History of Peer Sexual Harassment in Title IX Cases*, 183 EDUC. L. REP. 1, 28 (2004) (stating that, traditionally, "educational institutions are well-insulated from the imposition of Title IX liability for peer sexual harassment occurring within their parameters").

165. *Simpson*, 500 F.3d at 1181; *see also* INDEP. INVESTIGATIVE COMM'N, *supra* note 161, at 17.

166. *Simpson*, 500 F.3d at 1181–82.

167. INDEP. INVESTIGATIVE COMM'N, *supra* note 161, at 18. An additional incident involved a previous recruit who approached Coach Barnett about the improprieties he had seen while on a recruiting visit. *Simpson*, 500 F.3d at 1183.

168. INDEP. INVESTIGATIVE COMM'N, *supra* note 161, at 19.

169. *Simpson*, 500 F.3d at 1184–85.

170. *Id.*

171. *See id.*

Regardless of how a jury would have ultimately decided the sufficiency of the University's response, *Simpson* presents a new approach to Title IX liability. However, the Tenth Circuit's approach does not stray far from the Supreme Court's previous actual notice and deliberate indifference standards.

E. A New Standard of Liability?

In articulating its modified approach to Title IX liability, the Tenth Circuit pointed out that actual notice and insufficient response requirements do not apply to cases involving official policies of educational institutions.[172] The Tenth Circuit's supposedly new standard for Title IX liability in situations involving official policies requires that the need for training is obvious, and that the school is deliberately indifferent to this need.[173] These requirements, however, are not unique to liability under an official-policy framework.

The Tenth Circuit's requirement that the need for additional training and supervision be obvious is analogous to *Gebser*'s requirement that the school have actual knowledge of the harassment.[174] If a need for additional or improved training is obvious to an educational institution, then the institution presumably has actual notice of the need, as opposed to constructive notice.[175] It follows that the school has actual notice of the substantial risk associated with a failure to provide such training as well. Though the application is different, actual notice is still required under the Tenth Circuit's approach.[176] In other words, the traditional Title IX analysis requires actual notice of ongoing harassment, whereas the new Tenth Circuit analysis requires actual knowledge of the risk of harassment created by an official policy. The other factors in proving a Title IX sexual harassment claim remain the same: the school must receive federal funding, the school must be deliberately indifferent to the need for additional or better

172. *Id.* at 1176.

173. *Id.* at 1184–85.

174. "Actual notice" is defined as "[n]otice given directly to, or received personally by, a party." BLACK'S LAW DICTIONARY 1090 (8th ed. 2004). "Obvious" is defined as "easily perceived or understood; clear." CONCISE OXFORD ENGLISH DICTIONARY 983 (10th ed. 2002).

175. "Constructive notice" is defined as "[n]otice arising by presumption of law from the existence of facts and circumstances that a party had a duty to take notice of." BLACK'S LAW DICTIONARY, *supra* note 174, at 1090. The Court rejected liability based on constructive notice in *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 290 (1998).

176. *See* Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170, 1178 (10th Cir. 2007) ("[T]he § 1983 municipal-liability cases reveal how the standard changes when the claim 'involve[s] official policy . . . although the underlying principle . . . remains the same." (internal citations omitted)).

training, and the risk involved must be so severe as to deny an educational benefit.[177]

Previously, an educational institution faced liability only if it was deliberately indifferent to sexual harassment involving two known parties of which it had actual knowledge.[178] This approach left an accountability gap for situations in which the risk of harassment was obvious to the school, but the identities of the harasser and victim could not be determined in advance. The Tenth Circuit's approach fills this gap by permitting liability when a university has actual notice of the severe risk of harassment that could be avoided by adequate training, but remains deliberately indifferent in preventing the risk from materializing.[179]

Simpson is not the first case to examine allegations that an educational institution was aware of a substantial risk of sexual harassment instead of the actual occurrence of such harassment.[180] In *Delgado v. Stegall*, Judge Posner discussed the notice and deliberate indifference standards by comparing the two to a theory of recklessness.[181] While Judge Posner recognized that Supreme Court precedent requires a plaintiff in a Title IX damages suit to prove actual knowledge of misconduct and not just actual knowledge of the risk of misconduct,[182] he expressed his view of the appropriate standard for Title IX liability:

> When the cases speak of a "known" or "obvious" risk that makes a failure to take steps against it reckless they have in mind risks so great they that are almost certain to materialize if nothing is done .... [I]t is only in such cases that recklessness regarding the consequences if the risk materializes merges with intention to bring about the consequences (more precisely, to allow the consequences to occur *though they could be readily prevented from occurring*).[183]

Therefore, according to Judge Posner, an educational institution should face liability when it recklessly ignores a "known" or "obvi-

177. *See supra* notes 69–74 and accompanying text.

178. *See, e.g.*, Davis *ex rel.* LaShonda D. v. Monroe County Bd. of Educ., 526 U.S 629 (1999); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998); Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992); Murrell v. Sch. Dist. No. 1, Denver, 186 F.3d 1238 (10th Cir. 1999).

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

180. *See, e.g.*, Delgado v. Stegall, 367 F.3d 668 (7th Cir. 2004) (discussing liability in situations involving known and obvious risks); Johnson v. Galen Health Insts., Inc., 267 F. Supp. 2d 679, 688 (W.D. Ky. 2003) (finding that "the 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").

181. 367 F.3d at 671 ("Deliberate indifference means shutting one's eyes to a risk one knows about but would prefer to ignore. It thus corresponds to the criminal definition of recklessness, which the law treats as the equivalent of intentionality." (internal citations omitted)).

182. *Id.* at 672.

183. *Id.* (emphasis added) (internal citations omitted).

ous" risk when the means to prevent the risk from materializing are available.[184] Judge Posner's explanation is similar to the Tenth Circuit's analysis.[185]

Under the Tenth Circuit's approach, courts may find a recipient school liable for Title IX sexual harassment claims in two scenarios: when the harassment has already occurred and when a substantial certainty exists that the harassment will occur. All previous requirements for Title IX liability remain intact.[186]

F. Does Simpson *Comport with the Language and Intent of Title IX?*

Because the Tenth Circuit's opinion appears to expose educational institutions to liability under a new standard—when the violation occurs as the result of official policy—it is important to determine if this interpretation is consistent with the language and purpose of Title IX. The Tenth Circuit's approach fully accomplishes the goals of Title IX by filling the accountability gap that existed under prior precedent, which imposed liability only after the fact.[187] Nonetheless, the potential breadth of the Tenth Circuit's approach must be tempered by the confines of Title IX liability set forth in previous Supreme Court decisions.

In *Davis*, the Court stressed that Title IX liability must be circumscribed to situations in which the school has notice of its potential liability.[188] Perhaps the narrow constraints of Title IX liability were best defined in the district court decision that the Tenth Circuit overruled in *Simpson*: "The more a risk becomes generalized, the more that risk is likely to fall outside of the narrowly circumscribed scope of Title IX liability. In other words, the risk at issue must be well-defined and focused to support a claim of Title IX liability."[189] Additionally, the Supreme Court has repeatedly stated that an educational institution may be liable for damages under Title IX for only its own misconduct,[190] which *Davis* defines as liability for remaining deliber-

184. *Id.*

185. The Tenth Circuit's focus on the obvious need for training implies that an obvious risk of harassment also exists.

186. *See supra* notes 69–74 and accompanying text.

187. *Gebser* and *Davis* outlined a reactive framework to Title IX liability—responding effectively to known instances of harassment—whereas *Simpson*'s approach is more proactive—preventing imminent risks of harassment through anticipatory measures.

188. Davis *ex rel.* LaShonda D. v. Monroe County Bd. of Educ., 526 U.S. 629, 641 (1999).

189. Simpson v. Univ. of Colo., 372 F. Supp. 2d 1229, 1236 (D. Colo. 2005) (applying the *Davis* analysis), *rev'd sub nom.* Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170 (10th Cir. 2007).

190. *Davis*, 526 U.S. at 640.

ately indifferent to the misconduct of others and not liability for the misconduct itself.[191] Consequently, the Supreme Court found that liability rests on the educational institution's degree of control over the harasser and the environment in which the harassment occurs.[192]

In light of the above precepts, the Tenth Circuit's opinion does not conflict with precedent. First, when an institution implements a policy or program, it cannot reasonably claim that it has no notice of the liability it will face if the program or policy proximately causes a Title IX violation. Second, the *Simpson* analysis does not unconditionally hold a school liable for every act of those over whom it exercises control; a school will face liability only for its own failure to properly supervise or train individuals under its control when the need to do so is obvious.[193] Therefore, the scope of Title IX remains tightly focused on situations in which the risk of harassment is clear and the means to prevent it are available. Finally, an educational institution will face liability only when it exercises a substantial degree of control over the harassment and the environment in which it occurs. Though the institution may not directly control the harasser, the institution does potentially control the circumstances that could lead to harassment—for example, an environment in which those implementing the policy have received obviously inadequate training and supervision.[194]

A careless interpretation of the Tenth Circuit's opinion may lead to the conclusion that educational institutions could be exposed to liability whenever they have initiated a program or enacted a policy. While the *Simpson* decision finds that Title IX liability may attach to violations occurring as a result of official policy, the actual notice and deliberate indifference standards remain intact as safeguards.[195] A plaintiff must show not only that the school had actual notice of the inadequate training or supervision, but also that the school's response to this inadequacy was deliberately indifferent.[196] These requirements protect a school from liability in situations where the plaintiff claims that the school could have done something to prevent the harassment

191. *Id.* at 646–47.

192. *Id.* at 646.

193. Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170, 1178 (10th Cir. 2007); *see also supra* notes 110–112 and accompanying text.

194. *See Simpson*, 500 F.3d at 1184–85.

195. *See supra* notes 174–179 and accompanying text.

196. *Simpson*, 500 F.3d at 1184–85. A court will not find a school to be deliberately indifferent unless the response to the risk of harassment, or lack thereof, is "clearly unreasonable in light of the known circumstances." Davis *ex rel.* LaShonda D. v. Monroe County Bd. of Educ., 526 U.S. 629, 648 (1999).

from occurring.[197] Instead, Title IX liability will attach only when known incidents or circumstances placed the school on notice of the fact that the risk of harassment is substantially likely to materialize if the school does not act.

V. IMPACT

The Tenth Circuit's opinion will likely have a profound impact on the way universities manage their athletic departments and recruitment programs. Yet the decision might also affect how educational institutions that receive federal funding implement and monitor other programs or policies outside of athletics. School officials worry that the Tenth Circuit's decision exposes their institutions "to liability based upon the adequacy of their training, not whether they failed to respond to known harassment."[198] While this potential does exist, these fears are likely unfounded because the notice and indifference standards still impose a high standard of liability. In fact, liability standards are no different than they were under the traditional framework.[199] *Simpson*'s only distinction is that it provides an articulated liability standard for situations in which an institution's official policy created or increased the likelihood of harassment.

Section A examines *Simpson*'s effect on university athletic and recruitment practices.[200] Section B discusses how courts that broadly interpret *Simpson* could hold schools liable for failing to implement policies that make sexual harassment less likely.[201] Finally, Section C considers how the conservative majority of today's Supreme Court might view the Tenth Circuit's new approach to Title IX liability.[202]

A. *How Will* Simpson *Affect University Athletic Recruitment Practices?*

The *Simpson* ruling will have the most direct effect on the way many university athletic departments operate their recruitment programs. But to fully understand *Simpson*'s impact in this area, one must understand the pervasive use of sex and alcohol in college recruitment. The practices described in the *Simpson* decision are so

197. *See* City of Canton v. Harris, 489 U.S. 378, 392 (1989) (rejecting a lesser standard of liability). One can easily imagine situations in which plaintiffs could allege that additional teacher supervision or training would have prevented the harassment, though the need prior to the harassment was not obvious at the time.

198. Anas, *supra* note 12.

199. *See supra* notes 174–179 and accompanying text.

200. *See infra* notes 203–213 and accompanying text.

201. *See infra* notes 214–229 and accompanying text.

202. *See infra* notes 230–236 and accompanying text.

widespread that even Coach Barnett recognized that sex in recruiting is a part of football culture that would be almost impossible to eliminate entirely.[203] Nonetheless, the Tenth Circuit's landmark ruling will likely push universities nationwide to seek a more active role in assuring that these activities do not continue on their campuses.

The "good time" policy promoted by the coaching staff in *Simpson* was in no way unique to the University of Colorado. In fact, many consider the use of sex in college recruitment a part of football culture that has become a form of institutionalized sexism hardly talked about, but impossible to ignore.[204] College recruiting is highly competitive, and in order to recruit "blue-chip high school athletes," universities often ignore the questionable activities that occur after campus tours and dinners with coaching staff.[205] Such practices have existed for over fifty years, and hostess groups such as the "Gator Guides," "Georgia Girls," and "Bama Belles" are now infamous.[206] Though universities have made highly public changes to recruitment programs in recent years, the previous culture remains, leading many recruits to expect opportunities for sex and partying when they arrive on campus.[207]

The Tenth Circuit's ruling undoubtedly sent shockwaves through athletic programs nationwide.[208] The appellate decision likely encouraged universities to reevaluate their own recruitment procedures, regardless of their involvement in similar practices. After *Simpson*, even universities that had no previous knowledge of sexual misconduct would be wise to implement departmental changes and guidelines concerning acceptable behavior during campus visits. Future courts might even consider the highly publicized decision and recent exposure of related misconduct at other universities as sufficient no-

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203. *See* Greg Avery, *Sex, Parties and Alcohol Ingrained in Recruiting Culture*, DAILY CAMERA, Feb. 1, 2004, at 1C.

204. Murray Sperber, *Sex and Booze: Two Steps to Winning Football*, CHRON. HIGHER EDUC., Mar. 12, 2004, at B24.

205. *See* Avery, *supra* note 203.

206. *Id.* Recently, however, these groups have expanded to include men due to the public perception that they existed for purposes other than showing recruits around campus. *See* David Epstein, *Crushed Spirit*, INSIDE HIGHER ED, Sept. 22, 2005, http://www.insidehighered.com/news/2005/09/22/spirit.

207. Avery, *supra* note 203; *see also* Joe Watson, *Risky Behavior Not Policed in ASU Football Recruiting*, ARIZ. ST. U. PRESS, Dec. 9, 2002, http://asuwebdevilarchive.asu.edu/issues/2003/02/26/specialreports/339775 (last visited Nov. 1, 2008) (quoting Notre Dame's assistant athletic director that "when you present a group of attractive females to a high school football player, that's the impression [an offering of sex] you're giving them").

208. *See* Brady, *supra* note 1.

tice that a need for training and supervision is obvious in all similar recruitment programs.[209]

Less than six months after the 2001 assaults, CU implemented numerous changes to its program.[210] It now notifies visiting athletes and their parents, in writing, of behavior expectations, establishes strict curfews with reporting mechanisms, increases adult supervision, uses well-trained upperclassmen as player-hosts, and provides well-structured itineraries for recruitment visits.[211] Other universities will likely make similar changes, in addition to ensuring that all athletes and coaches are properly educated and trained regarding sexual misconduct. Though these changes will not provide a defense for a university that remains deliberately indifferent to reported acts of harassment, such changes will provide comfort to universities that face charges of a Title IX violation.[212]

For many university athletic departments, *Simpson* is a wake-up call. The decision signals that athletic programs can no longer turn a blind eye to the issue and must instead implement real, substantial changes and guidelines ensuring that these practices do not continue. At the very least, the Tenth Circuit's decision has sent a message to educational institutions nationwide that they must hold their athletic departments to the same standards as their academic departments.[213]

B. How Will Simpson *Affect Educational Institutions' Views of Title IX Liability in Other Areas?*

The *Simpson* decision, in its most literal interpretation, provides an efficient framework for addressing Title IX liability when schools fail to establish reasonable guidelines and training for student-run programs.[214] However, the language of the Tenth Circuit's opinion could easily be interpreted to find Title IX liability in instances where "the need for more or different training [of the student population was] so obvious, and the inadequacy so likely to result in [Title IX violations], that [school officials could] reasonably be said to have been deliber-

209. In its opinion, the Tenth Circuit also considered articles addressing sexual misconduct in recruiting as a national phenomenon, though the court focused more heavily on instances specific to CU. Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170, 1180–81, 1183 (10th Cir. 2007).

210. INDEP. INVESTIGATIVE COMM'N, *supra* note 161, at 21.

211. *Id.*

212. Spies, *supra* note 47, at 459.

213. Peter Schmidt, *U. of Colorado Ruling May Alter Enforcement of Title IX*, CHRON. HIGHER EDUC., Sept. 21, 2007, at A29.

214. Recruiting programs where students act as player-hosts and university ambassadors are examples. *See Simpson*, 500 F.3d at 1180; *see also* Morse v. Regents of the Univ. of Colo., 154 F.3d 1124 (10th Cir. 1998) (involving Title IX liability for student leaders' actions within an ROTC program).

ately indifferent to the need."[215] This broader interpretation of *Simpson* would hold schools liable whenever an official policy—implemented by faculty or students—is obviously deficient and likely to result in sexual harassment, if not modified.

Critics of the opinion correctly point out that liability under these circumstances would be an expansion of Title IX.[216] Previously, educational institutions could avoid Title IX liability by claiming that, despite the likelihood that their obviously deficient policies and programs facilitated or caused the misconduct, they had no knowledge of the alleged harassment prior to its occurrence.[217] Under this broader interpretation, however, educational institutions could face liability for remaining deliberately indifferent to known instances of harassment, as well as for remaining deliberately indifferent to obviously flawed programs and policies.

The Tenth Circuit's approach to Title IX liability could essentially create another category of harassment. Previously, Title IX sexual harassment cases were divided into two categories: quid pro quo and hostile environment—also known as teacher-on-student and peer-on-peer harassment.[218] Under a broader *Simpson* framework, however, a new "class-on-class" category is created. Though similar to hostile environment, class-on-class differs from the other categories because it does not involve identified victims or harassers. Instead, it involves identified classes of victim and harasser. In *Simpson*, for example, the identified class of harassers was certain football players and recruits and the identified class of victims was the female student population, in particular, female hostesses and ambassadors.[219]

If courts were to adopt this new, broader classification, schools receiving federal funding would be required to respond to risks that have yet to materialize.[220] Under this framework, schools would be responsible for not adequately responding to imminent risks of student misconduct, maybe even when previous incidents of harassment have not provided notice. On its face, this approach would require

215. *Simpson*, 500 F.3d at 1184–85 (quoting City of Canton v. Harris, 489 U.S. 378, 390 (1989)).

216. Many critics fear that *Simpson* is inimical to educational interests, because it opens the floodgates to liability that Congress never intended. Schmidt, *supra* note 213.

217. *See, e.g.*, Simpson v. Univ. of Colo., 372 F. Supp. 2d 1229, 1245 (D. Colo. 2005), *rev'd sub nom.* Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170 (10th Cir. 2007).

218. *See supra* notes 34–36 and accompanying text.

219. At the very least, Boulder County district attorneys informed University officials that female students were being made available to recruits for sex. *Simpson*, 500 F.3d at 1181–82.

220. In particular, schools would be required to respond when the need for policy changes was "so obvious, and the inadequacy so likely to result in [Title IX violations] . . . ." *Id.* at 1184 (alteration in original).

schools to take an unprecedented, more aggressive approach to all forms of past, present, and future harassment.

Regardless of the implications of a broad interpretation of *Simpson*, the consequences would be neither unreasonable nor unworkable. Few could argue that educational institutions should remain shielded from liability when they refuse to amend policies that make student abuse more likely to occur.[221] The language of Title IX creates an affirmative duty for schools to implement policies that assure students are not subjected to discrimination on the basis of sex.[222] The *Simpson* approach, however, would not likely open the floodgates of Title IX liability, because the same safeguards existing under previous precedent remain.

As stated in Section IV, the need for additional training or supervision must reach a level of obviousness that is akin to actual notice.[223] Furthermore, an institution's response to the need for training will not be questioned, provided the response is not "clearly unreasonable in light of the known circumstances."[224] Blatantly ignoring an obvious need for policy or program changes would and should expose schools to liability, but schools can protect themselves by taking action that is appropriate for the situation.[225] The most difficult inquiry, however, is determining when policy or program deficiencies have become obvious.

Most commonly, the need for additional measures becomes obvious when an educational institution has knowledge of previous incidents within its programs.[226] For example, a school may sponsor academic clubs that travel to other schools for competition. Initially, there is no obvious need to train or provide students with additional guidelines regarding appropriate physical contact during these trips. However, after numerous instances of misconduct reportedly occur during these excursions, the school confronts an apparent need to increase or revise student guidelines and supervision. Under *Simpson*, failure to implement reasonable changes in light of this obvious need may ex-

221. This includes liability for failing to implement a policy, which courts will consider a de facto policy. *See supra* notes 150–151 and accompanying text.

222. *See* 20 U.S.C. § 1681(a) (2000).

223. *See supra* notes 172–186 and accompanying text.

224. Davis *ex rel.* LaShonda D. v. Monroe County Bd. of Educ., 526 U.S. 629, 648 (1999).

225. Courts must give schools broad discretion in these matters to prevent Monday-morning quarterbacking by pointing out measures the school could have taken.

226. *See* Bd. of the County Comm'rs v. Brown, 520 U.S. 397, 407 (1997) ("If a program does not prevent constitutional violations . . . decisionmakers may eventually be put on notice that a new program is called for.").

pose the school to Title IX liability if and when the risk of harassment materializes.[227]

On the other hand, the need for additional measures can also be obvious because of the nature of the program. [228] For example, in co-ed university dormitories, there need be no previous harassment on record for a school to recognize that supervision and student guidelines are necessary to prevent sexual misconduct from occurring within university-sponsored housing. It seems logical that a university would establish rules and supervision to prevent the obvious risks associated with young men and women cohabiting for the first time in their lives. However, in the event that the university did not take reasonable preventative measures and sexual harassment did occur, a broader interpretation of *Simpson* might hold the university liable for failing to take minimal steps to thwart the inevitable likelihood of sexual misconduct.

Under this expanded interpretation of *Simpson*, educational institutions must remain cognizant of and cure obvious deficiencies in their programs and policies. Though no court before *Simpson* has articulated this standard, it is not novel or unreasonable to expect schools to recognize and remedy programs and policies that endanger the people they are designed to serve.[229] However, educational institutions will face expanded Title IX liability only in situations of egregious disregard, because institutions enjoy the same safeguards that existed before *Simpson*. Therefore, exposing schools to potential Title IX liability under a broad *Simpson* interpretation may better effectuate the goals of Title IX. This interpretation would give schools the leeway to implement the policies that they deem most effective, while at the same time forcing them to take action before harassment occurs rather than merely reacting after the fact.

C. How Would the Current Supreme Court Evaluate Title IX Sexual Harassment Resulting from a School's Official Policy?

In *Simpson*, the Tenth Circuit clearly stated that existing Title IX precedent provided an imperfect framework for analyzing Title IX sexual harassment cases involving official school policy.[230] The opinion in *Simpson* raises the question of how the current Supreme Court

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

228. *See id.* at 1178–79 (citing City of Canton v. Harris, 489 U.S. 378, 390 n.10 (1989)).

229. As one commentator noted, "If [schools] keep having red flags come up and they don't do anything about it . . . it is not a stretch for them to be held liable." Schmidt, *supra* note 213.

230. *Simpson*, 500 F.3d at 1174.

majority would view the Tenth Circuit's approach. However, to understand fully how today's Court might approach Title IX liability in this new context, an examination of the dissent in *Davis* is useful because the dissenting Justices strongly opposed liability in situations of peer-on-peer harassment.[231] The conservative Justices who wrote and joined the dissent are now part of the Court's majority.[232] An analysis of their dissenting opinion might provide interesting insights into how these Justices would rule if presented with this issue.

In the *Davis* dissent, Justice Kennedy contended that sexual harassment occurring between peers should not expose a school to Title IX liability because it does not occur under a school program.[233] However, this argument appears tenuous in situations where the institution's policy or program creates or ignores the likelihood of misconduct. Under these circumstances, the harassment clearly occurs under the school's program, over which the school exercises absolute control.[234] Additionally, the dissenting Justices in *Davis* relied heavily on the fact that educational institutions, in particular public schools and universities, do not control students in the same way that they control teachers or others with whom they contract.[235] But in situations like *Simpson*, where the university chooses the students to carry out its program, the educational institution does exercise a level of control over students' actions. Though schools do not control the independent actions of these individuals outside of the scope of their delegated responsibilities, they do have control over establishing program guidelines and training that attempt to prevent obvious risks from materializing.

Justice Kennedy's focus on an institution's lack of control would likely cause the current conservative majority the most difficulty in confronting the Tenth Circuit's approach. The *Davis* dissenters' concerns about institutional control over the harasser and the environment may be relevant regarding students acting independently, but

231. *See generally* Davis *ex rel.* LaShonda D. v. Monroe County Bd. of Educ., 526 U.S. 629, 676 (1999) (Kennedy, J., dissenting).

232. Justice Kennedy authored the dissenting opinion, which Chief Justice Rehnquist and Justices Scalia and Thomas joined. *Id.* at 632. Due to the passing of Justice Rehnquist and the recent addition of Chief Justice Roberts and Justice Alito, the Court now has a conservative majority.

233. *Id.* at 661–62 (referencing the language of 20 U.S.C. § 1681(a)).

234. *See Simpson*, 500 F.3d at 1178 ("Implementation of an official policy can certainly be a circumstance in which the recipient exercises significant 'control over the harasser and the environment in which the harassment occurs.'" (internal citations omitted)).

235. *Davis*, 526 U.S. at 664 (Kennedy, J., dissenting). With regard to university liability, Justice Kennedy stressed that these institutions "do not exercise custodial and tutelary power over their adult students." *Id.* at 667.

these concerns do not apply to students acting under the official policy or program of the institution.[236] Therefore, Justice Kennedy's concerns are not implicated in the Tenth Circuit's opinion, and it is unclear how the current conservative majority would approach Title IX liability under the *Simpson* framework.

VI. CONCLUSION

Simpson v. University of Colorado Boulder potentially reshapes how courts approach Title IX sexual harassment cases. The Tenth Circuit recognized that not all incidents of harassment fit neatly into situations where the victim and aggressor remain constant throughout. *Simpson* outlined a framework for holding educational institutions liable when their official policies or programs make harassment more likely. In doing so, *Simpson* closed an accountability gap that existed previously, in which schools could turn a blind eye to substantial risks that had yet to materialize.

Simpson specifically focused on situations where students act as agents in carrying out official institutional policy. However, the language of the opinion lends itself to interpretation outside of this principal-agent relationship. A broader interpretation of the decision could lead courts to find liability when a school ignores deficient policies, whether they are carried out by school officials, teachers, or other students.

This expanded liability creates questions about the scope of Title IX and whether holding schools to a higher standard is proper. Closer analysis, however, shows that schools remain shielded by actual notice and deliberate indifference standards and can protect themselves from liability by acting reasonably in situations where the risk of harassment has become obvious. Requiring educational institutions to use their best efforts to prevent harassment, whether it be ongoing or imminent, is exactly what Title IX has required since 1972. Thirty-six years later, *Simpson* is a much needed step in that direction.

*Wes R. McCart**

236. In fact, Justice Kennedy wrote that a natural reading of the statute finds a violation of Title IX only when the discrimination is "authorized by, or in accordance with, the actions, activities, or policies of the grant recipient." *Id.* at 659.

* J.D. Candidate 2009, DePaul University College of Law; B.S. Ed. 2001, University of Georgia. I would like to thank Professor Michael Jacobs and Professor Mark Weber for their insight and guidance. I would also like to thank my brother, Ryan, for his thoughtful evaluation of this Note.