

The Evolution and Limits of Title IX Doctrine on Peer Sexual Assault

*Grayson Sang Walker**

Tony Cole, a basketball player at the University of Georgia (“UGA”), invited Tiffany Williams, then a freshman at UGA, to his dorm room on the evening of January 14, 2002.¹ Williams and Cole engaged in consensual sex shortly after she arrived at his room while Brandon Williams, a UGA football player, hid in Cole’s closet. Cole later excused himself to use the bathroom, slamming the door behind him. Brandon Williams then emerged from the closet and sexually assaulted Tiffany Williams. Meanwhile, Tony Cole called Steve Thomas and Charles Grant, fellow UGA athletes, and reported that they were “running a train” on Williams.² One of Cole’s teammates, Steve Thomas, came to the room and raped Williams.

Upon returning to her room, Tiffany Williams called Jennifer Shaughnessy, one of her close friends. Shaughnessy urged Williams to call the police, but Williams said she was afraid to report the incident. As the two women discussed Williams’s options, her phone rang. It was Steve Thomas, who had never called Williams before that night. Williams recognized his voice immediately and hung up. Thomas called again. Shaughnessy answered the phone and told Thomas he had the wrong number. Williams eventually called her mother, who reported the gang rape to UGA police. Williams sought emergency medical care in the early morning hours of January 15, 2002 and filed a formal complaint against Tony Cole, Brandon Williams, and Steve Thomas later the same day. She withdrew from UGA shortly after filing the complaint.

* Harvard Law School, J.D. Candidate, 2010. Yale College, B.A., 2007. I would like to thank Jonathan Gingerich and Katie Lamm for their consistently thoughtful comments during the editing process and the students in Diane Rosenfeld’s Title IX seminar for their friendship and commitment to rape and sexual assault prevention.

¹ The following summary of events is drawn from the Eleventh Circuit’s opinion in *Williams v. Bd. of Regents of the Univ. Sys. of Ga.*, 477 F.3d 1282 (11th Cir. 2007). The Eleventh Circuit accepted all allegations in Tiffany Williams’s complaint as true for purposes of reviewing the district court’s dismissal of her case. *Williams v. Bd. of Regents of the Univ. Sys. of Ga.*, No. Civ.A.103CV2531CAP, 2004 WL 5545037 (N.D. Ga. June 30, 2004). The overwhelming majority of Title IX case law on peer sexual harassment is made through district court rulings on motions for dismissal or summary judgment and *de novo* review of these decisions. The Supreme Court has held that all reasonable factual inferences should be drawn in favor of the non-moving party when resolving motions for dismissal or summary judgment (or conducting *de novo* review of lower court rulings on such motions). *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). In light of the procedural posture of most Title IX suits, I accept all allegations in a survivor’s complaint as true when discussing Title IX suits throughout this paper.

² As the Eleventh Circuit explains, “[r]unning a train is a slang expression for a gang rape.” *Williams*, 477 F.3d at 1288 n.3.

Tony Cole arrived at UGA with a long history of disciplinary problems. Cole gained attention for his talent on the basketball court at a young age, but coaches and scouts described him as “immensely talented and equally troubled.”³ Jim Harrick offered Tony Cole a scholarship to play basketball at University of Rhode Island (“URI”) in 1999, but accepted a job at UGA only a few days before Cole was scheduled to arrive on campus. URI refused to admit Cole after Harrick’s departure. Harrick then arranged for Cole to play basketball at the Community College of Rhode Island (“CCRI”),⁴ but Cole failed to take advantage of this opportunity. CCRI dismissed Cole in March 2000 after two female employees in the athletic department alleged that Cole groped and threatened them after they rejected his advances.⁵ Cole pleaded no contest to charges of misdemeanor trespass and transferred to Wabash Community College in Mount Carmel, Illinois.⁶ Cole played one season at Wabash before coaches dismissed him from the team after a series of disciplinary problems, including an incident in which he sexually harassed a female store clerk.⁷ Notwithstanding Cole’s long history of sexual misconduct, UGA granted Harrick’s request to admit him through a “special admissions policy” in August 2001.⁸

UGA coaches swiftly suspended Cole, Thomas, and Williams from their respective athletic teams after Tiffany Williams filed her complaint,⁹ but all three men were reinstated within two weeks.¹⁰ Although formally reinstated, Harrick did not allow Cole to rejoin the team saying, “It’s a personal thing between me and Tony. I want to improve his life.”¹¹ The suspected perpetrators were suspended again when a grand jury in Athens-Clarke County issued criminal indictments on April 4, 2002,¹² but by then the basketball and spring football seasons had already concluded.¹³ UGA’s internal investigation of the incident in Tony Cole’s dorm room moved at a glacial pace after campus police provided the Director of Judicial Programs

³ Rebecca McCarthy & Mark Schlabach, *Rhode Island Pair Sues Cole, Claims Sex Assaults*, ATLANTA J.-CONST., Jan. 29, 2002, at 1C.

⁴ *Williams*, 477 F.3d at 1290.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Plott Brice & Mark Schlabach, *Georgia Suspends Three Athletes; Basketball, Football Players Accused: Officials Investigating Alleged Sexual Assault*, ATLANTA J.-CONST., Jan. 17, 2002, at 1H.

¹⁰ Mark Schlabach, *Georgia Allows Players’ Return; Harrick Reinstates Thomas and Cole, but Playing Status Unclear*, ATLANTA J.-CONST., Jan. 25, 2002, at 1D; Mark Schlabach, *Richt Permits Reinstatement of Williams*, ATLANTA J.-CONST., Jan. 29, 2002, at 1C.

¹¹ Craig Schneider, *Cole Remains in Bulldogs’ Purgatory*, ATLANTA J.-CONST., Mar. 7, 2002, at 1E.

¹² All three perpetrators were charged with aggravated assault with intent to rape. Brandon Williams and Steve Thomas were each indicted on one count of rape. Williams was also charged with aggravated sexual battery. Rebecca McCarthy & Craig Schneider, *Players Charged in UGA Rape Case*, ATLANTA J.-CONST., Apr. 5, 2002, at 1A.

¹³ *Williams*, 477 F.3d at 1289.

with a summary of the incident on January 23, 2002.¹⁴ Tony Cole, Brandon Williams, and Steve Thomas were charged with disorderly conduct under UGA's Code of Conduct rather than a violation of UGA's Sexual Harassment Policy, which represents a more serious offense.¹⁵ The UGA Office of Judicial Programs did not convene a panel to hear Tiffany Williams's case until December 2002, almost one year after the incident. Tony Cole and Brandon Williams no longer attended UGA when the hearing was finally held, which limited the panel's ability to impose meaningful punishment.¹⁶

The result of UGA's disciplinary proceedings was not a foregone conclusion even after a jury acquitted Brandon Williams of rape¹⁷ and District Attorney Maudlin dropped charges against Cole and Thomas in August 2002.¹⁸ The burden of proof in UGA's disciplinary hearings is a preponderance of the evidence rather than the more demanding criminal standard of beyond a reasonable doubt.¹⁹ In a videotaped interview with UGA police the morning after the assault, Brandon Williams claimed that he was selecting a shirt to borrow in Tony Cole's closet when he heard Cole and Tiffany Williams having sex.²⁰ After emerging from the closet, Brandon Williams told UGA police that Tiffany Williams said, "You're cute," to which he responded, "How cute am I?"²¹ Brandon Williams conceded that he attempted to have sex with Tiffany Williams, but was physically unable to perform.²² The UGA disciplinary panel ultimately decided that Cole, Brandon Williams, and Thomas did not violate the university's code of conduct in the events of January 14, 2002.²³ The UGA Code of Conduct prohibits students from infringing the "privacy, rights, privileges, health or safety of other persons."²⁴

The injustices in Tiffany Williams's case are legion. Jim Harrick and UGA administrators admitted Tony Cole, a known sexual assailant, through a special program and then failed to mitigate the risk he posed to female

¹⁴ Rebecca McCarthy, *UGA Gives Sexual Assault Case to DA*, ATLANTA J.-CONST., Jan. 24, 2002, at 1C.

¹⁵ *Williams*, 477 F.3d at 1289.

¹⁶ *Id.*

¹⁷ Rebecca McCarthy, *UGA's Williams Acquitted of Rape; Athlete Claimed Incident Was Consensual Sex*, ATLANTA J.-CONST., Aug. 24, 2002, at 1H.

¹⁸ Rebecca McCarthy, *Court Dismisses Charges Against Two UGA Athletes*, ATLANTA J. - CONST., Sept. 4, 2002, at 1B.

¹⁹ OFFICE OF JUDICIAL PROGRAMS, DIV. OF STUDENT AFFAIRS, UNIV. OF GA., UNIVERSITY OF GEORGIA CODE OF CONDUCT 14 (2007), available at <http://www.uga.edu/judicialprograms/Code%20of%20Conduct.pdf>.

²⁰ Rebecca McCarthy, *Mother Testifies in UGA Rape Case*, ATLANTA J.-CONST., Aug. 23, 2002, at 3D.

²¹ *Id.*

²² *Id.*

²³ Rebecca McCarthy, *UGA Clears Basketball Player Cole of Misconduct in Sexual Assault Case*, ATLANTA J.-CONST., Dec. 6, 2002, at 9D.

²⁴ Greg Bluestein, *Athletes Exonerated by Univ. Judiciary*, redandblack.com, Dec. 5, 2002, <http://media.www.redandblack.com/media/storage/paper871/news/2002/12/05/News/Athletes.Exonerated.By.Univ.Judiciary-2580994.shtml>.

students. Upon learning about the incident in Tony Cole's dorm room on January 14, 2002, the UGA Office of Judicial Programs failed to adjudicate Tiffany Williams's complaint in a prompt or equitable fashion. In light of these civil rights violations, Tiffany Williams filed a \$25 million lawsuit against UGA, the Board of Regents of the University System of Georgia ("Board of Regents"), and the University of Georgia Athletic Association ("UGAA") alleging, *inter alia*, violations of Title IX of the Education Amendment of 1972²⁵ ("Title IX").²⁶ In her complaint, Tiffany Williams stated that UGA's "failure to take any remedial action . . . caused [her] to transfer to another school because [of] the threatening, humiliating, abusive, unsafe, and hostile environment" for female students.²⁷ UGA allowed male athletes "to exploit, abuse, disrespect, and degrade women because of the positions that they hold as members of male sports teams."²⁸ Williams sought \$10 million in compensatory damages, \$15 million in punitive damages,²⁹ and injunctive relief ordering UGA to implement policies to protect students from sexual harassment.³⁰

Tiffany Williams's case is a tragically common experience for college women.³¹ Despite its prevalence, sexual assault remains one of the most underreported crimes on college campuses.³² Tiffany Williams, like many rape survivors,³³ was initially reluctant to report the incident to campus or local police. Filing a formal complaint with school officials often triggers a lengthy and embarrassing investigation, even if the case is never referred to a local prosecutor. Survivors naturally fear a loss of privacy and control during this process, but some women file formal complaints citing prevention and deterrence as their primary motivations.³⁴ Universities possess a

²⁵ 20 U.S.C. § 1681 (2006).

²⁶ Mark Schlabach, *UGA Faces Suit Over Alleged Rape*, ATLANTA J.-CONST., Aug. 26, 2003, at 1B. Williams also filed suit against UGA, the Board of Regents, UGAA, UGA President Michael Adams, Athletic Director Vince Dooley, and Jim Harrick under 42 U.S.C. § 1983. Finally, she filed state tort claims against Tony Cole, Brandon Williams, and Steve Thomas. *Williams v. Bd. of Regents of the Univ. Sys. of Ga.*, 477 F.3d 1282, 1290 (11th Cir. 2007).

²⁷ Schlabach, *supra* note 26, at 1B.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Williams*, 477 F.3d at 1290.

³¹ See generally BONNIE S. FISHER ET AL., U.S. DEP'T OF JUSTICE, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN (2000).

³² *Id.* at iii (observing that "many women do not characterize their sexual victimization as a crime for a number of reasons (such as embarrassment, not clearly understanding the legal definition of rape . . . not wanting to define someone they know who victimized them as a rapist) . . . or because they blame themselves for their sexual assault").

³³ I use the term "survivor" rather than "victim" to refer to women who have been raped or sexually assaulted. Regarding the use of gendered pronouns, I refer to rape survivors as female and perpetrators as male. I am sensitive to the fact that many men survive rape and sexual assault, but the overwhelming majority of rape survivors are female. In an area where many readers are sure to have strong opinions, I hope that my terminological choices are neither offensive nor distracting.

³⁴ See generally ROBIN WARSHAW, I NEVER CALLED IT RAPE: THE MS. REPORT ON RECOGNIZING, FIGHTING, AND SURVIVING DATE AND ACQUAINTANCE RAPE (1994).

wide range of remedial powers, including orders of protection, suspension, and expulsion.³⁵ Law enforcement authorities need not participate in campus disciplinary proceedings, which are less formal than criminal trials. Campus judicial hearings provide survivors with access to justice and remove threats to the student body using non-criminal sanctions and a lower burden of proof than the criminal justice system.

Title IX plays an underappreciated role in protecting the integrity of campus judicial hearings. Although Title IX is best known for its role in expanding women's sports at the high school and collegiate levels,³⁶ the statute speaks in broad terms that apply to all educational activities: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."³⁷ The focus on sports has limited the transformative power of Title IX's non-discrimination mandate. Not every woman plays sports, but a rape-tolerant campus—with ineffective prevention programming, inadequate support services for survivors, and inequitable grievance procedures—threatens every student. Title IX was intended to protect *all* students, not just female athletes, from gender discrimination in federally funded educational programs and activities.

The epidemic of rape and sexual assault on college campuses³⁸ remains the principal focus throughout the following analysis of Title IX's unrealized promise. Part I describes the shortcomings in administrative enforcement of Title IX. The Office for Civil Rights at the Department of Education ("OCR") has promulgated vague guidelines identifying "a number of elements [used] in evaluating whether a school's grievance procedures are prompt and equitable."³⁹ Vague policy guidance leaves schools with wide latitude in developing and implementing grievance procedures for resolving sexual harassment complaints. Having promulgated a flexible compliance

³⁵ OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., SEXUAL HARASSMENT: IT'S *NOT* ACADEMIC 11 (2008), available at <http://www.ed.gov/about/offices/list/ocr/docs/ocrshpam.pdf> (observing that "[i]t may be necessary to take interim measures during the investigation of [a sexual harassment] complaint," such as "keep[ing the accused and the survivor] separated until the investigation is complete").

³⁶ See, e.g., KAREN BLUMENTHAL, LET ME PLAY: THE STORY OF TITLE IX: THE LAW THAT CHANGED THE FUTURE OF GIRLS IN AMERICA (2005); JESSICA GAVORA, TILTING THE PLAYING FIELD: SCHOOLS, SPORTS, SEX, AND TITLE IX (2002); NANCY HOGSHEAD-MAKAR & ANDREW ZIMBALIST, EQUAL PLAY: TITLE IX AND SOCIAL CHANGE (2007); EILEEN McDONAGH & LAURA PAPPANO, PLAYING WITH THE BOYS: WHY SEPARATE IS NOT EQUAL IN SPORTS (2008); BRIAN L. PORTO, A NEW SEASON: USING TITLE IX TO REFORM COLLEGE SPORTS (2003); RITA SIMON, SPORTING EQUALITY: TITLE IX THIRTY YEARS LATER (2005); WELCH SUGGS, A PLACE ON THE TEAM: THE TRIUMPH AND TRAGEDY OF TITLE IX (2006).

³⁷ 20 U.S.C. § 1681 (2006).

³⁸ See generally FISHER ET AL., *supra* note 31.

³⁹ OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 20 (2001), available at <http://www.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [hereinafter OCR POLICY GUIDANCE (2001)].

standard, OCR naturally investigates the worst actors and rarely examines ineffective, but non-egregious, sexual harassment policies. Students can petition OCR to initiate a compliance review, but vague policy guidance creates uncertainty about the content and structure of a viable complaint. Part I concludes with a modest vision for OCR enforcement that would complement the role of private litigation.

With OCR conducting only ad hoc compliance reviews, the burden falls on private litigants to ensure that schools resolve sexual assault complaints in a prompt and equitable fashion. Part II describes the evolution of Supreme Court doctrine in Title IX suits involving peer sexual harassment. The modern doctrinal test for recovery in a Title IX suit alleging peer sexual harassment requires a survivor to demonstrate that her school (1) received federal funds; (2) had actual, as opposed to constructive, knowledge of the harassment; (3) responded to such known acts of harassment with deliberate indifference; and (4) deprived her of equal access to educational opportunities through its “clearly unreasonable” response to “severe, pervasive, and objectively offensive” harassment.⁴⁰ This test practically immunizes schools from liability in Title IX suits involving peer sexual harassment in all but the most extreme cases.

The prospects of securing monetary or injunctive relief in a Title IX suit appeared bleak until two recent decisions—*Williams v. Board of Regents of the University System of Georgia*⁴¹ and *Simpson v. University of Colorado*⁴²—broke new doctrinal ground. Part III describes how the Tenth and Eleventh Circuits have revolutionized the concepts of “actual notice” and “deliberate indifference,” which traditionally frustrated Title IX suits alleging an inadequate institutional response to peer sexual harassment. The key doctrinal innovation in *Williams* and *Simpson* is the recognition that a school can receive actual notice of high risk students and groups *before* the Title IX litigant is ever assaulted. Under this logic, actual notice of risk is equivalent to actual notice of a specific assault for purposes of establishing Title IX liability. I use the term “early notice” to describe this doctrinal innovation.

Having received early notice of high risk students or organizations, schools must implement prevention, response, and disciplinary protocols to minimize the risk of harm. Responding to a sexual assault complaint in a manner that does not reflect deliberate indifference is relatively easy if notice occurs only when the litigant files a formal complaint with school officials. It is much harder to demonstrate that a school responded appropriately to an elevated risk of peer sexual assault if the inquiry spans several years and includes actions or omissions that precede the underlying assault. Judge

⁴⁰ *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650 (1998).

⁴¹ 477 F.3d 1282 (11th Cir. 2007).

⁴² 500 F.3d 1170 (10th Cir. 2007).

Adalberto Jordan describes this emerging form of Title IX liability as “*before-the-fact* deliberate indifference.”⁴³

The concepts of early notice and before-the-fact-deliberate indifference prompted UGA and the University of Colorado (“CU”) to settle quickly rather than continuing to litigate with a bleak factual record. UGA ultimately settled with Tiffany Williams for an undisclosed six figure sum⁴⁴ while CU paid Lisa Simpson, who was raped by multiple football players, \$2.5 million and agreed to hire an advisor who would present non-binding policy recommendations to the Chancellor regarding Title IX compliance.⁴⁵ Part IV argues that Title IX settlements provide survivors with some measure of compensation, but also allow schools with reckless or grossly negligent policies to disclaim any liability or fault for the underlying events.⁴⁶ Moreover, Title IX settlements are available only to litigants who endure extreme forms of sexual harassment. *Williams* and *Simpson* involved the unique combination of athletes with a long and conspicuous history of sexual misconduct, universities and athletic departments with a singular focus on winning, and sustained media attention. In other words, *Williams* and *Simpson* provide a model for suing the most reckless universities, but not schools with ineffective policies that fall short of the “clearly unreasonable”⁴⁷ threshold.

Williams, *Simpson*, and their ensuing settlements represent significant achievements for rape survivors, but securing monetary or injunctive relief in a Title IX suit remains exceedingly difficult. The *Davis* standard still allows negligent and reckless schools to avoid institutional liability so long as their response to an elevated risk of assault or a specific incident is “not clearly unreasonable.”⁴⁸ In the absence of statutory reform, Title IX’s prohibition on gender discrimination in educational programs and activities will remain difficult to enforce through private suits.

I. THE SHORTCOMINGS OF ADMINISTRATIVE ENFORCEMENT

Title IX provides for both administrative and private enforcement. This section describes the shortcomings of administrative enforcement in an effort to underscore the importance of private litigation. The Office for Civil Rights, a division within the Department of Education, has assumed primary enforcement responsibility for Title IX and conducts periodic compliance reviews, either in response to student complaints or on its own initiative.

⁴³ *Williams*, 477 F.3d at 1305 (Jordan, J., concurring) (emphasis added).

⁴⁴ *UGA Settles Ex-Student’s Harassment Lawsuit*, ATLANTA J.-CONST., Apr. 29, 2007, at 3D.

⁴⁵ Simpson Settlement ¶¶ 6, 21 (Dec. 3, 2007), http://extras.mnginteractive.com/live/media/site36/2007/1205/20071205_115513_Simpson.pdf.

⁴⁶ *Id.* ¶ 12 (“Ms. Simpson acknowledges that University’s payment is in compromise of disputed claims and does not constitute an admission of liability or fault.”).

⁴⁷ *Davis*, 526 U.S. at 648.

⁴⁸ *Id.*

While OCR has the power to terminate federal funding, the overriding goal of OCR review is voluntary compliance. In theory, OCR review and Title IX suits should be complementary modes of enforcement, but lackluster administrative enforcement has often forced private litigants to seek vindication of their civil rights within a daunting doctrinal framework.

OCR promulgated revised policy guidance on peer sexual harassment in 2001, but this guidance is poorly organized⁴⁹ and fails to establish firm standards for preventing campus sexual assault, supporting survivors, and adjudicating sexual harassment complaints in a prompt and equitable fashion. Commentators have distilled the OCR guidelines into a three part test for evaluating the adequacy of a school's response to peer sexual harassment: (1) whether the harassment impaired access to educational opportunities, (2) whether the school had actual or constructive notice of the harassment, and (3) whether the school took prompt and effective action to remedy the harassment and prevent its recurrence.⁵⁰ In a sense, the first two prongs of this test are merely preliminary.

The purpose of filing a complaint with OCR is to trigger an investigation into the adequacy of a school's response to peer sexual harassment. The critical inquiry in OCR review is how quickly and effectively the school responded after receiving actual or constructive notice of harassment that impairs a student's access to educational programs or activities. The OCR guidelines announce:

Once a school has notice of possible sexual harassment of students . . . it should take immediate and appropriate steps to investigate or otherwise determine what occurred and take prompt and effective steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again.⁵¹

This standard is also phrased in terms of a duty to take "immediate and effective corrective action responsive to the harassment, including effective steps to end the harassment, prevent its recurrence, and, as appropriate, remedy its effects."⁵²

After calling for strong remedial action, OCR fails to provide clear guidance on what constitutes a prompt and effective response to peer sexual harassment. OCR establishes a minimum baseline for measuring the effec-

⁴⁹ For example, Sections V.B ("Nature of a School's Responsibility to Address Sexual Harassment"), V.D. ("The Role of Grievance Procedures"), VII ("Recipient's Response"), and IX ("Prompt and Equitable Grievance Procedures") are largely redundant. See OCR POLICY GUIDANCE (2001), *supra* note 39.

⁵⁰ Holly Hogan, *What Athletic Departments Must Know About Title IX and Sexual Harassment*, 16 MARQ. SPORTS L. REV. 317, 322 (2006); Jenni E. Spies, Comment, *Winning at All Costs: An Analysis of a University's Potential Liability for Sexual Assaults Committed by Its Student Athletes*, 16 MARQ. SPORTS L. REV. 429, 438 (2006).

⁵¹ OCR POLICY GUIDANCE (2001), *supra* note 39, at 15.

⁵² *Id.* at 14.

tiveness of a sexual harassment policy, but presents other critical safeguards as merely optional. A grievance procedure must include the following protections:

Notice to students, parents . . . and employees of the procedure, including where complaints may be filed . . . ; [a]pplication of the procedure to complaints alleging harassment . . . ; [a]dequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence . . . ; [d]esignated and reasonably prompt timeframes for the major stages of the complaint process; [n]otice to the parties of the outcome of the complaint; and [a]n assurance that the school will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others.⁵³

After establishing this baseline, OCR states that “[m]any schools also provide an opportunity to appeal the findings or remedy, or both,”⁵⁴ without establishing the right to appeal as an essential element of an equitable grievance procedure. Regarding the possibility that other students will retaliate against a survivor who files a formal complaint or other individuals who participate in the investigation, OCR suggests that “schools *may* want to include a provision in their procedures prohibiting retaliation.”⁵⁵ Finally, OCR observes that “it is a good practice for schools to inform students who have alleged harassment about the status of the investigation on a periodic basis.”⁵⁶ In an area where students and administrators would benefit from bright line rules mandating certain procedures, OCR readily accepts that grievance procedures “will vary considerably in detail, specificity, and components” from school to school.⁵⁷ Some degree of variation among schools is both healthy and inevitable, but OCR’s failure to mandate a more expansive set of procedural protections makes the “prompt and equitable” hearing requirement unnecessarily vague.

School administrators and students bear the most direct costs of OCR’s vague policy guidance on peer sexual harassment. Every school must establish a grievance procedure for resolving sexual harassment complaints in a prompt and equitable fashion, but the OCR guidelines fail to answer several critical questions including (1) whether the school must convene a judicial panel to hear such complaints; (2) who can sit on the panel; (3) whether the panel must include student representatives; (4) what burden of proof and rules of evidence will apply at the judicial hearing; (5) whether the parties can bring an attorney or support person to the hearing; (6) whether the survivor and the accused are entitled to present evidence and cross examine wit-

⁵³ *Id.* at 20 (citations omitted).

⁵⁴ *Id.*

⁵⁵ *Id.* (emphasis added).

⁵⁶ *Id.*

⁵⁷ *Id.*

nesses; (7) whether character witness testimony will be allowed; (8) whether the losing party is entitled to an appeal and, if so, the basis on which he or she may appeal; (9) who will hear the appeal; (10) whether the appellate body will review both factual and legal questions; and (11) what standard of review will apply on appeal. OCR need not promulgate a firm answer to each question, but the current sexual harassment guidelines leave schools with too much discretion. Grievance procedures will naturally “vary . . . in detail, specificity, and components,”⁵⁸ but OCR should mandate or prohibit certain procedures in cases involving allegations of rape or sexual assault. Wendy Murphy has proposed using the OCR case resolution process, in which the agency attempts to obtain voluntary compliance from a deficient school, as a natural springboard for issuing further guidance on the “prompt and equitable” hearing requirement.⁵⁹ At the very least, OCR could conduct a best practices review and promulgate more precise guidance on what constitutes a “prompt and equitable” grievance procedure for resolving complaints alleging the most extreme forms of sexual harassment.

Vague compliance standards create uncertainty and confusion for students petitioning OCR to review a particular sexual harassment policy. OCR presents its complaint process as a straightforward exercise in summarizing events and meeting deadlines,⁶⁰ but the OCR review process is anything but straightforward. An OCR complaint should demonstrate: (1) impairment of access to educational opportunities, (2) actual or constructive notice, and (3) the inadequacy of the school’s response, but this three step test is largely the product of scholarly analysis⁶¹ and does not appear directly in the OCR guidelines. A survivor may inadvertently address these issues in summarizing her story, but filing an OCR complaint should not be a game of chance. Survivors and their advocates need better guidance on the essential elements of an OCR complaint and how Title IX doctrine⁶² differs from the compliance standards that trigger OCR review. Promulgating more precise guidelines on the proper way to resolve sexual harassment complaints would aid students seeking OCR review as well as schools seeking to comply with their Title IX obligations.

A school with ineffective grievance procedures that fail to remedy the harassment and prevent its recurrence has effectively subjected one or more of its students to sexual harassment and will be held in violation of Title IX.

⁵⁸ *Id.*

⁵⁹ See Wendy J. Murphy, *Using Title IX’s “Prompt and Equitable” Hearing Requirements to Force Schools to Provide Fair Judicial Proceedings to Redress Sexual Assault on Campus*, 40 NEW ENG. L. REV. 1007, 1009-10 (2006) (arguing that OCR should have issued a public ruling announcing that requiring survivors to provide independent corroboration before an investigation can go forward is improper and violates Title IX after resolving a complaint against Harvard College addressing this issue).

⁶⁰ U.S. Department of Education Office for Civil Rights, Discrimination Complaint Form, <http://wdcrobcolp01.ed.gov/CFAPPS/OCR/complaintform.cfm> (last visited Oct. 9, 2009).

⁶¹ See, e.g., Hogan, *supra* note 50.

⁶² See *infra* Part II.

However, OCR has established relatively weak sanctions for violating the prompt and equitable hearing requirement. In the event of a violation, “the school is responsible for taking effective corrective actions to stop the harassment, prevent its recurrence, and remedy the effects on the victim that could reasonably have been prevented had it responded promptly and effectively.”⁶³ This standard merely restates the school’s original duty to resolve sexual harassment complaints in a prompt and equitable fashion. OCR will seek “voluntary corrective action before pursuing fund termination or other enforcement mechanisms.”⁶⁴ In no case will OCR award money damages to the survivor or other complainant.⁶⁵ To the extent that money damages are necessary to make survivors whole and deter schools from adopting ineffective sexual harassment policies, OCR review will remain an imperfect substitute for private suits. Nonetheless, OCR review plays a critical role in realizing the promise of Title IX. As a sub-unit within a federal agency, OCR has more resources and expertise than a private litigant. By conducting periodic compliance reviews and investigating student complaints, OCR has the power to shape the content of sexual harassment policies on college campuses.

The OCR case resolution process is fairly opaque, which makes it difficult to draw conclusions about how OCR exercises its enforcement power. However, periodic compliance reviews appear to be an unreliable and insufficiently rigorous exercise. The present shortcomings in OCR enforcement—including vague guidance on the essential elements of a grievance procedure for resolving sexual harassment complaints—underscore the importance of private suits. OCR investigations should be a rigorous complement to Title IX suits rather than an unpredictable substitute. Having concluded that sexual assault survivors cannot rely on OCR to vindicate their civil rights, I turn to the doctrinal barriers that have traditionally frustrated private enforcement of Title IX’s “prompt and equitable” hearing requirement.

II. THE SUPREME COURT’S TITLE IX JURISPRUDENCE

The Supreme Court has recognized an implied private right of action in Title IX, concluding that “when that remedy is necessary or at least helpful to the accomplishment of the statutory purpose, the Court is decidedly receptive to its implication under the statute.”⁶⁶ Money damages are available in Title IX suits under the theory that “[when] legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong

⁶³ OCR POLICY GUIDANCE (2001), *supra* note 39, at 12.

⁶⁴ *Id.* at iv.

⁶⁵ *See id.*

⁶⁶ *Cannon v. Univ. of Chicago*, 441 U.S. 677, 703 (1979).

done.”⁶⁷ After setting the stage for some measure of private enforcement, the Supreme Court established extraordinarily high barriers to recovery in Title IX suits involving sexual harassment. This section describes the doctrinal hurdles facing a Title IX litigant and the theoretical rationale for creating a narrow path to victory.

Prior to the Supreme Court’s decision in *Gebser v. Lago Vista Independent School District*,⁶⁸ lower courts used a variety of different standards for imposing institutional liability in cases involving sexual harassment. One commentator counted seven different standards in play during the pre-*Gebser* period: “strict liability, agency principles or negligence, agency principles alone, negligence, intentional discrimination, actual knowledge, and whether a reasonable avenue of complaint was made available.”⁶⁹ *Gebser* clarified the law by establishing an unmistakably high standard for institutional liability in Title IX cases involving teacher-on-student sexual harassment.

Frank Waldrop, a high school teacher in the Lago Vista Independent School District, sexually harassed Alida Gebser, a student who joined one of his book discussion groups and was later assigned to two of his classes during her freshman year of high school, on several occasions over a two-year period.⁷⁰ Waldrop initiated sexual contact with Gebser during a visit to her home in which he kissed and fondled her.⁷¹ Gebser and Waldrop had sexual intercourse several times during the spring semester of her freshman year, but she never reported the relationship to school officials.⁷² Other parents complained about Waldrop’s inappropriate classroom behavior, including sexually suggestive comments, during Gebser’s sophomore year.⁷³ Waldrop denied making any inappropriate remarks, but apologized to the parents and promised that there would not be any more problems.⁷⁴ The principal met with Waldrop and advised him to be careful about his classroom behavior, but did not report the parents’ complaints to the superintendent of schools.⁷⁵ In January 1993, police arrested Waldrop after finding him engaged in sexual intercourse with Gebser.⁷⁶ Lago Vista fired Waldrop and the Texas Educa-

⁶⁷ *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 66 (1992).

⁶⁸ 524 U.S. 274 (1998).

⁶⁹ Justin F. Paget, Comment, *Did Gebser Cause the Metastasis of the Sexual Harassment Epidemic in Educational Institutions? A Critical Review of Sexual Harassment Under Title IX Ten Years Later*, 42 U. RICH. L. REV. 1257, 1258-59 (2008) (citing Dawn A. Ellison, *Sexual Harassment in Education: A Review of Standards for Institutional Liability Under Title IX*, 75 N.C. L. REV. 2049, 2095-118 (1997)).

⁷⁰ *Gebser*, 524 U.S. at 277-78.

⁷¹ *Id.* at 278.

⁷² *Id.* (Gebser testified that she thought Waldrop’s conduct was inappropriate, but she did not know how to react and wanted to continue taking his classes).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* (Lago Vista’s superintendent also served as Title IX coordinator for the district).

⁷⁶ *Id.*

tion Agency revoked his teaching license.⁷⁷ At the time of these events, Lago Vista had not issued an anti-harassment policy or established a grievance procedure for resolving sexual harassment complaints, a clear violation of Title IX and its implementing regulations.⁷⁸

Although Lago Vista violated Title IX regulations by not having a policy that provided for “prompt and equitable” resolution of sexual harassment complaints, the Court denied Gebser’s Title IX claim.⁷⁹ Gebser based her claim on theories of *respondeat superior* and constructive notice, but the Court rejected both theories in favor of a more demanding standard for institutional liability in cases of student-on-teacher sexual harassment. Justice O’Connor observed that *Franklin* did not “define the contours of . . . [institutional] liability”⁸⁰ and declared that the Court enjoyed “a measure of latitude to shape a sensible remedial scheme that best comports with the statute”⁸¹ given that Title IX’s private right of action is implied rather than explicit.⁸² The standard for institutional liability may not be “at odds with the statutory structure and purpose,”⁸³ but crafting the standard “inherently entails a degree of speculation, since it addresses an issue on which Congress has not specifically spoken.”⁸⁴

In a five-to-four decision, the Court held that “damages may not be recovered . . . unless an official of the school district who at a minimum has authority to institute corrective measures on the district’s behalf has actual notice of, and is deliberately indifferent to, the teacher’s misconduct.”⁸⁵ In a prior municipal liability case, the Court described deliberate indifference as “a stringent standard of fault, requiring proof that [the] . . . actor disregarded a known or obvious consequence of his action.”⁸⁶ The statutory basis for this test is Title IX’s administrative enforcement scheme: “It would be unsound . . . for a statute’s *express* system of enforcement to require notice to the recipient and an opportunity to come into voluntary compliance while a judicially *implied* system of enforcement permits substantial liability without regard to the recipient’s knowledge or its corrective actions upon receiving notice.”⁸⁷ Regarding the deliberate indifference standard, the Court concluded that OCR would terminate funding only when a school refused to comply voluntarily. In other words, Title IX’s “most severe sanction”⁸⁸ would be imposed only based on “an official decision by the recipient not to

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 280.

⁸⁰ *Id.* at 281.

⁸¹ *Id.* at 284.

⁸² *Id.* at 281.

⁸³ *Id.* at 284.

⁸⁴ *Id.*

⁸⁵ *Id.* at 277.

⁸⁶ *Bryan County v. Brown*, 520 U.S. 397, 410 (1997).

⁸⁷ *Gebser*, 524 U.S. at 289.

⁸⁸ *Id.* at 290.

remedy the violation.”⁸⁹ The deliberate indifference standard was deemed a “rough parallel” to this administrative enforcement framework.⁹⁰

Applying the actual notice and deliberate indifference framework to the facts at hand, the Court held that Gebser failed to establish that a school official with authority to take corrective action had actual notice of Waldrop’s sexual misconduct. Some parents complained to the principal about Waldrop’s inappropriate comments during class, but these complaints were deemed “plainly insufficient to alert the principal to the possibility that Waldrop was involved in a sexual relationship with a student.”⁹¹ Inquiry notice⁹² is not an adequate substitute for actual notice for purposes of Title IX liability. The Court also rejected Gebser’s argument that Lago Vista did not receive actual notice of Waldrop’s misconduct because the school district never adopted or published “grievance procedures providing for prompt and equitable resolution” of sexual harassment complaints,⁹³ a clear violation of federal regulations that should not be held against Title IX litigants.⁹⁴ According to the Court, OCR can enforce the “prompt and equitable” hearing requirement against Lago Vista, but a Title IX litigant cannot cite the absence of grievance procedures to explain why her school never received actual notice of the underlying sexual harassment. Commentators have noted that this holding “[creates] perverse incentives for schools not to have effective reporting mechanisms”⁹⁵ as a means of insulating themselves from receiving actual notice of sexual harassment. Regarding Lago Vista’s response, the Court observed that the school district fired Waldrop as soon as it received actual notice of his sexual relationship with Gebser.⁹⁶ This response was deemed entirely appropriate and did not reflect deliberate indifference to the underlying harassment.⁹⁷ Thus, the Court affirmed summary judgment for Lago Vista.

The Supreme Court extended the *Gebser* framework to complaints alleging student-on-student sexual harassment the following term in *Davis v. Monroe County Board of Education*.⁹⁸ LaShonda Davis, a fifth-grade student at Hubbard Elementary School in Monroe County, Georgia, endured a series of sexually harassing comments and actions from one of her male

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 291.

⁹² Inquiry notice describes the investigation a reasonable school district would undertake based on the knowledge it currently possesses. Through this inquiry, Lago Vista would presumably have acquired actual knowledge of the relevant fact (i.e. that Frank Waldrop was having an inappropriate relationship with one of his students).

⁹³ *Gebser*, 524 U.S. at 291.

⁹⁴ 34 C.F.R. § 106.8(b) (2008).

⁹⁵ Diane L. Rosenfeld, Conference, *Changing Social Norms? Title IX and Legal Activism Comments from the Spring 2007 Harvard Journal of Law & Gender Conference*, 31 HARV. J.L. & GENDER 407, 412 (2008) [hereinafter *Title IX Conference*].

⁹⁶ *Gebser*, 524 U.S. at 291.

⁹⁷ *Id.* at 291-92.

⁹⁸ 526 U.S. 629 (1999).

classmates for approximately six months before school officials punished the perpetrator.⁹⁹ The alleged harassment began in December 1992 when LaShonda's classmate, G.F., "attempted to touch [her] breasts and genital area and made vulgar statements such as 'I want to get in bed with you' and 'I want to feel your boobs.'" ¹⁰⁰ G.F. verbally and physically harassed LaShonda in January, February, March, and April of 1993.¹⁰¹ On one occasion, "G.F. allegedly rubbed his body against LaShonda in the school hallway in what LaShonda considered a sexually suggestive manner" ¹⁰² G.F. also harassed other girls in LaShonda's class, but their teacher denied the girls' request to speak with the school principal, reportedly saying, "If [Mr. Query] wants you, he'll call you."¹⁰³ LaShonda and her mother reported each incident to one of her teachers and even spoke to the school principal, but G.F. was not punished until mid-May, when he pleaded guilty to sexual battery.¹⁰⁴ LaShonda suffered tremendously during the intervening months. Unable to concentrate on her schoolwork, LaShonda's grades dropped during the spring semester.¹⁰⁵ Her father also found a suicide note in her room.¹⁰⁶ School officials were totally unresponsive to LaShonda's complaints during this period. Only after three months of alleged harassment was LaShonda allowed to move her classroom seat further away from G.F.¹⁰⁷ The Monroe County Board of Education ("Board") had not published a sexual harassment policy and school personnel had not been instructed on how to respond to complaints of peer sexual harassment.¹⁰⁸

LaShonda's mother filed suit against the Board and other defendants alleging that school officials had displayed deliberate indifference "to the unwelcome sexual advances of . . . [G.F.] upon . . . [her daughter, which] created an intimidating, hostile, offensive, and abus[ive] school environment in violation of Title IX."¹⁰⁹ The district court granted the defendants' motion to dismiss, which the Eleventh Circuit affirmed after a rehearing en banc.¹¹⁰ In another five-to-four decision with Justice O'Connor writing for a different majority, the Court reversed the Eleventh Circuit, but established an even more demanding standard for Title IX suits involving student-on-student sexual harassment. The issue in *Davis* was whether a school district could be held liable for its inadequate response to discrimination perpetrated by a non-agent.¹¹¹ Citing Department of Education regulations and tort prin-

⁹⁹ See *id.* at 633-34.

¹⁰⁰ *Id.* at 633.

¹⁰¹ *Id.* at 633-34.

¹⁰² *Id.* at 634.

¹⁰³ *Id.* at 635.

¹⁰⁴ *Id.* at 634.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 635.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 636.

¹¹⁰ *Id.* at 636-37.

¹¹¹ *Id.* at 643.

principles, the Court held that schools had long been on notice that they could be held responsible for failing to prevent or respond appropriately to the discriminatory acts of non-agents, including other students.¹¹²

The element of control is critical in cases involving non-agents. In order to be held liable “for its *own* decision to remain idle in the face of known student-on-student harassment,”¹¹³ a school must “[exercise] substantial control over both the harasser and the context in which the . . . harassment occurs.”¹¹⁴ Assuming that the element of “substantial control” is present, school districts are “properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”¹¹⁵ The actual knowledge and deliberate indifference requirements parallel the *Gebser* standard, but the Court now defined deliberate indifference as a response that was “clearly unreasonable in light of the known circumstances.”¹¹⁶ Perhaps the most significant development in *Davis* was the addition of a requirement that the alleged harassment be sufficiently “severe, pervasive, and objectively offensive” to deprive the victim of equal access to the school’s programs and activities.¹¹⁷ This burden makes the standard of recovery in a Title IX suit involving student-on-student sexual harassment even more demanding than the *Gebser* test.

Although *Davis* was technically a victory for sexual assault survivors—in the sense that LaShonda Davis’ complaint, which the lower courts had dismissed, was remanded for further proceedings—Title IX advocates feared that the Supreme Court had established an impossibly high bar for recovery.¹¹⁸ The doctrinal test for cases involving allegations of rape or sexual assault on college campuses now has four components: (1) substantial control over the harasser and the environment in which the alleged harassment occurred; (2) actual knowledge of the alleged harassment, which must be (3) “so severe, pervasive, and objectively offensive” that it deprives the survivor of equal access to educational programs and activities; and (4) deliberate

¹¹² *Id.* at 643-44.

¹¹³ *Id.* at 661 (emphasis in original).

¹¹⁴ *Id.* at 668.

¹¹⁵ *Id.* at 650.

¹¹⁶ *Id.* at 648.

¹¹⁷ *Id.* at 651.

¹¹⁸ See, e.g., Gigi Rollini, *Davis v. Monroe County Board of Education: A Hollow Victory for Student Victims of Peer Sexual Harassment*, 30 FLA. ST. U. L. REV. 987, 995 (2003) (arguing that *Davis* “can hardly be . . . [seen as] a victory for student victims of sexual harassment, when the only victims who [will] succeed . . . are students utterly debilitated by the harassment . . . nor . . . [as] an effective tool to motivate educational institutions to participate in the effort to eliminate sexual harassment in our schools”); Linda Wharton, Remarks, *Title IX Conference*, *supra* note 95, at 387 (observing retroactively that “there was a clear danger that courts would apply [the *Davis* and *Gebser*] standards so strictly as to exclude from liability all but the most egregious cases”).

indifference to the known acts of harassment, defined as a response that was “clearly unreasonable” under the circumstances. The third and fourth elements of this doctrinal test have frustrated numerous Title IX claims in the post-*Davis* era.¹¹⁹ Regarding the issue of impaired access to educational programs and activities, Judge Roger Gregory has acknowledged the risk of penalizing resilient students who continue to excel in school while enduring a hostile environment.¹²⁰ While several judges have recognized that a student need not suffer a decline in grades in order to demonstrate that a hostile

¹¹⁹ See, e.g., *Winzer v. Sch. Dist. for the City of Pontiac*, No. 02-2451, 2004 WL 1543160, at *3 (6th Cir. July 7, 2004) (holding that school principal who knew that students were sexually active on school property was not deliberately indifferent to the risk that student would be raped in school bathroom); *Soper v. Hoben*, 195 F.3d 845, 855 (6th Cir. 1999) (holding that it was not “clearly unreasonable in light of the known circumstances” when a school district failed to separate a mentally retarded female student from a boy who made sexual advances toward her in elementary school, which her mother reported to daughter’s special education teachers, and later raped her in middle school); *Sauerhaft v. Hastings-on-Hudson Union Free Sch. Dist.*, No. 05 Civ. 09087(PGG), 2009 WL 1576467, at *2, *6 (S.D.N.Y. June 2, 2009) (holding that series of e-mails in which author stated that he “[wanted] to have sex” with female classmate, “grab [her] tits and suck them,” and “[feel her] up in the vagina” were “highly offensive,” but did not so undermine or detract from her educational experience to deprive her of equal access to the school’s programs and activities); *Doe v. Ohio State Univ. Bd. of Regents*, No. 2:04CV0307, 2006 WL 2813190, at *13 (S.D. Ohio Sept. 28, 2006) (noting that university had “no duty to warn” other students about perpetrator while investigation of alleged sexual assault was pending, but before he assaulted a second student); *Soriano v. Bd. of Educ. of the City of New York*, No. 01 CV 4961(JG), 2004 WL 2397610, at *1, *5 (E.D.N.Y. Oct. 27, 2004) (holding that fourth grade girl who experienced nightmares and declining grades and sought treatment from a therapist after male classmate “touched [her] vagina over her skirt against her will” failed to demonstrate that alleged harassment was sufficiently “severe, pervasive, and objectively offensive” to deprive her of access to educational activities); *Doe v. Town of Bourne*, No. Civ.A.02-11363-DPW, 2004 WL 1212075, at *12 (D. Mass. May 28, 2004) (holding that school’s decision not to inform student’s parents or the police that she was sexually assaulted on school property was not “clearly unreasonable in light of the known circumstances”); *Vaird v. Sch. Dist. of Philadelphia*, No. CIV. A. 99-2727, 2000 WL 576441, at *1, *3 (E.D. Pa. May 12, 2000) (holding that school district’s decision to place male and female second grade students in the same reading group after the boy allegedly “pulled down [her] pants and panties and forcefully put her finger in her vagina” did not reflect deliberate indifference); *Fortune v. City of Detroit Pub. Sch.*, No. 248306, 2004 WL 2291333, at *4 (Mich. Ct. App. Oct. 12, 2004) (ignoring argument that school district’s failure to follow its own policy of supervising students until they leave the building, which allowed two boys to force seventh grade student into an empty classroom and rape her, constituted deliberate indifference).

¹²⁰ See, e.g., *Jennings v. Univ. of North Carolina*, 482 F.3d 686, 706 (4th Cir. 2007) (Gregory, J., concurring) (“In essence, the dissent concludes that because [the victim] did her best to avoid [her abuser], but still made the most of her time on the team and as a student at UNC, she has forfeited her cause of action. This implication turns Title IX on its head.”).

environment impaired her access to educational program and activities,¹²¹ some courts continue to penalize resilient survivors.¹²²

One of the most disturbing trends in post-*Davis* litigation is the subtle questioning of a survivor's allegations in resolving motions for dismissal or summary judgment despite the fact that "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [her] favor."¹²³ There is no "normal" response to rape or sexual assault, yet some judges find it noteworthy that survivors sometimes respond to traumatic events without instant alarm.¹²⁴ Post-*Davis* litigation also reveals a tendency to discount allegations of verbal—as opposed to physical—harassment.¹²⁵ The connection between sexually degrading language and sexual assault¹²⁶ is

¹²¹ See, e.g., *id.* at 705-06 ("While . . . a plaintiff's grades are relevant to the question of the concrete and negative effect of harassment, an increase or decrease in grades is not dispositive."); *Gabrielle M. v. Park Forest-Chicago Heights, Illinois Sch. Dist.* 163, 315 F.3d 817, 828 (7th Cir. 2003) (Rovner, J., concurring in part and concurring in judgment) ("The fact that [student's] grades did not suffer is by no means dispositive."); *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1094 (D. Minn. 2000) ("[G]rades are not the sole benefit to be derived by a student from an educational experience.").

¹²² See, e.g., *Hawkins v. Sarasota County Sch. Bd.*, 322 F.3d 1279, 1289 (11th Cir. 2003) (noting that "[n]one of the girls [who endured sexual threats and inappropriate touching] suffered a decline in grades and none of their teachers observed any change in their demeanor or classroom participation"); *Addison v. Clarke County Bd. of Educ.*, No. 3:06-CV-05 (CDL), 2007 WL 2226053, at *4 (M.D. Ga. Aug. 2, 2007) (observing that special needs student "continued to attend school" after enduring two episodes of verbal and physical harassment on a school bus); *Burwell v. Pekin Cmty. High Sch. Dist.* 303, 213 F. Supp. 2d 917, 932 (C.D. Ill. 2002) (noting that "it is undisputed that Plaintiff missed very little school [during the semester in which she was allegedly the victim of verbal harassment], took all of the classes she wanted and received her highest grades during . . . high school").

¹²³ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

¹²⁴ See, e.g., *Snethen v. Bd. of Educ. for the City of Savannah*, No. 406CV259, 2008 WL 766569, at *4 n.6 (S.D. Ga. Mar. 24, 2008) (observing that student who allegedly survived attempted rape in high school hallway returned to class "with no obvious signs of distress or disarray" and later went to a friend's house and dined at a local restaurant before reporting the incident).

¹²⁵ See, e.g., *Sauerhaft*, 2009 WL 1576467, at *5 (observing that "there was no physical or public component" to series of sexually threatening e-mails sent to female student); *Doe v. Bellefonte Area Sch. Dist.*, No. 4:CV-02-1463, 2003 WL 23718302, at *2 (M.D. Pa. Sept. 29, 2003) (observing that student's complaint alleging that student was repeatedly called "fag," "queer," and "gay boy" did not include any incidents involving "sexual gestures, grabbing, or touching"); *Benjamin v. Metro. Sch. Dist. of Lawrence Twp.*, IP 00-0891-C-T/K, 2002 WL 977661, at *5 (S.D. Ind. Mar. 27, 2002) (observing that student who was called a "bitch," "whore," and "slut" after refusing to have sex with her then boyfriend was "not inappropriately touched or subjected to any harassment of a physical nature"); *Burwell*, 213 F. Supp. 2d at 930 (observing that plaintiff "was not touched in any way by any of the male students she has accused of sexual harassment"); accord *Linda Wharton, Title IX Conference, supra* note 95, at 390 (observing that "too many courts seem to require physical assault or physically threatening conduct of some kind, and will not accept humiliating conduct and sexual remarks as actionable harassment").

¹²⁶ See, e.g., Helen Benedict, *The Language of Rape*, in *TRANSFORMING A RAPE CULTURE* 103, 103 (Emilie Buchwald et al. eds., 1993) (describing the language of rape as "a vocabulary that portrays women as sexual, subhuman, or childlike temptresses, and that perpetuates the idea of women as legitimate sexual prey"); MARTIN D. SCHWARTZ & WALTER S. DEKESEREDY, *SEXUAL ASSAULT ON THE COLLEGE CAMPUS: THE ROLE OF MALE PEER SUPPORT* 71 (1997) ("It cannot be a wonder if many boys come to college convinced that to gain

apparently lost on some judges.¹²⁷ At least one court rejected the claim that “explicitly gendered derogatory terms for women” constitute sexual harassment and required additional evidence that the harasser was motivated by “sexual desire” or “general hostility to one sex.”¹²⁸ School districts seeking to impose limits on institutional liability for peer sexual harassment argue that this holding follows naturally from the observation that “[t]he real world of school discipline is a rough-and-tumble place where students practice newly learned vulgarities, erupt with anger, tease and embarrass each other, share offensive notes, flirt, push and shove in the halls, grab and offend.”¹²⁹ Some courts have seized on this language in Justice Kennedy’s *Davis* dissent to send a callous message to students who allege verbal harassment: “[J]ust deal with it.”¹³⁰

Title IX case law on peer sexual harassment includes some significant victories that reflect admirable sensitivity to the needs of rape and sexual assault survivors.¹³¹ Other putative “victories” occurred in cases with positively horrific fact patterns in which the survivor experienced an academic, mental, or emotional breakdown¹³² and school administrators were com-

the admiration of their friends, they must continue to be sexually aggressive and to constantly put down women and everything they perceive as feminine. If they join with other young men who feel the same way . . . then this all turns into a self-fulfilling prophecy: they *will* gain the respect and admiration of their support group for ridiculing women, treating them like objects, and being sexually aggressive with them.”)

¹²⁷ See, e.g., *Sneath*, 2008 WL 766569, at *8 (“No reasonable teacher or administrator could be charged with deliberate indifference for failing to anticipate that [male student] would progress from the above described, ‘bitch-and-ho’ horsing around behavior to a sudden, daylight sexual-attack in a *public* school hallway.”).

¹²⁸ *Benjamin*, 2002 WL 977661, at *4.

¹²⁹ *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 673 (1999) (Kennedy, J., dissenting) (quoting Brief for Nat’l Sch. Bds. Ass’n et al. as Amici Curie Supporting Respondents, *Davis*, 526 U.S. 629 (No. 97-843)). In a pre-*Davis* decision, Judge Posner observed that “insults, teasing, petty persecutions, grabbing, poking, sexual experimentation, and other forms of what might actually or arguably constitute sexual harassment are an omnipresent feature of school life.” *Doe v. Univ. of Illinois*, 138 F.3d 653, 679 (7th Cir. 1998) (Posner, J., dissenting from denial of rehearing *en banc*).

¹³⁰ *O.H. v. Oakland Unified Sch. Dist.*, No. C-99-5123 JCS, 2000 WL 33376299, at *1 (N.D. Cal. Apr. 14, 2000) (male student who was raped three times by classmate and forced to leave campus at knife point alleged that principal told him to “be a man” and “just deal with it”).

¹³¹ See, e.g., *Doe v. Hamden Bd. of Educ.*, No. 3:06-CV-1680(PCD), 2008 WL 2113345, at *5 (D. Conn. May 19, 2008) (“Further encounters, of any sort, between a rape victim and her attacker could create an environment sufficiently hostile to deprive the victim of access to educational opportunities provided to her at school.”); *Doe v. Derby Bd. of Educ.*, 451 F. Supp. 2d 438, 444 (D. Conn. 2006) (holding that a reasonable jury could conclude that allowing perpetrator “to continue attending school in the same building as [survivor] after the assault, leaving open the constant potential for interactions between them,” constituted “severe, pervasive, and objectively offensive” harassment); *Kelly v. Yale Univ.*, No. Civ.A. 3:01-CV-1591, 2003 WL 1563424, at *4 (D. Conn. Mar. 26, 2003) (“[A] reasonable jury could find that . . . Yale’s failure to provide [survivor] with accommodations, either academic or residential, immediately following [the] assault . . . was clearly unreasonable given all the circumstances of which it was aware.”).

¹³² See, e.g., *Murrell v. Sch. Dist. No. 1*, 186 F.3d 1238, 1244 (10th Cir. 1999) (reporting that a survivor who began “to engage in self-destructive and suicidal behavior [after the assault] . . . left school and entered a psychiatric hospital”); *Doe v. Dallas Indep. Sch. Dist.*, No.

pletely unresponsive to her complaint of severe sexual harassment.¹³³ At best, one could say that the state of Title IX doctrine on peer sexual harassment is decidedly mixed.¹³⁴ Survivors have enjoyed only a few genuine victories in the post-*Davis* era. Dismissal and adverse summary judgment remain common outcomes in Title IX suits alleging peer sexual harassment.

The following section describes how the Tenth and Eleventh Circuits have interpreted the *Davis* standard in two high profile cases involving college athletes and rape. Title IX advocates celebrated each decision as an important breakthrough for sexual assault survivors. Although significant, these “victories” will be difficult to replicate and were achieved from within a doctrinal framework that remains fundamentally hostile to sexual assault survivors.

III. EARLY NOTICE AND BEFORE-THE-FACT DELIBERATE INDIFFERENCE

In light of the extraordinarily high bar for recovery in Title IX suits involving peer sexual harassment, many defendant school districts file a motion to dismiss or a motion for summary judgment.¹³⁵ The dangers arising from the “robust use of summary judgment to clear trial dockets are particularly acute in . . . sex discrimination cases,”¹³⁶ but summary judgment remains a common disposition in gender discrimination cases.¹³⁷ The Supreme Court has declared that lower courts should dismiss a Title IX suit or grant summary judgment when a reasonable jury could not conclude that the school’s response to the alleged sexual harassment was “clearly unreasona-

CIV.A.3:01-CV-1092-R, 2002 WL 1592694, at *1 (N.D. Tex. July 16, 2002) (noting that survivor, an honor student who participated in the Gifted and Talented Program, “began to show signs of depression, sleeplessness, weight loss and suicidal tendencies” after classmate assaulted her during gym class).

¹³³ See, e.g., *Murrell*, 186 F.3d at 1243-44 (describing, in the course of reversing dismissal of Title IX suit, an event in which teachers told a special needs student who was sexually assaulted and battered by male classmate “not to tell her mother about the incident and encouraged her to forget it had happened at all”); *Dallas Indep. Sch. Dist.*, 2002 WL 1592694, at *1 (denying school district’s motion for judgment on the pleadings in case where a five-year-old boy “used his hand to violate [a classmate’s] vagina, which resulted in vaginal bleeding, pain while urinating, and abdominal pain” and the principal, after learning about the assault, “did not interview [the perpetrator], obtain any written statements from the counselor or nurse, or hold any type of meeting with parents and teachers” and “accused [the survivor] of fabricating the entire incident”).

¹³⁴ *Accord* Wharton, *supra* note 118, at 387 (observing that “some lower courts are broadly and generously applying the *Gebser/Davis* ‘actual knowledge and deliberate indifference’ standard, but many have narrowly construed this standard and raised the bar disturbingly high for students”).

¹³⁵ The Federal Rules of Civil Procedure provide that “[a] party against whom relief is sought may move at any time, with or without supporting affidavits, for summary judgment on all or part of the claim.” FED. R. CIV. P. 56(b).

¹³⁶ *Gallagher v. Delaney*, 139 F.3d 338, 343 (2d Cir. 1998).

¹³⁷ See Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 737-54 (2007) (examining several gender discrimination cases in which innovative arguments were “cut off” at the summary judgment stage).

ble.”¹³⁸ As long as the funding recipient conducts *some* type of investigation and convenes *some* type of adjudicative body to hear the complaint, *Gebser* and *Davis* suggest that a school is practically immune from Title IX liability.¹³⁹

This section illustrates how *Williams* and *Simpson* have threatened whatever practical immunity schools once enjoyed by articulating the concepts of early notice and before-the-fact deliberate indifference. The key doctrinal innovation in *Williams* and *Simpson* is the recognition that a school can receive actual notice of high risk students and groups *before* the Title IX litigant is ever assaulted. In other words, the Tenth and Eleventh Circuits interpreted the actual notice requirement in *Gebser* and *Davis* to encompass actual knowledge of an elevated risk, not merely actual knowledge of the specific assault giving rise to the Title IX suit. As soon as a school is on notice, a court will begin measuring the adequacy of its response. Failing to take preventive or corrective action in the face of a known risk of sexual assault constitutes before-the-fact deliberate indifference. *Williams* and *Simpson* conceptualize the underlying rape or sexual assault as simply the final act in a long pattern of harassment. The remainder of this section explains how the concepts of early notice and before-the-fact deliberate indifference emerged from *Williams* and *Simpson*, while Part IV explores the limits of these doctrinal innovations.

A. Early Notice

Gebser and *Davis* suggest that a school acquires “actual knowledge” of alleged sexual misconduct only *after* the survivor files a formal complaint.¹⁴⁰ *Williams* and *Simpson* break new ground by indicating that this narrow conception of actual notice should not apply in every Title IX suit. Before reaching the merits of Tiffany Williams’s suit against UGA, the Eleventh Circuit observed that her case “present[ed] a factually distinct scenario from . . . the Supreme Court’s [Title IX] precedents.”¹⁴¹ The distinguishing feature of her complaint was the allegation that UGA officials—including the president, athletic director, and men’s basketball coach—knew that Tony Cole, the lead perpetrator in the case, presented a threat to women on cam-

¹³⁸ *Davis v. Bd. of Educ.*, 526 U.S. 629, 649 (1999) (“In an appropriate case, there is no reason why courts, on a motion to dismiss, for summary judgment, or for a directed verdict, could not identify a response as not ‘clearly unreasonable’ as a matter of law.”).

¹³⁹ The Sixth Circuit has rejected the argument that a school avoids Title IX liability merely by “[doing] something in response to the harassment.” *Vance v. Spencer County Pub. Sch. Dist.*, 231 F.3d 253, 260 (6th Cir. 2000). I agree with this conclusion, but maintain that *Davis* was silent on the scope, thoroughness, and timeliness of any investigation that a school may undertake and the procedures that should apply at a grievance hearing. To the extent that *Davis* can be interpreted as a call for some type of investigation and adjudication of sexual harassment complaints, the instruction represents the triumph of form over substance.

¹⁴⁰ *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998).

¹⁴¹ *Williams v. Bd. of Regents of the Univ. of Ga.*, 477 F.3d 1282, 1292.

pus *before* he enrolled at UGA. Cole had a history of sexual misconduct at other colleges, including a “no contest [plea] to criminal charges of misdemeanor trespass in connection with . . . two sexual assaults” and was dismissed from another basketball team after whistling and making “lewd suggestions to a female store clerk.”¹⁴² In contrast to UGA, neither Lago Vista nor Monroe County learned about “the alleged harasser’s proclivities” until *after* he was hired or enrolled at the school.¹⁴³ When a future perpetrator arrives on campus with a clean record and sexually assaults another student, the first opportunity for the school to receive actual notice of his dangerous behavior is often the assault itself.¹⁴⁴ In contrast, when a student is recruited and admitted despite his history of sexual misconduct, the school already knows that he presents a threat to other students, which triggers a duty to supervise his behavior and engage in other preventative measures.

The Eleventh Circuit also cited a series of “suggestions” from UGA student-athletes that their peers needed more information and training about the school’s sexual harassment policy as a secondary basis for holding that UGA had actual notice that Tony Cole presented a danger to female students.¹⁴⁵ Although the Eleventh Circuit did not hold that these recommendations would have been sufficient to provide UGA with actual notice that its student-athletes required enhanced supervision, the court concluded that UGA was aware of “the need to inform its student-athletes about the applicable sexual harassment policy.”¹⁴⁶

Williams involved a specific perpetrator with a long history of sexual misconduct, which allowed the Eleventh Circuit to avoid taking a strong position on whether evidence of a *general* risk arising from a discrete group of male students, such as student-athletes, would be sufficient to establish actual notice. The Tenth Circuit confronted this issue directly in *Simpson* where the question presented was whether an official policy of showing football recruits a “good time” and multiple reports of rape and sexual assault by current players and high school recruits provided the University of Colorado (“CU”) with actual notice that a specific group of students and visitors posed a serious threat to female students.¹⁴⁷

Recruiting talented high school players is one of the keys to sustained success in college football. The Tenth Circuit described CU’s recruiting process as a “sales effort” in which high school players were paired with female “Ambassadors” and player hosts, who were instructed “to show the

¹⁴² *Id.* at 1290.

¹⁴³ *Id.* at 1292.

¹⁴⁴ However, a perpetrator with a previously clean record who joined a male organization with a known history of sexual misconduct should have been subject to enhanced supervision and received targeted prevention programming by virtue of his affiliation with a high-risk group.

¹⁴⁵ *Williams*, 477 F.3d at 1290.

¹⁴⁶ *Id.* at 1296.

¹⁴⁷ *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1171, 1173 (10th Cir. 2007).

recruits a good time.”¹⁴⁸ CU won the Big 12 Conference championship on December 1, 2001 and invited a group of high school recruits to campus a few days later. CU football players reportedly arranged for some of the recruits to have sex with female students in a local hotel room on December 6, 2001. CU player-hosts told the recruits to expect similar treatment every weekend if they joined the football team. The following evening, a female tutor in the athletic department invited a group of football players and recruits to Lisa Simpson’s apartment. Ms. Simpson told the female tutor that four football players could attend her party. Approximately twenty football players and recruits arrived at Ms. Simpson’s apartment between 11:30 and 11:45pm on Friday, December 7, 2001. A few players left shortly after arriving, but the tutor encouraged at least one player to stay by suggesting that the women were about to begin showing the recruits a good time. Ms. Simpson went to her bedroom shortly after midnight and fell asleep. Within a matter of minutes, two naked men were removing Lisa Simpson’s clothes while a group of players and recruits surrounded her bed. Lisa Simpson was sexually assaulted, both orally and vaginally, while three other men raped her friend, Anne Gilmore, in the same room. CU football players and recruits reportedly harassed three other women in Lisa Simpson’s apartment that night. A fourth woman had non-consensual sex with two CU football players after leaving the apartment. Lisa Simpson eventually withdrew from CU while Anne Gilmore took a one year leave of absence.¹⁴⁹ Four football players implicated in the incident lost their spring semester scholarships, but were allowed to play in the Fiesta Bowl in January 2002.¹⁵⁰

In holding that CU was aware of the dangers arising from its football recruiting program long before Lisa Simpson and Anne Gilmore were raped, the Tenth Circuit cited “a variety of sources of information suggesting . . . that sexual assault[s] would occur if recruiting was inadequately supervised . . . [including] reports not specific to CU regarding the serious risk of sexual assault by student-athletes.”¹⁵¹ The court described a series of specific incidents at CU that provided administrators with actual notice of the risks associated with the CU football program: (1) an article in *Sports Illustrated* reporting that CU football players were involved in several sexual assault cases in the late 1980s¹⁵²; (2) a recruiting party at a local hotel in 1997 where a high school student was sexually assaulted¹⁵³; (3) a February 1998 meeting during which an Assistant District Attorney in Boulder County told CU administrators that the 1997 rape was not an isolated inci-

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 1180.

¹⁵⁰ *Id.* at 1184.

¹⁵¹ *Id.* at 1173.

¹⁵² *Id.* at 1181 (citing Rick Reilly, *What Price Glory?*, *SPORTS ILLUSTRATED*, Feb. 27, 1989, at 32).

¹⁵³ *Id.* (“Although the victim was not a CU student protected by Title IX, that circumstance is irrelevant to evaluation of the risk to CU women.”).

dent and encouraged them to stop “turn[ing their] head[s]” from the problem¹⁵⁴; (4) multiple reports of verbal harassment directed at Katharine Hnida, a female football player, during her brief tenure with the team¹⁵⁵; and (5) a September 2001 incident in which a CU football player raped a female student trainer, who was encouraged not to press charges.¹⁵⁶ The picture that emerges from *Simpson* is a university with a long history of overlooking acts of sexual violence by football players and recruits. CU administrators received actual notice of the risks associated with the football recruiting program early and often.

Rather than focusing on a single player or recruit with a history of sexual misconduct, the Tenth Circuit spread the blame equally in *Simpson* by describing the CU football team’s appalling history of sexual misconduct. After *Simpson*, a known pattern of sexual misconduct by members of the same team or organization may provide a school with actual notice that the group requires enhanced supervision. This doctrinal development might make it easier for sexual assault survivors to demonstrate that their schools had actual knowledge of the dangerous peer culture in certain male organizations,¹⁵⁷ but responded to this elevated risk of harm with deliberate indifference. At the very least, the concept of early notice should allow many survivors to raise a genuine issue of material fact regarding this element. Scholars have noted that male athletic teams “may be an environment that reinforces sexually harassing behavior while simultaneously rejecting any behavior that goes against acceptable male social norms—anything that might be viewed as feminine or homosexual.”¹⁵⁸ The same observation applies to fraternities,¹⁵⁹ particularly chapters with a high concentration of male

¹⁵⁴ *Id.* at 1181-82.

¹⁵⁵ *Id.* at 1183. Baine Kerr, who represented Lisa Simpson, reports that Katharine Hnida was repeatedly called a cunt by other players, which the CU Chancellor later defended as a term of endearment. Baine Kerr, Esq., Hutchinson Black and Cook, LLC, Guest Lecture in Diane Rosenfeld’s Title IX Seminar at Harvard Law School (Nov. 4, 2008).

¹⁵⁶ *Simpson*, 500 F.3d at 1183 (Coach Gary Barnett reportedly told the student trainer that her “life would change” if she pressed charges and indicated that he would support his player).

¹⁵⁷ See SCHWARTZ & DEKESEREDY, *supra* note 126, at 107 (observing that “there is an argument to make that when men band together strongly, the chances are increased that they will see women as the Other, a weaker sex that can deservedly be abused”).

¹⁵⁸ Anita M. Moorman & Lisa P. Masteralexis, *An Examination of the Legal Framework Between Title VII and Title IX Sexual Harassment Claims in Athletics and Sports Settings: Emerging Challenges for Athletics Personnel and Sport Managers*, 18 J. LEGAL ASPECTS SPORT 1, 6 (2008); accord MARIAH BURTON NELSON, *THE STRONGER WOMEN GET, THE MORE MEN LOVE FOOTBALL: SEXISM AND THE AMERICAN CULTURE OF SPORTS* 7 (1994) (arguing that “when we begin to understand how male coaches and players speak and think about women and masculinity, it ceases to be surprising that college football and basketball players gang-rape women in numbers equaled only by fraternity brothers”).

¹⁵⁹ See SCHWARTZ & DEKESEREDY, *supra* note 126, at 110 (noting that “the most widely cited works on fraternities argue that the highly masculinist, racist, homophobic views promoted by fraternities; the preoccupation with loyalty; the use of alcohol and physical force as weapons; the obsessions with competition, physical force, superiority, and dominance, all encourage social and sexual violence against women”). See generally PEGGY REEVES SANDAY, *FRATERNITY GANG RAPE: SEX, BROTHERHOOD, AND PRIVILEGE ON CAMPUS* (2d ed. 2007).

athletes. Not every male organization on campus is suspect and athletic teams and fraternities are not “completely unique in their ability to provide the peer pressure and social support to enable their members to victimize women.”¹⁶⁰ However, schools should be deemed to have actual knowledge that certain groups present a serious threat to female students based on previous incidents. A responsible, evidence-based prevention strategy will direct more supervision and prevention resources to these organizations.

Critics might argue that the conception of actual notice articulated in *Simpson*, which relies heavily on historical events that did not involve the men who raped Lisa Simpson and Anne Gilmore, is akin to guilt by association. This criticism overlooks the fact that the defendant in a Title IX suit is the university, not the perpetrator. The perpetrator and his group affiliations are relevant only in determining (1) whether the university had actual notice that he—either individually (Tony Cole) or by virtue of his membership in a high risk group (CU football team)—had a higher than average propensity to commit violent sexual acts, and (2) whether the school was deliberately indifferent to this elevated risk of harm. Moreover, Title IX requires schools to educate all students on rape and sexual assault prevention. To the extent that enhanced supervision and prevention education are perceived as punishments, men can simply leave an athletic team or fraternity if the costs of membership outweigh the social benefits. After *Williams* and *Simpson*, Title IX requires schools to supervise men who join high risk organizations or arrive on campus with a history of sexual misconduct more closely than other students.

In addition to describing prior misconduct by CU football players and recruits as a basis for establishing actual knowledge of hostile environment harassment, the Tenth Circuit also cited several national studies on the disproportionate role of student-athletes in campus sexual assaults.¹⁶¹ This citation raises the possibility that a school could be deemed to have actual knowledge of the dangerous peer culture in certain male organizations even without specific information about previous misconduct involving teams or chapters on campus.¹⁶² CU knew that its football players and recruits were likely to be involved in a disproportionately high number of sexual assaults based on academic research suggesting that “male student athletes [are]

¹⁶⁰ SCHWARTZ & DEKESEREDY, *supra* note 126, at 115.

¹⁶¹ *Simpson*, 500 F.3d at 1181 (citing numerous scholarly and popular articles addressing the high risk of sexual misconduct among male student athletes).

¹⁶² The use of national statistics to draw inferences about specific groups on campus is admittedly controversial and is unlikely to receive judicial endorsement in future Title IX litigation. A district court in Georgia recently held that “[g]eneralized findings in national studies will not relieve” a litigant’s burden of showing that her school had “actual knowledge of past complaints” against a particular fraternity. *Ross v. Corp. of Mercer Univ.*, 506 F. Supp. 2d 1325, 1350 (M.D. Ga. 2007). Title IX advocates should view the Tenth Circuit’s citation of national studies indicating that male athletes are a high risk group as promising dicta that may reinforce a claim based on the prior misconduct of a specific group on campus.

more prone to commit sexual assault than other male students.”¹⁶³ To its credit, CU cited two of these studies in a handbook distributed to football players before the 2001 season,¹⁶⁴ which suggests that the school was aware that male athletes are a high risk group. Beyond citing specific events at CU and a variety of national studies describing the disproportionate role of male athletes in campus sexual assaults, the Tenth Circuit concluded that an official policy of showing football recruits a “good time” presented an “obvious” risk of sexual assault such that failure to supervise the program closely would constitute deliberate indifference.¹⁶⁵ In other words, the dangers arising from a particular program can be so obvious that a school will be deemed to have actual knowledge of this elevated risk merely by promulgating such a reckless policy.

Williams and *Simpson* provide multiple ways for a survivor to allege or demonstrate that her school had actual knowledge of the rape culture on campus long before she was assaulted. If the perpetrator arrived at school with a history of sexual misconduct, additional supervision and monitoring were required (*Williams*). If the perpetrator belonged to an organization with a history of violent and disrespectful behavior—either by virtue of specific incidents on campus or national studies on the dangerous culture that exists in certain male groups—the school was on notice that additional prevention resources should be directed at the individual and his organization (*Simpson*). If the perpetrator assaulted another student within the context of a reckless recruiting program that presents obvious risks to female students, the policy itself provides actual notice of an elevated risk of sexual assault (*Simpson*). These doctrinal innovations with respect to the concept of actual knowledge have effectively lowered the pleading burden on Title IX litigants in cases where the perpetrator has a history—either individually or by virtue of his associations—of sexual misconduct. The following subsection will describe how providing a school with early notice that campus sexual assault is a serious risk for female students also reduces the burden of alleging or demonstrating deliberate indifference.

B. *Before-the-Fact Deliberate Indifference*

Sexual assault survivors can recover damages under Title IX only if their school “acts with deliberate indifference to known acts of harassment in its program and activities.”¹⁶⁶ Although this standard appears daunting, *Williams* and *Simpson* have clarified that a school can display deliberate indifference to an elevated risk of peer sexual harassment both before and after

¹⁶³ *Simpson*, 500 F.3d at 1181.

¹⁶⁴ *Id.* (citing studies conducted by the National Institute of Mental Health and the Center for the Study and Prevention of Campus Violence at Towson State University).

¹⁶⁵ *Id.* at 1173.

¹⁶⁶ *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999).

an assault occurs.¹⁶⁷ Schools that receive early notice of a general or specific risk of sexual assault have a unique opportunity to demonstrate their commitment to student safety. This opportunity can also be squandered if a school ignores or underestimates the severity of the risk and fails to implement aggressive prevention education. The success of a Title IX suit often turns on how well a school utilizes the period of time after it receives early notice of an elevated risk of peer sexual assault.

Williams and *Simpson* illustrate the consequences of failing to mitigate a known risk of peer sexual assault. After admitting Tony Cole despite his known history of sexual misconduct, UGA failed to provide adequate supervision or training. “[By] placing Cole in a student dormitory and failing to supervise him in any way or to inform him of their expectations of him under the applicable sexual harassment policy, UGA . . . substantially increased the risk faced by female students.”¹⁶⁸ UGA also “waited almost eleven months to take corrective action” after Tiffany Williams was raped and “failed to take any precautions that would prevent future attacks.”¹⁶⁹ Thus, UGA acted with deliberate indifference both before *and* after the assault. The concept of early notice makes UGA responsible for its decision to admit Tony Cole, its failure to supervise his behavior, and its handling of Tiffany Williams’s sexual harassment complaint.

In a similar holding, the Tenth Circuit concluded that CU had “maintained an unsupervised player-host program to show high school recruits a good time” despite the “obvious” dangers arising from this practice and the inadequacy of existing prevention and supervision efforts.¹⁷⁰ Although the Tenth Circuit did not use the term “before-the-fact deliberate indifference,” the court based its holding on institutional failures that occurred before Lisa Simpson and Anne Gilmore were assaulted. Having received early notice that football players were going too far in showing recruits a good time and strong encouragement from local prosecutors to train player-hosts and supervise recruits, CU “did little to change its policies or [provide] training.”¹⁷¹ Despite mounting sexual harassment complaints tied to recruiting visits, “player-hosts still received little or no direction on appropriate behavior or responsibilities.”¹⁷² Head coach Gary Barnett distributed a handbook with one page of information on rape and sexual assault, but no guidelines for

¹⁶⁷ See also *Ross*, 506 F. Supp. 2d at 1346 (“[A] court can find a Title IX violation when a university exhibits deliberate indifference before an attack makes a student more vulnerable to the attack itself, or when a university exhibits deliberate indifference after an attack that causes a student to endure additional harassment.”).

¹⁶⁸ *Williams v. Bd. of Regents of the Univ. Sys. of Ga.*, 477 F.3d 1282, 1296 (11th Cir. 2007).

¹⁶⁹ *Id.* at 1297.

¹⁷⁰ *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1171, 1184.

¹⁷¹ *Id.* at 1173.

¹⁷² *Id.* at 1182 (One player reported that “[t]hey really don’t go into detail [regarding] your responsibilit[ies]” as a player-host).

recruiting visits.¹⁷³ Moreover, Barnett undermined efforts to “establish[] a football team culture that would prevent sexual assaults” by (1) retaliating against Katharine Hnida after she complained about verbal harassment from other football players; (2) discouraging a student trainer from pressing charges after a CU football player raped her in September 2001; and (3) hiring an assistant coach who was accused of assaulting a woman and who had been banned from the CU campus.¹⁷⁴ Barnett even suggested that eliminating the implied promise of sex during recruiting visits would place the football program at a “competitive disadvantage.”¹⁷⁵

In light of the preceding facts, the Tenth Circuit concluded that the CU coaching staff was aware of its players misconduct and “responded in ways that were more likely to encourage than eliminate such conduct.”¹⁷⁶ Barnett and CU officials did not make “any sincere effort . . . to instruct players not to engage in or promote sexual harassment or assault.”¹⁷⁷ CU’s high-risk recruiting program and its failure to train player-hosts or supervise recruits suggests that the school had “a policy of deliberate indifference.”¹⁷⁸ The concept of early notice facilitated this conclusion by making CU’s failure to prevent harm as relevant as its failure to resolve Lisa Simpson’s complaint in a prompt and equitable fashion. In fact, the Tenth Circuit’s opinion in *Simpson* contains surprisingly few details about whether or how CU punished the men who raped Lisa Simpson and Anne Gilmore. By shifting the focus from CU’s response to the events on December 7, 2001 to institutional failures that preceded the assaults, *Simpson* places sexual assault prevention and response on the same plane.

Providing a school with early notice of high-risk students and groups expands the time frame during which the adequacy of its response will be measured. In order to avoid Title IX liability, schools with early notice must have effective response *and* prevention protocols. Prompt and equitable grievance procedures for resolving sexual harassment complaints have some deterrent effect on potential perpetrators, but deterrence alone is not an effective prevention strategy. A concurring opinion in *Williams* suggests that Tiffany Williams would have stated a valid Title IX claim against UGA for failing to supervise Tony Cole, even if her sexual assault complaint had been resolved in a timely and equitable fashion.¹⁷⁹ When a school disregards a known risk of harm, “there should not and need not be any requirement that the victim be subjected to a second act of discrimination or harassment [in the form of a delayed or inequitable grievance procedure] before there can

¹⁷³ *Id.* at 1182-83.

¹⁷⁴ *Id.* at 1183-84.

¹⁷⁵ *Id.* at 1184.

¹⁷⁶ *Id.* at 1173-74.

¹⁷⁷ *Id.* at 1184.

¹⁷⁸ *Id.* at 1178.

¹⁷⁹ *Williams v. Bd. of Regents of the Univ. Sys. of Ga.*, 477 F.3d 1282, 1305 (11th Cir. 2007) (Jordan, J., concurring).

be Title IX liability.”¹⁸⁰ This logic would presumably allow students to file Title IX suits against schools with inadequate prevention programming. The injury in cases of purely before-the-fact deliberate indifference involves subjecting students to an excessive risk of harm. It remains to be seen how much supervision or prevention education is necessary to avoid Title IX liability under the emerging doctrine of before-the-fact deliberate indifference, but *Williams* and *Simpson* suggest that schools have a strong incentive to implement proactive prevention measures in addition to promulgating prompt and equitable grievance procedures that attempt to repair harm.

The concept of “before-the-fact deliberate indifference” represents an important breakthrough for Title IX litigants.¹⁸¹ The Supreme Court’s Title IX jurisprudence has focused exclusively on “after-the-fact deliberate indifference,”¹⁸² that is, cases where the school had no knowledge of hostile environment harassment prior to the first act of physical or verbal harassment. As Title IX doctrine matures, *Gebser* and *Davis* may become outliers in the sense that many schools—especially colleges and universities—are aware that certain students and groups require additional supervision and training before a prospective Title IX litigant is ever harassed. A growing body of research shows that campus sexual assault is a national problem that affects schools of all sizes in all geographic regions.¹⁸³ As campus sexual assault becomes increasingly impossible to ignore, the ignorance as bliss defense to Title IX liability may disappear entirely.

IV. TITLE IX SETTLEMENTS AND THE LIMITS OF DOCTRINAL INNOVATION

Tiffany Williams and Lisa Simpson settled with respective suits after securing remands, but Title IX advocates should not expect the recent wave of settlements to continue indefinitely. The first half of this section examines the content of Title IX settlements, with a particular focus on their non-monetary components. After describing the terms of these agreements, I challenge the suggestion that *Williams* and *Simpson* establish a desirable or viable model for future Title IX litigation. Demonstrating a genuine issue of material fact regarding actual knowledge and deliberate indifference remains a non-trivial burden even after *Williams* and *Simpson*, which may prove to be fairly narrow precedents. *Simpson* provides a road map for the narrow class of Title IX suits in which a university recklessly subordinates student safety to athletic success. *Williams* may have slightly broader application to situations where a university admits a student with a history of sexual misconduct. However, Title IX does not establish a strict liability regime. The fact that UGA probably could have avoided Title IX liability by adopting

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* at 1304.

¹⁸³ See FISHER ET AL., *supra* note 31.

some minimal precautions suggests that *Williams* may not be a durable precedent. Some survivors are fortunate enough to settle their Title IX suits on favorable terms, but I argue that these agreements deny survivors full vindication of their civil rights by disclaiming any fault or liability for the injuries they suffered. Ultimately, Title IX settlements are difficult to secure and remain imperfect substitutes for favorable jury verdicts.

A. Title IX Settlements

If a school fails to dismiss a Title IX suit or prevail on the pleadings, administrators will often attempt to settle the case quietly to avoid further embarrassment.¹⁸⁴ Following the Tenth Circuit's decision in *Simpson*, the University of Colorado agreed to pay Lisa Simpson \$2.5 million and hire a Title IX advisor for five years who would present non-binding policy recommendations to the Chancellor regarding Title IX compliance, sexual harassment prevention, and support services for survivors.¹⁸⁵ The Title IX advisor was also authorized "to make recommendations concerning the final disposition of any University investigation or disciplinary proceeding arising from the sexual abuse of a student," which the Chancellor must "consider . . . in good faith."¹⁸⁶ CU agreed to provide a "written explanation in any instance where the University does not adopt the Title IX advisor's recommendation."¹⁸⁷ Tiffany Williams settled with UGA for an undisclosed six-figure sum.¹⁸⁸ One should not infer that her failure to obtain more money or policy reforms reflects any weakness in her case against UGA. UGA was under less pressure to settle because Tiffany Williams's case never became a national story to the same extent as the CU football scandal. Sustained media attention and litigation stamina are instrumental in securing a favorable Title IX settlement.

Continuing the pattern established in *Williams* and *Simpson*, Arizona State University ("ASU") recently settled a Title IX suit after a federal district court denied its motion for summary judgment.¹⁸⁹ The facts in this case are "chillingly similar" to *Williams*.¹⁹⁰ Darnel Henderson, a scholarship football player, was expelled from ASU's Summer Bridge program on July

¹⁸⁴ See Schneider, *supra* note 137, at 716 ("[W]hen summary judgment is denied, lawyers and judges report that defendants immediately offer to settle, often with far more generous [terms] than they might have otherwise considered.").

¹⁸⁵ Simpson Settlement, *supra* note 45, ¶¶ 6, 21. Anne Gilmore settled with CU for \$350,000. Brittany Anas, *CU Accuser to Receive New Diploma Signed by Brown*, BUFFZONE.COM, Dec. 6, 2007, http://www.buffzone.com/ci_13093668.

¹⁸⁶ Simpson Settlement, *supra* note 45, ¶ 21.

¹⁸⁷ *Id.*

¹⁸⁸ Rebecca K. Quigley, *UGA Settles Harassment Suit*, ATHENS BANNER-HERALD, Apr. 28, 2007, available at http://onlineathens.com/stories/042807/news_20070428040.shtml.

¹⁸⁹ *J.K. v. Ariz. Bd. of Regents*, No. CV 06-916-PHX-MHM, 2008 WL 4446712, at *17 (D. Ariz. Sept. 30, 2008).

¹⁹⁰ Plaintiff's Motion for Default or Partial Summary Judgment and Sanctions for ASU's Willful Destruction of Evidence, *J.K.*, 2008 WL 4446712 (No. CV 06-916-PHX-MHM).

17, 2003 after “repeated acts of [sexual] misconduct, including . . . physically intimidating and making threatening remarks to female staff members, making inappropriate sexual remarks to females, grabbing and inappropriately touching females, and exposing his genitalia to female staff members.”¹⁹¹ Henderson was only the second student ever expelled from the Summer Bridge program, but his case was not reported to ASU’s Office of Student Life and Judicial Affairs.¹⁹² An Assistant Athletic Director described Henderson as “the highest risk individual in the group [of freshman football players] both socially and academically,” but he was allowed to return to ASU in August 2003 and live in the same dormitory from which he had been expelled the previous month. The head football coach informed Henderson that he could rejoin the team subject to a zero tolerance or three strikes plan,¹⁹³ but “Henderson received no special supervision, monitoring, mentoring, counseling, or guidance . . . [and] a zero tolerance plan was never implemented.”¹⁹⁴ What happened next was reasonably foreseeable. Henderson raped J.K., a woman living in his dorm, in the early hours of March 12, 2004.¹⁹⁵ ASU did not provide Henderson with a written notice of the charges against him or expel him from the dorm until April 2, 2004.¹⁹⁶ Henderson was not formally expelled from ASU until May 10, 2004.¹⁹⁷

In denying ASU’s motion for summary judgment, the district court stated that it could “not hold as a matter of law that ASU’s response to Henderson’s known misconduct during the Summer Bridge program, as well as J.K.’s allegation that Henderson raped her, were not ‘clearly unreasonable.’”¹⁹⁸ The court also rejected ASU’s argument that “‘*Davis* should not be extended to recognize a claim premised on alleged deliberate indifference to prior harassment’ of victims other than [J.K.]”¹⁹⁹ This argument would have allowed schools to disclaim actual knowledge of a perpetrator’s dangerous proclivities if he simply harassed a different student each time. Judge Martha Daughtrey described this tactic as the “impermissible disaggregation of incidents” in a separate Title VII case.²⁰⁰ A hostile environment claim requires judges to consider the totality of the circumstances at a particular school, not merely the final incident that prompted a law suit. This conclusion will strike some readers as obvious, yet some courts continue to “slice

¹⁹¹ *J.K.*, 2008 WL 4446712, at *1.

¹⁹² *Id.*

¹⁹³ Neither ASU nor the trial court distinguished between (a) a zero tolerance or strict liability policy, and (b) a three strikes plan. This conceptual distinction would not change the court’s analysis of J.K.’s suit against ASU.

¹⁹⁴ *J.K.*, 2008 WL 4446712, at *2.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at *3.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at *17.

¹⁹⁹ *Id.* at *14.

²⁰⁰ *Williams v. Gen. Motors*, 187 F.3d 553, 562 (6th Cir. 1999).

and dice”²⁰¹ hostile environment claims into seemingly innocuous incidents.²⁰² The district court rightly rejected ASU’s attempt to disaggregate Darnel Henderson’s conduct into isolated incidents and observed that “the focus on Title IX liability lies on the conduct of the harasser,” not whether he targeted the same student more than once.²⁰³

ASU promptly settled with J.K. after the court rejected its motion for summary judgment. J.K. agreed to “release and forever relinquish any and all claims she possesses against [ASU]”²⁰⁴ in exchange for \$850,000 and ASU’s promise to conduct “a review of [its] policies on sexual harassment and implement changes as needed.”²⁰⁵ The newly appointed Student Safety Coordinator for the three public universities in Arizona was ordered to publish an annual report describing actions taken to carry out her responsibilities for each of the next five years.²⁰⁶ In a mutual statement released by the parties, ASU cited a desire “to avoid the expense of [further] litigation and to spare all the individuals involved the likely anguish of attempting to resolve disputed claims in open court.”²⁰⁷ J.K. agreed to settle because she believed “the non-monetary terms of the settlement [would] make a significant contribution to making Arizona’s campuses safer and reducing the risk of sexual harassment and assault for all students.”²⁰⁸

Title IX advocates celebrated the ASU settlement as a dramatic turning point in the struggle to transform rape tolerant campuses into safe educational communities. Joanne Belknap, a sociologist who studies gender-based violence, was effusive in her praise of the settlement: “This is a new day. Universities always protect the male athlete. It has happened forever. But this settlement will make things significantly better.”²⁰⁹ Kathy Redmond, founder of the National Coalition Against Violent Athletes, declared that ASU was “establishing a fortress of prevention that will be a model for all colleges and universities.”²¹⁰ Diane Rosenfeld was slightly more cautious in her assessment of the ASU settlement: “This *could* be our turning point. . . . With this system in Arizona, we will begin to see the end of a

²⁰¹ Schneider, *supra* note 137, at 729 (observing that judges “frequently slice and dice law and fact in a technical and mechanistic way without evaluating the broad context [of] an arid record”).

²⁰² See, e.g., Addison v. Clarke County Bd. of Educ., No. 3:06-CV-05 (CDL), 2007 WL 2226053, at *4 (M.D. Ga. Aug. 2, 2007) (holding that even if a school had actual knowledge of a perpetrator’s “pattern of inappropriate behavior toward other students, there is nothing to indicate that [the school] . . . had actual knowledge that [he] posed a threat to [plaintiff]”).

²⁰³ J.K., 2008 WL 4446712, at *14.

²⁰⁴ Settlement Agreement and Release of Claims Between Plaintiff and the Arizona Board of Regents and Arizona State University ¶ 6 (Jan. 7, 2009), available at <http://www.ncava.org/settlementrelease.pdf>.

²⁰⁵ *Id.* ¶¶ 6, 21.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at Exhibit A.

²⁰⁸ *Id.*

²⁰⁹ Lester Munson, Landmark Settlement in ASU Rape Case, ESPN.com, Jan. 30, 2009, <http://sports.espn.go.com/espn/otl/news/story?id=3871666>.

²¹⁰ *Id.*

culture of male privilege, especially for athletes, and the beginning of a culture of sexual respect.”²¹¹ It is too early to tell whether the ASU settlement will prompt other schools to reform their sexual assault policies, but Title IX experts remain overwhelmingly optimistic—perhaps irrationally so.²¹²

Perhaps the most significant elements of the Simpson and ASU settlements are their non-monetary components. Obtaining injunctive relief in a Title IX suit often requires the survivor to retain her status as a student. For example, Tiffany Williams sought an injunction “ordering UGA and the Board of Regents to implement sexual harassment policies providing for . . . an assurance that the school will take steps to prevent recurrence of any harassment,”²¹³ but the Eleventh Circuit held that she “lacked standing to pursue injunctive relief because the threat of future harm to Williams and other students [was] merely conjectural” given that both she and her assailants no longer attended UGA.²¹⁴ The denial of injunctive relief in *Williams* produces an odd result: a survivor is most likely to withdraw or transfer after her school’s sexual harassment policies have failed miserably, yet her decision to leave will prevent her from securing meaningful policy reforms in a subsequent Title IX suit. Title IX settlements allow survivors to secure important policy reforms, but they do not provide injunctive relief that would redress the denial of equal access to educational opportunities.

B. *The Limits of Doctrinal Reform and Title IX Settlements*

Although *Williams* and *Simpson* are exciting developments for Title IX advocates, there are important limits to seeking damages or injunctive relief from within the existing doctrinal framework. First, the doctrinal standards of actual notice and deliberate indifference still influence how courts rule on pre-trial motions for dismissal or summary judgment. Title IX doctrine rejects the theory of constructive or inquiry notice used in OCR investigations. Moreover, the deliberate indifference standard imposes a much higher burden on Title IX litigants—even at the pre-trial motion stage—than a negligence or recklessness standard.²¹⁵ Lower courts have also routinely disposed of Title IX suits on the ground that the harassment alleged was not sufficiently “severe, pervasive, or objectively offensive . . . to deprive the [victim] of access to the educational opportunities or benefits provided by the school.”²¹⁶ While demonstrating a genuine issue of material fact with re-

²¹¹ *Id.* (emphasis added).

²¹² See *infra* Part IV.B.

²¹³ *Williams v. Bd. of Regents of the Univ. Sys. of Ga.*, 477 F.3d 1282, 1302 (11th Cir. 2007).

²¹⁴ *Id.* at 1303.

²¹⁵ One commentator has noted that early notice and before-the-fact deliberate indifference come dangerously close to the prohibited concepts of constructive notice and negligence. Paget, *supra* note 69, at 1298 (characterizing the Tenth Circuit’s decision in *Simpson* as a “*should have known*” standard that “sounds in negligence”).

²¹⁶ *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650 (1998).

spect to actual notice, deliberate indifference, and deprivation of access to educational activities is certainly easier than establishing each element based on a preponderance of the evidence, surviving a pre-trial motion to dismiss or for summary judgment remains a daunting challenge for Title IX litigants. Schools continue to enjoy a certain degree of practical immunity from Title IX liability as long as they respond to a known risk of sexual assault—or a specific complaint—in a manner that is “not clearly unreasonable.”²¹⁷

Tiffany Williams and Lisa Simpson raised genuine issues of material fact regarding actual notice and deliberate indifference, but both cases involved unique factual circumstances that may be difficult to replicate. College athletes are involved in a disproportionately high percentage of sexual assaults, but the CU football team’s recruiting program seems exceptionally reckless. How many athletic departments will allow their recruiting programs to spiral so far out of control? The ASU case raises similar questions about the prevalence of the institutional malfeasance at issue. In resolving ASU’s motion for summary judgment, the district court did not have occasion to discuss the survivor’s previous motion for partial summary judgment and sanctions for ASU’s willful destruction and withholding of evidence.²¹⁸ ASU failed to preserve incident reports describing Darnel Henderson’s misconduct during the Summer Bridge Program and destroyed electronically stored information in violation of its duty to preserve evidence when litigation should be “reasonably anticipated.”²¹⁹ ASU also proved uncooperative during the course of litigation. After stating that it had disclosed all relevant information, ASU produced seventy-six pages of e-mails containing “critical, and in some cases, explosive new evidence”²²⁰ hours before the close of discovery. It is no wonder that ASU decided to settle after the court denied its motion for summary judgment. Although *Simpson* and *J.K.* established favorable precedents for sexual assault survivors, I fear that future Title IX litigants will derive limited utility from these decisions. The standards for institutional liability under Title IX are sufficiently capacious to sanction the worst actors, but not every survivor will be able to cite a long history of egregious misconduct. In other words, *Simpson* and *J.K.* may be limited to their facts.

Williams presents a slightly more common scenario in which a major college athletic program recruits a talented player with a troubled past. Unlike CU, UGA did not have a smoking gun recruiting policy that created an obvious risk of sexual assault. Moreover, UGA did not destroy or withhold evidence that may have supported Tiffany Williams’s Title IX suit. This is not to say that UGA’s behavior was commendable. To the contrary, UGA

²¹⁷ *Id.* at 649.

²¹⁸ Plaintiff’s Motion for Default or Partial Summary Judgment and Sanctions for ASU’s Willful Destruction of Evidence, *J.K.*, 2008 WL 4446712 (No. CV 06-916-PHX-MHM).

²¹⁹ *Id.* at 6 (citing *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212, 217-18 (S.D.N.Y. 2003)).

²²⁰ *Id.* at 4.

recruited a known sexual assailant, failed to mitigate the risk he posed to other students, and declined to hold him responsible for organizing and participating in a gang rape. My goal in contrasting *Simpson* and *J.K.* with *Williams* is merely to suggest that *Williams* may be a more useful precedent for sexual assault survivors. A Title IX litigant seeking to analogize the facts of her case to *Williams* need not identify a smoking gun policy or establish that the perpetrator sexually harassed another student on the same campus, such as during a summer program for incoming students. *Williams* lends itself to general application in a way that *Simpson* and *J.K.* do not. However, the deliberate indifference standard does not prohibit schools from recruiting Tony Cole and other sexual assailants. Title IX merely requires schools to provide enhanced supervision and training to high risk students and groups. In other words, UGA could have recruited Tony Cole and avoided Title IX liability simply by placing him in a dorm with a strict policy on visitors and a mandatory curfew for all residents and requiring him to attend special sexual assault prevention training. These precautions may not have protected Tiffany Williams and other female students from Tony Cole, but the Supreme Court has held that Title IX does not require funding recipients to “[purge] their schools of actionable peer harassment.”²²¹ The ease with which UGA could have avoided Title IX liability suggests that *Williams*—like *Simpson* and *J.K.*—may not be a terribly durable precedent.

Ultimately, *Williams*, *Simpson*, and *J.K.* may be useful in challenging the “win at all costs” attitude that prevails in some athletic departments,²²² but will not reform ineffective sexual harassment policies that fall short of the “clearly unreasonable” threshold. Courts are generally loath to transform deliberate indifference into an effectiveness standard.²²³ The Sixth Circuit has entertained the possibility that adopting a particular response to peer sexual harassment constitutes deliberate indifference when a school district discovers an effective prevention strategy, employs it for a short period of

²²¹ *Davis*, 526 U.S. at 648.

²²² See also *S.S. v. Alexander*, 177 P.3d 724, 740 (Wash. Ct. App. 2008) (holding that University of Washington’s minimization of student equipment manager’s accusation that star football player raped her; attempt to resolve the dispute through mediation; acceptance of the perpetrator’s denial at face value; failure to offer alternatives to mediation, investigate the complaint, or report the incident to campus police; suggestions that the survivor resign her position with the football team; and “questioning [of the survivor’s] truthfulness when she expressed dissatisfaction with the results of the mediation” indicated deliberate indifference).

²²³ See, e.g., *Porto v. Town of Tewksbury*, 488 F.3d 67, 74 (1st Cir. 2007) (“[T]he fact that measures designed to stop harassment prove later to be ineffective does not establish that the steps taken were clearly unreasonable in light of the circumstances. . . . The test for whether a school should be liable under Title IX for student-on-student harassment is not one of effectiveness by hindsight”); *Snethen*, 2008 WL 766569, at *3 (“Deliberate indifference must be shown, and that doesn’t occur simply because preventive measures taken are ultimately ineffective.”); *Wilson v. Beaumont Ind. Sch. Dist.*, 144 F. Supp. 2d 690, 694 (E.D. Tex. 2001) (“Even assuming . . . that [the school district] could have taken swifter and more appropriate action, there is no legal requirement of perfection.”).

time, and then returns to an ineffective regime of verbal reprimands.²²⁴ In this situation, the school district “not only was aware of what did not work, but also was aware of what worked to insulate [the victim] from . . . harassment.”²²⁵ Most school districts facing a Title IX suit will argue that they could not classify certain responses as “effective” or “ineffective” ex ante and should not be punished for choosing what turned out to be the less effective strategy for preventing future harassment. The Supreme Court has instructed that “courts should refrain from second-guessing the disciplinary decisions made by school administrators,”²²⁶ which provides strong textual support for the proposition that the standard for Title IX liability is “not one of effectiveness by hindsight.”²²⁷ A school district’s response to sexual harassment can be ineffective—in the sense that the perpetrator re-offends or the victim suffers further harassment from other students—without rising to the level of deliberate indifference as long as the strategy has a non-trivial chance of preventing future harm.

It is tempting to characterize Title IX suits that survive dismissal or summary judgment—and culminate in high profile settlements—as “victories” for gender equality, but several words of caution are in order before reaching this conclusion. As an initial matter, Title IX advocates should remember that settlements do not constitute an admission of liability or fault. CU expressly denied any liability to Lisa Simpson²²⁸ and ASU included a similar no fault provision in its settlement with J.K.²²⁹ No fault provisions

²²⁴ *Patterson v. Hudson Area Sch.*, 551 F.3d 438, 448 (6th Cir. 2009) (when a “school district knows its methods of response to harassment, though effective against an individual harasser, are ineffective against persistent harassment [of] a single student,” a genuine issue of material fact exists regarding whether the school was deliberately indifferent to repeated acts of verbal and physical harassment). *Accord Vance v. Spencer County Pub. Sch. Dist.*, 231 F.3d 253, 261 (6th Cir. 2000) (“[W]here a school district has knowledge that its remedial action is inadequate and ineffective, it is required to take reasonable action in light of those circumstances to eliminate the behavior.”); *Martin v. Swartz Creek Cmty. Schs.*, 419 F. Supp. 2d 967, 974 (E.D. Mich. 2006) (“The admitted fact that . . . the school district’s efforts to . . . punish individual student harassers did not abate the frequency or severity of [harassment] might alone create a jury question of whether the school was deliberately indifferent.”); *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 377 F. Supp. 2d 952, 966 (D. Kan. 2005) (“[A] reasonable jury certainly could conclude that at some point during the four-year period of harassment the school district’s standard and ineffective response to the known harassment became clearly unreasonable.”); *Morlock v. W. Cent. Educ. Dist.*, 46 F. Supp. 2d 892, 910 (D. Minn. 1999) (“A claimant may demonstrate deliberate indifference by showing that a school district took only minor steps to address the harassment with the knowledge that such steps would be ineffective.”).

²²⁵ *Patterson*, 551 F.3d at 449.

²²⁶ *Davis*, 526 U.S. at 648.

²²⁷ *Porto*, 488 F.3d at 74.

²²⁸ *Simpson Settlement*, *supra* note 45, ¶ 12 (“Ms. Simpson acknowledges that University’s payment is in compromise of disputed claims and does not constitute an admission of liability or fault.”).

²²⁹ *Settlement Agreement and Release of Claims*, *supra* note 204, ¶ 12 (“Plaintiff acknowledges that the payment by or on behalf of the University is in compromise of disputed claims and does not constitute an admission of liability or fault.”).

suggest that Title IX settlements may be less than fully compensatory.²³⁰ In the absence of a provision acknowledging some degree of fault for the survivor's injuries, Title IX settlements are largely a vehicle for schools to minimize financial and reputation costs. UGA, CU, and ASU can plausibly argue that they did not violate Title IX and would have prevailed on remand, but the costs of continuing to litigate were simply too high. Some critics will argue that Title IX settlements and jury awards are essentially perfect substitutes, but I believe that full vindication of a legal right requires some acknowledgement that the right has been abridged. There is an important symbolic difference between a favorable verdict from a jury of one's peers and an economic bargain in which both sides can claim partial victory. Viewed from this perspective, Title IX settlements with no fault provisions remain an imperfect substitute for jury awards.

Title IX advocates should also remember that the costs of going to trial do not always exceed the costs of settling a dispute. A school with an ineffective but defensible sexual harassment policy may proceed to trial knowing that the barriers to recovery in a Title IX suit alleging peer sexual harassment remain incredibly high. Negative media attention is the strongest force driving schools to the bargaining table, but not every Title IX suit will be front page news, and not every Title IX advocate wants to read about her case on the front pages. *Williams*, *Simpson*, and *J.K.* attracted national media attention in part because each case involved athletes and sex. It seems unlikely that national or even local reporters will develop an interest in lower profile sexual harassment cases involving non-athletes—even when the facts are egregious. Sadly, the media remains fixated on the connection between Title IX and sports and has generally done a poor job in giving Title IX “a sweep as broad as its language.”²³¹ Journalistic preferences have real consequences for sexual assault survivors, whose ability to secure compensation and policy reforms often depends on the extent to which their Title IX suits generate negative publicity for defendant schools. In short, Title IX settlements are difficult to secure and defendants rarely acknowledge or accept responsibility for the harmful consequences of ineffective sexual assault policies.

It is too soon to tell whether *Williams* and *Simpson* have established a new paradigm for Title IX litigation, but the unique factual circumstances of each case suggest that litigation may not be the best strategy for achieving a broad transformation in sexual assault policies. Subtle doctrinal innovations and a handful of Title IX settlements will not reform sexual assault policies that reflect an inadequate commitment to prevention education, supporting

²³⁰ I am sensitive to the fact that a sexual assault survivor may view her Title IX settlement as fully compensatory even if the school expressly denies any liability or fault. In fact, I have no evidence that Tiffany Williams, Lisa Simpson, or J.K. was dissatisfied with the terms of her settlement. My assertion that Title IX settlements may be less than fully compensatory is intended to highlight the symbolic importance of acknowledging fault or wrongdoing.

²³¹ *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982).

survivors, and adjudicating complaints in a prompt and equitable fashion. Title IX advocates should celebrate *Williams* and *Simpson* as significant but limited victories and push for further legislative, doctrinal, and institutional reforms. Only through sustained attention and advocacy will Title IX's non-discrimination mandate become a meaningful statutory guarantee.

V. CONCLUSION

Having surveyed the evolution and limits of Title IX doctrine on peer sexual assault, I will attempt to conclude on an optimistic note. *Gebser* and *Davis* impose significant limitations on survivors seeking to enforce their statutory right to equal access to educational programs and activities, but Title IX advocates should not lose hope. The limits of doctrinal reform suggest that the time has come for Congress to renew its commitment to gender equality and student safety. The deliberate indifference standard is largely a creature of common law reasoning that will disappear if Congress speaks decisively on the existence and parameters of Title IX's private right of action.

Senator Edward Kennedy of Massachusetts and Representative John Lewis of Georgia introduced legislation in the 110th Congress that would fundamentally alter the doctrinal framework that has frustrated Title IX litigants in the post-*Davis* era. The Civil Rights Act of 2008²³² states that "*Gebser* and its progeny create an incentive for covered entities to insulate themselves from knowledge of harassment on the basis of . . . sex . . . rather than adopting and enforcing practices that will minimize the danger of such harassment. The rulings thus undermine the purpose of prohibitions on discrimination."²³³ In a spirited call to action, the bill declares that "[l]egislative action is necessary and appropriate to reverse *Gebser* and its progeny and restore the availability of a full range of remedies for harassment based on . . . sex."²³⁴ Title IX's private right of action would be made explicit under the bill: "[an] aggrieved person may recover equitable and legal relief . . . including compensatory and punitive damages . . . attorney's fees . . . and costs."²³⁵ Regarding the standard for institutional liability in cases involving peer sexual harassment of which the school "knew or should have known," Congress would allow schools to avoid liability "if it can demonstrate that it exercised reasonable care to prevent and correct promptly any harassment based on sex."²³⁶ The provisions defining reasonable care

²³² H.R. 5129, 110th Cong. (as referred to Subcomm. on the Constitution, Civil Rights, and Civil Liberties on Feb. 4, 2008); S. 2554, 110th Cong. (as referred to Comm. on Health, Education, Labor, and Pensions on Jan. 24, 2008).

²³³ S. 2554 § 111(8).

²³⁴ *Id.* § 111(9)(A).

²³⁵ *Id.* § 112(b)(1).

²³⁶ *Id.* § 111(b)(2)(C).

are impressive in their scope and rigor. In order to show that it has exercised reasonable care, a school must demonstrate that it has:

- (i) established, adequately publicized, and enforced an effective, comprehensive, harassment prevention policy and complaint procedure that is likely to provide redress and avoid harm without exposing the person subjected to the harassment to undue risk, effort, or exposure; (ii) undertaken prompt, thorough, and impartial investigations pursuant to its complaint procedure; and (iii) taken immediate and appropriate corrective action designed to stop harassment that has occurred, correct its effects on the aggrieved person, and ensure that the harassment does not recur.²³⁷

This standard clarifies and strengthens the “prompt and equitable” hearing requirement and transforms it from an obscure regulation subject to lackluster administrative enforcement into an explicit statutory command.

The Civil Rights Act of 2008 stalled in separate House and Senate committees,²³⁸ but Title IX advocates should rally around this piece of legislation as the most effective way to transform Title IX doctrine. *Davis* has cast a long shadow over Title IX litigation involving peer sexual harassment that remains firmly in place even after *Williams* and *Simpson*. Subtle doctrinal innovations and occasional Title IX settlements are half measures relative to statutory reform. Early notice and before-the-fact deliberate indifference may make it easier to survive motions for dismissal or summary judgment, but Title IX liability will not be imposed unless the prevention and response protocols in question are “clearly unreasonable.” This language from *Davis* will remain an insurmountable hurdle for many Title IX litigants and a firewall for negligent or reckless schools. The Supreme Court is unlikely to overturn its own statutory precedents, which means that Congress must act. Title IX litigation will continue apace and survivors may secure significant victories in the future, but feminists and their allies should lobby Congress to overturn *Gebser* and *Davis*. The mixed results of post-*Davis* litigation suggest that the time has come to strengthen Title IX’s guarantee of equal access to educational opportunities for all students.

²³⁷ *Id.* § 111(b)(2)(D)(i)-(iii).

²³⁸ Description of H.R. 5129: Civil Rights Act of 2008, <http://www.govtrack.us/congress/bill.xpd?bill=H110-5129>, (last visited Oct. 18, 2009).

