TOPIC:
LIABILITY FOR SEXUAL ASSAULT BY COLLEGE ATHLETES UNDER TITLE IX

INTRODUCTION:
College athletes routinely make the news for their athletic achievements, and a few of them, unfortunately, make the news for misconduct. Since the mid 1990s, there have been hundreds of allegations of sexual assault by college athletes against fellow students or younger individuals. [1] Student-victims of these alleged assaults by fellow students have previously been unsuccessful in holding colleges and universities legally liable for these injuries, both under Title IX of the Education Amendments of 1972 [2] and other statutes. [3]

Rulings by two federal circuit courts, and a similar ruling by a state appellate court have, however, made it more likely that plaintiffs who are assaulted by student athletes may be able to succeed in Title IX claims against their institutions. This Note will review these cases and suggest guidelines for avoiding both the sexual assaults and the ensuing legal liability.

DISCUSSION:

Title IX and Sexual Harassment
Title IX prohibits discrimination on the basis of sex by any program or activity that receives federal funds. The law has been interpreted as applying to any subunit of a college or university if the institution itself is a federal funds recipient. All institutions that participate in the federal student financial aid program are covered by Title IX. The law is enforced by the U.S. Office of Civil Rights, which is housed within the U.S. Department of Education.

Lawsuits brought under Title IX seeking to hold institutions liable for peer sexual assault are reviewed under the standards for evaluating claims of sexual harassment created by the U.S. Supreme Court in three cases. In the first, Franklin v. Gwinnett County Public Schools [4], the Court determined that plaintiffs could bring private causes of action under Title IX and be awarded money damages. In Gebser v. Lago Vista Independent School District [5], also alleging harassment of a student by a teacher, the Court created a two-step test to determine whether the institution should be found liable for hostile environment sexual harassment. First, the plaintiff must demonstrate that "an official, who at a minimum, has authority to address the alleged discrimination and to institute corrective measures on the [institution’s] behalf has actual knowledge of discrimination and fails adequately to respond." [6] Secondly, the plaintiff must prove that the official was "deliberately indifferent" in that he or she refused to take action to either stop or remediate the harassment. [7] A year later, in Davis v. Monroe County Board of Education [8], the Court applied the Gebser standard to peer-to-peer sexual harassment. The Davis court added two more tests to the Gebser standard: the plaintiff must be able to show that the school had "substantial control over both the harasser and the context in which the known harassment occurs" [9] and the plaintiff must show harassment that was "so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims’ [sic] educational experience, that the victim-students are effectively denied equal access to an institution’s
resources and opportunities."[10] Thus, students seeking to hold colleges and universities responsible for sexual harassment or assaults by fellow students must establish that the institution had "substantial control" over the student harasser, which may be more difficult than establishing that the institution had such control over a faculty harasser's actions.

The Office for Civil Rights issued its Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties in 2001 to reflect the tests articulated in the two Supreme Court opinions. The Revised Guidance may be found at http://www.ed.gov/about/offices/list/ocr/docs/shguide.html.

Sexual Assault by Athletes and Title IX Liability

In recent cases, two federal courts and one state appellate court have permitted plaintiffs to proceed to trial on the issue of whether the university’s knowledge that either the alleged assailant, or other student athletes, had committed previous assaults could provide evidence of either “actual knowledge” and “deliberate indifference” or could support an inference that the institution had a “policy” of indifference to assaults by student athletes. Because the procedural posture of each of these cases involved an appeal from a summary judgment ruling, (see Williams v. Board of Regents of the University System of Georgia[11] and Simpson v. University of Colorado Boulder[12]) or from a motion to dismiss, decided in the university’s favor (see S.S. v. Roc Alexander and University of Washington[13]), all facts and inferences in the decisions discussed below were viewed in the light most favorable to the non-moving party. The alleged facts were not adjudicated as the evidentiary truth, but are examples of circumstances under which a Title IX cause of action will lie. Although two cases, Williams and Simpson, have been settled, the other, S.S, was still awaiting trial at the time that this NACUANote went to press.

In Williams[14], a federal appellate court reversed the trial court’s dismissal of the plaintiff’s Title IX complaint. Williams, a student at the University of Georgia, had consensual sex with Tony Cole, a basketball player. In her complaint, Williams alleged the following: that she did not know that Brandon Williams, a football player, was hiding in the closet of Cole’s residence hall room; that by prearrangement, when Cole left the room, Brandon Williams emerged from the closet, allegedly sexually assaulted plaintiff Williams, and attempted to rape her; that during the alleged sexual assault by Brandon Williams, Cole was on the telephone with Steven Thomas, a basketball teammate, encouraging Thomas and another student to come to his room and gang rape plaintiff Williams; and that Thomas arrived and allegedly raped plaintiff Williams. She withdrew from the university shortly thereafter.

Although the university charged Cole, Brandon Williams, and Thomas with disorderly conduct under the university’s Code of Conduct, due to a variety of circumstances, nearly a year elapsed before the judiciary panel held a hearing. None of the students was sanctioned. All three assailants were indicted for criminal sexual assault; Brandon Williams was acquitted by a jury and charges against Cole and Thomas were dismissed.

Plaintiff Williams asserted that the basketball coach, athletic director, and university president, all of whom were involved in recruiting Cole, knew that he had prior disciplinary problems and had been accused of harassing and assaulting women at schools he previously attended. In fact, according to Plaintiff, Cole had been dismissed from a community college for sexually assaulting two athletic department employees, and had been dismissed from the basketball team at another college because of misconduct, including sexual harassment. Despite the knowledge of the coach, athletic director, and president that Cole had engaged in several prior incidents of sexual misconduct, he was admitted on a full scholarship and no action was taken to monitor his behavior or warn him that he must follow institutional rules.

Plaintiff Williams also alleged that several student-athletes had asked university officials to educate team members about the university’s sexual harassment policy. According to Williams, the university’s response to these requests was inadequate.
Although the trial court dismissed Williams' Title IX case for failure to allege sufficient facts, the Eleventh Circuit Court of Appeals granted a rehearing, sua sponte, in order to address the issue of factual sufficiency. In reversing the lower court's dismissal of Williams' case, the appellate court discussed the factual disparities between Williams' allegations and those of prior sexual harassment cases. Williams, said the court, was alleging deliberate indifference by the university before the assault occurred, rather than complaining solely that the university's response to a complaint of harassment was indifferent after it occurred. The court relied on Williams' allegations that officials' knowledge of Cole's prior misconduct, and their knowledge that student athletes had requested training on the sexual harassment policy, to determine that the first test under Davis – actual knowledge of an official with the authority to remedy the discrimination – could be met.

This alleged foreknowledge of Cole's prior misconduct, and the claim that neither the coach nor the athletic director supervised Cole or warned him against engaging in sexual misconduct, convinced the court that the second test of "deliberate indifference" could be met as long as Williams could establish that this indifference subjected her to further discrimination. The court found that if plaintiff Williams' allegations were true, the university's response to her report of the sexual assault was inadequate. The eight-month gap between the university's receiving a full police report that corroborated Williams' claims and the holding of a disciplinary hearing deprived Williams of the ability to return to campus. Thus, the court ruled that Williams' allegations regarding the university's failure to respond promptly and to control Cole and his fellow assailants between the date of the assault and the results of the disciplinary hearing could meet the "deliberate indifference" test.

The third test, the university's control over Cole and the context in which the harassment occurred, was also met by the plaintiff's allegations, according to the court.

The court next turned to the fourth test: whether the discrimination suffered by Williams was "severe, pervasive, and objectively offensive" and denied her equal access to an education. The court viewed the "conspiracy" between Cole and his friends, and the length of time that the Plaintiff alleged she was exposed to the assaults, as sufficient to meet this test. It ruled that Williams' allegations could meet the fourth test. The court stated that because there was no evidence that the coach or athletic director increased their supervision of student athletes after the assault, and because no charges had been brought against the assailants until nearly eleven months after the assault, it was reasonable for Williams to conclude that she could not safely return to campus. The court noted that the facts alleged in this case were "extreme" and commented that it was uncertain that a valid Title IX claim would have been stated if the facts had been "less severe." The court rejected Williams' attempt to hold the coach, athletic director and president personally liable under Title IX, noting that only the institutional recipient of funding is bound by Title IX.

Seven months after the ruling in Williams, the U.S. Court of Appeals for the Tenth Circuit allowed two female students' Title IX claim against the University of Colorado to proceed to trial. The court reversed a trial court's award of summary judgment to the university. In Simpson, the court did not use the four-part Gebser/Davis test. The court relied on a statement in the Gebser opinion that the test that Gebser had created applied to "cases like this one [Gebser] that do not involve official policy of the [school district]." The Simpson court appears to have created an exception to the Gebser test if the plaintiff can demonstrate that the discrimination or harassment resulted from the institution's "official policy." The Simpson court found that the evidence on the record could support a finding that the university's policy of encouraging student athletes to show high school recruits 'a good time' without supervising their activities or ensuring that they did not engage in underage drinking or sexual assault was a potential violation of Title IX. The court found that the evidence presented to the District Court on the University's motion for summary judgment was sufficient to support findings:

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 sexual 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. [21]

Plaintiffs Simpson and Gilmore, students at the University of Colorado-Boulder (CU), were allegedly sexually assaulted in Simpson's apartment by CU football players and high school recruits who were visiting the campus. According to the plaintiffs, CU was on notice of prior sexual assaults by CU recruits during campus visits, and the local district attorney had warned CU officials to develop policies for supervising recruiting visits and to train student athletes on sexual harassment prevention. There was no evidence that either had been done, or done effectively.

In addressing Simpson's claims, the court looked to *Gebser* and noted that the opinion distinguished between situations in which the conduct was not the "official policy" of the institution (and thus required a finding of actual knowledge and deliberate indifference), and other fact situations where it was alleged that harassment was the official policy of the institution. The court noted that Simpson's complaint was that "CU sanctioned, supported, even funded, a program (showing recruits a "good time") that, without proper control, would encourage young men to engage in opprobrious acts. We do not think that the standards established for sexual-harassment claims in *Gebser* and *Davis* necessarily apply in this circumstance." [22] The court referenced a municipal liability case, *City of Canton v. Harris* [23], in which the U.S. Supreme Court ruled that a municipality could be responsible for discrimination under §1983 of the Civil Rights Act if the violation were a result of inadequate training of police and the municipality’s failure to train amounted to "deliberate indifference." Thus, according to the Simpson court, deliberate indifference could be established by demonstrating that a municipality—or a university—had a policy of failing to adequately train its employees or others over which it exercises "significant control."

The court then turned to the plaintiffs’ allegations. There was evidence that part of the strategy for recruiting high school athletes to play football at the university was to promise them alcohol and sex during their campus visit. Female "ambassadors" were asked to escort the recruits around campus and to make sure that they "had a good time." One ambassador apparently arranged for several football players and recruits, who had been drinking, to visit Simpson’s apartment. Ms. Simpson and Ms. Gilmore were allegedly sexually assaulted and were too intoxicated to consent.

The court concluded that the risk of sexual assault during these recruiting visits was "obvious" because of the attention in the media to similar problems on other campuses between 1983 and the plaintiffs' assaults in 2001. In fact, said the court, a 1989 article in *Sports Illustrated* discussed alleged unlawful conduct by then-CU football players, including sexual assault. [24] And in 1990, according to the court, two CU football players were charged with rape and sexual assault in two separate incidents. [25] The communication from the local district attorney concerning a sexual assault of a high school student by a CU football player who was hosting two visiting recruits, referred to earlier, occurred in late 1997. The district attorney recommended that CU adopt a zero tolerance policy for alcohol use and sex in the football recruiting program, and train players each year concerning their responsibilities under the sexual harassment policy. Although new policies were apparently developed, according to the court, none of them dealt with sexual conduct of football players and recruits.

The plaintiffs also provided evidence that other female students, including a female place kicker and an athletic trainer, had been sexually harassed or assaulted by football players. In neither case was the alleged assailant disciplined, and the female place kicker left the university. Furthermore, the plaintiffs demonstrated that the football coach hired as an assistant coach a former player who had been accused of assaulting a woman several years earlier and had been banned from the CU campus. Additionally, although the coach revoked the spring semester scholarships of two of the players accused by Simpson and Gilmore, they were allowed to play in the post-season bowl game where CU had an opportunity to win the national championship. The court noted that the player-host recruitment program was not eliminated until the 2004-05 recruiting season. The case was settled in late 2007. [26]

The approach used by the court in *Simpson* permits plaintiffs to introduce a wider range of evidence, including media reports of assaults by athletes at that institution and others, to demonstrate that the institution should have been aware that the risk of further assaults by athletes was "obvious." The court also
stated that an institution's failure to train its athletes with respect to sexual harassment and assault and to implement other precautionary measures could be evidence of deliberate indifference. In other words, Simpson (as well as Williams) seems to impose a duty on institutions to anticipate the risk of sexual assaults by student athletes and to take adequate preventive measures.

Although the Simpson court used a different approach to evaluating the evidence of potential institutional liability, the result was similar to that in Williams. Before-the-fact knowledge of sexual assaults by one of the players who had been accused convinced the Williams court to allow the Title IX claim to proceed. In Simpson, although the coach and athletic director did not have actual knowledge that the assailants themselves had committed earlier assaults, they did have knowledge that both players and recruits had been previously accused of sexual assault on more than one occasion, and that other women had been harassed or assaulted by football players. In both cases, the failure of athletic department staff to take steps to supervise these athletes, to instruct them on the expected standard of behavior, and to take prompt and decisive action against the players after learning of their misconduct, led both courts to conclude that the university, through its coaches and athletic directors, could be found deliberately indifferent to the problem of sexual assault by athletes.

More recently, a state appellate court ruled that a student who alleged that she was raped by a University of Washington football player could bring a Title IX claim against the institution. In S.S. v. Roc Alexander and University of Washington [27], S.S., a student athletic trainer who had had a consensual sexual relationship with Alexander, a member of the football team, ended the relationship. Days after the relationship ended, Alexander allegedly had forcible intercourse with S.S. against her will. S.S. alleged that she eventually reported the rape to several members of the athletic department, but that they were slow to respond and told her that her only option was mediation of the “dispute.” S.S. went through mediation with Alexander, who denied the rape, but complied with the assistant athletic director and university ombuds decision that he undergo counseling and perform community service. S.S claimed that several athletic department staff suggested that she give up her job as an athletic trainer so as to avoid having to interact with Alexander. She also claimed that she informed the ombuds that Alexander had been accused of a second rape, but that no action was taken.

The court found that because a jury could conclude that the university ombuds, the Title IX coordinator, and the athletic director all had knowledge of the alleged rape, S.S. could establish at trial that the university had actual notice of the assault. The court after examining Supreme Court and other applicable court decisions, determined that the following could constitute post-assault evidence of deliberate indifference: a failure to properly investigate a claim of discrimination or harassment; the failure to notify law enforcement of a criminal act (or discouraging a victim from notifying law enforcement); a failure to meaningfully and appropriately discipline the student-harasser; and the institution’s “minimization of the discriminatory import of sexual harassment or assault.” The court found that these examples as well as others, including suggesting that the plaintiff leave her job with the football program while the alleged assailant remained, would provide evidence sufficient to allow a jury to determine whether the university displayed deliberate indifference.

The court next addressed the issue of whether the alleged discrimination was severe, pervasive, and objectively offensive. It concluded that rape is a severe form of discrimination, and despite the fact that it was alleged to have occurred just once, it met the test for “pervasive” because S.S. continued to encounter Alexander after the alleged rape, in part because, she alleged, the university refused to punish him for the assault. Although the court did not explicitly find the rape and the university’s response “objectively offensive,” it concluded that the private right of action implied in Title IX applied to S.S.’s claim, permitting her to seek recovery for the injuries done to her “by actions of the university after she reported the rape.”

Despite the fact that S.S. remained enrolled after the alleged rape and its aftermath, the court concluded that she had presented the trial court with evidence that she was denied “equal access to educational opportunities or benefits.” S.S. had alleged evidence of “distress, anxiety, and emotional hurt,” as well as the need to see a counselor for 64 sessions for depression and other emotional problems. The court also noted that the consequences of the rape and the university’s response interfered with her studies, and diminished her enjoyment of her job as a student trainer. The court ruled that a jury could find that she was denied equal
The S.S. case differs factually from Williams and Simpson because S.S. did not allege that the university had "before the fact" knowledge of the alleged assailant’s proclivity to engage in sexual assault, or prior knowledge of other sexual assaults under similar circumstances. Despite the fact that the S.S. case seeks to impose Title IX liability for the university’s alleged failure to act after an assault rather than before it, the legal analysis in S.S. is similar to that of Williams, which the court in S.S. cites as one authority for the elements of proof in a peer-to-peer Title IX sexual harassment/assault case. The analysis used by the court in Simpson is not discussed in S.S.

Recommendations for Institutional Practice

Although there are currently only a few published cases in which colleges and universities have faced liability under Title IX for assaults by student athletes, the data indicate that student athletes commit sexual assaults at a greater rate than students who are not athletes. [28] For that reason, colleges and universities should ensure that the athletic programs establish policies against sexual harassment and assault, train their student athletes and staff about those policies, and enforce them firmly. Specific suggestions follow.

Recruiting. As the evidence in Simpson and other anecdotal evidence demonstrates, colleges that are anxious to recruit high-performing high school athletes try to compete for them by showing them a “good time” when they come to campus. Unless the athletic department establishes clear rules, works to ensure that its player-hosts and its high school recruits have safe and wholesome activities to occupy them during the visit, and swiftly punishes any conduct that involves alcohol or sex (particularly for underage college and high school students), it may find itself in the position of the institution in the Simpson case. The problem of underage drinking on college campuses has been widely documented, [29] but coaches arguably exercise more control over their players than do other college or university staff with respect to non-athletes. And if a player is recruited who has previously been found to have engaged in sexual misconduct, if that player is admitted at all, he or she should be closely supervised and reminded frequently about the standard of conduct expected of a student athlete.

Codes of Conduct. Some institutions have established special codes of conduct for student athletes. For example, in 2003, the University of Wisconsin-Madison developed a code of conduct for student athletes that requires the immediate suspension from the team of any student athlete who is “arrested for or charged with a felony or any ‘violation of local, state, or federal law involving drugs, gambling, or violence.’” [30] The policy eliminates a role for the coach in determining whether the student is suspended from the team or disciplined; an athletics department team makes the determination. Similar policies have been implemented at the University of Iowa and the University of Maine. These codes eliminate the conflict of interest when the coach, who has understandable concerns about needing a star athlete in an upcoming game (or season) must also determine whether to suspend or discipline the student athlete.

Training on sexual harassment and sexual assault. The courts in both Williams and Simpson focused on the need to provide sexual harassment and assault training for student athletes every year. Perfunctory training, or the overt or implied message from the coach that the training is unimportant or the subject of humor, will send a message that sexual harassment or assault is not a concern of the coaches and need not be for the students. Given the courts’ analyses in Simpson and Williams, a cultural change in athletic department leadership’s attitudes toward and treatment of women (whether or not they are athletes) seems warranted. The National Coalition Against Violent Athletes recommends that the only potentially successful way to prevent sexual harassment and assault by athletes is through a program of education concerning sexual harassment and assault, as well as on the ethical problems that plague college sports, including the abuse of fellow students. [31]

Policies discouraging alcohol and drug use by athletes. Research demonstrates the high correlation between the abuse of alcohol by college students and date rape or other forms of sexual assault. [32] Because of the
control that coaches have over student athletes, they have a greater ability to prevent or reduce the use of alcohol or drugs by their team members. Institutional policies against underage consumption of alcohol or use of drugs at any age should be strictly enforced for all students, especially for student athletes.

**Prompt institutional response to allegations of assault.** In each of the three cases discussed in this Note, the plaintiff alleged that the university’s response was inadequate and, in some cases, exacerbated the effects of the alleged assault. Clearly, allegations of sexual assault, particularly when one or both parties were intoxicated at the time, are extremely difficult to investigate and resolve. Nevertheless, institutions need to devote appropriate resources to the training and support of sexual assault victims’ counseling centers and the discipline process used in cases of alleged sexual assault. Athletics staff should be trained about referring alleged victims to these services, since, in several of these cases, the alleged victim worked for the athletics department.

**Prompt and effective discipline.** If the institution determines that a sexual assault occurred, the student athlete should be treated just as any other student accused of a similar offense. Penalties could include expulsion from the team and withdrawal of scholarships, in addition to the penalties meted out to non-athletes for similar offenses. In several of these cases, the court appeared to be convinced that the alleged assailant was treated more favorably than was appropriate because of the institution’s interest in winning athletic competitions.

**CONCLUSION:**

Two recent federal and one state appellate court decisions herald change in university liability under Title IX for student-on-student sexual assaults, potentially lowering the threshold. Although each of these cases arose from the actions of student athletes, institutions may want to review their current policies and practices, not only with regard to athletic recruiting, but codes of conduct and training on sexual harassment and sexual assault. In light of the holdings of these cases, institutional policies and procedures should discourage alcohol and drug use by athletes, encourage prompt institutional response to allegations of assault, and invoke prompt and effective discipline.

**FOOTNOTES**

**AUTHOR:**

Barbara A. Lee

**RESOURCES:**

Cases:
- [Williams v. Board of Regents of the University System of Georgia](https://www.courtlistener.com/cases/united-states/477-f3d-1282/), 477 F.3d 1282 (11th Cir. 2007).
- [Simpson v. University of Colorado Boulder](https://www.courtlistener.com/cases/united-states/500-f3d-1170/), 500 F.3d 1170 (10th Cir. 2007).
Additional Resources for Counsel:

- College Binge Drinking Issues
- College Drinking: Changing the Culture
- College Students and Alcohol Use
- Infofacts Resources: College Athletes and Alcohol and Other Drug Use
- National Coalition Against Violent Athletes