Maryland Law Review

Volume 67 | Issue 3 Article 6

Sexual Harassment in Education and Student Athletics: a Case for Why Title IX Sexual Harassment Jurisprudence Should Develop Independently of Title VII

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Comment

SEXUAL HARASSMENT IN EDUCATION AND STUDENT ATHLETICS: A CASE FOR WHY TITLE IX SEXUAL HARASSMENT JURISPRUDENCE SHOULD DEVELOP INDEPENDENTLY OF TITLE VII

Sexual harassment in education is a serious issue, and, according to students in a recent poll, "routine" on college campuses.[1] In a study conducted in 2005 for the American Association of University Women (AAUW), almost two-thirds of college students said they experienced some form of sexual harassment while in school.[2] While many of the incidents reported involved student-to-student harassment, nearly one-fifth of students said that "faculty and staff often or occasionally sexually harass students."[3] The problem is particularly salient in student athletic programs, where the physical nature of sports, the emphasis on the athletes' bodies, and the close contact between coaches and players provide "unique opportunities for sexual harassment."[4] One relatively recent study performed in Canada found that one in five female athletes are sexually harassed or abused by their coaches.[5]

These figures are especially troubling given the importance of education in nurturing individuals to become full and meaningful participants in society.[6] As Justice Warren noted in *Brown v. Board of Education*:[7]

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1. *See* Susan Kinzie, *Sexual Harassment Routine, College Students in Poll Say*, WASH. POST, Jan. 25, 2006, at A02, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/01/24/AR2006012401540.html (discussing the results of a recently released national online survey conducted by the American Association of University Women).

2. CATHERINE HILL & ELENA SILVA, DRAWING THE LINE: SEXUAL HARASSMENT ON CAMPUS 2 (2005).

3. *Id.* at 20–21.

4. Nancy Hogshead-Makar & Sheldon Elliot Steinbach, *Intercollegiate Athletics' Unique Environments for Sexual Harassment Claims: Balancing the Realities of Athletics with Preventing Potential Claims*, 13 MARQ. SPORTS L. REV. 173, 178–79 (2003).

5. *Id.* at 173.

6. *See* THE RIGHT TO BE EDUCATED 55 (Robert F. Drinan ed., 1968) (stating that the denial of education "is tantamount to denial of human life itself" and that "[t]he right to education is the foundation of all the rights of the person to live as a free and equal member of his community").

7. 347 U.S. 483 (1954).

> [Education] is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.[8]

Sexual harassment threatens the educational mission because of its potentially devastating effects on a student's ability and willingness to learn.[9] Although sexual harassment is perceived differently by different people and can elicit a variety of feelings and responses, some common emotions include embarrassment, anger, fear, loss of confidence, confusion, and disappointment.[10] One female student, when asked about being subject to harassment stated, "'I felt violated and could not focus on my classes. I also felt limited in where I could go on campus.'"[11] One male student stated that sexual harassment "'distract[s] from the working environment and make[s] it harder to concentrate because you become paranoid.'"[12] For students who are athletes, in addition to the emotional suffering it can elicit, sexual harassment can effectively ruin an athletic career.[13] It can harm relationships with teammates and coaches, and, in the case of athletes who choose to leave their programs, limit their ability to participate in other programs under National Collegiate Athletic Association (NCAA) regulations.[14]

Although many people acknowledge the problem of sexual harassment, the term "sexual harassment" eludes a simple definition.[15] This is because of the variety of circumstances in which sexual harass-

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8. *Id.* at 493.

9. *See* Ronna Greff Schneider, *Sexual Harassment and Higher Education*, 65 TEX. L. REV. 525, 540 (1987) (arguing that the academic environment is essential to the quality of the education the student receives and that harassment in that environment diminishes the benefit to the student).

10. HILL & SILVA, *supra* note 2, at 28–29.

11. *Id.* at 27.

12. *Id.*

13. Hogshead-Makar & Steinbach, *supra* note 4, at 173; *see also* Women's Sports Foundation, Sexual Harassment—Sexual Harassment and Sexual Relationships Between Coaches, Other Athletic Personnel and Athletes: The Foundation Position (Oct. 1, 2007), http://www.womenssportsfoundation.org/cgi-bin/iowa/issues/coach/article.html?record=575 ("In the context of athletic programs[, sexual harassment] lowers the self-esteem and limits the ability of women and girls to develop their full potential in sports and fitness activities. It impairs the future capacity of its victims . . . to pursue employment and leadership roles in athletics.").

14. Hogshead-Makar & Steinbach, *supra* note 4, at 173–74.

15. HILL & SILVA, *supra* note 2, at 7.

ment may occur, and the numerous ways in which conduct may be perceived.[16] Therefore, in determining whether sexual harassment has occurred, courts must look to the overall context in which the harassment took place and cannot rely on any static definition of the term.

The Supreme Court of the United States has held that sexual harassment constitutes intentional discrimination and is prohibited in educational institutions under Title IX of the Education Amendments of 1972.[17] Title IX itself does not mention sexual harassment, but instead, states that "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."[18] Without any statutory guidance on the meaning of sexual harassment, the courts, in analyzing and defining sexual harassment under Title IX, have relied heavily on case law under Title VII of the Civil Rights Act,[19] which prohibits discrimination in the workplace.[20] Although Title VII case law may be useful as a guide in analyzing Title IX sexual harassment claims, its repeated influence on Title IX jurisprudence has inhibited Title IX's effectiveness in confronting problems unique to the educational, and particularly the student-athletic, environment.

This Comment critiques the courts' reliance on Title VII case law and posits three reasons why the application of Title VII standards and precedent to Title IX sexual harassment cases is inadequate in confronting sexual harassment in education. First, whereas Title VII prohibits discrimination in the workplace, Title IX is exclusively geared towards protecting the educational environment, and the affirmative language of Title IX suggests that courts should take a more proactive approach in identifying and protecting students from sexually harassing conduct than that taken under Title VII.[21] Title VII prohibits discrimination based on a variety of traits, including sex, with respect to

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16. *See, e.g.*, *id.* at 8 ("What is a laughing matter for one student may be offensive to another and traumatic to yet another, especially in the campus community, which teems with students and staff from a diversity of backgrounds and perspectives."); Annmarie Pinarski, Note, *When Coaches "Cross the Line": Hostile Athletic Environment Sexual Harassment*, 52 RUTGERS L. REV. 911, 922 (2000) (averring that in the coach-athlete relationship, appropriate behavior for a coach may include inquiry into more private areas of an athlete's life, but that the boundaries of acceptable conduct would be different in other contexts).

17. Davis *ex rel.* LaShonda D. v. Monroe County Bd. of Educ., 526 U.S. 629, 649–50 (1999).

18. 20 U.S.C. § 1681(a) (2000).

19. *See infra* Part I.

20. 42 U.S.C. § 2000e-2(a)(1) (2000).

21. *See infra* Part II.A.

employment terms, conditions, privileges, and opportunities.[22] Although Title IX also targets acts that discriminate, Title IX is focused on inequalities based on sex and it affirmatively mandates that a person not be denied participation in, or the benefits of, any educational program or activity.[23] Second, the educational environment warrants a broader definition of sexual harassment than the work environment because of the inherent trust and imbalance of power between teachers and students.[24] Although the framework used under Title VII is helpful as a guide in analyzing Title IX cases, standards developed to protect the adult workplace are not always appropriate for situations involving children and young adults.[25] Third, although Title VII provides that an employer may be liable for the actions of its employees under a theory of *respondeat superior*, the Supreme Court has held that an educational institution's liability under Title IX must be based on the institution's own acts and not on agency principles.[26] This limitation allows Title IX to cover a wider range of activity without unduly exposing educational institutions to Title IX liability.[27]

To bolster the argument that Title IX jurisprudence should develop independently of Title VII, this Comment also identifies several factors that are uniquely important to the educational setting that courts should consider when analyzing sexual harassment claims under Title IX.[28] This Comment then uses *Jennings v. University of North Carolina*[29] to illustrate the inadequacies of the courts' reliance on Title VII[30] and to apply the proposed factors to a specific factual context.[31]

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22. 42 U.S.C. § 2000e-2(a).

23. 20 U.S.C. § 1681(a).

24. *See infra* Part II.B.

25. *See* Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1011 n.11 (5th Cir. 1996) (cautioning against "importing a theory of discrimination from the adult employment context into a situation involving children").

26. *See infra* Part I.B.

27. *See infra* Part II.C.

28. *See infra* Part II.D.

29. 482 F.3d 686 (4th Cir. 2007) (en banc). *Jennings* is a recent sexual harassment case that was brought against the coach of the women's soccer team at the University of North Carolina at Chapel Hill (UNC), which was recently settled. Jane Stancill, *Cash, Apology Settle UNC-CH Soccer Suit*, NEWS & OBSERVER (Raleigh, N.C.), Jan. 15, 2008, at A1, *available at* http://www.newsobserver.com/sports/story/880965.html.

30. *See infra* Part I.D.

31. *See infra* Part II.D.4.

I. THE HISTORY AND DEVELOPMENT OF TITLE VII AND TITLE IX JURISPRUDENCE

Legislation prohibiting sexual harassment derives from Title VII of the Civil Rights Act of 1964.[32] As under Title IX, the term "sexual harassment" does not appear in the text of Title VII.[33] Rather, Title VII makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment," or with respect to "employment opportunities," "because of such individual's race, color, religion, sex, or national origin."[34] Congress passed Title VII to purge inequality from the workplace by requiring employers to make employment decisions based on an individual's qualifications, and not on one of the characteristics mentioned in the statute.[35] In *Meritor Savings Bank, FSB v. Vinson*,[36] the Supreme Court of the United States recognized that sexual harassment in the workplace constitutes discrimination on the basis of sex in violation of Title VII.[37]

To protect students in educational programs from discrimination based on sex, Congress enacted Title IX of the Education Amendments of 1972. Title IX states, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."[38] Title IX was patterned after Title VI of the Civil Rights Act of 1964, which sought to end discrimination on the basis of race, color, or national origin in any program or activity that received federal funding.[39] In enacting Title IX, Congress sought to prevent federal resources from being used to further sex-based discriminatory practices and to pro-

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32. WILLIAM E. FOOTE & JANE GOODMAN-DELAHUNTY, EVALUATING SEXUAL HARASSMENT 6 (2005).

33. *Id.* at 7.

34. 42 U.S.C. § 2000e-2(a) (2000).

35. Kara L. Gross, Note, *Toward Gender Equality and Understanding: Recognizing that Same-Sex Sexual Harassment Is Sex Discrimination*, 62 BROOK. L. REV. 1165, 1165 (1996).

36. 477 U.S. 57 (1986).

37. *Id.* at 63–64. The Court reasoned that Title VII does not merely apply to "terms" and "conditions" of employment in the narrow contractual sense, but rather extends to "'the entire spectrum of disparate treatment of men and women' in employment." *Id.* at 64 (quoting City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).

38. 20 U.S.C. § 1681(a) (2000). Congress included colleges, universities, and other post-secondary institutions within its definition of an education "program or activity." 42 U.S.C. § 2000d-4a(2)(A).

39. Sasha Ransom, *How Far Is Too Far? Balancing Sexual Harassment Policies and Reasonableness in the Primary and Secondary Classrooms*, 27 SW. U. L. REV. 265, 277 (1997).

vide protection from such discrimination to individuals attending educational institutions.[40]

Although Title IX was designed to supplement Title VI, because Title VII also prohibits sexual discrimination, many courts have used Title VII case law to analyze Title IX sexual harassment claims.[41] Initially, the courts looked to Title VII to establish a private right of action for damages under Title IX.[42] In addition, the Supreme Court has compared and contrasted Title VII and Title IX in defining the contours of an educational institution's exposure to liability for sexual harassment committed by its employees and students.[43] Most significantly, the courts have looked to Title VII case law and Title VII's "severe or pervasive" standard to determine the type and amount of conduct that constitutes actionable sexual harassment under Title IX.[44]

A. The Influence of Title VII in Developing an Implied Private Right of Action for Damages for Sexual Harassment Under Title IX

The courts initially looked to Title VII in attempting to construct a private right of action for damages under Title IX. As under Title VII, the Supreme Court has recognized that sexual harassment constitutes discrimination under Title IX.[45] However, by its terms alone, Title IX does not afford a private right of action for money damages.[46] Whereas Title VII contains an express cause of action for Title VII violations,[47] Title IX's provisions include merely an administrative remedy that conditions federal funding to recipients on their compliance with Title IX.[48] It was not until 1979, in *Cannon v. University of Chicago*,[49] that the Court recognized an individual's right to sue for discrimination under Title IX.[50] In doing so, the Court established a private right of action by implication.[51]

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40. Cannon v. Univ. of Chicago, 441 U.S. 677, 704 & n.36 (1979) (citing 118 CONG. REC. 5806–07 (1972) (statement of Sen. Bayh); 117 CONG. REC. 39252 (1971) (statement of Rep. Mink)).

41. Ransom, *supra* note 39, at 277.

42. *See infra* Part I.A.

43. *See infra* Part I.B.

44. *See infra* Part I.C.

45. *E.g.*, Davis *ex rel.* LaShonda D. v. Monroe County Bd. of Educ., 526 U.S. 629, 649–50 (1999).

46. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 285 (1998).

47. 42 U.S.C. § 2000e-5(f) (2000) (enforcement provisions).

48. *Gebser*, 524 U.S. at 280–81, 283, 285–86.

49. 441 U.S. 677 (1979).

50. *Id.* at 717.

51. *Id.*

Although *Cannon* established that a plaintiff may enforce Title IX through an implied private right of action, the *Cannon* Court considered neither what remedies would be available to a plaintiff who sued under Title IX, nor whether sexual harassment was actionable under Title IX.[52] The Court first addressed these issues in *Franklin v. Gwinnett County Public Schools*,[53] where the Court applied Title VII case law to conclude that a monetary damages remedy existed for a private cause of action for sexual harassment under Title IX.[54] In *Franklin*, a high school student, Franklin, brought a Title IX action against her school district, alleging that Andrew Hill, a sports coach and teacher who worked for the school district, subjected her to regular sexual harassment.[55] Franklin averred that although the school became aware of the harassment, it failed to take any action to end the harassment and actually tried to dissuade Franklin from filing charges.[56] Although the district court and the court of appeals found that Title IX did not authorize damages, the Supreme Court reversed.[57] The Court found that the school district had a duty not to discriminate based on sex and that the sexual harassment of a student by a teacher or coach, like the sexual harassment of a subordinate by a supervisor in the Title VII context, constituted discrimination on the basis of sex.[58] The Court reasoned that if damages were not available to Franklin, she would be left without a remedy and, therefore, the Court remanded the case for trial to determine liability and damages.[59]

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52. Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 65–66, 75 (1992).

53. 503 U.S. 60 (1992).

54. *Id.* at 74–76.

55. *Id.* at 62–63. Specifically, Franklin alleged that Hill called her at her home, asked to meet with her socially, and inquired about her sexual relations with her boyfriend and whether she would have sexual relations with an older man. *Id.* at 63. Additionally, Franklin alleged that on three occasions during eleventh grade, Hill took her into a private office at the school and subjected her to coercive intercourse. *Id.*

56. *Id.* at 63–64.

57. *Id.* at 64, 76.

58. *Id.* at 75 (citing Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986) (a Title VII case)).

59. *Id.* at 76. In general, the Supreme Court recognizes the presumption that federal courts have the authority, absent clear direction from Congress to the contrary, to award appropriate relief in a valid cause of action brought under a federal statute. *See* Bell v. Hood, 327 U.S. 678, 684 (1946) ("[I]t is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.").

B. The Influence of Title VII in Establishing a Standard for Imputing Liability Under Title IX to Educational Institutions for the Acts of Their Subordinates

While the Supreme Court relied on Title VII in *Franklin*, in *Gebser v. Lago Vista Independent School District*,[60] the Court acknowledged differences between the two statutes and substantially limited an individual's private right of action under Title IX.[61] In *Gebser*, a high school student, Gebser, and her mother brought suit under Title IX against the school district, alleging that a teacher sexually harassed Gebser while she was a student at the high school.[62] Gebser claimed that the teacher directed sexually suggestive remarks at students in general, and Gebser in particular, and that he also engaged in a sexual relationship with Gebser.[63] Gebser never notified the school of the relationship because she was confused about how to react and wanted to remain in the teacher's classes.[64] The school did not learn of the relationship until a police officer spotted Gebser and the teacher engaging in sexual intercourse.[65]

Gebser, relying on the Court's comparison of supervisor-employee and teacher-student sexual harassment in *Franklin*, argued that the Court should follow standards developed in Title VII cases to find the school district liable under a theory of common law agency.[66] The Court refused to apply agency principles, clarifying that it had compared *Franklin*, a Title IX case, to *Meritor*, a Title VII case, only in reference to the general principle that sexual harassment can consti-

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60. 524 U.S. 274 (1998).

61. *Id.* at 283–85 (finding that Title VII's agency principles did not apply to Title IX, and also that Title VII contained an express cause of action, but that Title IX contained only an implied cause of action).

62. *Id.* at 277–79.

63. *Id.* at 277–78. Specifically, Gebser alleged that the teacher initiated sexual contact with her, kissing and fondling Gebser during a visit to her home. *Id.* at 278. Gebser added that this sexual conduct eventually led to frequent sexual intercourse, including during school hours. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 281–82. The Court explained that to impute liability on employers for the actions of their employees under Title VII, it has previously required application of common law principles of agency. *Id.* at 282. The Court has referred to Congress's Title VII definition of an "employer," which includes any "agent" of an employer, *see* 42 U.S.C. § 2000e(b) (2000), as support for its application of agency principles in this context. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 72 (1986). Even under Title VII, however, an employer will not always be held liable for the sexual harassment that its employees commit against other employees. *See id.* (reasoning that while lack of notice to an employer of sexual harassment by one of its employees will not automatically shield the employer from liability, there are some limits on when an employer will be held liable for its employees' actions).

tute discrimination in violation of Title IX.[67] The Court reasoned that the application of agency principles in Title VII cases relied on a component of Title VII not found in Title IX: whereas Title VII's definition of an "employer" expressly includes the employer's agents, Title IX does not analogously reference the agents of an educational institution.[68] As further support for this differential treatment, the Court noted that although Title VII imposes an outright prohibition of discrimination in the workplace, Title IX's prohibition of sexual discrimination simply establishes a contractual condition between educational institutions and federal funding agencies.[69] The Court stated that, under Title IX, courts must carefully evaluate the propriety of private actions for damages because the express enforcement mechanism of Title IX is a contractual condition on federal funding awards, not the threat of monetary damages liability.[70] Therefore, the Court emphasized the need for the school district to at least have notice of the discriminatory conduct before being held liable for money damages.[71] For these reasons, the Court held that a plaintiff could not recover damages under Title IX unless an official with at least minimum authority to establish corrective measures had actual knowledge of the discriminatory acts and was deliberately indifferent in his or her response.[72]

C. Sexual Harassment Defined: The Development of the "Severe or Pervasive" Standard of Sexual Harassment Under Title VII and Its Influence on Title IX

Title VII has been most influential on Title IX jurisprudence in the context of determining the type and level of conduct that constitutes actionable sexual harassment. By not mentioning the term "sexual harassment" in Title VII or in Title IX,[73] Congress implicitly left it to the courts to establish the term's parameters.[74] As such, the courts

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67. *Gebser*, 524 U.S. at 283, 292–93.

68. *Id.* at 283.

69. *Id.* at 286–88. In other words, the Court reasoned that Congress passed Title IX, unlike Title VII, pursuant to its power under the Spending Clause, U.S. CONST. art. I, § 8, cl. 1, and that Title IX thus "condition[s] an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds." *Id.* at 286–87.

70. *Id.* at 287.

71. *Id.*

72. *Id.* at 290. In other words, the Court made clear that the recipient could not be held liable merely on theories of *respondeat superior* or constructive notice. *Id.* at 287–88.

73. *See* 20 U.S.C. § 1681(a) (2000); 42 U.S.C. § 2000e-2(a) (2000).

74. *See* Davis *ex rel.* LaShonda D. v. Monroe County Bd. of Educ., 526 U.S. 629, 650–51 (1999) (explaining that the language of Title IX provides "content" to the discrimination

have recognized two main forms of sexual harassment as discrimination under these statutes: (1) *quid pro quo* sexual harassment; and (2) hostile environment sexual harassment.[75] *Quid pro quo* sexual harassment, under Title VII for example, occurs when "submission to [sexual] conduct is made either explicitly or implicitly a term or condition of an individual's employment, [or when] submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual."[76] Hostile environment sexual harassment occurs when sexually harassing conduct "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[77] This Comment will focus primarily on the hostile environment form of sexual harassment because this is where Title VII cases have had their greatest influence on Title IX.

In order for a hostile environment claim to be actionable under Title VII, the Supreme Court requires that conduct be sufficiently "severe or pervasive" so as to alter the conditions of the victim's employment and create an abusive work environment.[78] To be "severe or pervasive," Title VII requires that the conduct be not merely offensive, but so severe as to be both subjectively and objectively hostile and discriminating.[79] In the Title IX context, the Supreme Court has applied Title VII's "severe or pervasive" standard only in a student-to-student sexual harassment case.[80] While the Supreme Court has yet to apply the "severe or pervasive" standard to adult-to-student sexual harassment cases, lower courts have done so in both teacher-to-student and coach-to-player sexual harassment cases.[81]

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that it prohibits and that courts should analyze harassment using a totality of the circumstances approach).

75. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 751–52 (1998) (noting the two types of harassment under Title VII); Klemencic v. Ohio State Univ., 263 F.3d 504, 510 (6th Cir. 2001) (referring to the two types of harassment under Title IX).

76. 29 C.F.R. § 1604.11(a)(1)–(2) (2007); *see also* Wills v. Brown Univ., 184 F.3d 20, 25 (1st Cir. 1999) (explaining that *quid pro quo* harassment "occurs most often when some benefit or adverse action, such as change in salary at work or a grade in school, is made to depend on providing sexual favors to someone in authority").

77. 29 C.F.R. § 1604.11(a)(3); *see also* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986) (describing the regulation's definition of hostile environment sexual harassment).

78. Faragher v. City of Boca Raton, 524 U.S. 775, 786 (1998); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998); Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993); *Meritor*, 477 U.S. at 67.

79. *See infra* Part I.C.1.

80. *See infra* Part I.C.2.

81. *See infra* Part I.C.3–4.

1. Factors Considered in Title VII Cases when Applying the "Severe or Pervasive" Standard

To be "severe or pervasive" under Title VII, the Supreme Court requires that the alleged harassment create an environment that is both objectively and subjectively hostile or abusive.[82] The Court reasons that Title VII targets discrimination, but does not function as a "general civility code" for the workplace.[83] To determine whether conduct in a particular context is sufficient to create a hostile or abusive environment, courts must look to the "constellation of surrounding circumstances, expectations, and relationships."[84] Specifically, courts have considered the following nonexclusive list of factors: (1) whether the conduct is physically threatening or humiliating, or merely an offensive utterance; (2) the presence or absence of direct sexual propositioning or inappropriate touching; (3) whether the conduct is sexually neutral or ambiguous; and (4) the length of time during which, and the frequency with which, incidents have occurred.[85] However, Title VII does not require that the conduct be so severe as to cause psychological injury.[86]

Conduct such as "simple teasing" and "offhand comments" will not be actionable under Title VII, where it is not physically threatening or humiliating.[87] For example, in *Greene v. A. Duie Pyle, Inc.*,[88] the United States District Court for the District of Maryland held that the plaintiff's exposure to pornographic magazines, co-workers' sexist jokes, and supervisors' demeaning comments about female employees did not create a hostile environment.[89] For example, one of the sexist jokes to which the plaintiff was exposed went: "'How many men does it take to open a beer? None. It should be opened by the time she brings it.'"[90] The court reasoned that such conduct was not objectively hostile, absent aggravating factors.[91] The court proposed the

82. *Faragher*, 524 U.S. at 787; *Harris*, 510 U.S. at 21–22.

83. *Faragher*, 524 U.S. at 788; *Oncale*, 523 U.S. at 81.

84. *Oncale*, 523 U.S. at 81–82.

85. *See infra* notes 87–134 and accompanying text.

86. *See infra* notes 102–108 and accompanying text.

87. *Faragher*, 524 U.S. at 787–88; *see also, e.g.*, Byers v. HSBC Fin. Corp., 416 F. Supp. 2d 424, 435 (E.D. Va. 2006) (finding that a supervisor's conduct was not sufficiently severe or pervasive when she asked an employee if he was faithful to his girlfriend and invited him to places outside of work, because these remarks merely constituted the type of teasing and offhand comments described above).

88. 371 F. Supp. 2d 759 (D. Md. 2005), *aff'd per curiam*, 170 Fed. Appx. 853 (4th Cir. 2006).

89. *Id.* at 761, 763–64.

90. *Id.* at 761.

91. *Id.* at 763–64.

following as examples of aggravating factors: an audience for the plaintiff's embarrassment; co-workers' lengthy conversations about inappropriate materials; and physical threats and humiliation.[92] The court added that although the conduct that the plaintiff endured was "crude," it did not, without such aggravating circumstances, create "the hellish environment against which Title VII protects."[93]

The absence of direct sexual propositioning or inappropriate touching may also undermine a hostile environment claim.[94] In *Hartsell v. Duplex Products, Inc.*,[95] an employee, Hartsell, brought suit under Title VII against her former employer, Duplex, alleging that three other employees of the company subjected her to continual sexual harassment.[96] Particularly, Hartsell claimed that she was repeatedly subjected to sexually degrading comments.[97] The United States Court of Appeals for the Fourth Circuit, however, found the comments insufficient to satisfy the "severe or pervasive" requirement.[98] The court pointed out that Hartsell was never "inappropriately touched, propositioned, flirted with, taunted, or even ogled."[99] Additionally, the court noted that the environment at Duplex was "relaxed and informal" and that Hartsell took part in the office banter.[100] Although the court stated that the "severe or pervasive" test was a question of fact, the court upheld summary judgment, finding that the conduct was "so trivial, so isolated, and so far from the paradigmatic case of sexual harassment" that it could not consider it actionable.[101]

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92. *Id.* at 764.

93. *Id.* at 763–64.

94. *See* Hartsell v. Duplex Prods., Inc., 123 F.3d 766, 772–73 (4th Cir. 1997) (finding conduct merely unpleasant and not actionable absent allegations of inappropriate touching and propositioning).

95. 123 F.3d 766 (4th Cir. 1997).

96. *Id.* at 768, 770.

97. *Id.* at 768–69. For instance, Hartsell alleged that within two weeks of starting at Duplex, the other employees exclaimed, "'We've made every female in this office cry like a baby,'" and threatened to do the same to Hartsell. *Id.* at 768. On another occasion, one of the employees inquired, in front of Hartsell and upon seeing a buxom woman in a magazine wearing a revealing shirt, "'[W]hy don't we have sales assistants that look like that[?]'" *Id.* (alteration in original). Additionally, one of the employees once cried out to Hartsell, "'[W]hy don't you go home and fetch your husband's slippers like a good little wife . . . .'" *Id.* at 769 (alteration in original).

98. *Id.* at 772.

99. *Id.* at 773.

100. *Id.* at 769. For instance, the court noted that Hartsell herself had referred to masturbation. *Id.* at 773.

101. *Id.* at 773–74.

However, Title VII does not require that the alleged conduct be so severe as to cause psychological injury.[102] In *Harris v. Forklift Systems, Inc.*,[103] Harris brought suit against her former employer under Title VII, alleging that Charles Hardy, the president of the company, created an abusive work environment by continually insulting her because of her gender and by directing sexual innuendos at her.[104] The district court rejected Harris's claim and the Sixth Circuit affirmed.[105] The district court held that although Hardy's comments could have offended a reasonable person in Harris's situation, they were not so severe as to "'seriously affect [Harris'] psychological well-being'" or to cause her injury.[106] The Supreme Court reversed, holding that Title VII does not require a showing of psychological injury and that a plaintiff does not have to experience a nervous breakdown before Title VII applies.[107] Instead, the Court held that as long as a plaintiff reasonably perceives the workplace to be hostile or abusive, a showing of psychological injury is unnecessary.[108]

A court may be reluctant to find conduct actionable under Title VII where it is sexually neutral or ambiguous, even where a plaintiff outwardly objects to the conduct.[109] In *Hopkins v. Baltimore Gas and Electric Co.*,[110] a case of same-sex sexual harassment by a male supervisor, the Fourth Circuit found that a supervisor's conduct was not sufficiently "severe or pervasive" to be actionable.[111] Hopkins alleged that, over a seven-year period, his male supervisor frequently subjected him to inappropriate sexual comments and jokes, including about his appearance and clothing.[112] Hopkins also claimed that the supervisor

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102. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993) (holding that conduct violates Title VII if it creates an environment that is and would reasonably be perceived as hostile or abusive, regardless of whether the conduct caused actual psychological harm).

103. 510 U.S. 17 (1993).

104. *Id.* at 19. Specifically, Hardy made comments such as, "'You're a woman, what do you know[?]' and 'We need a man as the rental manager.'" *Id.* On another occasion, in front of other employees, Hardy allegedly recommended that he and Harris visit a Holiday Inn to negotiate her raise, and once while Harris was arranging a deal he exclaimed, "'What did you do, promise the guy . . . some [sex] Saturday night?'" *Id.* (alteration in original). He also referred to her on at least one occasion as a "'dumb ass woman.'" *Id.*

105. *Id.* at 19–20.

106. *Id.* at 20 (alteration in original).

107. *Id.* at 22–23.

108. *Id.* at 22.

109. *See* Hopkins v. Balt. Gas & Elec. Co., 77 F.3d 745, 747–48, 753–54 (4th Cir. 1996) (holding that sexually neutral or ambiguous conduct was not actionable and highlighting the absence of overt sexual propositioning).

110. 77 F.3d 745 (4th Cir. 1996).

111. *Id.* at 747, 753–54.

112. *Id.* at 747–48. During a discussion with a vendor and Hopkins about a recent plane crash, the supervisor stated that to survive a plane crash in the water, he would "'find a

directed physically harassing conduct at him, including bumping into him, and positioning a magnifying glass over Hopkins's crotch and asking "'Where is it?'"[113] The court, however, reasoned that the conduct was "sexually neutral or, at most, ambiguous" because the supervisor never made any overt sexual proposition to Hopkins or touched him sexually.[114] Additionally, the court maintained that many of the alleged incidents took place in group settings and that Hopkins only subjectively believed that the conduct was directed just at him.[115] Although the court expressed its disapproval of the supervisor's offensive and provocative conduct, it emphasized that Title VII was not created "'to purge the workplace of vulgarity'" and that the conduct was akin to that of other cases in which the Fourth Circuit had found conduct insufficiently "severe or pervasive."[116]

Courts evaluating hostile environment claims also consider the length of time and the frequency with which the incidents occurred.[117] In *Baskerville v. Culligan International Co.*,[118] the Seventh Circuit found that a "handful" of comments by a male manager spread out over a seven-month period did not amount to actionable sexual harassment of his female secretary.[119] The secretary claimed that her manager referred to her as "'pretty girl,'" and sometimes made grunting sounds like "'um um um'" when she turned to exit his office.[120] The secretary further averred that once at a company Christmas party, her manager said that he did not want to "'lose control'" with all of the attractive women around, and that on another occasion

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dead man and cut off his penis and breathe through that.'" *Id.* at 747. Another time, the supervisor allegedly wrote the word "Alternative" before the company name "Lifestyles" on a piece of mail addressed to Hopkins. *Id.*

113. *Id.* at 747–48. Hopkins further alleged that the supervisor regularly came into the men's bathroom when Hopkins was there alone and that he once, after acting as if he had locked the door, said, "'Ah, alone at last.'" *Id.* at 747. The supervisor was also the only man who tried to kiss Hopkins at his wedding and, one time, attempted to force himself into a single-person revolving door with Hopkins. *Id.* at 747–48.

114. *Id.* at 753.

115. *Id.* at 754.

116. *Id.* at 753–54 (quoting Baskerville v. Culligan Int'l Co., 50 F.3d 428, 430 (7th Cir. 1995)).

117. *See Baskerville*, 50 F.3d at 430–31 (considering these timing factors); *see also Hopkins*, 77 F.3d at 753 (reasoning that the supervisor's conduct did not likely have a significant emotional impact on the employee because it occurred intermittently over a seven-year period).

118. 50 F.3d 428 (7th Cir. 1995).

119. *Id.* at 430–31.

120. *Id.* at 430. The secretary also alleged that the manager once exclaimed that his office became "hot" when she walked in. *Id.* On another occasion, when an announcement came over the public-address system at the office, he told her it meant that "'All pretty girls run around naked.'" *Id.*

he made a gesture to her that referred to masturbation.[121] In finding that the manager's behavior was "'merely vulgar and mildly offensive,'" rather than "hostile or deeply repugnant," the court reasoned that the infrequency of the conduct made it unlikely that it would have a significant emotional impact.[122] The court contrasted the comments in *Baskerville* with a "concentrated or incessant barrage."[123]

As explained previously, the factors listed above often overlap and interact with each other. As such, the *Baskerville* court, in finding that the manager's conduct had not made the secretary's work environment hostile, further noted that the manager had not propositioned the plaintiff, threatened her, or exposed himself to her.[124] The court added that the manager's comments were of the sort found on primetime television and that his reference to masturbation merely showed that the manager's sense of humor had not progressed passed that of an adolescent.[125]

Additionally, the factors are non-exclusive, thus, the absence of one of the factors is not always dispositive. For example, a work environment may be abusive or hostile even in the absence of sexual advances or propositions.[126] In *Smith v. First Union National Bank*,[127] Smith brought suit under Title VII against her former employer claiming that she was sexually harassed by her supervisor, Ronald Scoggins.[128] Smith claimed that on more than thirty occasions, Scoggins stated that he preferred a male in Smith's position because men are "'natural leaders'" and women are "'too emotional to handle a managerial role.'"[129] Additionally, Scoggins demeaned women by making comments such as: "women should be barefoot and pregnant," and a

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121. *Id.* The manager allegedly made the reference to masturbation after the secretary asked if he had purchased his wife a Valentine's Day card. *Id.* The manager responded in the negative, but said that he should have because his wife was still living apart from him, and it was lonely in his hotel room. *Id.* At that point, the manager allegedly gazed down at his hand "ostentatiously." *Id.*

122. *Id.* at 431 (quoting Carr v. Allison Gas Turbine Div., Gen. Motors Corp., 32 F.3d 1007, 1010 (7th Cir. 1994)).

123. *Id.*

124. *Id.*

125. *Id.* Although the court conceded that mildly offensive remarks must be viewed in context, and that such remarks may take on a more "sinister" quality "when delivered in the suggestive isolation of a hotel room," the court noted that the secretary and manager had never been alone while away from the office. *Id.*

126. *See* Smith v. First Union Nat'l Bank, 202 F.3d 234, 242 (4th Cir. 2000) (determining that an environment consumed by intimidation, ridicule, and demeaning conduct can be as hostile as one with unwelcome sexual advances).

127. 202 F.3d 234 (4th Cir. 2000).

128. *Id.* at 238, 241.

129. *Id.* at 238.

woman needs to "'spread her legs'" to advance.[130] At one point, Scoggins allegedly got in Smith's face and told her that he could "'see why a man would slit a woman's throat.'"[131] The Fourth Circuit found that even though Scoggins never inappropriately touched, propositioned, or ogled Smith, Scoggins's conduct, if proven, violated Title VII.[132] The court distinguished *Hartsell*, noting that whereas Hartsell had been exposed to four isolated and non-threatening comments, Scoggins made his remarks against Smith regularly, and they even included a physical threat.[133] The court held that an environment that is infiltrated by intimidation, ridicule, and the mean-spirited demeaning of women could be as hostile or abusive as one that involved unwelcome sexual propositioning.[134]

2. *The Supreme Court Has Applied the Title VII "Severe or Pervasive" Standard in the Title IX Student-to-Student Hostile Environment Sexual Harassment Context*

The Supreme Court has imported Title VII's "severe or pervasive" standard into the Title IX context, but only in a case of student-to-student sexual harassment. Although *Franklin* and *Gebser* established a damages remedy and a standard for imputing liability to funding recipients in Title IX cases,[135] neither addressed the standard for evaluating when conduct rises to the level of actionable sexual harassment under Title IX. To date, the only Supreme Court case to address this standard is *Davis ex rel. LaShonda D. v. Monroe County Board of Education*,[136] a student-to-student sexual harassment case. In *Davis*, the mother of a fifth-grade student sued the school board and school officials for failing to prevent or properly respond to the continued sexual harassment of her daughter, LaShonda, by one of LaShonda's classmates.[137] The complaint averred that as a result of the harass-

130. *Id.* at 239. When a woman at the office was upset, Scoggins allegedly would comment to Smith that the woman needed a "'good banging,'" or that she was menstruating. *Id.* at 238. Scoggins also stated that he would have liked to have been a woman so he could "'whore his way through life.'" *Id.* at 239.

131. *Id.* at 239.

132. *Id.* at 242–43. The court also noted that nearly all of Scoggins's harassing remarks contained express and demeaning references to women, and that his conduct was clearly unwelcome, given Smith's repeated objections to the comments. *Id.* at 242.

133. *Id.* at 242–43.

134. *Id.* at 242.

135. *See supra* Part I.A–B.

136. 526 U.S. 629 (1999).

137. *Id.* at 632–35. The mother claimed that the classmate, over a five-month period, sexually harassed LaShonda by attempting to touch her breasts and genital area, making obscene comments such as "'I want to get in bed with you' and 'I want to feel your boobs,'"

ment, LaShonda's grades dropped and LaShonda at one point contemplated suicide.[138] Additionally, the complaint alleged that although LaShonda reported this conduct to her teachers and her mother also reported it to the school principal, the school took no disciplinary action and made no effort to separate the harasser from LaShonda.[139] The lower courts dismissed the claim, holding that Title IX provided no basis for liability absent an allegation that the school board or an employee of the school participated in the sexual harassment of the student.[140] The Supreme Court reversed, holding that it could not find beyond a doubt that the plaintiff's claim would not entitle her to relief.[141] The Court noted that although Title IX is focused on the educational institution's own behavior, a school may be found liable for damages under Title IX for student-to-student sexual harassment in "certain limited circumstances."[142]

In *Davis*, the primary issue did not concern what sort of conduct Title IX proscribed, but rather, whether an educational institution could be liable under Title IX for failing to respond to student-on-student harassment.[143] The Court reasoned that even if the funding recipient did not directly participate in the harassment, the recipient could still be liable in damages for sexual harassment in circumstances where "the recipient exercise[d] substantial control over both the harasser and the context in which the known harassment occur[red]."[144] However, the Court cautioned that "schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults."[145] The Court, therefore, reasoned that the simple teasing, banter, and name-calling that often occur among school children, even if upsetting to the children, would not support a cause of action for damages under Title IX.[146] Instead, the Court held that in student-to-student sexual harassment cases, dam-

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and allegedly positioning a door stop in his pants and acting in a sexually suggestive manner. *Id.* at 633–34.

138. *Id.* at 634.

139. *Id.* at 634–35.

140. Davis *ex rel.* LaShonda D. v. Monroe County Bd. of Educ., 120 F.3d 1390, 1392 (11th Cir. 1997) (en banc); Aurelia D. *ex rel.* LaShonda D. v. Monroe County Bd. of Educ., 862 F. Supp. 363, 367 (M.D. Ga. 1994).

141. *Davis*, 526 U.S. at 654.

142. *Id.* at 642–43.

143. *Id.* at 639.

144. *Id.* at 644–45. Although the Court conceded that these elements would be most easily met when the harasser was an agent of the recipient, the Court reiterated that it had not injected an agency requirement into Title IX jurisprudence. *Id.* at 645–46.

145. *Id.* at 651.

146. *Id.* at 651–52.

ages are only available when the conduct is "so severe, pervasive, and objectively offensive" so as to deny its victims equal access to education.[147] Ultimately, the Court found that the plaintiff had adequately alleged that her harasser's conduct was "severe, pervasive, and objectively offensive," and that the school did not try to investigate or put an end to the conduct.[148]

3. Lower Courts Have Applied the Title VII "Severe or Pervasive" Standard in Title IX Teacher-to-Student Hostile Environment Cases

Although the Supreme Court has yet to do so, federal circuit courts have applied Title VII standards to hostile educational environment cases involving teacher-to-student sexual harassment.[149] These courts require a plaintiff in a Title IX hostile environment sexual harassment case to show:

> (i) that he/she is a member of a protected class; (ii) that he/she was subject to unwelcome sexual harassment; (iii) that the harassment was based upon sex; (iv) that the harassment was sufficiently severe or pervasive so as to alter the conditions of plaintiff's education and create an abusive educational environment; and (v) that some basis for employer liability has been established.[150]

Courts have looked to Title VII cases to assess the severity and pervasiveness of the harassers' conduct.[151] In *Brown v. Hot, Sexy and Safer Productions, Inc.*,[152] two high school students and their parents sued school officials, among other defendants, after they were compelled to attend a sexually explicit AIDS awareness assembly conducted at their public high school.[153] The students claimed that mandatory attendance at the assembly created a hostile environment in violation of Title IX.[154] The court noted that relevant Title IX case law was "relatively sparse" and, based on the Supreme Court's use of Title VII in *Franklin*, applied Title VII case law to assess the allegedly harassing

147. *Id.* at 652.
148. *Id.* at 653–54.
149. *See, e.g.*, Hayut v. State Univ. of N.Y., 352 F.3d 733, 744 (2d Cir. 2003) (noting that 42 U.S.C. § 1983 hostile educational environment claims are resolved using Title VII hostile environment jurisprudence); Brown v. Hot, Sexy & Safer Prods., Inc., 68 F.3d 525, 529, 540 (1st Cir. 1995) (applying Title VII cases to a Title IX hostile environment claim).
150. *E.g.*, *Brown*, 68 F.3d at 540.
151. *See, e.g.*, *id.*
152. 68 F.3d 525 (1st Cir. 1995).
153. *Id.* at 529–30.
154. *Id.*

conduct.[155] Relying on *Harris v. Forklift Systems, Inc.*,[156] another Title VII case, and substituting the term "educational environment" for "workplace," the court held that Title IX is violated "'[w]hen the [educational environment] is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's *employment* and create an abusive . . . environment.'"[157] The court also highlighted the same factors described in *Harris* to evaluate whether the conduct in *Brown* created a hostile or abusive environment.[158] Ultimately, the court found that the students' allegations, viewed in light of the *Harris* factors, were insufficient to establish an objectively hostile or abusive educational environment.[159]

The First Circuit further enmeshed Title VII and Title IX in *Wills v. Brown University*,[160] by treating Title IX and Title VII hostile environment claims as one and the same.[161] In *Wills*, a student brought a Title IX suit against Brown University after one of its former professors allegedly inappropriately touched the student.[162] Specifically, the student alleged that during a visit to the teacher's office for assistance with class material, the teacher placed his hand under the student's shirt, rubbed her stomach and touched her breasts.[163] The student claimed that the university subjected her to a hostile environment because she was forced to endure the continued presence of her har-

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155. *Id.* at 540 (citing Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 73–75 (1992); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64–65 (1986)).

156. 510 U.S. 17 (1993); *see supra* notes 102–108 and accompanying text.

157. *Brown*, 68 F.3d at 540 (emphasis added) (alteration in original) (quoting *Harris*, 510 U.S. at 21).

158. *Id.* The factors that the *Brown* court listed include: (1) the frequency of the conduct; (2) the severity of the conduct; (3) whether the conduct was physically threatening or humiliating, rather than merely offensive; and (4) whether the conduct unreasonably hindered work performance. *Id.*

159. *Id.* at 540–41. The court reasoned that the plaintiffs' mandatory attendance at the AIDS awareness program was only a one-time exposure and that the comments and material from the program were not objectively offensive in the context of the program. *Id.* at 541. The court strongly considered the introductory remarks before the assembly, which emphasized that the AIDS program was a unique and unusual way of disseminating the message about AIDS to high school students. *Id.* The court stated that this introduction should have indicated to a reasonable person that the "allegedly vulgar sexual commentary" was meant to reach out to and educate students, instead of creating a hostile environment for them. *Id.*

160. 184 F.3d 20 (1st Cir. 1999).

161. *See id.* at 26 (stating that "a hostile environment claim requires the victim to have been subjected to harassment severe enough to compromise the victim's employment or educational opportunities").

162. *Id.* at 23.

163. *Id.*

asser, as the teacher remained on the faculty after the incident.[164] The student further alleged that the university had notice of the incident and of the teacher's prior sexual misconduct, and that the university failed to take action to prevent harm to her and other students.[165] In determining whether the continued presence of the harasser could create a hostile environment, the court looked to Title VII principles.[166] The court stated that although the Supreme Court, in *Gebser*, refused to apply Title VII agency principles to Title IX sexual harassment cases, Title VII case law was still informative when evaluating "the *nature* of sex discrimination under Title IX."[167] In so doing, the court relied on the Supreme Court's reference to *Meritor* in its discussion of sexual harassment in *Franklin*,[168] where the Court analogized the sexual harassment of a student by a teacher to the sexual harassment of a subordinate by a supervisor.[169] The court ultimately held that a reasonable jury could find that the teacher's continued presence on the faculty created a hostile environment for the student and remanded the case for trial.[170]

The Eighth Circuit has also relied on Title VII precedent to determine whether conduct is sufficiently severe as to create a hostile educational environment.[171] In *Lam v. Curators of the University of Missouri, at Kansas City Dental School*,[172] a dental student, Lam, brought a Title IX action against her dental school claiming that she was exposed to a hostile educational environment after her clinical instructor forcibly kissed her and after instructors at the university showed her an instructional videotape that contained sexual innuendos.[173] According to Lam, the assault by her clinical instructor brought back memories of prior sexual abuse, and the instructional video was offensive.[174] The court, however, found that Lam had not established a sufficient connection between the assault by her clinical instructor and her edu-

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164. *Id.* at 27, 38. Specifically, the court looked to *Ellison v. Brady*, 924 F.2d 872, 883 (9th Cir. 1991), a Title VII case where the court held that a hostile work environment could exist because of the mere presence of an employee who had perpetrated especially severe or pervasive sexual harassment. *Id.* at 38.

165. *Id.* at 26.

166. *Id.* at 38.

167. *Id.* at 38 n.8.

168. *Id.*

169. Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 75 (1992) (citing Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986)).

170. *Wills*, 184 F.3d at 39, 42.

171. Lam v. Curators of the Univ. of Mo., at Kan. City Dental Sch., 122 F.3d 654, 656–57 (8th Cir. 1997).

172. 122 F.3d 654 (8th Cir. 1997).

173. *Id.* at 655.

174. *Id.*

cational program.[175] Therefore, on Lam's hostile environment claim against the university, the court only considered Lam's exposure to the offensive videotape.[176] In finding that Lam's single exposure to a distasteful video was not sufficiently "severe or pervasive," the court looked to Title VII and compared Lam's situation to an employee's single exposure to offensive behavior by a supervisor.[177] Thus, the court found that Lam failed to establish a prima facie case of sexual harassment under Title IX.[178]

4. *Courts Have Also Applied Title VII Case Law to Title IX Hostile Environment Sexual Harassment Claims by Student-Athletes Resulting from Conduct by Their Coaches*

Although the Supreme Court has held that sexual harassment of a student by a teacher-coach is actionable under Title IX,[179] a majority of the Title IX cases involving student-athletes have been suits by women to gain equal treatment, funding, and access to athletic opportunities and programs.[180] Thus, there have been very few reported cases involving Title IX hostile environment sexual harassment claims against coaches. Those that do exist have used Title VII standards and cases to guide their analyses.[181]

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175. *Id.* at 656. Specifically, the assault took place off school grounds after Lam's instructor invited her to work in his private clinic. *Id.* at 655–56. The court reasoned that, because the assault did not happen in school or during a school-sponsored activity, such conduct could not serve as a predicate for the university's liability under Title IX. *Id.* at 656. This case was decided one year before the decision in *Gebser*, which established the current standard that an institution, to be liable, must have knowledge of and act with deliberate indifference to the sexual harassment of a student by one of its employees. *See supra* note 72 and accompanying text.

176. *Lam*, 122 F.3d at 656.

177. *Id.* at 656–57.

178. *Id.* at 657.

179. Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 63, 65 (1992).

180. *See, e.g.*, Cook v. Colgate Univ., 992 F.2d 17, 18 (2d Cir. 1993) (former members of the women's ice hockey team brought suit claiming that a university's failure to upgrade the team to varsity status violated Title IX); Favia v. Ind. Univ. of Pa., 7 F.3d 332, 335 (3d Cir. 1993) (female athletes brought suit to challenge a university's decision to cancel the women's gymnastics and field hockey programs); Haffer v. Temple Univ., 678 F. Supp. 517, 521–22 (E.D. Pa. 1987) (actual and potential female athletes brought a class action suit alleging unlawful sex discrimination in a university's intercollegiate athletic program).

181. *See* Klemencic v. Ohio State Univ., 10 F. Supp. 2d 911, 912, 915 (S.D. Ohio 1998), *aff'd*, 263 F.3d 504 (6th Cir. 2001) (holding that the elements necessary to prove a Title VII case apply equally in Title IX hostile environment cases against coaches); Morrison v. N. Essex Cmty. Coll., 780 N.E.2d 132, 143 (Mass. App. Ct. 2002) (noting that the determination of whether a hostile environment exists under Title IX depends on analogous Title VII principles).

For example, in *Klemencic v. Ohio State University*,[182] Klemencic, a former member of Ohio State University's women's track and cross country teams, brought Title IX claims against Ohio State alleging that her coach subjected her to both *quid pro quo* and hostile environment sexual harassment.[183] Specifically, Klemencic alleged that her coach harassed her by making a sexual proposition to her over the phone.[184] This came about amidst a pattern of involvement by her coach in Klemencic's personal life.[185] After Klemencic refused those propositions, the coach allegedly confronted her outside of her apartment.[186] After she again refused his advances, the coach prevented her from training with the team and functioning as the team's assistant coach.[187]

The United States District Court for the Southern District of Ohio found that although Klemencic had stated a subjective claim of psychological harm, the alleged conduct was not "severe or pervasive" enough to create an objectively hostile educational environment.[188] The court noted that although the coach's requests to go out on a date with Klemencic may have been inappropriate and personally offensive to Klemencic, the coach's conduct was "not the stuff of which a hostile environment is made."[189] The court found this to be true based on the conduct that other courts had previously found not to be actionable in a variety of Title VII cases.[190] The court also rejected the *quid pro quo* claim, holding that, under *Gebser*, no official with the au-

182. 10 F. Supp. 2d 911 (S.D. Ohio 1998), *aff'd*, 263 F.3d 504 (6th Cir. 2001).

183. *Id.* at 912, 914.

184. *Id.* at 916. During the telephone conversation between Klemencic and her coach, the coach purportedly told Klemencic that he considered her to be his best friend and asked her to go out with him. *Id.* The coach then allegedly explained that he could get a prostitute, but that he would rather be with someone he cared about. *Id.*

185. *Id.* Klemencic alleged that her coach drove her home from practice, called her at home, offered to allow her to stay at his apartment when her lease was about to expire, and interfered with her and her boyfriend's relationship. *Id.* Additionally, on one occasion, the coach sent her a sexually explicit image from a magazine. *Id.* at 914.

186. *Id.* at 913.

187. *Id.*

188. *Id.* at 916.

189. *Id.* at 917.

190. *Id.* at 917–18 (citing Baskerville v. Culligan Int'l Co., 50 F.3d 428, 430 (7th Cir. 1995) (holding that verbal conduct that occurred over a seven-month period did not rise to the level of sexual harassment under Title VII); Koelsch v. Beltone Elecs. Corp., 46 F.3d 705, 706–07 (7th Cir. 1995) (holding that a supervisor who caressed an employee's leg, grabbed her buttocks, told her that she was attractive, and asked her out on dates had not engaged in actionable sexual harassment); Saxton v. Am. Telephone & Telegraph Co., 10 F.3d 526, 528, 534 (7th Cir. 1993) (holding that a supervisor's inappropriate kissing and repeated touching were not actionable sexual harassment)).

thority to enact corrective measures had been deliberately indifferent upon learning of the coach's conduct.[191]

Similarly, in *Morrison v. Northern Essex Community College*,[192] the Appeals Court of Massachusetts, Essex analogized sexual harassment claims in the employment context to claims brought in the educational context.[193] In *Morrison*, however, the court found that the college athletic director-coach's conduct created a genuine issue of material fact as to whether a hostile educational environment existed for two female plaintiffs.[194] The plaintiffs alleged that the coach, Mr. Hess, gave alcohol to students, requested sexual favors from female students, and engaged in sexual intercourse with other students.[195] In response to a complaint from a female athlete in the late 1980s, the college conducted an investigation into the activities of Mr. Hess.[196] The investigation revealed that the student athletes felt "beholden" to Mr. Hess because of his ability to obtain scholarships for them and give them playing time.[197] The investigation also showed that during lunches and walks with the female athletes, Mr. Hess inquired about intimate details of the athletes' lives, such as their relationships with boyfriends and whether they had received abortions.[198] As a result of Mr. Hess's conduct, many female athletes left the team or withdrew from college completely to avoid him.[199] Although some former students agreed to testify against Mr. Hess, others who had had sexual relations with him would not because they thought that the conduct had been consensual, or they were too intimidated to testify.[200]

With regard to the conduct directed at the plaintiffs, members of the women's basketball team in the early 1990s, they alleged that Mr. Hess inquired into their personal lives, asked for massages, made inappropriate comments, and prevented them from receiving playing time

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191. *Id.* at 918.

192. 780 N.E.2d 132 (Mass. App. Ct. 2002).

193. *Id.* at 143.

194. *Id.* at 134, 136, 142–43. In *Morrison*, the plaintiffs brought a state hostile environment sexual harassment claim under MASS. GEN. LAWS ANN. ch. 151C, §§ 1(e) and 2(g) (West 2004), as well as a federal claim under Title IX. *Id.* at 134.

195. *Id.* at 136–37. Some of the alleged conduct occurred in the 1980s, before the plaintiffs began attending the community college in the early 1990s. *Id.* at 136–38.

196. *Id.* at 136. These activities included pulling down his female athletes' shorts, patting their buttocks, undoing their bra straps, walking in on female students in the bathroom, making them drink liquor out of his mouth, kissing them, engaging in sexual intercourse with female students, and discussing his vasectomy with them. *Id.* at 137.

197. *Id.* at 137.

198. *Id.*

199. *Id.*

200. *Id.*

when they avoided or rejected him.[201] For example, he made comments to one of the plaintiffs, such as "'I bet . . . you probably got laid in Dallas.'"[202] To the other plaintiff, he said, "'I want a massage but don't worry, we don't have to do it. I just want it in your underwear.'"[203] He also asked about whether they had orgasms, and met them each privately for lunch in a condominium that he owned, where he massaged the breasts of one of the plaintiffs.[204]

The court found that the repetitive and continued sexual harassment to which the students had been subjected was "humiliating and degrading" and "sufficiently pervasive to constitute a hostile educational environment."[205] The court noted that a student exposed to such repeated conduct might not realize the enormity of the discrimination and harassment until it had occurred for an extended time.[206] In finding that a hostile educational environment existed, the court relied on principles taken from Title VII.[207] As in *Brown v. Hot, Sexy and Safer Productions, Inc.*,[208] the court turned to the list of factors laid out in *Harris*.[209] Additionally, the court cited a number of other Title VII cases in establishing the standard for sexual harassment.[210]

Although federal circuit courts have used Title VII jurisprudence to analyze hostile environment claims under Title IX, courts have, nevertheless, underscored the "fact-specific and circumstance-driven nature" of hostile environment cases.[211] The Supreme Court has emphasized using a totality of the circumstances approach to determine when conduct creates a hostile environment.[212] The "'constellation of surrounding circumstances'" that must be considered under Title IX includes, but is not limited to, the relationship and relative ages of

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201. *Id.* at 137–39.

202. *Id.* at 138.

203. *Id.* at 139.

204. *Id.* at 138–39.

205. *Id.* at 142.

206. *Id.*

207. *Id.* at 143.

208. 68 F.3d 525, 540 (1st Cir. 1995); *see supra* notes 149–159 and accompanying text.

209. *Morrison*, 780 N.E.2d at 143. See *supra* note 158 and accompanying text for a list of the factors.

210. *See Morrison*, 780 N.E.2d at 143 (citing Gorski v. N.H. Dep't of Corr., 290 F.3d 466, 474 (1st Cir. 2002); Marrero v. Goya of P.R., Inc., 304 F.3d 7, 18–19 (1st Cir. 2002)).

211. Hayut v. State Univ. of N.Y., 352 F.3d 733, 746 (2d Cir. 2003); *see also* Gabrielle M. v. Park Forest-Chi. Heights, Ill. Sch. Dist. 163, 315 F.3d 817, 822 (7th Cir. 2003) (also noting the "fact-specific" nature of Title IX analysis).

212. *See, e.g.*, Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993) (stating, in a Title VII case, that "whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances").

the harasser and the victims, and the number of persons involved.[213] In addition, courts have emphasized viewing conduct in the aggregate, rather than focusing on individual allegations and occurrences.[214] Accordingly, courts have cautioned against using prior case law to attempt to create a baseline for what constitutes actionable sexual harassment.[215]

D. Jennings v. University of North Carolina*: Demonstrating the Problem of Persistently Applying Title VII Precedent to Title IX Cases*

The most recent example of a court's use of Title VII cases in analyzing a sexual harassment claim by a student-athlete against a coach is *Jennings v. University of North Carolina*.[216] The history of the *Jennings* case demonstrates the inadequacy of applying Title VII precedent in the Title IX context and the confusion that this approach has caused in the courts. In *Jennings*, a former student and soccer player at the University of North Carolina at Chapel Hill brought suit against the university and her soccer coach, Anson Dorrance, among others, alleging that the coach had created a hostile environment by continually inquiring into and discussing the sexual activities of the team members and by making remarks that were sexually charged.[217] Jennings was seventeen years old when she began playing for coach Dorrance, while Dorrance was forty-five.[218]

Jennings alleged that Dorrance would probe girls about their sexual activities and often make objectifying remarks about players' bodies.[219] According to Debbie Keller, one of Jennings's teammates, during daily warm-up sessions before practice, some women spoke freely about their personal lives, including sexual activities.[220] Amy

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213. Davis *ex rel.* LaShonda D. v. Monroe County Bd. of Educ., 526 U.S. 629, 651 (1999) (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82 (1998)).

214. *See, e.g.*, Crandell v. N.Y. York Coll. of Osteopathic Med., 87 F. Supp. 2d 304, 319 (S.D.N.Y. 2000) (stating that whether each of the plaintiffs' allegations alone created a hostile environment under Title IX was irrelevant because the allegations had to be viewed in the aggregate).

215. *See, e.g.*, *Hayut*, 352 F.3d at 746 (noting that "'appalling conduct alleged in prior cases should not be taken to mark the boundary of what is actionable'" (quoting Whidbee v. Garzarelli Food Specialties, Inc., 223 F.3d 62, 70 (2d Cir. 2000))).

216. 482 F.3d 686 (4th Cir. 2007) (en banc).

217. *Id.* at 691.

218. *Id.*

219. *Id.*

220. Jennings v. Univ. of N.C., 444 F.3d 255, 259–60 (4th Cir. 2006) (panel decision). Every day, before the formal start of practice, the team would engage in casual warm-up sessions where team members would stretch and often talk and joke amongst themselves about various subjects besides soccer. *Id.*

Steelman, another member of the team, stated that Dorrance took part in "'sexual discussions, sexual jokes, sexual talk, sexual banter, and sexual innuendos,'" with the players during these sessions.[221] Jennings claimed that almost every day Dorrance would ask one player questions such as "'who [her] fuck of the minute is, fuck of the hour is, fuck of the week [is],' whether there was 'a guy [she] ha[dn't] fucked yet,' or whether she 'got the guys' names as they came to the door or . . . just took a number.'"[222] He asked another player whether she planned "'to have sex with the entire lacrosse team,'" and told a third player "'to keep [her] knees together . . . you can't make it so easy for them.'"[223] He also told some girls that they had "'nice legs'" and "'nice rack[s],'" and made references to their "'bouncing'" breasts and "'top heav[iness].'"[224] To one player named Charlotte, Dorrance questioned whether she liked men and often referred to her as "Chuck" because he thought that she was a lesbian.[225] Jennings also once overheard Dorrance fantasizing with the team's trainer about participating in an "'Asian threesome'" with the team's Asian members.[226]

Although Jennings admitted that Dorrance never spoke inappropriately about her body, Jennings alleged two instances when her personal life became the topic of discussion during practice.[227] On one occasion during her sophomore year, Dorrance had asked one of Jennings's teammates whether the teammate had a "'shag fest'" while visiting with her boyfriend over the weekend, after which both Dorrance and the teammate asked Jennings about Jennings's personal activities during a weekend visit with her boyfriend.[228] On another occasion, Dorrance was present when one of Jennings's teammates teased her about whether Jennings was dating a particular boy.[229]

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221. *Id.* at 260.

222. *Jennings*, 482 F.3d at 691 (en banc) (alteration in original).

223. *Id.* at 691–92. Dorrance also allegedly asked yet another player whether she intended to have a "'shag fest'" with her boyfriend and if she was "'going to fuck him and leave him.'" *Id.* at 692. To a fifth player, Dorrance specifically asked about the size of her boyfriend's genitalia. *Id.*

224. *Id.* at 692 (alteration in original).

225. *Id.* Dorrance also said to Debbie Keller that he would "'die to be a fly on the wall'" when her roommate, also a teammate, first had sex because he believed her roommate to be "'a very sexual person by nature.'" *Id.*

226. *Id.*

227. *Jennings*, 444 F.3d at 261 (panel decision).

228. *Id.*

229. *Id.* According to Jennings, this incident took place during a stretching session before practice. *Id.* When Jennings answered that the boy was just a friend, the teammate teased her and said that she saw Jennings hug him. *Id.* Although Dorrance was present,

In the fall of her first year at the school, Jennings met with Susan Ehringhaus, the university's legal counsel and Assistant to the Chancellor, to voice her discomfort with Dorrance's comments and behavior.[230] During the meeting, Jennings made a number of complaints, including the allegation that Dorrance made sexual comments during practice.[231] However, Ehringhaus dismissed Jennings's concerns and told her to "'work it out'" with Dorrance directly.[232]

Despite this meeting, Dorrance's conduct continued and extended beyond the practice field.[233] On one particular instance, in a one-on-one player meeting in Dorrance's hotel room, he prodded Jennings personally about her sex life.[234] While the soccer team was in California for the national championship tournament, Dorrance allegedly held one-on-one player evaluation meetings with each of the players, including Jennings, in his hotel room.[235] During their meeting, Dorrance informed Jennings that she needed to improve her grades or she could lose her athletic eligibility.[236] Jennings claimed that during this discussion, Dorrance asked, "'Who are you fucking?'" and if such behavior was hurting her grades.[237] Jennings replied that her personal life was "'[n]one of his God damn business.'"[238]

Eventually, Dorrance cut Jennings from the team, allegedly because of "inadequate fitness."[239] Thereafter, Jennings's parents complained to Ehringhaus about Dorrance's personal questions and sexual comments directed at the players.[240] In a letter to Ehringhaus by Jennings's father, Mr. Jennings expressed that he found it "extremely disturbing and completely inappropriate" for a university staff member to address such comments and questions to any university student or athlete.[241] In accordance with the university's sexual har-

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Jennings could not remember if he said anything during this particular exchange. *Id.* at 261–62.

230. *Jennings*, 482 F.3d at 693–94 (en banc).

231. *Jennings*, 444 F.3d at 262 (panel decision). During her meeting with Ehringhaus, Jennings discussed how Dorrance continually discussed the sex lives of the players and that his conduct made her feel humiliated and uncomfortable. *Jennings*, 482 F.3d at 694 (en banc). Jennings never said that Dorrance's sexual comments were aimed at her. *Jennings*, 444 F.3d at 262 (panel decision).

232. *Jennings*, 482 F.3d at 694 (en banc).

233. *Id.* at 693–94, 700.

234. *Id.* at 693; *Jennings*, 444 F.3d at 262 (panel decision).

235. *Jennings*, 482 F.3d at 693 (en banc).

236. *Id.*

237. *Id.*; *Jennings*, 444 F.3d at 263 (panel decision).

238. *Jennings*, 482 F.3d at 693 (en banc) (alteration in original).

239. *Id.* at 694.

240. *Id.*; *Jennings*, 444 F.3d at 264 (panel decision).

241. *Jennings*, 444 F.3d at 264 (panel decision).

assment policy, the Director of Athletics, Richard Baddour, conducted an administrative review, which Dorrance participated in.[242] Although Dorrance acknowledged taking part in group discussions at practice concerning the athletes' sexual activities, Dorrance alleged that his comments were made in jest.[243] After the review, Baddour wrote a letter to Jennings's father, which Dorrance endorsed.[244] In the letter, Baddour apologized for Dorrance's actions and acknowledged that, although Dorrance did not intend for his comments to be offensive, Dorrance's actions were inappropriate and that Dorrance would immediately stop this activity.[245]

Unsatisfied with the school's response, Jennings brought suit in the United States District Court for the Middle District of North Carolina against the university, Dorrance, and various university officials, including Ehringhaus.[246] Although Jennings brought this suit in August 1998,[247] the case was not settled until January 2008,[248] and there was considerable disagreement among the judges in the district court and in the Fourth Circuit as to whether Dorrance's conduct satisfied the "severe or pervasive" test.[249] Specifically, in the original district court case, the court granted summary judgment to the defendants, holding that although Dorrance's conduct was "inappropriate in some respects," the conduct "was not 'severe, pervasive and objectively offensive'" such that it denied Jennings educational opportunities.[250] In reaching this conclusion, the district court noted that "[c]ourts

242. *Jennings*, 482 F.3d at 694 (en banc).

243. *Id.*

244. *Id.*

245. *Id.*; *Jennings*, 444 F.3d at 265 (panel decision).

246. *Jennings*, 482 F.3d at 694 (en banc); *Jennings*, 444 F.3d at 265–66 (panel decision). Originally, both Jennings and her teammate Debbie Keller brought suit. *Jennings*, 482 F.3d at 694 (en banc). After the district court partially granted the university's motion to dismiss, the following claims remained: (1) a Title IX claim against the school; (2) claims for damages under 42 U.S.C. § 1983 against Dorrance for invading the plaintiffs' privacy, Dorrance and Palladino (the assistant coach) for sexual harassment, and against various university officials for failing to supervise Dorrance and Palladino so as to prevent the alleged conduct; and (3) a claim for common law invasion of privacy under North Carolina law against Dorrance. *Jennings*, 444 F.3d at 259, 265–66 (panel decision). Ultimately, Keller settled her suit with the defendants and her claims were dismissed with prejudice. *Jennings*, 482 F.3d at 694 (en banc).

247. *Jennings*, 482 F.3d at 694 (en banc).

248. Stancill, *supra* note 29.

249. *Compare, e.g.*, *Jennings*, 482 F.3d at 695 (en banc) ("[Dorrance's] conduct went far beyond simple teasing and qualified as sexual harassment."), *with Jennings*, 444 F.3d at 275 (panel decision) ("[N]o reasonable jury could find that Dorrance's remarks during Jennings'[s] two-year tenure on the team were sufficiently severe or pervasive to create a sexually hostile educational environment.").

250. Jennings v. Univ. of N.C., 340 F. Supp. 2d 666, 675 (M.D.N.C. 2004).

have looked to case law for Title VII . . . to establish what constitutes discrimination based on sex under Title IX."[251] Using the factors enunciated in *Harris* "as well as the ages of the harasser and the victim and the number of individuals involved," the court reasoned that Dorrance's conduct was merely offensive.[252] Citing *Faragher*, the court reiterated that such an approach was "'sufficiently demanding to ensure that Title VII [and by extension, Title IX] does not become a general civility code . . . . Properly applied, they will filter out complaints attacking the ordinary tribulations of the workplace, such as sporadic use of abusive language, gender-related jokes, and occasional teasing.'"[253]

On appeal, a panel of the Fourth Circuit affirmed the district court's grant of summary judgment.[254] Relying predominately on Title VII case law, the panel agreed that Dorrance's conduct did not constitute sexual harassment in violation of Title IX because he only once directed his comments at Jennings and he "never touched, never threatened, never ogled, and never propositioned" her.[255] The court stated that sexual harassment is sufficiently "severe or pervasive" under Title VII if it amounts to "'a change in the terms and conditions of employment,'" making the workplace "'hellish for women.'"[256] Thus, the court maintained that only extreme conduct would be actionable under Title VII.[257]

In applying this standard to Dorrance's sexual banter during practice, the court reasoned that such remarks were not focused on Jennings and that, even if the comments were harassing, "'secondhand harassment'" was not as objectionable as harassment directed at Jennings.[258] Additionally, the court reasoned that Dorrance's comment regarding an "'Asian threesome'" at most amounted to an "offensive utterance" because it only occurred on one occasion and was

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251. *Id.* at 673 (citation omitted).

252. *Id.* at 674–75.

253. *Id.* at 674 (alteration in original) (quoting Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1988)).

254. *Jennings*, 444 F.3d at 259, 282 (panel decision).

255. *Id.* at 259, 269–72.

256. *Id.* at 269 (quoting *Faragher*, 524 U.S. at 788; Ocheltree v. Scollon Prods., Inc., 335 F.3d 325, 333 (4th Cir. 2003) (en banc)). In other words, according to the court, Title VII requires that the work environment be "'permeated with discriminatory intimidation, ridicule and insult'" to be sufficiently hostile. *Id.* (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)).

257. *Id.* at 270.

258. *Id.* at 272 (quoting Moser v. Ind. Dep't of Corr., 406 F.3d 895, 903 (7th Cir. 2005)). The court also considered that many of Jennings's teammates who took part in these conversations did not consider them offensive. *Id.* at 273.

not directed at Jennings.[259] With regard to the conduct that Dorrance allegedly directed at Jennings, although the court acknowledged that Dorrance's question to Jennings in his hotel room about Jennings's sex life was certainly inappropriate, the court emphasized that Dorrance had not physically threatened or made a sexual proposition to Jennings.[260] The court ultimately found that the question was merely an offensive utterance made in the context of a coach asking about a student's low grades and whether her social life had harmed her academic performance.[261] The court also reasoned that Jennings's "forceful rejection" of Dorrance's questioning suggested that neither Dorrance's age nor the power relationship between Dorrance and Jennings made Dorrance's inquiry sufficiently severe.[262]

Sitting en banc, however, the Fourth Circuit vacated the district court's decision granting summary judgment to the university on Jennings's Title IX claim, and remanded the case for trial.[263] The Fourth Circuit held that a jury could reasonably find Dorrance's conduct to be sufficiently "severe or pervasive" so as to create a hostile environment.[264] In so finding, the Fourth Circuit emphasized Dorrance's control over the lives of the players, including over team membership, positions, playing time, and scholarships, and how Dorrance used his power to intrude into the sex lives of his players.[265] Although Jennings was only specifically targeted on a few occasions, the Fourth Circuit recognized that a reasonable jury could find these instances more abusive given the overall, sexually charged environment that Dorrance had created.[266] Unlike the Fourth Circuit panel, the Fourth Circuit, en banc, found the conduct to be "degrading and persistent" and that it caused discomfort, humiliation, fear, and dread among the players.[267]

Jennings illustrates the difficulty courts have in determining what constitutes sexual harassment and the inadequacy of persistently applying standards developed under Title VII to Title IX cases. In each of these decisions, the court's reliance on Title VII case law to evaluate Dorrance's conduct obscured its reasoning and inhibited its ability to contemplate circumstances unique to the educational, specifically, the

259. *Id.* at 273.
260. *Id.*
261. *Id.*
262. *Id.* at 273–74.
263. Jennings v. Univ. of N.C., 482 F.3d 686, 702 (4th Cir. 2007) (en banc).
264. *Id.* at 696.
265. *Id.* at 696–97.
266. *Id.* at 698.
267. *Id.* at 697–98.

student-athletic, environment. Although the court's reliance on Title VII is consistent with precedent,[268] the repeated influence of Title VII case law on Title IX jurisprudence threatens to eclipse the effectiveness of Title IX in confronting problems unique to the educational, and, particularly, the student-athletic, environment.[269] Rather than repeatedly refer to case law that evolved to address problems in the work environment, courts should develop factors and standards uniquely designed for the educational context.

II. ANALYSIS OF TITLE IX AND THE ARGUMENT FOR THE DEVELOPMENT OF SEXUAL HARASSMENT STANDARDS INDEPENDENT OF TITLE VII

Title IX warrants standards unique to the educational environment and distinct from the standards developed under Title VII for three main reasons. First, the language and purpose of Title IX impel courts to be more proactive in identifying and preventing sexual harassment, and to establish standards designed specifically to protect students.[270] Second, Title IX's proscriptions should be broader than Title VII's because, for a student to fully participate in and obtain the benefits of education, a powerful trust must exist between the student and the teacher, creating an imbalance of power that does not inherently exist in the work environment.[271] Third, Title IX's reach is already limited by the Supreme Court's holding in *Gebser* and, therefore, a broader definition of sexual harassment under Title IX is warranted and will not unreasonably expose educational institutions to Title IX liability.[272]

Although Title VII may be helpful as a guide in analyzing Title IX cases, the statutes were designed to apply to different social contexts, and standards developed to protect the adult workplace are not ade-

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268. *See supra* notes 73–215 and accompanying text.

269. *See* Pinarski, *supra* note 16, at 924 ("A direct application of the 'severe and pervasive' prong of Title VII into Title IX hostile athletic environment cases may fail to capture the nuances that characterize the power dynamic between male coaches and female athletes."); *see also* Diane Heckman, *On the Eve of Title IX's 25th Anniversary: Sex Discrimination in the Gym and Classroom*, 21 NOVA L. REV. 545, 622 (1997) (discussing the distinctions between the Title VII environment and the Title IX environment and asking whether Title IX should offer more protection to its "unique constituency"); Hogshead-Makar & Steinbach, *supra* note 4, at 175 (noting that "the increased opportunity for harassment and an environment that makes some conduct less likely to be considered harassment—make close consideration of the 'constellation of . . . circumstances' in intercollegiate athletics essential").

270. *See infra* Part II.A.

271. *See infra* Part II.B.

272. *See infra* Part II.C.

quate to protect students in the educational environment.[273] Thus, rather than focus on Title VII case law to evaluate Title IX sexual harassment cases, courts should emphasize factors tailored to protect and preserve the educational mission.[274] Using such factors, courts could begin to better evaluate conduct that occurs in the educational setting and more effectively protect the unique relationships, including those between coaches and athletes, that exist in schools.[275]

A. The Affirmative Language of Title IX and Its Overall Purpose to Provide Gender Equality in Education Call for More Proactive and Expansive Protections than Title VII Provides

Although Title VII's ban on sex-based discrimination may not have been "'designed to purge the workplace of [all] vulgarity,'"[276] and only applies to conduct that makes the workplace "'hellish,'"[277] the language and purpose of Title IX suggest that Title IX reaches a broader range of vulgar conduct. Specifically, to ensure equality in education, Title IX affirmatively mandates that a person not be denied "participation in" or the "benefits of" any educational program or activity based on sex.[278] This language is subtly different from Title VII, which prohibits discrimination with respect to "compensation, terms, conditions, or privileges of employment," or with respect to "employment opportunities."[279] In using the language that it did in

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273. *See* Schneider, *supra* note 9, at 551–52 (calling for a more stringent standard to be imposed on faculty-student behavior than on employer-employee behavior).

274. *See infra* Part II.D.

275. Although courts have previously taken the surrounding circumstances of each case into account by applying a broad totality of the circumstances approach, *see supra* notes 211–215 and accompanying text, this unfocused approach is inadequate because it does not prioritize factors unique to the educational context. The *Jennings* case used a totality of the circumstances approach and, as demonstrated above in Part I.D, such an approach proved unpredictable and difficult for courts to apply consistently. *See* Jennings v. Univ. of N.C., 482 F.3d 686, 696 (4th Cir. 2007) (en banc) (stating that courts look at all of the circumstances to determine when harassment is sufficiently "severe or pervasive"); Jennings v. Univ. of N.C., 444 F.3d 255, 267–70 (4th Cir. 2006) (panel decision) (same); Jennings v. Univ. of N.C., 340 F. Supp. 2d 666, 674 (M.D.N.C. 2004) (same).

276. Hartsell v. Duplex Prods., Inc., 123 F.3d 766, 773 (4th Cir. 1997) (quoting Baskerville v. Culligan Int'l Co., 50 F.3d 428, 430 (7th Cir. 1995)).

277. Greene v. A. Duie Pyle, Inc., 371 F. Supp. 2d 759, 763 (D. Md. 2005) (quoting *Baskerville*, 50 F.3d at 430).

278. 20 U.S.C. § 1681(a) (2000) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .").

279. 42 U.S.C. § 2000e-2(a) (2000). Title VII states:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions,

Title IX, Congress called on both educational institutions and courts to take proactive steps in preventing sex discrimination, rather than just prohibiting it. Additionally, although the words "terms" and "conditions" are given a broad construction under Title VII,[280] Title IX's terms "participation" and "benefits of" are even more far-reaching because they are not tied to any specific aspects of education, but rather encompass the entire educational experience.

Although this difference in language should not be overemphasized, it should be acknowledged and viewed within the overall context of the purpose and focus of the two statutes. Title IX was created as part of a broader effort towards "achieving excellence and efficiency" in education,[281] which suggests that Title IX may reach a broader range of conduct than Title VII.[282] Whereas Title VII prohibits workplace discrimination based on a number of characteristics, of which sex is only one, Title IX is uniquely focused on the issues of sex and equality in education[283] and, therefore, its interpretation should be so tailored.[284] Therefore, not only does the language of Title IX dictate more proactive and extensive protection than Title VII provides,[285] but its overall purpose in seeking gender equality in education does as well.

> or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id.

280. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986).

281. *See* H.R. REP. NO. 92-554, at 247 (1971), *as reprinted in* 1972 U.S.C.C.A.N. 2462, 2586–87 (suggesting that the Education Amendments were designed to meet this purpose).

282. *Cf.* 118 CONG. REC. 5806–07 (1972) (Senator Bayh characterizing Title IX as "a strong and comprehensive measure" that he found necessary "to provide women with solid legal protection as they seek education and training for later careers," and adding that it was "designed to expand some of our basic civil rights and labor laws to prohibit the discrimination against women which has been so thoroughly documented").

283. 20 U.S.C. § 1681(a); 42 U.S.C. § 2000e-2(a).

284. *Cf.* Foote & Goodman-Delahunty, *supra* note 32, at 6–7 (noting that Title VII "was implemented mainly to address racial discrimination in the workplace, and ironically, the inclusion of sex as a protected category on the basis of which discrimination was outlawed was a political strategy designed to prevent the act's passage" (emphasis omitted)).

285. *See* CATHARINE A. MACKINNON, SEX EQUALITY 1001 (2001) (asking whether "Title IX's affirmative language envision[s] sex equality rights more expansive than those encompassed by simpler antidiscrimination prohibitions like Title VII"); *cf.* North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982) ("There is no doubt that 'if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language.'" (alteration in original) (quoting United States v. Price, 383 U.S. 787, 801 (1966))).

The importance of education and the unique and vital role it plays in society are well established and bolster the argument that Title IX should be specifically tailored to meet the above goals. The benefits of education range from giving students the opportunity to develop skills needed for a lucrative professional future,[286] to instilling the social and civic values necessary for a democratic society.[287] A college education is critical to an individual's career success and economic security.[288] According to the College Board, college graduates earn over sixty percent more in wages than high school graduates.[289] Similarly, the more educated a person is, the less likely he or she is to experience poverty and unemployment.[290]

Moreover, education functions as the conduit through which society instills its values and mores into its citizens.[291] Evidence suggests that the more educated a person is, the more likely he or she is to vote, engage in volunteer work, give blood, and lead a healthy life overall.[292] For these reasons, psychologists and progressive educators assert that education goes beyond teaching students to read and write to encompass "preparation for living, life adjustment and consequently such things as ethics, human relationships, producing, consuming and civic responsibility."[293]

Colleges are important "in influencing the attitudes and behaviors of young adults," and that time in a student's life is a "defining experience."[294] A college campus may at once function as a place of education, a workplace, and a living space.[295] Moreover, the "college experience" is often highly influential in forming young people's per-

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286. *See* SANDY BAUM & JENNIFER MA, EDUCATION PAYS: THE BENEFITS OF HIGHER EDUCATION FOR INDIVIDUALS AND SOCIETY 8–16 (2007), *available at* http://www.collegeboard.com/prod_about/news_info/cbsenior/yr2007/ed-pays-2007.pdf (detailing how average earnings levels increase with higher levels of education).

287. *See* Ambach v. Norwick, 441 U.S. 68, 77 (1979) (stating that public schools "inculcat[e] fundamental values necessary to the maintenance of a democratic political system").

288. Barbara O'Connor, *Foreword* to HILL & SILVA, *supra* note 2, at iii. Barbara O'Connor, President of the AAUW Educational Foundation, avers that "[w]ithout a college degree, women earn substantially less pay, receive far fewer employer benefits, and are less likely to be financially independent." *Id.*

289. BAUM & MA, *supra* note 286, at 8.

290. *Id.*

291. *See* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (stating that education is so essential in preparing individuals for their "most basic public responsibilities" that "[i]t is the very foundation of good citizenship").

292. BAUM & MA, *supra* note 286, at 8. In addition, the children of more highly educated adults "have higher cognitive skills and engage in more extracurricular, cultural, athletic, and religious activities than other children." *Id.*

293. Charles A. Bucher, *Athletics in Education*, 28 J. EDUC. SOC. 241, 242 (1955).

294. Barbara O'Connor, *Foreword* to HILL & SILVA, *supra* note 2, at iii.

295. HILL & SILVA, *supra* note 2, at 27.

ceptions about sexual conduct and what is appropriate.[296] Therefore, creating an environment in colleges and universities that is free from sexual harassment is of profound importance, and these institutions should be leaders in promoting "respectful and appropriate sexual behavior that does not interfere with other students' educational experiences."[297]

Sexually harassing conduct should also be more closely monitored in schools because of the profound effect it can have on students. While acts of sexual harassment are often similar, regardless of the social context in which they take place, the injury to students, who have impressionable and vulnerable minds, is specific to the educational environment.[298] For example, although the effects of sexual harassment are diverse, some common effects include feeling uncomfortable, embarrassed, violated, distracted, angry, less confident, afraid, confused, helpless, or disappointed.[299] Whether the student reacts by having trouble sleeping, not participating in classes, avoiding his or her harassers, avoiding particular buildings or places, or changing schools,[300] sexual harassment negatively affects the student's participation in and denies the student the benefits of his or her educational experience.[301] In addition to the harm it causes individuals, an educational environment tarnished with sexual harassment can have detrimental implications for society as a whole, "as graduating students bring their attitudes about sexual harassment into the workplace and beyond."[302] Ultimately, sexual harassment in schools poisons the educational environment and can destroy the educational mission.

Courts have recognized the vital importance of education in other contexts as well, and have cautioned against the use of standards

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296. *Id.* at 36.

297. *Id.*

298. *See* MACKINNON, *supra* note 285, at 1001.

299. HILL & SILVA, *supra* note 2, at 27–30, 32. When thinking about gender equality, it is also noteworthy that female students are more likely to experience these feelings as a result of harassment. *Id.* at 28.

300. *Id.* at 28, 31–32.

301. *See* MACKINNON, *supra* note 285, at 1007 (discussing the harm of unwanted sexual attention to individual students and to the entire academic community, and noting that an individual might "'submit to unwanted sexual attention at the price of debilitating personal anguish or may withdraw from a course or position and thus be forced to change plans for a life's work'" (quoting Senate Committee on Faculty Affairs, Univ. of Minn., *Policy Statement on Sexual Harassment* (Apr. 16, 1981))).

302. HILL & SILVA, *supra* note 2, at 4.

developed in the adult context to evaluate conduct in schools.[303] For example, the Supreme Court has emphasized the "'special characteristics of the school environment'" in the student speech context.[304] In *Bethel School District No. 403 v. Fraser*,[305] the Supreme Court emphasized the vital role that education plays in our society, and gave schools more latitude to limit First Amendment free speech rights than is allowed outside of the school environment.[306] The Court underscored the public school's role in instilling the core values of society and reasoned that schools "teach by example the shared values of a civilized social order" and "teach[ ] students the boundaries of socially appropriate behavior."[307] In addition, the Court noted that "teachers . . . demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class."[308] The Court also distinguished the educational environment from situations involving adults.[309] In doing so, the Court recognized the school's interest in limiting lewd and offensive speech, reasoning that it "could well be seriously damaging to its less mature audience."[310]

If student speech rights must be tailored to accommodate the distinct characteristics of the educational environment and to protect students from exposure to lewd and offensive behavior, so too should school officials be held to a higher standard in governing their own conduct and the conduct of their employees. Thus, the Court's recognition of a different constitutional standard for evaluating First Amendment speech claims in the educational environment supports

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303. *See, e.g.*, Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1011 n.11 (5th Cir. 1996) (explaining that "importing a theory of discrimination from the adult employment context into a situation involving children is highly problematic").

304. Morse v. Frederick, 127 S. Ct. 2618, 2622 (2007) (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988)); *see also* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986) (noting that the First Amendment standards that apply to adults do not necessarily also apply to children in public schools).

305. 478 U.S. 675 (1986).

306. *Id.* at 681–84.

307. *Id.* at 681, 683.

308. *Id.* at 683.

309. *See id.* at 682 (asserting that the constitutional rights of children in schools are not "coextensive with the rights of adults in other settings"). The Court further stated that while the First Amendment affords broad protection to adult public discourse, the same freedom does not extend to children in public schools. *Id.*

310. *Id.* at 683; *see also* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) ("A school need not tolerate student speech that is inconsistent with its 'basic educational mission,' even though the government could not censor similar speech outside the school." (quoting *Fraser*, 478 U.S. at 685)).

the notion that schools are highly distinct from the adult work environment.

For all of the above reasons, courts should be wary of reflexively applying Title VII standards to Title IX sexual harassment cases. To ensure that no student is denied, on the basis of sex, participation in or the benefits of education, Title IX warrants broader, more proactive protections that take into consideration the distinctive aspects of the educational environment.

B. The Educational Environment Warrants a Broader Definition of Sexual Harassment than the Work Environment Because of the Inherent Trust and Imbalance of Power Between Teachers and Students

Title IX also warrants broader protections from sexual harassment than those required under Title VII because of the importance of trust between students and teachers. To be effective in carrying out the educational mission, an educational program requires close, but nondiscriminatory and non-abusive, personal interaction between students and faculty members.[311] Although a non-hostile environment is important in the employment context, it is essential in the academic context because students develop an "inherent trust in and dependence upon professors" that is critical to their education.[312] Because of the unique trust placed in teachers by students, some commentators have suggested that the teacher-student relationship resembles a fiduciary relationship, like the therapist-client relationship, particularly in one-on-one situations.[313] In a fiduciary relationship, the two parties proceed on unequal terms and the fiduciary must, therefore, conduct him or herself with the highest level of good faith and only for the other party's benefit.[314] When the boundaries of the student-teacher relationship are violated, its "integrity and effectiveness" suffer, hampering the student's personal and professional development.[315] This intrinsic trust between students and members of a school's faculty and administration does not exist between adults in the employment context.[316]

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311. *See* Schneider, *supra* note 9, at 534, 551.

312. *Id.* at 551–52.

313. S. Michael Plaut, *Boundary Issues in Teacher-Student Relationships*, 19 J. SEX & MARITAL THERAPY 210, 213 (1993).

314. *Id.*

315. *Id.* at 216.

316. *See* Schneider, *supra* note 9, at 551 (noting that "[t]he student-faculty relationship encompasses a trust and dependency that does not inherently exist between parties involved in a sexual harassment claim under Title VII").

In addition to the trust between a teacher and a student, there is an inherent imbalance of power in educational environments that does not always exist in employment settings.[317] Teachers have obvious formal powers over students, such as control over "grades, summer opportunities, research positions, fellowships, and access to information and other scholars."[318] However, educators also exercise a more intrinsic power, which derives from their role as "mentors and nurturers of young minds."[319] This imbalance of power is critical to assessing harassing behavior because, as many commentators suggest, sexual harassment is much more about power and control than it is about sex.[320] One of the major characteristics that distinguishes sexually harassing conduct from conduct that is merely inappropriate or obnoxious is that sexual harassment often "occurs in the context of a power imbalance."[321] This imbalance is especially acute in schools, where students may be particularly vulnerable.[322]

Moreover, given this imbalance of power, students are more likely to acquiesce to improper behavior on the part of a teacher out of fear that the harasser may retaliate or that nobody would believe the story if the student reported it.[323] The Supreme Court recognized the chal-

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317. *See id.* at 551–52.

318. SEXUAL HARASSMENT ON CAMPUS: A GUIDE FOR ADMINISTRATORS, FACULTY, AND STUDENTS 7 (Bernice R. Sandler & Robert J. Shoop eds., 1997) [hereinafter SEXUAL HARASSMENT ON CAMPUS].

319. Thomas M. Melsheimer et al., *The Law of Sexual Harassment on Campus: A Work in Progress*, 13 REV. LITIG. 529, 554 (1994); *see also* Letter from Dean Henry Rosovsky to the Harvard Faculty (April 1983), *in* JOHN KENNETH GALBRAITH, A VIEW FROM THE STANDS 125 (Andrea D. Williams ed., 1986) [hereinafter Letter from Dean Rosovsky] ("Implicit in the idea of professionalism is the recognition by those in positions of authority that in their relationships with students there is always an element of power.").

320. *See, e.g.*, SEXUAL HARASSMENT ON CAMPUS, *supra* note 318, at 7 ("Most people think sexual harassment is simply about sex, when in truth, it has more to do with power than with sex."); Melsheimer et al., *supra* note 319, at 530–31 (linking the imbalance of power in the student-teacher relationship to the problem of sexual harassment).

321. SEXUAL HARASSMENT ON CAMPUS, *supra* note 318, at 7.

322. *See* MACKINNON, *supra* note 285, at 1005 ("Sexual harassment of students by teachers arguably derives much of its ability to injure from power and authority that teachers hold and exercise as teachers, including their access to vulnerable students whose receptivity and openness makes learning possible.").

323. *See* Hayut v. State Univ. of N.Y., 352 F.3d 733, 749 (2d Cir. 2003) ("Given the power disparity between teacher and student[,] a factfinder could reasonably conclude that a student-victim's inaction, or counter-intuitive reaction, does not reflect the true impact of objectionable conduct."); Crandell v. N.Y. Coll. of Osteopathic Med., 87 F. Supp. 2d 304, 306 (S.D.N.Y. 2000) ("Plaintiff's failure to notify defendants of her problems as they occurred . . . may well have been a product of concern about the effect of such complaints on her grades and career prospects."); Morrison v. N. Essex Cmty. Coll., 780 N.E.2d 132, 137 (Mass. App. Ct. 2002) (noting that students acquiesced to sexual abuse by their coach to whom they felt "beholden" for scholarships and playing time); Holly Hogan, *What Athletic Departments Must Know About Title IX and Sexual Harassment*, 16 MARQ. SPORTS L. REV. 317,

lenges a student may face in reporting sexual harassment when, in *Jackson v. Birmingham Board of Education*,[324] it stated that adult employees, such as teachers and coaches, are often best positioned to protect students' rights because they can, more easily than students, identify discrimination and notify administrators.[325] Because students are in this vulnerable position vis-à-vis their teachers, teachers have a heightened duty "not to abuse, nor to seem to abuse, the power with which they are entrusted."[326]

Equal access to participation in, and the benefits of, education are precisely what Title IX protects.[327] An environment that is soured by sexually offensive behavior can inhibit a student's ability to participate equally and benefit fully from his or her educational program.[328] The relationship that students have with their teachers and mentors has been characterized as the epitome of the educational experience.[329] One study found that graduate students view their relationships with faculty members "as the single most important aspect of the quality of their graduate experience."[330] In educating a student of a particular profession, a teacher takes on a variety of roles, including: (1) a teacher of skills and ideas; (2) a sponsor of the student's admission into and development within the profession; (3) a guide into the "values, customs, resources and cast of characters" important in the profession; (4) an exemplar; (5) a counselor; (6) an evaluator of the

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349 (2006) (explaining that a student may submit to harassment from a teacher in a position of authority, fearing retaliation from the teacher or that no one will believe the student); Schneider, *supra* note 9, at 528 (noting that "students may fear that [an] institution will deny the validity or seriousness of a student['s] complaint against a faculty member").

324. 544 U.S. 167 (2005).

325. *Id.* at 181. In support of the notion that teachers and coaches may more easily be able to identify sexually harassing conduct than students, see *Morrison*, 780 N.E.2d at 137, where college athletes feared testifying against their coach because they believed their acquiescence to his sexual abuse was consensual. In that opinion, the court reasoned that the students may not have immediately recognized the significance of the sexually discriminating conduct. *Morrison*, 780 N.E.2d at 142.

326. Letter from Dean Rosovsky, *supra* note 319, at 125.

327. *See* Davis *ex rel.* LaShonda D. v. Monroe County Bd. of Educ., 526 U.S. 629, 633 (1999) (holding that sexual harassment is actionable under Title IX when "it effectively bars the victim's access to an educational opportunity or benefit").

328. *See* Doe v. Green, 298 F. Supp. 2d 1025, 1038 (D. Nev. 2004) (noting that a student who was sexually abused by a teacher "ha[d] been denied the security that is fundamental to accessing the institution's resources and opportunities"); Schneider, *supra* note 9, at 551 ("A sexually abusive environment inhibits, if not prevents, the harassed student from developing her full intellectual potential and receiving the most from the academic program.").

329. *See* Plaut, *supra* note 313, at 210 ("A good mentoring relationship can be what is sometimes called a 'peak experience' for both mentor and student—a sharing of something unique that no one else may experience in quite the same way.").

330. Robert R. Bargar & Jane Mayo-Chamberlain, *Advisor and Advisee Issues in Doctoral Education*, 54 J. HIGHER EDUC. 407, 407 (1983).

student's work and development; and (7) a believer in the student's ability to grow and flourish in the profession.[331] Where a teacher sexually harasses a student, the student loses the value of all of these benefits.[332] Likewise, when a coach harasses one of his athletes, the athlete loses the benefits associated with the coach-athlete relationship and the benefits of participating in the athletic activity.

The importance of trust and the intrinsic imbalance of power in the student-teacher relationship demands that sexually offensive conduct in the academic setting be more carefully scrutinized and circumscribed than in the employment context.[333] Indeed, the Supreme Court in *Gebser* noted the "extraordinary harm" that a student must endure when he or she is sexually harassed by a teacher, and reasoned that such conduct "undermines the basic purposes of the educational system."[334] As such, conduct that may be merely offensive in an adult employment context may well constitute actionable harassment at school. For example, if a teacher engaged in conduct comparable to that in *Hopkins v. Baltimore Gas and Electric Co.*,[335] such as entering a student bathroom and pretending to lock the door, positioning a magnifying glass over a student's crotch and exclaiming "Where is it?," or engaging in a discussion in front of students about surviving a plane crash using another person's genitalia to breathe through, such conduct seems much closer to hostile and abusive, than merely offensive.[336] This would be true even if the comments were sexually neutral or ambiguous and the teacher never made any overt propositions to students. Thus, whereas Title VII is designed to provide a remedy only when a workplace is made "hellish,"[337] courts must analyze the characteristics of the educational environment specifically to deter-

331. *See* Plaut, *supra* note 313, at 214.

332. *See id.* at 216–17 (discussing the negative effects on students when teachers violate boundaries).

333. Schneider, *supra* note 9, at 551–52; *see also* Heckman, *supra* note 269, at 622 (arguing that while reliance on Title VII is proper in the employment context, Title IX should offer more protection because of "its unique constituency").

334. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 292 (1998); *see also* Doe v. Green, 298 F. Supp. 2d 1025, 1038 (D. Nev. 2004) (stating that "the Supreme Court undoubtedly refer[red] to the immense trust placed in school employees to keep students safe and to maintain an environment and relationship conducive to learning" when making the statement above).

335. 77 F.3d 745 (4th Cir. 1996).

336. *See id.* at 747, 754 (determining that the conduct described above did not create a hostile environment).

337. *See supra* note 277 and accompanying text.

mine the broader range of abusive behavior against which Title IX is meant to guard.[338]

C. *Allowing Title IX to Proscribe a Broader Range of Conduct Would Not Subject Educational Institutions to Undue Liability as Their Exposure to Liability Is Already Limited Under* Gebser

Because courts do not hold educational institutions liable on an agency basis, but only for showing deliberate indifference to known harassment,[339] adopting a broader construction of Title IX would not overly burden schools with unfair liability. Instead, it would require educational institutions to respond to conduct that is less severe than required under Title VII, but that may, nevertheless, reasonably be perceived as harassing to students.[340] The Supreme Court has made clear that an educational institution may be liable under Title IX only for the institution's own acts and not under agency principles and, as such, an educational institution must know about the harassment and must have "an opportunity to rectify any violation."[341] If the educational institution responds adequately to the harassment, the institution will not be held liable.[342] Thus, the institution itself will not be held liable unless it had notice and its response was "clearly unreasonable."[343] This built-in limitation curtails the reach of Title IX and allows Title IX to cover a broader range of abusive activity without unduly exposing educational institutions to Title IX liability.[344]

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338. *See* Pinarski, *supra* note 16, at 945 (arguing that the courts must recognize "the nuances of the context of the athletic environment so that seemingly benign behavior is not summarily dismissed as coaching technique . . . if the promise of Title IX equality is ever to be fulfilled").

339. *Gebser*, 524 U.S. at 288–90.

340. *See infra* Part II.D (listing factors to consider when making this determination under Title IX).

341. *Gebser*, 524 U.S. at 288–90.

342. Wills v. Brown Univ., 184 F.3d 20, 41 (1st Cir. 1999).

343. Davis *ex rel.* LaShonda D. v. Monroe County Bd. of Educ., 526 U.S. 629, 648–49 (1999).

344. This restriction distinguishes Title IX cases from Title VII cases, where the analysis focuses more on the employee's conduct than on the employer's response, and an employer's lack of notice of the conduct is not dispositive. *See supra* note 66 and accompanying text.

D. Rather than Rely on Title VII Case Law to Assess Conduct and Determine Liability, Courts Should Focus on Factors Tailored to Protect the Educational Environment

When assessing whether conduct is "severe or pervasive" enough to warrant Title IX liability, courts should not look primarily to Title VII standards for analogies and comparisons, but should emphasize factors uniquely tailored to ensure equality in education. Specifically, the courts should look to factors that take into account the unique importance of education and the inherent trust and power imbalances between educators and students. Thus, in addition to the *Harris* factors described above, which act as a general guide when assessing sexual harassment,[345] courts should consider more specifically tailored factors. In particular, courts should take into account: (1) the educational setting in which the harassment took place;[346] (2) the nature of the relationship between the harasser and the harassed, including the imbalance of power and the educational purpose of the relationship;[347] and (3) the existence of adequate safeguards and policies to prevent such harassment, and the reasonableness of the educational institution's response in preventing or remedying conduct of which it knew or should have known.[348] An example of how a court should apply these factors, in the context of *Jennings*, is offered below.[349]

1. Educational Setting of Harassment

The first factor courts should consider is the educational setting in which the harassment occurred. Specifically, courts should assess the educational purpose of the activity and overall value that the activity has in the student's education. This factor takes into consideration the variety of activities, events, and social contexts that occur within the educational environment and during which harassment can take place.[350] For example, harassment may occur in the classroom, in the

345. *See supra* note 158 and accompanying text.
346. *See infra* Part II.D.1.
347. *See infra* Part II.D.2.
348. *See infra* Part II.D.3.
349. *See infra* Part II.D.4.
350. It is important to consider each of these contexts given that with the enactment of the Civil Rights Restoration Act of 1987, Title IX's coverage extends, with certain exceptions for religiously affiliated entities, to "all of the operations of . . . (A) a college, university, or other postsecondary institution, or a public system of higher education; or (B) a local educational agency . . . , system of vocational education, or other school system" if the institution receives federal funding. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, § 3, 102 Stat. 28, 28–29 (1988) (codified as amended at 20 U.S.C. § 1687 (2000)).

hallways, in a clinical program, during an extracurricular activity, in an athletic program, on school trips, during school-related functions, and so forth.[351] The effect on a student's ability to participate in or benefit from an educational experience will vary depending on the setting in which the harassment took place.[352] For instance, sexual misconduct in a one-on-one tutorial session by a teacher with whom a student has a class, or a one-on-one training session by a coach, is likely to cause greater detriment than harassment by a school employee during a school-related social activity or in the cafeteria, at least where physical violence is not involved. Whereas sexual harassment in the classroom or in the locker room more directly affects the educational "benefit" the student receives, harassment outside of these environments will usually more indirectly affect the student's educational experience. This factor, therefore, will allow courts to better evaluate the harm to the student's educational experience and the possible denial of educational participation and benefits.

2. Relationship Between Harasser and Harassed

The second factor, intertwined with the first, focuses on the nature of the relationship between the harasser and harassed.[353] In assessing this factor, courts should look at the relative ages of the harasser and the harassed,[354] whether the relationship is one of teacher-student, coach-student, administrator-student, or school employee-student,[355] as well as how directly that individual is involved in the education of the student. Courts should also consider the level of school at which the harassment took place, elementary through postgraduate secondary education, because it affects the power imbalance between the student and the adult harasser. This factor is important because the level of dependency and trust between the student and

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351. *See, e.g.*, HILL & SILVA, *supra* note 2, at 2 ("Sexual harassment occurs nearly everywhere on campus, including student housing and classrooms.").

352. *Cf.* MACKINNON, *supra* note 285, at 1005 ("One cannot receive equal benefit of an education while coping with rape or threat of rape in school, or participate equally in class while running a gauntlet of physical or verbal sexual assault and denigration, or learn effectively in a context of insecurity and disrespect because of one's sex.").

353. Davis *ex rel.* LaShonda D. v. Monroe County Bd. of Educ., 526 U.S. 629, 653 (1999) ("The relationship between the harasser and the victim necessarily affects the extent to which the misconduct can be said to breach Title IX's guarantee of equal access to educational benefits and to have a systemic effect on a program or activity.").

354. *Id.* at 651.

355. *Cf.* HILL & SILVA, *supra* note 2, at 21 (noting that harassment on college campuses may come from a variety of people, including professors, resident advisers, security guards, coaches, counselors, or deans).

teacher will vary depending on the nature of the relationship.[356] Whereas a higher level of dependency and trust will exist between a student and teacher in a one-on-one mentoring relationship, the level of dependency and trust will be much lower between a student and a school employee with whom the student has no direct educational relationship.[357] Additionally, a teacher or a coach who functions as an evaluator will generally exert a greater power over a student than an employee or an administrator who does not directly evaluate the student's work or performance.[358] Thus, determining the nature of the relationship between the harasser and student is vital in assessing sexual harassment in education because of the role that dependence, trust, and power play in sexual harassment.[359]

3. Institutional Response to Harassing Conduct

The third factor focuses on the safeguards that a school establishes to protect students from sexual harassment and the school's response to sexually harassing conduct. Although courts ordinarily examine a school's response upon notification of harassment as a separate element of a Title IX hostile environment claim,[360] the school's response or failure to respond is also relevant in determining the hostility of the environment that the student endured.[361] Specifically, the failure to respond or provide adequate outlets for those who are experiencing some form of harassment can seriously aggravate the harm.[362] Many students suffering as a result of sexual harassment may be as hurt by the failure of the school to respond appropriately as by the actual harassment.[363] The harm caused by institutional indifference is also salient because of the difficulties students face in report-

356. Plaut, *supra* note 313, at 214.

357. *Id.* (noting that "the need for both closeness and boundaries are at their greatest" in one-on-one mentoring relationships); *cf.* HILL & SILVA, *supra* note 2, at 21 (pointing out that sexual harassment by faculty can be particularly upsetting for students due to faculty members' power and authority).

358. *Cf.* SEXUAL HARASSMENT ON CAMPUS, *supra* note 318, at 7 ("The formal power of a supervisor or a faculty member is obvious, both have the power to affect the life chances of employees and students because of their ability to provide or withhold a benefit, evaluation, or service, and their potential to do harm.").

359. *See supra* note 320 and accompanying text.

360. *See supra* note 72 and accompanying text.

361. See MACKINNON, *supra* note 285, at 1004–05 (noting that "sexual harassment in school, combined with the failure of schools to respond to it adequately, can have a devastating and traumatic effect on the educational opportunities and emotional development of girls and young women").

362. *Id.* at 1005.

363. *Id.*

ing harassment.[364] In a recent report, the AAUW stated that less than ten percent of college students who are harassed report the incidents to an employee of the college or university for various reasons, including "skepticism that anyone can or will help, and not knowing whom to contact at the school."[365] The AAUW added that many women experience "nervousness or discomfort" in reporting conduct because they fear it "might not be 'a big enough deal.'"[366] As a result of institutional indifference or unresponsiveness, students will continue to experience hostile educational environments, which cause them to consider changing schools, not attend school, not participate in class or, as a more extreme alternative way of dealing with harassment, think about or attempt suicide.[367] Therefore, the educational institution's response is pertinent in determining the severity of sexual conduct and whether a hostile environment exists.[368]

4. *Analyzing* Jennings v. University of North Carolina *Using the Three Proposed Factors*

As previously explained, *Jennings v. University of North Carolina*[369] demonstrates the difficulty courts have in defining sexual harassment and the problem with relying too heavily on Title VII case law.[370] The Fourth Circuit could more effectively have analyzed Dorrance's conduct by explicitly setting forth and using the three factors outlined above. If the court had done so, it would have concluded that participating in the UNC women's soccer program was fundamental to Jennings's educational experience;[371] that Dorrance unfairly capitalized on the power that he held over his players;[372] and that UNC's inadequate response to Jennings's complaint intensified the hostility of the environment that she experienced.[373] By expressly enunciating and evaluating these factors, as well as the pervasiveness of Dorrance's conduct, the court would have more soundly analyzed Jennings's Title IX

364. *See supra* notes 323–325 and accompanying text.

365. *See* HILL & SILVA, *supra* note 2, at 4. Over one-third of students do not reveal incidents of sexually harassing conduct to anyone. *Id.*

366. *Id.* at 32.

367. MACKINNON, *supra* note 285, at 1004–05.

368. While courts must still scrutinize the institution's response when determining whether to impute liability to the institution, to ensure that victims of sexual harassment reach the imputation stage of the analysis, courts should also consider it when evaluating the severity of the conduct.

369. 482 F.3d 686 (4th Cir. 2007) (en banc).

370. *See supra* Part I.D.

371. *See infra* Part II.D.4.a.

372. *See infra* Part II.D.4.b.

373. *See infra* Part II.D.4.c.

claim to determine that a reasonable jury could have found a Title IX violation based on sex.[374]

a. The Educational Setting: College Athletics

The alleged harassment in *Jennings* occurred within the context of the women's soccer program at the University of North Carolina at Chapel Hill.[375] Athletics have for many years played an important role in education.[376] Athletics afford those students who participate an opportunity to develop "physical, mental-emotional, and social values" that contribute to the students' overall educational experience.[377] Although an athletic program may sometimes appropriately be characterized as "extracurricular," in other circumstances, where the program is highly intensive and competitive and requires a substantial personal commitment of time and effort, the program may be characterized as more fundamental to the educational experience. When the activity rises to such a high level of importance in the student's overall educational experience, courts should more carefully scrutinize the alleged sexual misconduct.

In Jennings's case, the level of personal commitment required of her and the substantial role that soccer played in her college life suggests that the activity was fundamental to her educational experience. Jennings participated in a soccer program that has been labeled "the country's most successful women's soccer program at the college level."[378] The UNC soccer team has won the most national championships in the history of women's college soccer and, therefore, young women with extraordinary soccer skills yearn for a spot on the team.[379] Jennings began participating in the soccer program at the outset of her first year of college in August 1996, and continued through May 1998, when she was cut at the end of her sophomore year.[380] During soccer season, which was during the fall, Jennings was required to be at practice every weekday afternoon and on Saturday mornings, except on game days.[381] Given the high degree of performance and dedication required to compete at this level and the amount

374. *See infra* notes 375–429 and accompanying text.

375. *Jennings*, 482 F.3d at 691 (en banc).

376. *See* Bucher, *supra* note 293, at 242 (suggesting that athletics are "an important and integral part of the whole educational process").

377. *Id.*

378. *Jennings*, 482 F.3d at 691 (en banc).

379. *Id.*

380. Jennings v. Univ. of N.C., 444 F.3d 255, 283 (4th Cir. 2006) (panel decision) (Michael, J., dissenting).

381. *Id.* at 259 (majority opinion).

of personal commitment Jennings had to make, it is not unreasonable to conclude that the activity was central to Jennings's education. As such, and given the pervasiveness of Dorrance's sexual comments,[382] it is clear that Jennings at least raised a triable issue of fact as to whether a hostile environment existed that inhibited her from reaping the full benefits of the soccer program.

b. Nature of the Relationship: Coach-Student

Sexual harassment of female athletes by male coaches is a significant and frequent problem in student athletics.[383] Many attribute this phenomenon to the unique and close-knit relationship between coaches and athletes.[384] Coaches and athletes spend large amounts of time together both on and off the field, often traveling overnight for games.[385] Coaches see athletes' vulnerabilities "at inopportune and essential competitive moments."[386] In addition, the nature of sports is physical and there is a great deal of attention placed on the athletes' bodies.[387]

As with teachers in the classroom, coaches generally hold a significant amount of power over their athletes.[388] The nature of that power is quite different from the power a supervisor would have over an employee at work.[389] Coaches control the athletes' access to schol-

382. Debbie Keller alleged that Dorrance would make inappropriate comments "'anytime the team was together,' whether 'on a plane, in a car, or on a bus, in a hotel, at practice, out of town, [or] at events.'" *Id.* at 283 (Michael, J., dissenting).

383. *See* Heckman, *supra* note 269, at 624–25 (noting that the news had been "replete" with allegations of sexual harassment by male coaches of their female student athletes); Hogan, *supra* note 323, at 317 (stating that athletic departments may be involved more often in sexual harassment cases than any other department on campus, aside from those that manage discipline or provide resources to victims of sexual assault); Jesse Mendelson, Note, *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, 616 & n.183 (2003) (pointing out the rising trend of sexual harassment cases in women's sports over the last ten years).

384. *See* Filip Bondy, *When Coaches Cross the Line*, N.Y. TIMES, May 2, 1993, § 8, at 1 (explaining that "sports psychologists are beginning to understand that there is a unique relationship between the male coach and the young female athlete, and that the delicate balance can sometimes tilt the wrong way").

385. *See* Hogshead-Makar & Steinbach, *supra* note 4, at 176 (noting that coaches and athletes can spend more than one-third of their waking hours together and that the frequent opportunity for one-on-one contact heightens the risk of sexual impropriety).

386. Pinarski, *supra* note 16, at 922.

387. Hogshead-Makar & Steinbach, *supra* note 4, at 177–79.

388. *See id.* at 175 (discussing the "immense authority" that coaches typically exercise over athletes).

389. *See* Erika Tripp, Comment, *Sexual Harassment in Sports: How "Adequate" Is Title IX?*, 14 MARQ. SPORTS L. REV. 233, 246–47 (2003) (distinguishing the nature of control exercised by a coach over a student-athlete from that of a supervisor over an employee based on

arships, playing time, playing positions, leadership opportunities, and some social relationships.[390] In addition, coaches are frequently more involved in other private realms of their athletes' lives, including their health, weight, training, curfew, sexual activity, and social lives.[391] Typically, the supervisor and the employee are both adults, and the supervisor's authority over the employee lasts only during business hours.[392] However, with coaches and student-athletes, there is often a difference in age and a more natural imbalance of power.[393]

The close, intimate relationship between coaches and athletes increases the potential for abuse and makes the line between appropriate and inappropriate behavior less susceptible to precise definition than in a teacher-student or supervisor-employee relationship.[394] As such, the coach-athlete environment is prone to even more subtle abuses and violations of sexual integrity than in many other contexts.[395] On the other hand, the physical nature of the coach-athlete relationship may require a court to tolerate conduct that may be more offensive in other situations.[396] A coach may assume a number of roles in relation to the student, including "teacher, mentor, cheerleader, friend, advisor, and confidante" and, therefore, may appropriately engage in behavior that would be inappropriate in certain Title VII contexts.[397] Thus, a court must tailor its analysis of whether conduct is harassing or appropriate to the unique circumstances of such a relationship, and cannot merely look to Title VII case law for an analogue.

The coach-student relationship between Jennings and Dorrance contained elements of trust and dependency, which Dorrance violated by his conduct. Jennings's relationship with coach Dorrance began

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the times when a coach or supervisor may control an athlete or employee, the ages of the individuals involved, and the levels of trust and dependence at stake).

390. Hogshead-Makar & Steinbach, *supra* note 4, at 175.

391. Pinarski, *supra* note 16, at 922.

392. *Tripp*, *supra* note 389, at 247; *see also* Heckman, *supra* note 269, at 622 (noting that, in the employment context, individuals are usually adults on "equal planes").

393. *See* Tripp, *supra* note 389, at 247.

394. Pinarski, *supra* note 16, at 922.

395. *See id.* at 916–17 (arguing for a broader definition of sexual harassment in athletics that considers a coach's "imposition of sexual stereotypes or sexual shame" on an athlete).

396. *See* Hogshead-Makar & Steinbach, *supra* note 4, at 177 (explaining that coaches and athletes may come into physical conduct when a coach demonstrates techniques, offers congratulations, or assists with stretching, although such conduct would be improper in almost every classroom setting).

397. *See* Pinarski, *supra* note 16, at 923–24 (cautioning, nevertheless, that the coach-athlete relationship may be "potentially more psychologically exploitative than an employer-employee relationship").

when Dorrance personally recruited her during high school.[398] When Jennings began playing for Dorrance, Jennings was seventeen years old and Dorrance was forty-five.[399] Some consider Dorrance "one of the greatest Division I coaches in history," believing "[n]o one has done more to shape U.S. women's soccer than Dorrance," and some of his players look to him with trust and admiration.[400] As for his players' thoughts, Tiffany Roberts, a former member of the UNC women's soccer team, has stated that "'[h]e knows how women work, the way we think.'"[401] Lauren Gregg, former assistant coach for the U.S. women's national team and also a former UNC player, has said "'[h]e taps into the core of your being.'"[402] Another former player for Dorrance described Dorrance's style of coaching and relationship with his players as "'cultivat[ing] an environment where the players become dependent on him. . . . I got convinced that he was the only one who could coach me. It's a drug that you're on.'"[403] Dorrance himself has emphasized the importance of a coach caring for the athletes and making a personal connection with them, not merely coaching them.[404] As such, he encouraged players to speak in confidence with him about their personal lives, and claimed that he wanted to be like a father to them.[405]

By persistently meddling into and commenting about the players' sex lives, and by continually making sexually charged comments, Dorrance degraded his players and violated their dependency and trust.[406] Whereas a coach should use the coach-student relationship to help the players improve their skills and foster their development, Dorrance used his closeness with his players to "bombard[ ] [them] with crude questions" and to make remarks about the bodies of his players that "portrayed them as sexual objects."[407] As a result, rather than enjoying the benefit of the UNC soccer program and realizing her potential as an athlete, Jennings was left feeling "'uncomfortable, filthy and humiliated'" and in "constant fear" of becoming the subject

398. Jennings v. Univ. of N.C., 482 F.3d 686, 691 (4th Cir. 2007) (en banc).
399. *Id.*
400. S.L. Price, *Anson Dorrance, The Legendary North Carolina Women's Soccer Coach, Is Sure He Understands What Makes a Female Athlete Tick, and He Has 15 National Titles to Prove It. So Why Are Two Former Tar Heels Suing Him for Sexual Harassment?*, SPORTS ILLUS., Dec. 7, 1998, at 86, 88–89.
401. *Id.* at 88.
402. *Id.*
403. *Id.* at 102.
404. *Id.* at 89.
405. Jennings v. Univ. of N.C., 482 F.3d 686, 696–97 (4th Cir. 2007) (en banc).
406. *Id.* at 697–98.
407. *Id.* at 691.

of Dorrance's comments.[408] Jennings was not alone in feeling this way and she witnessed other players cry or react to Dorrance's behavior with other expressions of sadness or revulsion.[409] Amy Steelman, another member of the team, was apparently "'very uncomfortable with [the] sexually charged environment' that Dorrance had 'created and encouraged,'" and often left practice crying.[410] Debbie Keller, Jennings's initial co-plaintiff, stated that Dorrance's conduct "'made [her] skin crawl' and made her 'fe[el] dirty.'"[411] This evidence further suggests that Dorrance's conduct created a hostile environment for Jennings, which impaired her ability to participate and deprived her of an educational benefit.

Dorrance also exercised substantial power over Jennings, which Dorrance took advantage of by his alleged conduct. As the most successful coach in women's college soccer, Dorrance had a great deal of control over a player's prospects in the world of women's soccer.[412] At UNC, for example, Dorrance controlled a player's "team membership, position, playing time, and scholarship eligibility."[413] Jennings claimed that "'[g]irls would cut off their right arm'" to play for Dorrance.[414] One of Dorrance's former players described him as "'a very powerful man, and charismatic—and you're under his spell.'"[415] Dorrance used his power over the players to make them submit to his sexual comments and questioning.[416] Debbie Keller claimed that she endured Dorrance's conduct because she feared losing playing time.[417] Jennings claimed that Dorrance's conduct put the players "'between a rock and a hard place.'"[418] In Jennings's case, the most potent manifestation of Dorrance's abuse of power came during his one-on-one player interview with her in his hotel room.[419] In describing this occurrence, Jennings stated, "'I was 17 when he asked me [Who are you fucking?] in a dark hotel room, knee-to-knee, bed not

408. *Id.* at 693.
409. *Id.*
410. *Id.* (alteration in original).
411. *Id.* (alteration in original).
412. *Id.* at 696.
413. *Id.* at 697.
414. *Id.* at 696 (alteration in original).
415. Price, *supra* note 400, at 102. The player added, "'You fall out of that spell when maturity sets in, when you get out in the world, where the answers aren't spoon-fed to you.'" *Id.*
416. *Jennings*, 482 F.3d at 697 (en banc).
417. *Id.*
418. *Id.*
419. *See id.* (describing this scene and noting that it caused Jennings to acutely experience "the extra pressure of [the] age difference" between she and Dorrance).

made, sitting at one of those tiny tables.'"[420] Dorrance clearly abused his power by coercing Jennings into a sexually charged environment that made her uncomfortable and that she felt obliged to endure in order to participate in and receive the benefits of the soccer program.

c. The Institution's Response

Finally, UNC's tepid response to Jennings's complaints about Dorrance's behavior exacerbated the already precarious situation and amplified the hostility of the environment that Jennings was forced to endure. When Jennings reported Dorrance's conduct to Susan Ehringhaus, an official at UNC designated to field sexual harassment complaints, Ehringhaus dismissed Jennings's complaints instead of assisting Jennings in coping with the uncomfortable environment she faced.[421] Ehringhaus stated that Dorrance was a "'great guy'" and that Jennings should speak with Dorrance directly about her problems.[422] As a result of Ehringhaus's inaction, Dorrance's conduct continued and Jennings had to cope with it on her own, without adequate assistance from the school.[423]

UNC's failure to respond adequately was even more damaging given the difficulty Jennings must have faced in deciding to report the conduct.[424] As described above, the abundance of power that Dorrance exercised over his players, and the many different facets of that power, made it more likely that his athletes would acquiesce to inappropriate behavior.[425] Additionally, the fear of being a social outcast or a bad teammate can contribute to an athlete's proclivity to acquiesce to sexual advances, as well as a hesitancy to report such incidents.[426] The fact that Jennings and Keller were subjected to resentment and hostility from other players and students at UNC after news of the lawsuit broke[427] provides evidence of Dorrance's influence and the difficulty Jennings faced in reporting Dorrance's con-

420. *Id.* (alteration in original).

421. *Id.* at 700.

422. *Id.*

423. *Id.* at 700–01.

424. *See supra* notes 364–366 and accompanying text.

425. *See* Morrison v. N. Essex Cmty. Coll., 780 N.E.2d 132, 137 (Mass. App. Ct. 2002) (noting that players felt "beholden" to a coach who sexually harassed and abused them because of the coach's ability to obtain scholarships for them and to control playing time); Mendelson, *supra* note 383, at 600 (commenting on the great courage necessary for athletes to report harassment and that athletes may blindly follow their coaches' desires).

426. *See* Price, *supra* note 400, at 91, 93 (discussing the negative response by teammates and former players to Jennings's and Keller's suit against Dorrance).

427. *Id.* at 93. Players on the team when the suit was filed reportedly characterized it as "'a betrayal' and 'an attack on the program.'" *Id.*

duct. On one occasion, one of the team's former players allegedly swore at and threatened Jennings after seeing her on campus.[428] Additionally, given Dorrance's popularity on campus and the reputation of the soccer program, the UNC community generally seemed to treat Jennings and Keller as the "villain[s]" for bringing the lawsuit, as opposed to criticizing Dorrance for his alleged conduct.[429] The difficulty of Jennings's decision to report Dorrance's conduct, combined with the university's inaction in responding to it, therefore, exacerbated the hostility of the environment that Jennings had to endure and the harm to her educational experience. In sum, assuming Jennings's allegations are true, these factors, combined with the pervasiveness of Dorrance's sexual comments, make it reasonable to conclude that Dorrance's conduct prevented Jennings from fully participating in and benefiting from her soccer program and collegiate experience, in violation of Title IX.

III. CONCLUSION

The effectiveness of Title IX of the Education Amendments of 1972, in protecting students from sexual harassment, has been inhibited by the courts' reflexive use of case law from Title VII of the Civil Rights Act to analyze the severity and pervasiveness of sexually inappropriate conduct. This approach is inadequate for three reasons. First, the affirmative and more expansive language of Title IX suggests that both schools and courts should take a more proactive approach in identifying and prohibiting sexually harassing conduct than Title VII's general prohibition of discrimination does, particularly in view of Title IX's goal of providing equality in education for both sexes.[430] Second, Title IX warrants a broader proscription of sexual misconduct than Title VII because of the trust and natural imbalance of power that exists in the teacher-student relationship.[431] Third, because liability under Title IX for sexual harassment committed by an

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428. *Id.*

429. *See id.*

> In Chapel Hill[,] there's little doubt who is regarded as the villain. Chancellor Michael Hooker, who is a defendant in the suit along with AD Baddour, still shows up at most soccer games with his wife, Carmen. On Nov. 14, after Parlow scored a goal early in the second half of the Tar Heels'[s] 6-0 home win over UNC Charlotte, sports information codirector Dave Lohse announced to the crowd that Parlow had passed Keller on the Tar Heels'[s] alltime scoring list. "The place went nuts," Lohse says. "It was deafening compared to when we scored—the biggest cheer of the day."

Id.

430. *See supra* Part II.A.

431. *See supra* Part II.B.

employee may only be imputed to an educational institution based on the institution's own acts and not under agency principles, Title IX can cover a wider range of activity without overly exposing educational institutions to liability.[432]

Rather than structure their analyses of Title IX hostile environment cases around fact patterns arising in the work environment, courts should analyze factors uniquely designed for the complexities and subtleties of the educational environment.[433] These factors should include the educational setting in which the harassment occurred, the nature of the relationship between the harasser and the harassed, and both the safeguards established by the institution to protect students from harassment and the adequacy of the response by the institution once it receives notice of the harassment.[434] Application of these factors to the *Jennings* case reveals how they work and interact and how they can assist a court in evaluating sexual misconduct in schools.[435]

By focusing on such factors, the courts will develop a more suitable body of Title IX case law, uncontaminated by a jurisprudence that developed in an entirely different social context. Commentators have suggested that a lack of Title IX sexual harassment case law is the reason for the courts' persistent reliance on Title VII.[436] This dearth will continue, however, and no meaningful Title IX jurisprudence will develop until courts stop relying so heavily on Title VII case law and start developing standards and factors to consider specifically when analyzing Title IX claims.

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432. *See supra* Part II.C.

433. *See supra* Part II.D.

434. *See supra* Part II.D.1–3.

435. *See supra* Part II.D.4.

436. *See, e.g.*, Julie Carroll Fay, Note, Gebser v. Lago Vista Independent School District*: Is It Really the Final Word on School Liability for Teacher-to-Student Sexual Harassment?*, 31 CONN. L. REV. 1485, 1496 (1999) ("Because of the dearth of sexual harassment claims under Title IX, Title IX case law has borrowed heavily from Title VII principles in developing a model for sexual harassment claims.").