

# **GAMECHANGERS:**

## **Reshaping Campus Sexual Misconduct Through Litigation**

### **The NCHERM 10<sup>th</sup> Anniversary Whitepaper 2000-2010**

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## **ABOUT NCHERM**

- NCHERM is a law and consulting firm that is dedicated to best practices for campus health and safety.
- NCHERM is a repository for systems-level approaches and models that enhance and advance campus risk management and preventive law efforts.
- NCHERM emphasizes best practices for policy, training, and educational programming as proactive risk management.
- NCHERM specializes in advancing culture change strategies and problem-solving for the tough wellness, compliance and liability issues colleges and universities face today.

When colleges and universities engage the services of NCHERM, they benefit from the collective wisdom, experience and creative collaboration of our eleven consultants. As a not-for-profit corporation, our clients find the services of NCHERM to be both cost-effective and affordable. Our model has always been to use our thought- leadership to develop best practice models for higher education, and to give that intellectual property away for free. One of our vehicles for doing so is this annual Whitepaper. Only when colleges and universities seek to use our services to implement our models or provide training do we charge for our services. We hope this Whitepaper inspires you to consider making use of our expertise to enhance the safety of your campus community.

## **TEN YEARS OF NCHERM WHITEPAPERS**

2010 marks the 10<sup>th</sup> anniversary of the founding of NCHERM. Every year since NCHERM was founded, we have published an annual Whitepaper on a topic of special relevance to student affairs professionals, risk managers, student conduct administrators and higher education attorneys. The Whitepaper is distributed via the NCHERM e-mail subscriber list, posted on the NCHERM website, and distributed at conferences.

- In 2001, NCHERM published *Sexual Assault, Sexual Harassment and Title IX: Managing the Risk on Campus*.
- In 2002, NCHERM published *Complying With the Clery Act: The Advanced Course*.
- In 2003, the Whitepaper was titled *It's Not That We Don't Know How to Think—It's That We Lack Dialectical Skills*.
- For 2004, the Whitepaper focused on *Crafting a Code of Conduct for the 21<sup>st</sup> Century College*.
- Our 2005 topic was *The Typology of Campus Sexual Misconduct Complaints*.
- In 2006, the Whitepaper was entitled *Our Duty OF Care is a Duty TO Care*.
- The 2007 Whitepaper was entitled, *Some Kind of Hearing*.
- In 2008, NCHERM published *Risk Mitigation Through The NCHERM Behavioral Intervention and Threat Assessment (CUBIT) Model*.
- For 2009, NCHERM published *The NCHERM/NaBITA Threat Assessment Tool*.

For 2010, the NCHERM Whitepaper is entitled *Gamechangers: Reshaping Campus Sexual Misconduct Through Litigation*. What game has changed? Who changed it? How?

## **FRAMING THE TOPIC THROUGH CASE STUDIES**

Scenario # 1: A male student is suspended for drugging a female student's drink and then sexually assaulting her. An uproar ensues, with many members of the campus community arguing that a suspension minimizes the severity of the incident. Despite calls for expulsion, the suspension stands. During the course of the suspension, the male student is reported to be on campus several times, in violation of the terms of the suspension. His trespass is reported by several friends of the victim to campus law enforcement and the Dean of Students office, but no action is taken. Both the Dean and the Chief of Campus Police believe the friends are trying to force an expulsion, and do not take the reports seriously or follow-up.

- Could the Dean and Chief be held personally liable for violating Title IX?

Scenario #2: A female student reports a sexual assault, and is told by the Director of Student Conduct that the offense is a crime, and that it must be reported to police. The female student reports it to police, but also asks to file a campus conduct complaint. The Director of Student Conduct refuses, asserting that criminal actions cannot be addressed by campus hearings, and insists the matter must be handled by local police before the university will take any action.

- Could the Director of Student Conduct be held personally liable for violating Title IX for failing to proceed?
- Could the institution be found in violation of Title IX?

Scenario #3: Rachel claims she was gang raped. Robert, one of the accused students, produces a video of the incident. The video depicts a clearly inebriated and barely functional Rachel writing "I want sex" on a piece of cardboard, which the men then hold up to the camera. Robert argues the video is proof the sex was consensual. Rachel claims to remember none of it. Based on the video, the Dean of Students refuses to consider campus charges against the men, and refuses to investigate any further. Rachel commits suicide.

- Could the Dean of Students be held personally liable for violating Title IX?
- Could the institution be liable for wrongful death?

Scenario #4: The President of a public university hires its first female VPSA. Part of her charge is to improve the campus climate for women. The new vice president is an ardent feminist, and seeking to redress historical gender inequality on campus, convinces the president to expand the campus sexual harassment policy to be more protective of women. New provisions make it an offense to objectify women, to sexually demean them, or to subject them to derogatory language on the basis of their sex.

- Could the president of the university be held personally liable for violating the 1<sup>st</sup> Amendment rights of members of the community while seeking to be more proactive in complying with Title IX?

You know what you want the answers to be.

You fear what they might be.

Read on to know what they could be...

## **INTRODUCTION**

Ten years ago, NCHERM was founded with the intention of changing how colleges and universities address sexual misconduct. Rather than sue colleges and universities, NCHERM would work for change from within the field. The changes NCHERM has catalyzed are gratifying, as is the blossoming of our mission over the last ten years. NCHERM has become an attractor in the field for like-minded practitioners. But, as the recent article series from the Center for Public Integrity<sup>1</sup> demonstrates, not enough has changed in ten years on the issue NCHERM was formed to address. And, so, in our tenth anniversary year, the NCHERM team has decided to use our annual whitepaper to take us back to our roots, to revisit the ground from whence we sprang – sexual misconduct.

When NCHERM drew attention to this topic in 2000, we predicted a surge of litigation against colleges and universities. NCHERM was applying a civil rights lens to an issue that was not yet viewed in that way in our field. Ten years has confirmed the validity of the civil rights approach that we advocate, and has taught us much, but there is more for us to do to fully embrace the concept of seeing and treating sexual misconduct as a civil rights issue.

## **THE HISTORY OF TITLE IX AS APPLIED TO SEXUAL ASSAULT<sup>2</sup>**

History is important here. Let's go back to see if we can get a better vantage point on where we were, where we are and where we are heading. Arguing for the civil rights lens was controversial ten years ago. It's a given now. Arguing that Title IX would govern student-on-student sexual assault cases was a strong possibility then. No one was betting against that interpretation, and the courts ratified it. It is now settled law. We started to get comfortable with the boundaries laid down by the landmark Supreme Court cases of Gebser v. Lago Vista<sup>3</sup> and Davis v. Monroe County<sup>4</sup> in the late 1990s. Institutional liability under Title IX existed not for the occurrence of student-on-student sexual assault, but for our failure to address it institutionally when it became known to us. The scheme of liability was straightforward. There was no personal liability for administrators under Title IX, but if administrators had *actual notice* and responded with systemic *deliberate indifference*, civil damages could result against institutions for administrative inaction. It has taken ten years, but million dollar Title IX judgments and settlements against colleges and universities no longer surprise us.

At the same time, Title VII was relatively stable as a body of law. Stagnant even. Did we see the same trajectory for Title IX? No. At NCHERM, we feared our field would become complacent with the Title IX liability scheme. We knew that Title IX case law applying Gebser and Davis would change and mature in the courts, and so we pushed harder to anticipate and prepare. What would the implications be as courts started to distinguish Davis from Gebser? What would the courts do with Justice O'Connor's clever aside (called dicta in a legal opinion) from the Davis majority, inviting courts not to assess deliberate indifference alone, but to ensure as well that the institutional response was not "clearly unreasonable in light of the known circumstances?" It did not take long to realize the courts took the hint that O'Connor intended, and began to feel at liberty to assess institutional action and remedies qualitatively.

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<sup>1</sup> [http://www.publicintegrity.org/investigations/campus\\_assault/](http://www.publicintegrity.org/investigations/campus_assault/)

<sup>2</sup> (20 U.S.C. § 1681(a))

<sup>3</sup> Gebser v. Lago Vista Independent School Dist., 524 U.S. 274 (1998)

<sup>4</sup> Davis v. Monroe County Bd. of Ed., 526 U.S. 629 (1999)

## **DELIBERATE INDIFFERENCE UNPACKED**

The Davis dicta differs meaningfully from the Gebser deliberate indifference standard, which is both deferential and minimal (recall that Gebser covers employee-on-student harassment contexts). Under Gebser, if we act at all, that is enough. The reasonableness of our actions really isn't on the table in a Gebser case, as long as we did something, and did not fail to act. General Counsel's offices accordingly instructed us to investigate and apply prompt and equitable remedies when our investigation demonstrated gender-based discrimination. At NCHERM, we thought courts might be slow to pick up on the O'Connor dicta, but the lower courts were willing to apply it and to put the quality and substance of our institutional responses on the table. It was a warning shot across the bow starting in the early 2000s that Gebser and Davis might define the minimal contours of Title IX litigation, rather than the outer limits.

We expected the courts would persistently pry the lid back on both our practices and our remedies, until colleges and universities became more attentive to how we responded, and paid closer heed to the adequacy of our remedies. OCR<sup>5</sup> was not a significant player in this unfolding drama. The courts were dropping occasional crumbs to show us the trail. Then, without warning that it was impending, a series of tipping point was reached, and it changed the game. It is hard to pin down precisely when the tipping point occurred, as it is still unfolding in different courts around the country. Moreover, courts that tipped did so at different times and in different ways. The start occurred in the mid 2000s. The most substantial impact came in the latter part of the 2000s, with the federal appeals courts taking the lead. Even the Supreme Court has joined the charge, showing a willingness to permit new causes of action that belie its conservative majority.

Why is this happening, and why now? Simply, the courts are fed up with the pace of change by schools and colleges. Hoping to see internal reforms, the courts instead were treated to a litany of cases that should embarrass higher education, as a field. As a result, measured judicial restraint has given way to activism, legislation from the bench, and truly mindboggling settlements and verdicts.

So, where are we now?

## **A TIPPING POINT**

Some could argue the progressive transformation of Title IX started with Jackson v. Birmingham<sup>6</sup>, but that Supreme Court case wasn't even the clue it could have been to how lower courts would subsequently use it to produce a \$19.1 million jury verdict against California State University -- Fresno in 2008<sup>7</sup>. The first post-Davis Title IX settlement against a college in 2000 was a mere \$75,000<sup>8</sup>; not enough to get some lawyers out of bed in the morning. For \$19.1 million, some may never go to bed, though it should be noted that the judge did reduce that verdict to a mere \$6.6 million<sup>9</sup>. Jackson, which will be discussed below, was pretty straight-forward. It aligned retaliation claims under Title IX with the scheme used for Title VII (employment) claims, and opened the door to third party claims of retaliation under Title IX. It did not signal the tidal wave of scores of retaliation cases that have now cost schools

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<sup>5</sup> The US Department of Education's Office for Civil Rights (OCR) enforces Title IX against schools and colleges in proceedings that are parallel to civil lawsuits.

<sup>6</sup> Jackson v. Birmingham Bd. of Ed., 544 U.S. 167 (2005)

<sup>7</sup> <http://sports.espn.go.com/ncw/news/story?id=3237229>

<sup>8</sup> Brzonkala v. Virginia Polytechnic Institute and State University, 132 F.3d 949 (1997)

<sup>9</sup> <http://sports.espn.go.com/ncw/news/story?id=3237229>

more than \$60 million in the five years that courts have applied the Jackson retaliation theory. The fed up courts and juries made their mark post-Jackson. The last few years demonstrate the trend most clearly, not just with the retaliation claims, but with Title IX claims across the board. The legal underpinnings are nothing more than judicial “fed-up-ism,” not judicial “activism.” The courts are going to bang us till we get it, and they are banging as clearly and as hard as they can. Five cases are the clearest harbingers: the aforementioned Jackson, Simpson v. Colorado, Williams v. the University of Georgia, Jennings v. the University of North Carolina and Fitzgerald v. Barnstable. We must learn the lessons of this quintet of cases, lest we repeat the mistakes that have made them precedents.

Let’s take a look at each of the Gamechangers.

### **JACKSON V. BIRMINGHAM**<sup>10</sup>

#### *What Happened?*

Roderick Jackson was employed by the Birmingham School District for over 10 years. In 1993, he was hired to serve as a physical education teacher and girls' basketball coach. When he was transferred to the high school in the district in 1999, he discovered that the girls' team was not receiving equal funding and equal access to athletic equipment and facilities. This lack of resources made it difficult for him to do his job as a coach. The following year he began complaining to his supervisors about the unequal treatment of the girls' basketball team. His complaints went unanswered and the school failed to remedy the situation. However, following his complaints to his supervisor, Jackson began to receive negative work evaluations. He was removed as a coach in 2001, although he was retained as a teacher.

Jackson brought a Title IX lawsuit against the school district, alleging that the school board retaliated against him because he had complained about sex discrimination in the high school athletic program. He alleged that such retaliation violated Title IX of the Education Amendments of 1972.

#### *Analysis and Significance of the Case*

The district court dismissed the complaint against the school on the grounds that Title IX’s private right of action does not include claims of retaliation unless the complainant is the injured party. The 11<sup>th</sup> Circuit Court of Appeals upheld the district court. The U.S. Supreme Court overruled the lower courts, stating that “Title IX’s private right of action encompasses claims of retaliation against an individual because he has complained about sex discrimination”.

The court applied the following analysis to the facts presented:

1. When a funding recipient retaliates against a person because he complains of sex discrimination, this constitutes intentional “discrimination” on the basis of sex, in violation of Title IX;
2. The Supreme Court had previously held that Title IX implies a private right of action to enforce its prohibition on intentional sex discrimination, and that right includes actions for monetary damages by private persons;

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<sup>10</sup> Jackson v. Birmingham Bd. of Ed., 544 U.S. 167 (2005)

3. Retaliation is, by definition, an intentional act, and in this case, was discrimination on the basis of sex because it was an intentional response to the nature of the complaint – an allegation of sex discrimination;
4. The Title IX statute is broadly worded and does not require that the victim of the retaliation also be the victim of the discrimination that is the subject of the original complaint. Where the retaliation occurs because the complainant speaks out about sex discrimination, the statute’s “on the basis of sex” language is met;
5. Congress enacted Title IX not only to prevent the use of federal dollars to support discriminatory practices, but also to provide individual citizens effective protection against those practices. This objective would be difficult to achieve if persons complaining about sex discrimination did not have effective protection against retaliation;
6. The school board should have been put on notice that it could be held liable for retaliation by the fact that the Supreme Court’s cases since 1998 have consistently interpreted Title IX’s private cause of action broadly to encompass diverse forms of intentional sex discrimination.

We noted above that Jackson itself was not earthshaking, and you can see why. But, it led directly to the California State University – Fresno cases of 2008. In this series of cases, discriminatory actions within the athletics department led to settlements and jury verdicts totaling \$28.5 million, not including legal fees<sup>11</sup>. In the cases that follow, we turn from retaliation to assault and harassment as the bases for Title IX liability and settlements.

### **THE SIMPSON CASE**<sup>12</sup>

#### *What Happened?*

The University of Colorado at Boulder’s football team was considered a national “powerhouse”. The athletic department credited its success to its ability to attract talented players to their recruiting program. The program paired visiting recruits with an “ambassador” (usually female) and a current football player. The job of the ambassador and the player was to know how to “party”, to entertain the recruits, and to show recruits a “good time” during their visit to campus.

On December 7, 2001, Anne Gilmore and Lisa Simpson, two CU students, were planning an evening at Ms. Simpson’s off-campus apartment. A student tutor for the University of Colorado Boulder football team asked Ms. Simpson if four football players could come over for the evening and Ms. Simpson agreed. Twenty football players and recruits showed up at the apartment. At least one of the players was led to understand that the purpose of going to Ms. Simpson’s apartment was to provide recruits a chance to have sex. In fact, one recruit who was leaving the apartment reported being told to stay because, “it was about to go down” which he understood to mean that the women would begin showing the recruits a “good time”.

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<sup>11</sup> California State University-Fresno faced multiple Title IX retaliation claims, all resolved in 2007 against the university. Two were decided by juries for \$5.85 million (later reduced by a judge to \$4.5 million) and \$19.1 million (later reduced to \$6.6 million). A third claim was settled by the University for \$3.5 million. Each of the three suits was based on complaints of sex discrimination in the athletic department followed by the complaining employee’s termination or demotion.

<sup>12</sup> Lisa Simpson; Anne Gilmore, v. University of Colorado Boulder, et al., (No. 06-1184, No. 07-1182; 2007 U.S. App. LEXIS 21478) U.S. Ct. of Appeals, 10<sup>th</sup> Circuit, September 6, 2007

Ms. Simpson, who was intoxicated, went to her bedroom to sleep and locked her door. She awoke later to find two naked men removing her clothes. She was sexually assaulted, both orally and vaginally by recruits and players surrounding her bed. At the same time, three players or recruits were sexually assaulting Ms. Gilmore (who was too intoxicated to consent) in the other bed. That night, three other women were sexually harassed by players in the apartment and a fourth had non-consensual sex with two players after leaving the apartment.

Simpson and Gilmore did not report the sexual assaults to the university. They filed a federal Title IX lawsuit alleging that the CU athletic department was aware of the incidents of alcohol consumption and sexual assault by football players and recruits, and the department created a known risk of sexual harassment, assault and discrimination against female students and other women as a result of their knowledge and deliberate indifference to the risk.

### *Analysis and Significance of the Case*

The central issue in this case is whether the risk of such an assault on Ms. Simpson and Ms. Gilmore during football recruiting visits was obvious, since they did not report the assaults to the university prior to filing their Title IX lawsuit. The risk of sexual assault was not alleged to be generalized to the conduct of the entire CU student body; rather they argued the risk arose out of an official school program, the recruitment of high-school football athletes. The basis for their complaint was that CU sanctioned, supported and funded a program designed to “show recruits a good time”, that, without proper control, would encourage young men to engage in alcohol consumption and sexual assault.

At the district court, the case was dismissed in favor of CU on summary judgment. The judge found that CU could not be liable under Title IX because it did not have actual notice of the discrimination suffered by the plaintiffs. Simpson and Gilmore appealed. In rejecting CU’s motion for summary judgment, and reinstating the plaintiff’s claims, the court of appeals went to great lengths to discuss the nature of recruiting as a school program and CU’s responsibility to maintain oversight of the program. The significance of this ruling was the novel way in which the court interpreted the “deliberate indifference” standard. The court found:

1. That CU had an official policy of showing high-school football recruits a “good time” on their visits to the CU campus;
2. That the alleged assaults were caused by CU’s failure to provide adequate supervision and guidance to player-hosts chosen to show the football recruits a “good time”; and
3. That the likelihood of such misconduct was so obvious that CU’s failure was the result of deliberate indifference.

### *Significance as New Law*

Under the traditional Title IX “deliberate indifference” standard, an educational institution that receives federal funding is liable in monetary damages only when its deliberate indifference effectively caused the discrimination. As required by Davis, there must be actual notice of sexual harassment to the institution and an institutional failure after becoming aware of the harassment to address it and exercise a means to control it or eliminate it. This ruling created a judicially-invented basis for Title IX liability, by expanding the definition of deliberate indifference to also include a “failure to train for obvious risks, such as sexual harassment, in a school program”. The court stated that under Title IX, a college or university can be said to have intentionally acted in clear violation of the law when the violation is



caused by official policy, which may be a policy of deliberate indifference to providing adequate training or guidance that is obviously necessary. In this case, there was evidence that the football coach was aware of the need to adequately supervise recruits and to provide training to their players and thus responded with deliberate indifference and even undermined efforts by multiple individuals to prevent the harassment. The court stated that CU's deliberate indifference amounted to a conscious decision to permit sex discrimination in a school's program.

The tarnished history of the athletics program provided fodder for the court. As early as 1989, there were signs that CU players were engaging in improper sexual conduct. A *Sports Illustrated* article written that year discussed the high number of sexual assault cases involving CU football players and commented that, "the school's football coach sometimes didn't seem to grasp the seriousness of the situation". In 1997, the local district attorney recommended that the university adopt a zero tolerance policy regarding alcohol and sex in recruiting programs; that the athletes receive annual training regarding sexual misconduct; and that the university develop policies for supervision of recruits on campus. The D.A. considered the university to be put on notice with this recommendation. Although CU adopted a revised sexual harassment policy the following year, it applied to all students and did not contain anything additional regarding recruiting or athletics.

By the time of the assaults on Ms. Simpson, Ms. Gilmore, and others, the CU football coach had general knowledge of the serious risk of sexual assault during college football recruiting efforts and that the need for more or different training of players and hosts was so obvious that the failure to respond was clearly "deliberate indifference" to the need. The court found:

1. The head football coach had general knowledge of the serious risk of sexual harassment and assault during college football recruiting visits;
2. The coach knew that sexual assaults had occurred during prior recruiting visits;
3. Even with this knowledge, the coach continued to maintain an unsupervised player-host recruiting program designed to show recruits "a good time"; and
4. The head football coach was aware of prior incidents of sexual assault both because of incidents reported to him as well as the fact that he refused to work toward changing the culture regarding recruiting visits.

After this court of appeals ruling, the university chose to settle the lawsuit, agreeing to pay \$2.5 million to Ms. Simpson, and \$350,000 to Ms. Gilmore. Some have argued that this holding by the court of appeals oversteps the contours of liability as defined by the Supreme Court in Davis. We don't agree. We think it is a well-decided case that has significant precedential value. Davis was a case about adequacy of response, and so defined a standard on that basis. It did not address the implications for liability in a case where the institution created the discriminatory environment or was a co-sponsor of it. Simply, the Simpson case asked a question that was not raised in Davis, and so sets out a liability scheme beyond the scope of Davis.

We'd also like to draw attention to an obvious, yet revolutionary, aspect of this holding. The assaults occurred off-campus, on private property, and were in part committed by non-students. Title IX's jurisdictional reach has always differed from that of a student conduct process, which may or may not address off-campus misconduct. For Title IX to apply, two jurisdictional elements must be present: institutional control over the harasser and institutional control over the context of the harassment<sup>13</sup>.

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<sup>13</sup> King v. Board of Control of E. Michigan Univ., 221 F. Supp. 2d 783 (2002)

Both existed here, regardless of the physical site of the discriminatory conduct, or whether the recruits were enrolled as students. Any doubters to the validity of this holding should compare it to the next case, in which another court of appeals clear across the country made remarkably similar findings at almost the same time.

### **THE WILLIAMS CASE**<sup>14</sup>

#### *What Happened?*

On January 14, 2002 at 9:00 p.m., Tiffany Williams, a student at the University of Georgia (UGA), received a telephone call from UGA basketball player Tony Cole. Cole invited Williams to his room in the main residence hall for student-athletes on the university campus. Shortly after Williams arrived at Cole's room, the two engaged in consensual sex. Unbeknownst to Ms. Williams, Brandon Williams, a UGA football player whom Williams did not know, was hiding in Cole's closet. Cole and Brandon had previously agreed that Brandon would hide in the closet while Cole had sex with Williams. When Cole went to the bathroom and slammed the door behind him, Brandon emerged from the closet naked, sexually assaulted Williams, and attempted to rape her. Cole called a teammate, Steven Thomas, and encouraged him to come over because they were "running a train" on Williams. Thomas came to the room and sexually assaulted and raped Williams.

Williams returned to her residence hall and called Jennifer Shaughnessy. Williams was visibly upset and crying. Williams told Shaughnessy what had happened, and Shaughnessy told Williams that she had been raped and should call the police. Williams told Shaughnessy that she did not want to call the police because she was afraid. While Shaughnessy was with Williams, Thomas, who had never called Williams before that night, called Williams twice.

Williams then called her mother, who notified UGA Police of the incident and arranged for Williams to have a sexual assault exam performed. Later that same day, Williams requested that UGA Police process the charges against Cole, Brandon Williams, and Thomas. After filing her complaint with UGA Police, Williams permanently withdrew from UGA.

UGA Police conducted an investigation and the records showed that:

- Cole called Williams' room several times in the days immediately following the incident and Williams' withdrawal;
- Within forty-eight hours of the incident, UGA's chief of police notified UGA's director of judicial programs of the incident and provided her with a written explanation;
- On April 17, 2002, a lieutenant from UGA Police provided the director of judicial programs with additional information supporting Williams' allegations.

Because the sexual harassment policy at UGA at the time stipulated that student-on-student harassment be handled by student affairs, Cole, Brandon Williams, and Thomas were charged with disorderly conduct under UGA's code of conduct. A UGA judiciary panel, consisting of one staff member and two university students, held hearings almost a year after the January 2002 incident and decided not to

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<sup>14</sup>Tiffany Williams vs. Board of Regents of the University System of Georgia, et al; 477 F.3d 1282 (2007)

sanction Cole, Brandon Williams, or Thomas. By the time of the hearing, Cole and Brandon Williams no longer attended UGA. Thomas left UGA in September 2003.

Their coaches also suspended the three from their teams after a grand jury indicted them in April 2002 (after basketball season and spring football practice were already completed). A jury later acquitted Brandon Williams, and the prosecutor dismissed the charges against Cole and Thomas.

### *The Basis for the Title IX Claim*

Williams alleged that (former UGA Head Basketball Coach) James Harrick, Athletic Director Vince Dooley, and UGA President Michael Adams were personally involved in recruiting and admitting Cole, even though they knew he had a history of disciplinary and criminal problems involving harassment of women at other colleges. Cole was not academically qualified to attend UGA and was admitted under a “special admission” policy that required presidential approval by Adams. It should be noted that:

- When Harrick was at the University of Rhode Island, he recruited Cole to attend URI and helped Cole gain admission to the Community College of Rhode Island (CCRI). Cole was dismissed from CCRI after allegations that he sexually assaulted two employees by groping the women, putting his hands down their pants, and threatening them when they rejected his advances. Cole pleaded no contest to criminal charges of misdemeanor trespass in connection with the two sexual assaults;
- Harrick, Dooley, and Adams were aware of a protective order violation by Cole involving a friend of his foster mother;
- They were also aware of his dismissal from Wabash Valley College for disciplinary problems, including an incident in which he whistled at and made lewd suggestions to a female store clerk.

Additionally, Williams alleged that coaches failed to fulfill their duty to inform the student-athletes about UGA's sexual harassment policy and enforce it, specifically against basketball and football players.

### *Procedural History*

Williams brought a \$25 million lawsuit against:

1. UGA, the Board of Regents of the University System of Georgia and UGAA for violation of Title IX;
2. Adams, Harrick, and Dooley as individuals and in their official capacities as UGA and UGAA president, former head basketball coach, and athletic director of UGAA for violation of 42 U.S.C. § 1983;
3. UGA and the board of regents for violation of 42 U.S.C. § 1983; and
4. Cole, Brandon Williams, and Thomas for state law torts. She also sought "injunctive relief ordering the defendants to implement policies, and procedures to protect students from student-on-student sexual harassment prohibited by Title IX."

UGA, UGAA, the board of regents, Adams, Harrick, and Dooley all filed motions to dismiss her claims. Williams then moved to amend her complaint, adding additional factual allegations to support her claims, providing a more specific request for injunctive relief, and requesting declaratory relief against UGA, UGAA, and the board of regents. The district court dismissed Williams' Title IX and § 1983 claims, denied her requests for declaratory and injunctive relief, and denied in part and granted in part her motion to amend her complaint.

Williams appealed. The circuit court of appeals:

- reversed the district court's decisions to dismiss Williams' Title IX claims against UGA and UGAA;
- reversed the district court's decision to deny Williams' motion to amend her complaint;
- affirmed the other holdings of the district court, including the dismissal of the §1983 claims.

The case was then settled out of court for an undisclosed amount.

### *Analysis and Significance of the Case*

The central issue revolves around Williams' Title IX complaint against the coach, the AD, and the president, all of whom were central UGA employees with authority, control and knowledge. In particular, the court considered whether their knowledge of Cole's prior acts coupled with the coaches' failure to inform student-athletes about and enforce the sexual harassment policy created deliberate indifference under Title IX.

Title IX states, in pertinent part: "No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."<sup>15</sup> To bring a civil suit to enforce Title IX, the four elements that must be shown are:

- 1) The defendant must be a Title IX funding recipient.<sup>16</sup>
- 2) An "appropriate person" must have actual knowledge of the discrimination or harassment the plaintiff alleges occurred. (Gebser)
  - a. [A]n 'appropriate person' . . . is, at a minimum, an official of the recipient entity with authority to take corrective action to end the discrimination."
- 3) The funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities. (Davis)
  - a. and the funding recipient's deliberate indifference "subjected" the plaintiff to discrimination.
  - b. "deliberate indifference" is defined as a situation where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances
- 4) The discrimination must be "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." (Davis)

The court held that UGA clearly met the first criteria, and Dooley and Adams met the second. The court then devoted its analysis to the third question of deliberate indifference. The court found that the defendants' knowledge of Cole's prior acts constituted sufficient notice. Their failure to take immediate corrective action was deliberate indifference. Additionally, the court reasoned, given their knowledge of Cole's history and potential danger, their failure to "supervise" and "monitor" Cole (or even to let him know their specific expectations of him, given his history) also established deliberate indifference. This rationale parallels the reasoning of the Simpson court, when the university by its recruitment practices created the risk of discriminatory conduct toward Williams and others, much as CU's creation of discriminatory recruitment practices created the risk of harm to Simpson and Gilmore. The acts themselves met the fourth criteria.

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<sup>15</sup> 20 U.S.C. § 1681(a).

<sup>16</sup> Floyd v. Waiters, 133 F.3d 786 (11th Cir.1998)

### *Collateral Title IX Findings*

This case is also instructive for the court's holding that UGA also failed to offer a prompt remedy in that its hearing process took eight months to process Ms. Williams' complaints (outcome notwithstanding), unnecessarily waiting for the resolution of the criminal process. The court also faulted UGA for waiting eleven months until any corrective action was taken, by which time two of the three assailants had left UGA. Finally, the court found that despite having corroborating evidence of Williams' claims, UGA took no action to prevent any future attacks on Williams by any of the alleged assailants. This resulted in her "reasonable" action of withdrawal from UGA, thus depriving her of the educational benefit guaranteed by Title IX. As mentioned earlier in this Whitepaper, this case represents one of the first circuit court decisions in which the court applied the Davis standard to a college or university to assess the institutional response qualitatively, and found that response clearly unreasonable in light of the known circumstances. Williams represents a two-fold liability analysis, applying the traditional deliberate indifference analysis of Davis to the institutional response, but also finding deliberate indifference along the same reasoning as the Simpson court, where the university creates the unreasonable risk of harm through discriminatory recruitment practices.

As we were composing this Whitepaper, your authors were quite struck at the way that Title IX analysis in both Simpson and Williams is oddly coming to resemble the foreseeable harm analysis of negligence liability. That convergence is a clear trend we'll see more of in the future, especially as courts expand "special relationships"<sup>17</sup> doctrine. Additional lessons of this case for school officials include the need to pay particular attention to the students they actively recruit, especially where they have (or should have) knowledge of past dangerous behaviors. Officials will have civil rights-based obligations to exercise appropriate control, issue appropriate warnings, provide training, explain policies and behavioral expectations. Or, here's a thought -- we could just stop recruiting athletes with known violent histories, especially histories of violence against women. Maybe that's what has the courts so fed up.

In light of the 2009 Supreme Court decision in Fitzgerald v. Barnstable, discussed below, the §1983 claims for individual liability against administrators will not be so easily dismissed in future cases.<sup>18</sup> When a college president uses the college's special admissions policy to admit an otherwise unqualified athlete or student with a known history of violence because athletic success or any other factor trumps the right of female students to be safe, the courts (and certainly the juries) will not hesitate to make a quick example of the next college as a message to others whose ethics, values and priorities are similarly misguided.

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<sup>17</sup> Schieszler v. Ferrum College, 233 F. Supp. 2d 796 (W.D.Va. 2002)

<sup>18</sup> Final notes from the "you can't make this stuff up" file: Cole left UGA and became a whistleblower against Harrick, bringing down the UGA program. After leaving UGA, he was also charged with threatening a girlfriend with an Uzi (2003), writing bad checks in Georgia (2003), and was jailed "6 or 7 times" (by his own admission) for various other misdemeanors between 2003-2005. He later landed a job (with a reference from another basketball coach from LSU) as a civil servant in Cook County, and was dismissed from his HR job for not disclosing his past on his application. His boss, Donna Dunning was also fired after it was revealed she bailed Cole out of jail twice for violating a protective order filed by an ex-girlfriend. As of April 2009, he was in jail for probation violations. Thomas transferred to Middle Tennessee State, graduated, and was bypassed by the NBA. He now plays in the CBA and Polish leagues. Brandon Williams did not graduate and no update could be found. Harrick was fired/resigned from UGA, and drummed out of college coaching. He worked as a scout for the Denver Nuggets of the NBA and in basketball development in China. He now does regional color analysis for Fox Sports SW. Dooley resigned as AD in 2005, remained a consultant to UGA, and now serves as a consultant to Kennesaw State University in developing a football program.

## **THE JENNINGS CASE**<sup>19</sup>

### *What Happened?*

UNC Head Soccer Coach Anson Dorrance personally recruited Melissa Jennings, and she joined the UNC team in August 1996. He cut her from the team in May 1998, at the end of her sophomore year, for "inadequate fitness."

Dorrance engaged in sexually explicit conversations with his team, including asking them about their sexual activities and making sexually objectifying comments about their bodies. He also expressed his sexual fantasies about certain players and made advances towards at least one other player. These behaviors were made at all times the team was together, on or off campus. Some particularly egregious comments included:

- Asking one player "who [her] fuck of the minute is, fuck of the hour is, fuck of the week [is]," and whether there was a "guy [she] hadn't fucked yet," or whether she "got the guys' names as they came to the door or . . . just took a number.";
- Asking a second player if she was "going to have sex with the entire lacrosse team,";
- Advising another player to "keep your knees together . . . you can't make it so easy for them.";
- Asking another player "whether she was going to have a "shag fest" when her boyfriend visited and whether she was "going to fuck him and leave him.";
- Asking another player about the size of her boyfriend's genitalia;
- Regularly commented on certain players' bodies, referring to their "nice legs," "nice rack[s]," breasts "bouncing," "asses in spandex," and "top heav[iness]," and referred to a player as "Chuck" (her name was Charlotte) because he believed that she was a lesbian.

Dorrance disclosed his sexual fantasies about several players. These included:

- Telling one player, Debbie Keller, that he would "die to be a fly on the wall" the first time her roommate, another team member, had sex;
- Telling a trainer that he fantasized about having "an Asian threesome" (group sex) with his Asian players;
- Asking Keller's roommate if she was "...out having sex all over Franklin Street?";
- Telling Keller that he "couldn't hide his affection for [her]" and told her that "in a lifetime you should be as intimate with as many people as you can.";

He also engaged in inappropriate and unwelcome advances, including:

- Frequently brushing Keller's forehead, hugging her, rubbing her back, whispering in her ear, dangling a hand in front of her chest, touching her stomach, and putting his arm around her.
- Meeting with his players 1-on-1 in a hotel room to assess their performance.

So, readers, how do you think this one is going to go for Dorrance? This isn't a hard one based on the conduct, is it? You'd be surprised. He's one of the most successful coaches in college sports history. During the fall of her freshman year, Jennings filed a complaint in a meeting with Susan Ehringhaus,

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<sup>19</sup> Melissa Jennings and Debbie Keller vs. The University of North Carolina at Chapel Hill, et al 482 F.3d 686 (2007)

Legal Counsel to the University and Assistant to the Chancellor, telling Ehringhaus everything she was aware of. Ehringhaus told Jennings to "work it out" with Dorrance. Jennings was cut from the team one year later. Jennings's parents submitted several complaints to the Chancellor's office about Dorrance's regular involvement in discussions about the sexual activities of his players. The Director of Athletics, Richard Baddour, conducted an administrative review pursuant to UNC's sexual harassment policy. Dorrance admitted making the comments, but claimed they were only "of a jesting or teasing nature." Baddour sent a letter of apology (signed by Dorrance) to Jennings's father and a brief, mild letter of reprimand to Dorrance. Baddour then sent a letter to Dorrance declaring it "inappropriate for [Dorrance] to have conversations with members of [the] team (individually or in any size group) regarding their sexual activity."

After filing the lawsuit in August 1998 (the start of her junior year), Jennings was threatened and harassed and told by UNC officials that they could not guarantee her safety on campus. She spent her senior year at another school and was then awarded a UNC degree.

### *Procedural History*

Keller settled her claims and took a dismissal with prejudice for a six-figure settlement. A third player, Hill, settled for \$70,000 prior to filing suit. Jennings' claims were litigated. The district court found in favor of the defendant university and its employees on a motion for summary judgment. The court of appeals affirmed, and the case was then reheard *en banc*. The *en banc* (all judges of the court, together) panel vacated the lower courts' rulings on the Title IX claim against UNC, and the §1983 personal liability claims against the coach and general counsel. In 2008, Jennings settled for \$375,000, a required annual review of the UNC sexual harassment policy, and a requirement that Dorrance participate in annual sensitivity training. It is gratifying when our students try to teach us, isn't it? In addition to compensation for her damages, Jennings' goal was reform and prevention.

### *Analysis and Significance of the Case*

The central issue revolves around Jennings' Title IX complaint against UNC, the coach, and the general counsel, as well as her §1983 claims against the coach and counsel. The court considered whether Jennings was subjected to verbal harassment by Dorrance based on her gender, and whether the harassment was sufficiently severe or pervasive to create a hostile or abusive environment. At a public university, freedom from harassment and free speech are countervailing rights. In order for verbal harassment to overcome Constitutional 1<sup>st</sup> Amendment protections, it must be particularly egregious. The court found that Dorrance's claims that the language was "teasing" were disingenuous. The court noted the disparity in the power structure of the coach-athlete relationship (particularly such a successful coach), and the age disparity of the coach and his players (he was 45). Further, the Court indicated that the conduct was severe enough that Jennings was unable to participate in the program, and that she suffered athletically and academically – as well as psychologically.

A Title IX sexual harassment victim can be considered deprived of access to educational opportunities or benefits in several circumstances, including when the harassment:

1. Results in the physical exclusion of the victim from an educational program or activity;
2. "So undermines and detracts from the victim['s] educational experience" as to "effectively deny [her] equal access to an institution's resources and opportunities"; or

3. Has "a concrete, negative effect on [the victim's] ability" to participate in an educational program or activity. (Davis)

By the court's analysis, UNC clearly met the first criteria and Jennings' meeting with Ehringhaus met the second. Jennings' pretextual removal from the athletics program met the third.

The §1983 claims against Dorrance and Ehringhaus survive<sup>20</sup>. Dorrance continues to coach the Tarheels, winning his 21<sup>st</sup> National title in 31 years in 2009. Seven of his players have been drafted into the professional leagues. He continues to attend his required sexual harassment trainings. Ehringhaus is no longer in the general counsel's office. Baddour is still the athletic director. Jennings is working back in her home state.

### *Implications of the Decision*

Your authors find several aspects of this case worthy of Gamechanger status. The first is that it is rare for purely speech-based harassment to rise to the level of creating a hostile environment. At public universities, harassing speech must overcome the 1<sup>st</sup> Amendment protections, and to do so must be sufficiently severe and pervasive to effect a discriminatory deprivation. This case presents an excellent example of pervasive speech that rises to the actionable level, though a spirited dissent in the opinion makes strong points that Jennings heard some of the comments, Keller others, and that all comments cited above were not directed at or heard by the two plaintiffs. While that may be true, the notion of a pervasive hostility is one that literally pollutes the environment. It did so here, and over some time. The dissent seeks to argue that some of the players were discussing their own sexual exploits in detail, and Dorrance merely joined in. If you buy that logic, you should inform your employees that they can only make graphic and detailed sexual comments on the job when students are already doing so, and shouldn't add their own fantasies to the conversation. We don't recommend that course of action.

The second Gamechanging aspect of this case is remarkably subtle. Remember that deliberate indifference is a failure to act. Ehringhaus' apathy seems to be just the kind of deliberate indifference Title IX is intended to remedy. It is the basis for the majority opinion in this case, but the majority conveniently ignored the fact that while Ehringhaus may not have acted, Baddour did when he received a report of Dorrance's misconduct subsequently. He censured Dorrance and made him apologize. Why would the majority ignore the fact that UNC, through Baddour, actually did act? One employee was deliberately indifferent, but was the indifference systemic, if some action was actually taken by another employee with authority to act? This is a Gebser case, involving as it does misconduct by an employee directed at students. The Davis dicta, then, doesn't explicitly apply. The court isn't willing to ask whether the actions taken were clearly unreasonable in light of the known circumstances, but in some ways acted upon that standard without saying so. They ignored Baddour's remedies because they were ineffective, and because the discriminatory conduct persisted after Dorrance was chastised. We believe this case is a harbinger of more explicit convergence of the Davis and Gebser standards. Future cases will tell. We don't believe they will over time remain as distinct as some legal commentators believe them to be. We also wonder why a retaliation claim was not pursued in this case, given that Jennings removal from the team came after her complaints alleging deprivation of her civil rights?

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<sup>20</sup> The case itself indicates this. Whether the case may have settled since is unknown.



## **FITZGERALD V. BARNSTABLE**<sup>21</sup>

Your authors have debated the significance of this case, and unanimously concur that Fitzgerald is the most important case of 2009 affecting higher education, and arguably any supervisor anywhere. Time may also prove it to be the most significant case since Gebser and Davis, with respect to Title IX litigation. We struggle over the activism this case represents, from a Supreme Court not known for its activism, resulting in a unanimous decision. Typically, the High Court grants certiorari (agrees to hear a case) in one of two circumstances. The first is where there is a significant split between circuit courts of appeals, such that different circuits arrive at opposite holdings in similar cases, and the Supreme Court is needed to determine the controlling course the law should take for all courts. The second is where an issue represents a federal question of such burning social, political or religious import that the Court feels compelled to act. It is the first of these circumstances that prompted the Court to grant cert on Fitzgerald.

### *What is a §1983<sup>22</sup> Action?*

Many civil rights statutes apply to employers, or governmental entities. §1983 was enacted to provide a private right of action against an official (government or otherwise) in their individual capacity for depriving someone of their federal civil rights while acting in an official capacity. The statute usually is applied to government officials and state employees, but the actual statute does not limit the scope of §1983 to state actors. Instead, it applies to all who act under color of state law. That may, on occasion, apply to private employees, such as those charged with implementing state anti-discrimination employment laws. It certainly applies to officials of public universities, and on occasion could apply to officials of private colleges and universities.

### *Why Are We Interested in the Application of §1983 to Title IX?*

When Congress enacts statutes, it sometimes makes explicit whether it intends the statute to be the only route of enforcing the rights guaranteed by the statute. And sometimes, Congress fails to be explicit, thereby guaranteeing many billable hours for lawyers who will argue the question. The courts must divine whether Congress intended the statutory enforcement scheme to be the sole remedy, or whether other types of enforcement, such as §1983, should apply. Title IX is explicit in that it can only be enforced against federal educational funding recipients, and provides no recourse against individuals. Yet, nothing in the Title IX statute explicitly states that Congress intended institutional enforcement to be the sole remedy for gender based discrimination in educational settings. Thus, the door was left open for the courts to determine that the rights conveyed by Title IX could be enforced against individuals through a §1983 action.

### *What Happened?*

In 2002, Robert and Lisa Fitzgerald of Hyannis, MA, sued their local school district, the Barnstable School Committee and school superintendent Russell Dever. The Fitzgerald's daughter, Jacqueline, was in the kindergarten at Hyannis West Elementary School during the 2000-2001 school year. Her parents complained to school officials that every time Jacqueline wore a skirt to school, a third grade boy on her bus would force her to lift her skirt, pull down her underpants or spread her legs, while other students

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<sup>21</sup> Fitzgerald et Vir v. Barnstable School Committee et al, 555 U.S. \_\_\_\_ (2009)

<sup>22</sup> 42 U.S.C. §1983, the only remaining provision in force from the Civil Rights Act of 1871.

watched and laughed. Officials and local law enforcement investigated, and despite being unable to corroborate the accounts of the incidents, school officials offered various remedies to the Fitzgeralds. They suggested putting Jacqueline on a different bus, or segregating younger students from older ones on the bus. The Fitzgeralds proposed remedies of their own, including moving the harasser to a different bus, or putting a monitor on the bus, arguing that the remedies suggested by the school were punishing Jacqueline for the actions of others. School officials did not act on these suggestions, and so the Fitzgeralds began driving Jacqueline to school, to avoid the bus. The year was marked by a large number of absences from school for Jacqueline.

The boy allegedly continued to harass Jacqueline at school, and as a result, the Fitzgeralds brought suit under both §1983 and Title IX. They sought civil monetary damages and court orders to protect Jacqueline. The district court rejected the §1983 claim, holding that Title IX provided the only remedy. The court then ruled against the Fitzgeralds on their Title IX claim. While actual notice was given, the remedies offered were objectively reasonable, and did not constitute deliberate indifference. The 1<sup>st</sup> Circuit Court of Appeals affirmed.

#### *What Did the Supreme Court Hold?*

Following the precedent set by the Court in its Sea Clammers<sup>23</sup> decision, the Court applied the analysis that when the remedies provided by a statute are sufficiently comprehensive, a court may conclude that Congress intended them as the sole remedy. In Fitzgerald, the Court found that the statutory remedy under Title IX was specifically limited to administrative enforcement. This offered a limited rather than comprehensive enforcement scheme, such that the Court could infer that administrative enforcement was not intended as the sole remedy. In fact, the Court had previously inferred a private right of action against institutions with its Franklin v. Gwinnett<sup>24</sup> decision in 1990. The Court ruled, therefore, that violations of Title IX can give rise to suits against individuals via §1983 actions. The Court then remanded its decision to the district court, to reconsider the §1983 claims it had initially rejected. Those claims are still being litigated<sup>25</sup>. The district and circuit court decisions on the Title IX deliberate indifference claims were not considered by the Supreme Court because they were not raised by the Fitzgeralds.

#### *Implications for Colleges and Universities*

The Fitzgerald decision will essentially make it malpractice for a plaintiff's lawyer not to allege §1983 claims in any complaint against a college or university for a Title IX deliberate indifference or retaliation claim. Institutional officials, especially at public colleges and universities, will find themselves named personally in lawsuits. They may face personal liability for their administrative actions or inactions. Now more than ever, stepping up the Title IX compliance game is what will be required of administrators as a result of these Gamechanging cases. Courts are demanding of administrators the clarity of vision needed to see student complaints through a civil rights lens.

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<sup>23</sup> Middlesex County Sewerage Auth. v. Sea Clammers, 453 US 1 (1981)

<sup>24</sup> Franklin v. Gwinnett County Public Schools. 503 U.S. 60 (1992)

<sup>25</sup> This is according to the case. Whether a settlement has been reached is unknown.

## **WHERE WE ARE GOING?**

The case of McGrath v. Dominican College of Blauvelt<sup>26</sup> points the way. It's not a Gamechanger yet, but it may be if it is fully litigated. If nothing else, it points to the way lawyers will be framing Title IX cases in the years to come. In late November of 2009, the U.S. District Court for the Southern District of New York rejected the college's motion to dismiss. In doing so, the court will allow key causes of action of the complaint to go to trial. Those causes of action include:

1. A wrongful death suit, because student Megan Wright committed suicide in 2006, allegedly distraught in the aftermath of her campus gang rape and the college's failure to address it;
2. A Title IX action for deliberate indifference;
3. A fraud accusation for allegedly covering up similar previous campus incidents;
4. And a §1983 claim against the president and dean of students for Title IX, Equal Protection and negligence-based civil rights deprivations.

Dominican College has already settled with the New York Attorney General's office<sup>27</sup> over state campus crime reporting law violations arising from this case. The alleged details of the case are sad and sordid, and won't be fully detailed here<sup>28</sup>. In short, the allegations include the assertions that the dean refused to investigate the alleged gang rape, the president refused to meet with the alleged victim and her mother (McGrath), and the college covered up previous incidents that it should have warned students about. Perhaps the most compelling assertion is that campus officials encouraged Wright to contact a local police officer to investigate the complaint, a police officer who was apparently on the college's payroll at the time, and who ensured the criminal investigation never went anywhere.

This case may wind up being a stunning precedent for personal liability as well as institutional liability once the facts are litigated, though cases like this often settle at this point. If there is any reason to litigate it for the college, it's the attempt to apply broad §1983 liability to the officials of a private college. We'll be watching closely to see how this case unfolds. Of great interest is the trend we are seeing in the bootstrapping of Title IX and negligence together in cases, which we believe will become a potent litigation weapon.

The allegations of the McGrath case, if true, highlight significant weaknesses in the campus conduct system that are not only issues for Dominican, but potentially for other colleges and universities, as well. At NCHERM, we measure a campus conduct process not only in its efficient processing of everyday alcohol violations, but by how it withstands its toughest cases. Sexual misconduct is the yardstick for how fair, effective and resilient any campus conduct process is. Here are just a handful of examples from campuses visited by NCHERM consultants in the last few years of what it looks like when the civil rights lens is not the primary prism through which sexual misconduct complaints are processed.

- At one university, sex is prohibited in the residence halls. Until last year, when victims came forward to allege sexual misconduct, the university would file charges against the alleged victim for having had sex in the residence halls.

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<sup>26</sup> McGrath v. Dominican College, 2009 WL 4249122 (S.D.N.Y. Nov. 25, 2009)

<sup>27</sup> <http://www.insidehighered.com/news/2009/06/19/dominican>

<sup>28</sup> <http://abclocal.go.com/wabc/story?section=news/local&id=6259518>

- At another university, since all sexual assaults are “He Said/She Said” cases, the university files charges against both parties and leaves it to a campus conduct board to figure out who did what to whom.
- At another university they sanction male students found in violation of the sexual misconduct policy to university-directed, education-based rehabilitation programs.
- At another university, a student/faculty/staff board found an accused student not responsible for sexual assault. Why? The alleged victim was devoutly religious. She claimed to be a virgin. Yet, she admitted to performing consensual oral sex on the respondent prior to the alleged assault. If she would do that, she can’t really be a virgin. She’s lying. If she’s lying about that, she’s not believable in alleging an assault. After all, she voluntarily performed oral sex.
- At yet another university, the policy is two-tiered. The most egregious offense involves proving intent. The lesser offense includes the same behaviors, but without intent. The board consistently defaults to the lesser charge because there is insufficient evidence of intent. This campus apparently has more than its share of accidental rapists.
- At another university, they use the clear and convincing evidence standard of proof in their conduct hearings. Their hearings rarely produce a finding of violation of the sexual misconduct policy. But, the board feels better, because it still has the option to offer the accused student some counseling on masculinity, objectification and gender bias if he is open to learning from his experience.
- At a final university, alcohol use by the alleged victim is pursued when it comes up in a sexual misconduct hearing. As a result, several women have decided not to pursue their legitimate complaints, for fear of facing retribution for their inappropriate use of alcohol prior to and during their assaults.

How do you think these processes will hold up to our NCHERM yardstick? How about in court? How did you do on your answers to the first four opening case studies in this Whitepaper? Yes is the right answer to each.

Because the game is different now.

Below, you will find some useful suggestions for campus officials on effectively remedying sexual misconduct complaints.

### **SANCTIONING, TITLE IX AND THE “NOT CLEARLY UNREASONABLE” STANDARD**

How we sanction for sexual misconduct is a big part of the remedial process. The case law gives us some guidance on what the courts expect from our remedies:

1. Bring an end to the discriminatory conduct;
2. Take steps reasonably calculated to prevent the future reoccurrence of the discriminatory conduct;
3. Restore the victim as best you can to his or her pre-deprivation status.

These guidelines make many common sanctions suspect. In an egregious case, can anything short of separation achieve the aims of points one and two? What about suspending for some period of time? Does time change behavior? Can we verify that it has? Suspending upon the satisfaction of conditions, or the demonstration that return is a safe decision might be more appropriate. Suspending the offender until the victim graduates is misguided. It assumes a contextual conflict, and that no one else is at risk. The research of our field does not support that assumption. It is not the job of a college or university to try to rehabilitate a sex offender, and very little research supports the notion that such rehabilitation is

either possible or effective<sup>29</sup>. And while the risk of the student moving on to another institution is very real, it is real whether the student is suspended or expelled.

In satisfying Title IX, there is a very real clash with the typically educational and developmental sanctions of student conduct processes. In fact, sanctions for serious sexual misconduct shouldn't be developmental. They should protect the victim and the community. That's the point at which development ends and a different priority must control. Why? The research of David Lisak is one of the most compelling reasons. Lisak is a forensic psychologist and professor at the University of Massachusetts, Boston. To briefly summarize the findings of Lisak's 2002 study on undetected rapists<sup>30</sup>, Lisak researched rates of perpetration among 1,882 male students at UMASS, Boston. 120 men admitted to at least one of the four sexually violent acts identified (6.3%). However, the 120 men identified 483 total acts, with 76 of the 120 men (63%) admitting to 439 acts of repeat perpetration (an average of 6.6 acts each). Similar research by Antonia Abbey and Christine Gidycz supports these findings. So, unless you can distinguish whether an offender is one of the 63% of repeat perpetrators, or one of the 37% of one-time perpetrators (and you can't), can you really afford to take a chance with the safety of your community? We're fond of telling NCHERM clients, "if you're willing to let him back in, you also have to be willing to fix him up with your daughter on a date, because by reinstating him, you're vouching for his safety." Are you that sure?

Finally, we are bound by the scrutiny of the courts and OCR, which will ensure our remedies are not clearly unreasonable in light of the known circumstances. While the courts have yet to give us much clarity on this standard, we have a few examples to consider. Undue delays are typical targets, as is deferring campus resolution during the pendency of criminal proceedings. One court has held that investigation alone is not sufficient to overcome a deliberate indifference accusation in a rape complaint.<sup>31</sup> OCR insists there must be a nexus between the sanctions and the discriminatory conduct which led to the sanctions. In another case, OCR also insisted that colleges and universities at least investigate allegations of online sexual harassment, even if the online forum may ultimately prove to be outside the control of the college or university.<sup>32</sup>

### **PRACTICAL RISK MANAGEMENT LESSONS FROM THESE CASES**

- Investigate every complaint. No exceptions.
- Provide prompt (30-60 day) and equitable remedies for discriminatory conduct.
- Engage your campus in strategic prevention and comprehensive education on sexual harassment, campus policies, sexual assault and other high risk issues. Cases like Williams and Simpson create education and training requirements, and those requirements cannot focus solely on athletics programs, though that is a good place to start.
- Subject athletic recruitment practices to a risk assessment and mitigation process.
- Implement comprehensive civil rights investigation models for student complaints, just as you would for employee complaints.
- We need comprehensive reconsideration of student-athlete, and coach-as-god cultures.
- Make restorative justice or other healing/cathartic opportunities a part of your remedial processes.

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<sup>29</sup> <http://psychservices.psychiatryonline.org/cgi/content/full/50/3/349>

<sup>30</sup> [http://www.crisisconnectioninc.org/pdf/undetected\\_rapist.pdf](http://www.crisisconnectioninc.org/pdf/undetected_rapist.pdf)

<sup>31</sup> Vance v. Spencer County Public Sch. Dist., 231 F3d 253 (6<sup>th</sup> Cir. 2000)

<sup>32</sup> OCR Investigation of Hofstra University, 2009. <http://www.ncher.org/documents/Hofstra02092051.pdf>

- Find balance. Where fairness was once the goal of campus conduct and remedial proceedings, now fairness and balance must be the hallmarks. If you grant a right, privilege or procedural benefit to the accused individual, ask whether gender equity demands similar rights, privileges or benefits for the complaining individual. The 1992 Campus Sexual Assault Victim's Bill of Rights<sup>33</sup>, which amended the Clery Act, sought to codify some basic equivalent rights for victims. Now, we need to go farther, to ensure that equivalent rights and benefits attach to all parties to complaints.<sup>34</sup>

## **CONCLUSION**

It is fair to suspect the cases discussed in this Whitepaper could be cause for heartburn for many administrators. Faced with this unprecedented expansion of Title IX causes of action and liability, we fear the potential to overreact. Be mindful that most of these cases are federal circuit appeals decisions, and really only establish the law for that circuit. We highlight them because they can and will persuade other circuits. The Supreme Court cases discussed here apply, of course, to all of us.

Lest we might overreact, we want to encourage campuses to get it just right. A final case stands as a caution on what happens when a college or university overcorrects in the opposite direction. A 2008 decision by the 3<sup>rd</sup> Circuit Court of Appeals in DeJohn v. Temple University<sup>35</sup> is just such a cautionary case. In this case, the 3<sup>rd</sup> Circuit struck down a campus sexual harassment policy as being unconstitutionally overbroad, prohibiting more speech than the Constitution allows. The culprit? Temple's sexual harassment policy restricted speech that had the *intent or effect* of creating a discriminatory environment, language taken from EEOC guidelines, it should be noted. Courts are interested in the effects of discriminatory speech and conduct, but not the intent. This case might only be mildly interesting for that holding, except that the court went on to hold that the president of Temple University could be held personally liable under a §1983 action for implementing an unconstitutional policy. The trend toward individual, personal liability rears its ugly head again.

It is clear, then, that we are in Three Little Bears territory with these cases, now numbering seven. We cannot be too hot or too cold, or the courts will rapidly remind us we are off course. We have to be just right. If you're not sure what will give your institution the right balance, NCHERM is here to help.

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<sup>33</sup> [http://www.securityoncampus.org/index.php?option=com\\_content&view=article&id=133&Itemid=27](http://www.securityoncampus.org/index.php?option=com_content&view=article&id=133&Itemid=27)

<sup>34</sup> The Victim's Rights Paradigm for Campus Conduct Hearings is discussed in greater depth at [http://www.ncherp.org/pdfs/VICTIMS\\_RIGHTS\\_PARADIGM.pdf](http://www.ncherp.org/pdfs/VICTIMS_RIGHTS_PARADIGM.pdf)

<sup>35</sup> DeJohn v. Temple University, 537 F.3d 301 (3d. Cir. 2008)

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