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## "Show 'Em a Good Time." A Case Study on Title IX and its Flawed Implementation in Universities

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**“SHOW ‘EM A GOOD TIME.”  
A CASE STUDY ON TITLE IX AND ITS FLAWED IMPLEMENTATION IN  
UNIVERSITIES**

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## **I. Introduction**

Title IX of the Education Amendments Act of 1972 (Title IX) requires that no university discriminate against students on the basis of sex.<sup>1</sup> Individual universities receiving federal aid must decide how to implement this federal law, including its application to student athletes. Flawed implementation of Title IX at a university can create an unsafe environment for students, particularly female students who are subjected to sexual misconduct of student athletes. In the south, a region where sports often dominate the university culture, the “show ‘em a good time” mentality among athletes and athlete recruits generates ambiguity about the limitations on the athletes’ sexual behavior on college campuses. The ambiguity can lead to inappropriate behavior by student athletes and an avalanche of sexual-misconduct allegations.

This article uses the multiple Title IX complaints at Baylor University to illustrate a university’s flawed implementation of Title IX’s requirements when it received allegations of sexual misconduct by the university’s student athletes. The article will first explain Title IX and its requirements as they affect the administration of allegations of sexual misconduct against student athletes. Next, the article will discuss the case law applicable to universities’ administration of such allegations of sexual misconduct. The article will then focus on the flawed implementation of Title IX’s requirements regarding the complaints female students at Baylor University filed against the university. Referencing the Baylor University Report of External and Independent Review by Pepper Hamilton (Hamilton Report), the article will explore the legal remedies that could be applied against Baylor University if a court or jury reached the same conclusions as the Hamilton Report.<sup>2</sup> The article will conclude with recommendations for universities in their administration of allegations of sexual misconduct in order to avoid finding themselves in situations similar to that of Baylor University.

## **II. Title IX Background and History**

Title IX of the Educational Amendments Act of 1972 provides that “no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>3</sup> Title IX forbids sex discrimination, which includes sexual violence, at federally-funded schools and universities.<sup>4</sup> As soon as a university obtains knowledge that sexual violence involving a student has occurred in the university community, there is a duty to take “affirmative action to overcome the effects of the conditions.”<sup>5</sup> If a university does not take the “affirmative action” step, it is non-compliant with Title IX.<sup>6</sup>

Although the actual phrases “sexual violence” and “sexual harassment” are absent from Title IX’s language, the Supreme Court has held that sexual violence is, in fact, a form of sexual

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<sup>1</sup> 20 U.S.C. § 1681(a) (1990).

<sup>2</sup> See generally PEPPER HAMILTON, BAYLOR UNIVERSITY REPORT OF EXTERNAL AND INDEPENDENT REVIEW (2016), <http://www.baylor.edu/rtsv/doc.php/266597.pdf>.

<sup>3</sup> 20 U.S.C. § 1681(a) (1990).

<sup>4</sup> *Id.*

<sup>5</sup> 34 C.F.R. § 106.3(b) (1980).

<sup>6</sup> *Id.*

discrimination and covered under Title IX.<sup>7</sup> In one case, the Supreme Court found that “limiting private damages actions to causes having a systemic effect on educational programs or activities, we reconcile the general principle that Title IX prohibits official indifference to known peer sexual harassment with the practical realities of responding to student behavior, realities that Congress could not have meant to be ignored.”<sup>8</sup> This language shows that Congress and the Supreme Court both hold that Title IX applies to sexual violence in federally-funded entities.

A common assumption is that Title IX only applies to athletics.<sup>9</sup> Generally, Title IX encourages equality in athletics in federally-funded institutions by providing “sports opportunities to women at a level that is ‘substantially proportionate’ to the number of women in the student body.”<sup>10</sup> However, Title IX also applies to access to higher education, sexual harassment, and education for pregnant and parenting students, among other key areas addressed by the law.<sup>11</sup> Sexual harassment in education involves the making of unsolicited sexual advances or explicit comments.<sup>12</sup> The sexual harassment must inhibit the student’s access and ability to accomplish educational opportunities.<sup>13</sup> Title IX applies to all students, not just females.<sup>14</sup> Universities are not allowed to retaliate against a student for filing a complaint.<sup>15</sup>

The United States Department of Education’s Office for Civil Rights (“OCR”) published a “Dear Colleague Letter” as a “significant guidance document” for Title IX implementation.<sup>16</sup> The letter contains an overview of Title IX’s requirements regarding sexual violence.<sup>17</sup> In accordance with the definition given by the OCR, sexual violence “refers to physical acts perpetrated against a person’s will or where a person is incapable of giving consent.”<sup>18</sup> Drugs, alcohol, or a disability could impair consent in this situation.<sup>19</sup> Sexual violence includes rape, sexual assault, sexual battery, and sexual coercion, all of which are covered under Title IX.<sup>20</sup> Women are more likely to say that the sexual violence caused them to not want to attend classes, to think about changing their routes, and to have sleeping issues post-incident.<sup>21</sup> A report found that about one in five women are victims of attempted or completed sexual assault while in

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<sup>7</sup> *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 649–50 (1999); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998); *Franklin v. Gwinnet Cty. Pub. Sch.*, 503 U.S. 60, 75 (1992).

<sup>8</sup> *Davis*, 526 U.S. at 653.

<sup>9</sup> *History of Title IX*, THE MARGARET FUND OF THE NATIONAL WOMEN’S LAW CENTER, (2014), <http://www.titleix.info/History/History-Overview.aspx> (last visited Sept. 27, 2019).

<sup>10</sup> *Cheering on Women and Girls in Sports: Using Title IX to Fight Gender Role Oppression*, 110 HARV. L. REV. 1627, 1639 (1997) (internal quotations and citations omitted).

<sup>11</sup> *History of Title IX*, *supra* note 8.

<sup>12</sup> *Id. Sexual Harassment*, THE MARGARET FUND OF THE NATIONAL WOMEN’S LAW CENTER, (2014), <http://www.titleix.info/10-Key-Areas-of-Title-IX/Sexual-Harassment.aspx> (last visited Sept. 29, 2019).

<sup>13</sup> *Id.*

<sup>14</sup> *Know Your IX*, ADVOCATES FOR YOUTH, <http://www.knowyourix.org/college-resources/title-ix/> (last visited Sept. 27, 2019).

<sup>15</sup> *Id.*

<sup>16</sup> Letter from Russlyn Ali, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ., to Colleague (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [hereinafter “Dear Colleague Letter”].

<sup>17</sup> *Id.* at 2.

<sup>18</sup> *Id.* at 1.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 1–2.

<sup>21</sup> CHRISTOPHER P. KREBS ET AL., THE CAMPUS SEXUAL ASSAULT STUDY: FINAL REPORT 5-27, 6-2 (Nat’l Criminal Justice Reference Serv. Oct. 2007), *cited in* Dear Colleague Letter, *supra* note 15, at 2 n.3.

college.<sup>22</sup> The same study found that most on-campus sexual assaults occur when women are incapacitated, often by alcohol.<sup>23</sup>

The “Dear Colleague Letter” discusses the university’s obligation to respond to sexual violence.<sup>24</sup> A university should take “immediate action” if it knows or reasonably should know about student-on-student harassment that creates a “hostile environment.”<sup>25</sup> The “Dear Colleague Letter” asserts that even one instance of rape is sufficient to constitute a hostile environment.<sup>26</sup> A university must promptly process, evaluate, and investigate all complaints filed by students according to the university’s Title IX procedure.<sup>27</sup> This admonition raises a question of what happens if a university does not have a true or effective Title IX procedure.

On the same topic, the “Dear Colleague Letter” outlines procedural requirements regarding sexual violence. The requirements are as follows: (a) circulate a notice of nondiscrimination;<sup>28</sup> (b) designate an employee or employees to coordinate compliance and whose duty it is to carry out the responsibilities outlined in Title IX;<sup>29</sup> and (c) adopt and distribute the procedures to submit a complaint or grievance to provide for a “prompt and equitable” resolution of the complaints.<sup>30</sup> The “Dear Colleague Letter” explains requirements for the federally funded institutions and the possibilities that those universities may have to report to the OCR;<sup>31</sup> however, it does not outline disciplinary procedures for the non-compliant universities.

Title IX’s relevance has become apparent in recent reports of scandals involving popular universities, including Baylor University. Because the courts have found that sexual violence is incorporated into Title IX, it is important to discuss the key cases that created the current status of Title IX law.

### III. Applicable Case Law

#### A. *Cannon* – Recognizing Private Right of Action

In 1979, the Supreme Court decided *Cannon v. University of Chicago*.<sup>32</sup> *Cannon* illustrated the lack of an explicit private right of action in Title IX.<sup>33</sup> However, the Court also noted that Title IX “presents an atypical situation where all the circumstances that the Court has previously identified as supportive of a remedy are present.”<sup>34</sup> Therefore, to support their statutory rights, individuals may assert a private right of action under certain circumstances,

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<sup>22</sup> *Id.* at 2 n.3 (citing CHRISTOPHER P. KREBS ET AL., at xiii.).

<sup>23</sup> See Dear Colleague Letter, *supra* note 15, at 2 n.3 (citing KREBS ET AL., *supra* note 20, at xviii).

<sup>24</sup> See Dear Colleague Letter, *supra* note 15, at 3.

<sup>25</sup> *Id.* at 4.

<sup>26</sup> *Id.* at 3 (citing *Jennings v. Univ. of N.C.*, 444 F.3d 255, 268, 274 n.12 (4th Cir. 2006)).

<sup>27</sup> See Dear Colleague Letter, *supra* note 15, at 4–5.

<sup>28</sup> *Id.* at 6–7; see also 34 C.F.R. § 106.9 (1980).

<sup>29</sup> See Dear Colleague Letter, *supra* note 15, at 7–8; see also 34 C.F.R. § 106.8(a) (1980).

<sup>30</sup> See Dear Colleague Letter, *supra* note 15, at 6, 8; see also 34 C.F.R. § 106.8(b) (1980).

<sup>31</sup> See Dear Colleague Letter, *supra* note 15, at 18–19.

<sup>32</sup> *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979).

<sup>33</sup> *Id.* at 688.

<sup>34</sup> *Id.* at 717.

despite the absence of any express language in the statute.<sup>35</sup> *Cannon* set the precedent that private litigation can ensue after a Title IX violation.<sup>36</sup>

### B. *Franklin* – Recognizing Claims for Monetary Remedies

In 1992, the Supreme Court not only followed the precedent set in *Cannon*, but it decided that a Title IX claim supports a remedy for monetary damages in *Franklin v. Gwinnett County Public Schools*.<sup>37</sup> In *Franklin*, the issue at hand was to decide the remedies available in a Title IX case.<sup>38</sup> In its reasoning, the Court began by quoting the historic *Marbury v. Madison* case, recalling that “Chief Justice Marshall observed that our government ‘has not been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.’”<sup>39</sup> The value of an effective remedy for a violation of a legal right arises from English common law and has long been a strong legal principle.<sup>40</sup> By quoting it in *Franklin*, the Court showed its respect for precedent. Due to the inadequacies of the equitable remedies suggested by the school district and the federal government, the Court concluded that a damages remedy was available for actions brought to enforce Title IX.<sup>41</sup>

### C. *Gebser* – Actual Knowledge

While many Title IX cases arise out of sexual violence that occurs in a university setting, it is important to note that Title IX covers all federally funded institutions, including school districts.<sup>42</sup> In *Gebser v. Lago Vista Independent School District*, an eighth grader, Gebser, experienced sexual harassment by a teacher, Waldrop.<sup>43</sup> When Gebser entered high school, Waldrop continued to make sexually suggestive comments to students, including Gebser.<sup>44</sup> He finally visited her home, and initiated sexual conduct with her, which began a rather extensive sexual relationship that lasted months.<sup>45</sup> While parents of other students made complaints to the school regarding Waldrop’s behavior, he was given no more than a warning by the principal, and the behavior was not reported to the superintendent (who was also the Title IX coordinator).<sup>46</sup> Months later, the police discovered the relationship between Gebser and Waldrop.<sup>47</sup> Waldrop’s employment was terminated, and his teaching license was revoked, but Lago Vista School District (“Lago Vista”) did not distribute a procedure for sexual harassment complaints, nor did it publish a formal policy regarding sexual harassment within the school.<sup>48</sup>

Gebser and her mother filed suit against Lago Vista under Title IX, but the United States

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 76 (1992).

<sup>38</sup> *Franklin*, 503 U.S. at 65.

<sup>39</sup> *Id.* at 66 (quoting *Marbury v. Madison*, 5 U.S. 137, 163 (1803)).

<sup>40</sup> *Id.* at 66.

<sup>41</sup> *Id.* at 76.

<sup>42</sup> 20 U.S.C. § 1681(a), (c) (1990).

<sup>43</sup> *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277–78 (1998).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 278.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

District Court for the Western District of Texas granted summary judgement in favor of the school district on all claims.<sup>49</sup> On appeal, the Fifth Circuit affirmed, based on the assumption that school districts were not liable for teacher-student sexual harassment under Title IX unless a district employee (i.e., a teacher, administrator, or counselor) knew of the abuse, had the power to end it, and failed to do so.<sup>50</sup> The issue at hand was whether the school district was liable for the Title IX violation.<sup>51</sup> Another issue the court addressed for this case was whether the school district had actual or constructive notice that Waldrop was involved in a sexual relationship with a student based on the complaints raised by other parents regarding *their* children.<sup>52</sup>

While *Cannon* and *Franklin* both set important precedents for *Gebser*, the Supreme Court had no precedent to follow when establishing whether the school district had liability. It is important to note that *Franklin* did, however, establish that a school district *can* be liable in damages cases involving a teacher's sexual harassment of a student.<sup>53</sup> The Court reasoned that Title IX primarily focuses on guarding individuals from sexual discrimination, such as sexual harassment and violence, carried out within institutions that accept federal funds.<sup>54</sup> The Court held that it would not hold a school district liable for a teacher's misconduct unless actual notice and deliberate indifference were present.<sup>55</sup> Although the outcome was unfavorable to the victim petitioner, *Gebser* established that a school or university *may be* held liable for monetary damages under a Title IX claim when it has actual notice of the discrimination.<sup>56</sup>

#### D. *Davis* – Deliberate Indifference

Another landmark case involving student-on-student, or peer harassment in a school district is *Davis v. Monroe County Board of Education*.<sup>57</sup> Davis sued the Monroe County Board of Education under Title IX, alleging that her fifth-grade daughter had been sexually assaulted and harassed by another student.<sup>58</sup> The issue in this case was whether the victim petitioner was entitled to monetary and injunctive relief based on a Title IX claim for peer sexual harassment and assault.<sup>59</sup> Davis's daughter, LaShonda, had allegedly been a victim of a lengthy pattern of sexual harassment behavior by one of her classmates.<sup>60</sup> The classmate attempted to touch LaShonda and had made inappropriate sexual comments toward her.<sup>61</sup> LaShonda had reported each of these incidents to her mother and to a number of teachers, who had informed the school's principal.<sup>62</sup> However, no disciplinary action was taken against the classmate, and the harassment continued for months, with LaShonda reporting the incidents to various teachers.<sup>63</sup> As a result of

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<sup>49</sup> *Id.* at 278–79.

<sup>50</sup> *Id.* at 279–80 (citing *Doe v. Lago Vista Indep. Sch. Dist.*, 106 F.3d 1223 (5th Cir. 1997)).

<sup>51</sup> *Gebser*, 524 U.S. at 277.

<sup>52</sup> *Id.* at 292–93.

<sup>53</sup> *Id.* at 281 (referencing *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60 (1992)).

<sup>54</sup> *Gebser*, 524 U.S. at 287 (referencing *Cannon v. Univ. of Chicago*, 411 U.S. 677, 704 (1979)).

<sup>55</sup> *Gebser*, 524 U.S. at 289–91.

<sup>56</sup> *Id.* at 291; see also Nick Rammell, *Title IX and the Dear Colleague Letter: An Ounce of Prevention is Worth a Pound of Cure*, 2014 BYU EDUC. & L.J. 135, 137 (2014).

<sup>57</sup> *Davis v. Monroe Cty. Bd. of Ed.*, 526 U.S. 629 (1999).

<sup>58</sup> *Id.* at 632.

<sup>59</sup> *Id.* at 632–33.

<sup>60</sup> *Id.* at 633.

<sup>61</sup> *Id.* at 633–34.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 634.

the extensive sexual harassment, LaShonda's grades suffered; she experienced depression, and she even wrote a suicide note.<sup>64</sup> Davis alleged that during the time of the harassment, the Monroe County Board of Education had not instructed its personnel on how to respond to peer sexual harassment, nor had it established a policy on the subject.<sup>65</sup>

The Court agreed with the precedents set in *Cannon*, *Franklin*, and *Gebser*, but also considered whether private damage awards were available only where institutions receiving federal funding had adequate notice of the conduct.<sup>66</sup> The Court noted that Title IX was passed under Congress's legislative authority under the Constitution's Spending Clause.<sup>67</sup> So, when "Congress acts pursuant to its spending power, it generates legislation 'much in the nature of a contract: in return for federal funds, the states agree to comply with federally imposed conditions.'"<sup>68</sup> The Court concluded that institutions receiving federal funding *may* be liable for "subjecting" their students to sexual harassment and discrimination "where the recipient is deliberately indifferent to known acts of student-on-student sexual harassment and the harasser is under the school's disciplinary authority."<sup>69</sup> The Court found that in March 1993, while LaShonda was being harassed by her classmate, the National School Boards Association issued a publication for "school attorneys and administrators in understanding the law regarding sexual harassment of employees and students."<sup>70</sup> This publication stated the possibility of district liability for peer harassment and sexual violence under Title IX, and it referenced the "actual knowledge" element noted in *Gebser*.<sup>71</sup> The Court also noted that the Department of Education's Office for Civil Rights had recently adopted and promulgated policy guidelines for peer harassment under Title IX in 1997.<sup>72</sup> During this time, two publications were circulated regarding Title IX and its application to peer sexual harassment, which the school district apparently ignored.<sup>73</sup> The Court reasoned that because it found "sexual harassment" was, in fact, "discrimination" and included in Title IX, it would conclude that peer sexual harassment, "if sufficiently severe," could be actionable under Title IX.<sup>74</sup>

The *Davis* Court found that a school may be held liable for monetary damages in a Title IX lawsuit if the discrimination is "so severe, pervasive, and objectively offensive," that it denies the victim access to educational opportunities provided by their federally funded school.<sup>75</sup> Additionally, the Court found that the noticeable difference in LaShonda's grades proved there was a link between her education and her classmates' persistent sexual harassment.<sup>76</sup> Thus, there

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 635.

<sup>66</sup> *Id.* at 639–40.

<sup>67</sup> *Id.* at 637.

<sup>68</sup> *Id.* at 640 (quoting *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981)).

<sup>69</sup> *Davis*, 526 U.S. at 646–47.

<sup>70</sup> *Id.* at 647–48 (quoting GWENDOLYN H. GREGORY, NAT'L SCH. BOARDS ASS'N, SEXUAL HARASSMENT IN THE SCHOOLS: PREVENTING AND DEFENDING AGAINST CLAIMS (1993)).

<sup>71</sup> *Davis*, 526 U.S. at 647.

<sup>72</sup> *Id.* at 647–48 (citing OFFICE FOR CIVIL RIGHTS, SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (1997)).

<sup>73</sup> *Davis*, 526 U.S. at 647–48.

<sup>74</sup> *Id.* at 650.

<sup>75</sup> *Id.* at 653; *see also* Rammell, *supra* note 51, at 137.

<sup>76</sup> *See Davis*, 526 U.S. at 652–54.

was “deliberate indifference” to the harassment (and discrimination) by the school board.<sup>77</sup>

E. *Simpson* – “Show ‘Em a Good Time”

As previously stated, federally funded institutions, like school districts and universities, are governed by Title IX.<sup>78</sup> A case similar to those regarding Baylor University, *Simpson v. University of Colorado – Boulder*<sup>79</sup> considered Title IX’s applicability to sexual assault by a University of Colorado – Boulder (CU) football player. Simpson, a student at CU, filed a lawsuit against the university under Title IX. Simpson and her friend, Gilmore, were sexually assaulted on the night of December 7, 2001, by football players and recruits of CU.<sup>80</sup> The CU football team recruited high-school players each fall by bringing them to campus.<sup>81</sup> Part of the “sales pitch” was to show recruits “a good time.”<sup>82</sup> Recruits were paired with female “ambassadors,” who were tasked with showing them around campus, and player-hosts, who were responsible for the recruits’ entertainment.<sup>83</sup> “At least some of the recruits who came to Simpson’s apartment had been promised an opportunity to have sex.”<sup>84</sup>

Reports from a variety of sources had already suggested that risks of sexual assault would occur if recruiting was inadequately supervised.<sup>85</sup> In 1997, a high-school girl was assaulted by CU recruits at a party hosted by a CU football player, and CU did little to change its policies or training following the party.<sup>86</sup> Simpson and Gilmore allowed some recruits and football players into their apartment as part of “entertaining them.”<sup>87</sup> Simpson became drunk, went to bed, and was awakened by two naked men who were removing her clothes and raping her while other recruits and players were in the room.<sup>88</sup> The trial court granted summary judgment against Simpson.<sup>89</sup> The issue in this case was whether summary judgment was granted against Simpson properly in “(1) that CU had an official policy of showing high-school football recruits a ‘good time’ on their visits to the CU campus, (2) that the alleged sexual assaults were caused by CU’s failure to provide adequate supervision and guidance to player-hosts chosen to show the football recruits a ‘good time,’ and (3) that the likelihood of such misconduct was so obvious that CU’s failure was the result of deliberate indifference.”<sup>90</sup>

In its reasoning, the Court followed precedent set in *Gebser* and *Davis*.<sup>91</sup> However, the Court contended that Simpson’s situation was distinguishable from the aforementioned cases.<sup>92</sup>

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<sup>77</sup> *Id.* at 651.

<sup>78</sup> See *supra* text accompanying note 36.

<sup>79</sup> *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1173 (11th Cir. 2007).

<sup>80</sup> *Id.* at 1172.

<sup>81</sup> *Id.* at 1173.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 1173–74.

<sup>87</sup> *Id.* at 1180.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 1174.

<sup>90</sup> *Id.* at 1173.

<sup>91</sup> *Id.* at 1175–77 (citing *Davis v. Monroe Cty. Bd. of Ed.*, 526 U.S. 629 (1999); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998)).

<sup>92</sup> *Simpson*, 500 F.3d at 1175.

Nonetheless, the precedents set in *Gebser* and *Davis* provided applicable framework for this case.<sup>93</sup> The Court concluded that a federally funded institution could be said to “intentionally [act] in a clear violation of Title IX.”<sup>94</sup> The Court established the “deliberate indifference” element. Because of the concern expressed by multiple platforms, even *Sports Illustrated* in 1989, the Court believed there was evidence of a clear risk of assault.<sup>95</sup> Because of the publicity, the requirement of “adequate notice” recognized by *Gebser* and the “deliberate indifference” recognized by *Davis* became increasingly more important.<sup>96</sup> Because the coach, who had high rank in the CU hierarchy, had knowledge of the sexual assault, the Court held that someone who could have done something about the behavior had actual knowledge of it.<sup>97</sup> The coach could have made the assault that happened to Simpson less likely by reporting previous assaults.<sup>98</sup> But, despite having knowledge of the assaults, the coach continued to have an under-supervised player-host program to show the recruits “a good time” to convince the recruits to attend CU.<sup>99</sup> The Court specified that a jury could easily conclude there had been an obvious need for training of the recruits, players, and hosts/ambassadors, and without it there was a likelihood that more Title IX violations would ensue.<sup>100</sup> Ultimately, the Court held that the summary judgement was inappropriately granted, and the case was remanded in Simpson’s favor.<sup>101</sup>

#### F. *Williams* – Knowledge by “Appropriate Person”

Another landmark case discussing a failure of Title IX implementation in a federally funded university was *Williams v. Bd. of Regents of the Univ. Sys. of Georgia*.<sup>102</sup> This case considered a sexual assault by a University of Georgia (UGA) student athlete, Tiffany Williams, a student, engaged in consensual sex with Tony Cole, a UGA basketball player.<sup>103</sup> Unknown to Williams, a UGA football player, Brandon Williams (Brandon), was hiding in Cole’s closet.<sup>104</sup> Based on a previous agreement between Cole and Brandon, Cole would have sex with Williams while Brandon hid in the closet.<sup>105</sup> As a signal, Cole went into the bathroom and slammed the door behind him, and Brandon emerged naked from the closet where he sexually assaulted and attempted to rape Williams.<sup>106</sup> While in the hallway, Cole called Steven Thomas, a teammate, and Charles Grant, Brandon’s teammate, and stated that they were “running a train” on Williams.<sup>107</sup> Thomas came to Cole’s room, and with encouragement from Cole, Thomas sexually assaulted and raped Williams.<sup>108</sup> Williams returned to her dorm room, called Jennifer

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 1177 (quoting *Davis*, 526 U.S. at 642).

<sup>95</sup> *Id.* at 1181.

<sup>96</sup> *Id.* at 1178–79.

<sup>97</sup> *Id.* at 1183–84.

<sup>98</sup> *Id.* at 1184–85.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 1185.

<sup>102</sup> *Williams v. Board of Regents of the Univ. Sys. of Georgia*, 477 F.3d 1282 (11th Cir. 2007).

<sup>103</sup> *Id.* at 1288.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

Shaughnessy, and explained what happened.<sup>109</sup> Shaughnessy urged Williams to notify the police, but Williams said she was too afraid.<sup>110</sup> While Williams and Shaughnessy were together, Williams received a series of calls from Thomas.<sup>111</sup> Williams alerted her mother, who notified the UGA Police.<sup>112</sup> UGA Police performed an investigation, including obtaining Cole's telephone records, which showed that he called Williams several times in the days immediately following the accident.<sup>113</sup> Williams pressed charges against Cole, Brandon, and Thomas and permanently withdrew from UGA.<sup>114</sup>

Cole, Brandon, and Thomas were charged with disorderly conduct under UGA's Code of Conduct (because under UGA policy, sexual harassment between students not employed by UGA was treated as a disciplinary matter through the Office of Student Affairs).<sup>115</sup> The boys were suspended from their sports teams after being indicted.<sup>116</sup> A UGA judiciary panel held hearings almost a year after the incident (Cole and Williams no longer attended UGA) and decided not to sanction Cole, Brandon, or Thomas.<sup>117</sup> The boys also faced criminal charges, but a jury acquitted Brandon, and the prosecutor dismissed the charges against Cole and Thomas.<sup>118</sup>

Williams's complaint alleged that James Harrick, former UGA men's basketball coach, Vincent Dooly, UGA Athletic Director, and Michael Adams, UGA President, were personally involved in recruiting and admitting Cole, even though they knew of Cole's multiple disciplinary and criminal problems involving harassment of women at other colleges.<sup>119</sup> After Cole was dismissed from other schools, he was recruited by Harrick, who requested that Adams admit Cole through UGA's special admissions policy (which was Adams' decision exclusively).<sup>120</sup> Despite his past, Cole was admitted to attend UGA on a full scholarship.<sup>121</sup> Additionally, Williams alleged that student-athletes suggested to UGA officials that coaches needed to inform them about UGA's sexual harassment policy.<sup>122</sup> UGA and the athletic department failed to ensure that the student-athletes received adequate information, and they failed to enforce existing policy against football and basketball players.<sup>123</sup>

The lower court granted UGA's summary judgment motion and dismissed Williams's Title IX claims, finding that UGA neither had actual notice of Cole's behavior nor was UGA deliberately indifferent to it.<sup>124</sup> One issue at hand in this case was whether the lower court erred in dismissing Williams's Title IX claims.<sup>125</sup> Although the scenario in *Williams* was factually

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<sup>109</sup> *Id.* at 1288–89.

<sup>110</sup> *Id.* at 1289.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 1289–90.

<sup>120</sup> *Id.* at 1290.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 1292.

<sup>125</sup> *Id.*

distinct from the *Gebser* and *Davis*, the Eleventh Circuit followed the precedents they set.<sup>126</sup> The Court quickly established that UGA was a federally funded institution, and therefore covered by Title IX.<sup>127</sup> In applying Title IX, *Davis*, and *Gebser*, the court acknowledged Adams, Dooley, and Harrick’s preexisting knowledge of Cole’s past sexual misconduct.<sup>128</sup> In this case one of the underlying issues was whether an “appropriate person” had knowledge of the sexual misconduct and discrimination.<sup>129</sup> The court concluded that Adams, Dooley, and Harrick all qualified as “appropriate” people.<sup>130</sup> Next, the court posed the essential question of “deliberate indifference” to Title IX.<sup>131</sup> The court concluded that the Title IX standard of “deliberate indifference” was met when UGA and UGA Athletics failed to inform student athletes of Title IX and thus risked Williams becoming a victim of sexual assault.<sup>132</sup> Next, the court discussed the underlying question of whether the discrimination was “severe, pervasive, and objectively offensive” as outlined in *Davis*.<sup>133</sup> The court referenced the facts outlined above, noting a “conspiracy” between Cole and Brandon before Williams even entered Cole’s room for the consensual sex.<sup>134</sup> The conspiracy continued when Cole invited others over to his dorm room to sexually assault Williams.<sup>135</sup> The court concluded that the discrimination was “severe, pervasive, and objectively offensive.”<sup>136</sup> The court ultimately concluded that Williams’s Title IX claims against UGA and UGA Athletics were incorrectly dismissed, and the case was remanded.<sup>137</sup>

#### IV. Application of the Case Law to Baylor University

Multiple Title IX lawsuits have been filed against Baylor University alleging sexual misconduct, harassment, and assaults by Baylor football players against other students. This article analyzes two of them, *Hernandez v. Baylor University Board of Regents*<sup>138</sup> and *Doe v. Baylor University*.<sup>139</sup>

##### A. *Hernandez*

In her complaint, Hernandez first alleges that Art Briles, the head football coach at the time of the facts giving rise to her claims, was responsible for overseeing all football related

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 1294.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 1295.

<sup>132</sup> *Id.*

<sup>133</sup> *Davis v. Monroe Cty. Bd. of Ed.*, 526 U.S. 629, 633 (1999).

<sup>134</sup> *Williams*, 477 F.3d at 1298.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*; see also *Davis*, 526 U.S. at 651.

<sup>137</sup> *Williams*, 477 F.3d at 1294.

<sup>138</sup> Complaint and Jury Demand, *Jasmin Hernandez v. Baylor University Board of Regents*, Cause No. 6:16-cv-00069; In the United States District Court of the Western District of Texas – Waco Division (2016) [hereinafter *Hernandez*].

<sup>139</sup> Complaint and Jury Demand; *Elizabeth Doe v. Baylor University*; Cause No. 6:17-cv-00027 In the United States District Court of the Western District of Texas – Waco Division (2017) [hereinafter *Doe*].

activities, and had the authority to discipline all Baylor football players.<sup>140</sup> Additionally, Hernandez sued Ian McCaw, Baylor's athletic director at the time alleging that he was responsible for overseeing Baylor's athletic programs and had the authority to discipline Baylor coaches and student athletes.<sup>141</sup> Hernandez alleges that Baylor, Briles, and McCaw had knowledge that in 2011, Tevin Elliott, Hernandez's assailant, had been cited for a misdemeanor sexual assault in a community college dorm room.<sup>142</sup>

Hernandez first references the OCR's "Dear Colleague Letter."<sup>143</sup> She alleges that at the timeframe of her assault, Baylor did not have a Title IX coordinator.<sup>144</sup> Reports of sexual harassment were handled by Baylor's then-Chief Judicial Officer, Bethany McCaw.<sup>145</sup> Hernandez discusses a sexual assault of a fellow student, Roe, by a football player, Elliott.<sup>146</sup> In this situation, McCaw informed Roe there was nothing she could do and that "Roe was the sixth female student to come to McCaw's office to report that they had been sexually assaulted by Elliott."<sup>147</sup> After further questioning by Roe's mother, McCaw admitted that Briles was aware of the reports, and all McCaw could do was send a letter to Elliott informing him he was not to come near Roe, and Roe was to "hope for the best."<sup>148</sup>

In regards to Hernandez specifically, in 2012 Hernandez alleges she was invited by Elliot to a party near campus.<sup>149</sup> At a point during the party, Hernandez alleges Elliott grabbed her by the wrist and led her outside against her will.<sup>150</sup> He picked up Hernandez, threw her over his shoulder, and carried her to a shack deep on the property, where he raped her.<sup>151</sup> When Elliott let her go back to the party, Hernandez immediately told her friends what happened, and went to the hospital, where a rape kit was administered, and she participated in an interview by a Waco Police Department Officer.<sup>152</sup> Hernandez's mother immediately informed the Baylor Counseling Center about her daughter's rape, to which their response was that "they were too busy, and could not see Hernandez."<sup>153</sup> Hernandez's mother also called the Baylor Psychology Department at the Baylor Student Health Center; their response was that their counseling sessions were full and they could not help her.<sup>154</sup> Hernandez's mother called Baylor's Academic Services Department to request accommodations for her traumatized daughter; they refused and stated, "if a plane falls on your daughter, there's nothing we can do to help you."<sup>155</sup> Hernandez's mother

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<sup>140</sup> All factual claims and descriptions of events within this section—except as otherwise noted—are reported as they were alleged in Hernandez, *supra* note 129, at 1.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 5.

<sup>143</sup> Dear Colleague Letter, *supra* note 15.

<sup>144</sup> Hernandez, *supra* note 129, at 5.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 6.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 7.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

and father both called Briles to inform him of the rape by one of his athletes.<sup>156</sup> While her mother received a call from Briles's secretary indicating an investigation may take place, they heard nothing else back.<sup>157</sup>

Hernandez asserts that she suffered a multitude of educational setbacks as a result of the incident with Elliot, including a significant drop in her grades, placement on academic probation, and loss of her scholarship; she also alleges she avoided social activities and certain areas on campus and she eventually had to withdraw from Baylor altogether.<sup>158</sup> Hernandez sued for Title IX violations (on the part of Baylor Board of Regents) and negligence (of all defendants).<sup>159</sup>

### B. Doe

In her complaint, Elizabeth Doe only filed suit against Baylor, which is governed by the Baylor Board of Regents.<sup>160</sup> Doe alleged that she was brutally gang raped by at least two Baylor football players, Armstead and Chatman.<sup>161</sup> Doe first describes what the Baylor football program was like before Briles's hiring by stating that Baylor football "was comparatively one of the worst, if not the worst, team in the Big 12 Conference," because it finished in last place in 13 out of 14 seasons.<sup>162</sup> Once Briles was hired in 2008, his mission was to win football games, and within a few short years his recruits became "the most feared group of football players in the nation."<sup>163</sup> As a result of the success, Doe alleges that Baylor football players considered themselves celebrities.<sup>164</sup> While the football players were publicized and idolized, they were doing more than just playing football.<sup>165</sup> Between 2009 and 2015, Baylor football players committed a number of violent crimes, including assault, armed robbery, drug crimes, and sexual violence.<sup>166</sup>

Recruiting success hinged on Briles's and the team's ability to "show 'em a good time" when potential recruits visited Baylor University.<sup>167</sup> Doe alleged that Baylor used sex to sell the Baylor football program to these recruits.<sup>168</sup> To "show 'em a good time," players would organize women, alcohol, and drugs for parties (both on and off-campus) while the recruits were visiting Waco.<sup>169</sup> Players would also pay for recruits to go to strip clubs and bars.<sup>170</sup> Doe asserts that Assistant Coach Kendall Briles, Art Briles's son, even asked a recruit, "Do you like white

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<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 9.

<sup>159</sup> *Id.* at 9–10.

<sup>160</sup> All factual claims and descriptions of events within this section are reported as they were alleged in Doe, *supra* note 130, at 1.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 2.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 3.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 4 (quoting words used by a Baylor football player to illustrate what his coaches had tasked them to do with recruits).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

women? Because we have a lot of them at Baylor and they love football players.”<sup>171</sup> Coaches and athletes would use the Baylor Bruins, a female-only, on-campus organization that supported Baylor football in a school spirit capacity.<sup>172</sup> The Baylor Bruins became a “hostess program” with the purpose of having their members escort recruits to campus events and football games during their official visits.<sup>173</sup> The Bruins’s unofficial mission was to see that the recruits enjoyed their time at Baylor in part by engaging in sex acts with them.<sup>174</sup> This expectancy and implied promise for sexual acts directly contributed to the culture of sexual violence at Baylor.<sup>175</sup>

Doe’s complaint further alleges that there were, at minimum, fifty-two acts of rape, including gang rape, by at least thirty-one different football players under Briles’s reign.<sup>176</sup> After reporting the sexual violence, some victims were encouraged by Baylor employees to leave Baylor without further inquiry.<sup>177</sup> During the five years of sexual violence, Baylor dismissed from the university only two of the at least thirty-one football players involved in the rapes.<sup>178</sup>

In her complaint, Doe alleges that former Baylor Title IX Investigator Gabrielle Lyons left several months after starting her job at Baylor due to the amount of violence in the 2012–13 gang rapes.<sup>179</sup> Lyons was hired in 2015 during the heat of the investigations of the 2012–13 rapes.<sup>180</sup> Lyons noted that nearly a third of all cases she investigated were from the football program, which makes up less than one percent of Baylor’s total enrollment.<sup>181</sup> Lyons left Baylor after receiving advice from the Baylor Police Department that “she was not safe to do her job and would do well to look over her shoulder when walking to her car.”<sup>182</sup>

Doe’s complaint alleges that many Baylor employees, like Regent J. Cary Gray, Regent and Pastor Neal Jeffrey, and Michelle Davis (former member of Baylor’s Advisory Board on Sexual Assault) knew of the culture of sexual violence on campus.<sup>183</sup> Davis told ESPN in early 2016 of Baylor officials’ knowledge of the problem with sexual assaults by Baylor athletes.<sup>184</sup>

Prior to Doe’s rape, Chatman (her assailant) was reported to the Baylor Athletic Department for sexually assaulting another female student, the football athletic trainer, in his off-campus apartment.<sup>185</sup> Doe alleges that Baylor agreed to pay for this victim’s education, as long as she signed a non-disclosure agreement.<sup>186</sup> Baylor, however, never disciplined Chatman for the rape; it just transferred the trainer to a women’s team.<sup>187</sup>

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<sup>171</sup> *Id.* (quoting former assistant coach Kendall Briles on a recruiting trip in Dallas).

<sup>172</sup> *Id.* at 5.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 6.

<sup>176</sup> *Id.* at 7.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 7–8.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 8.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 14.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

Doe alleges that in 2013, she was out with other Baylor Bruins when they stopped by a party held by football player Oakman.<sup>188</sup> Oakman arrived at Baylor after being asked to leave Penn State following public reports of violence against women and sexual violence.<sup>189</sup> Doe became intoxicated at the party and was taken home by Chatman and Armstead.<sup>190</sup> Later, Doe's roommate came home with her boyfriend and noticed their apartment door was open.<sup>191</sup> The roommate's boyfriend reported hearing what sounded like wrestling and a woman yelling, "no."<sup>192</sup> Once Chatman and Armstead emerged, Doe was found partially unclothed on the floor of her bedroom.<sup>193</sup> Doe's roommate called the police, but prior to their arrival, another Bruin came to the apartment and tried to get Doe to cover for the assailants by telling Doe to report that "she had consensual sex with one white male."<sup>194</sup> The Baylor and Waco police, along with the university administration, took no meaningful action on the case.<sup>195</sup> As a result, Doe alleges she was forced to attend school with one of her assailants, which created stress-induced panic attacks, poor grades, and the inability to do day-to-day activities out of fear.<sup>196</sup> Chatman later transferred to another university in the wake of this second report of sexual violence by him.<sup>197</sup> Defying all odds, Doe graduated from Baylor in 2014.<sup>198</sup>

In the complaint, Doe claims gender discrimination in violation of Title IX and negligence for the sexually hostile culture, for the failure to supervise, and for the failure to respond to the rape; she also alleged gross negligence.<sup>199</sup>

### C. Pepper Hamilton Report

The Baylor Board of Regents hired Pepper Hamilton, LLP, a Philadelphia law firm, to conduct an internal audit of Baylor's Title IX regulations and compliance.<sup>200</sup> The firm submitted the "Baylor University Report of External and Independent Review" (the "Pepper Hamilton Report" or "Report").<sup>201</sup> The Report includes numerous critiques of Baylor University's Title IX compliance. This article provides a brief summary of the Pepper Hamilton Report and its recommendations, followed by this author's recommendations.

The Report's general recommendation is to make Title IX compliance an institutional priority throughout Baylor, not just for athletics.<sup>202</sup> Specifically for athletics, the Report suggests making the athletic department and the football program leadership set a "strong and consistent tone" in regards to Title IX conduct and compliance issues.<sup>203</sup> The Report recommends restoring

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<sup>188</sup> *Id.* at 15.

<sup>189</sup> *Id.* n.3.

<sup>190</sup> *Id.* at 16.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 17.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 19.

<sup>197</sup> *Id.* at 18.

<sup>198</sup> *Id.* at 1.

<sup>199</sup> *Id.* at 20–24.

<sup>200</sup> *Id.* at 9.

<sup>201</sup> Pepper Hamilton, *supra* note 2.

<sup>202</sup> *Id.* at I.1.

<sup>203</sup> *Id.* at I.10.

relationships with students who were sexual assault victims during the time that Baylor was non-compliant with Title IX.<sup>204</sup> The Report also highlights concerns with the governance and leadership of Baylor University and recommends that additional Title IX personnel be hired and official protocols be established.<sup>205</sup> The Report references the necessity of complete revision of the Title IX policy for Baylor University, including imposing centralized reporting.<sup>206</sup> The Report focuses on the athletic department, since this problem rose from the football team. The general theme for the section regarding the athletic department itself is to ensure that the leadership, including coaches, athletic director, and athletics staff, all impose a culture of high moral standards and discipline.<sup>207</sup> Additionally, the report calls for changes to the Baylor University Police Department, recommending education on Title IX and victims training.<sup>208</sup>

Baylor University published a “Findings of Fact”<sup>209</sup> based on the Pepper Hamilton Report to discuss the general conclusions drawn from the report. Baylor cites its “failure to prioritize, recognize, implement and resource Title IX,” through lack of response and education on the statute.<sup>210</sup> Additionally, Baylor cites the lack of meaningful engagement by senior leadership within the university as a general reason why Title IX was incorrectly (or not at all) implemented.<sup>211</sup>

Based on the findings in the Pepper Hamilton Report, it is obvious that there were numerous failures among Baylor leadership resulting in the flawed implementation of Title IX.

#### D. Application of Law to Baylor University Facts

In *Simpson*,<sup>212</sup> the victim was a student at the University of Colorado at Boulder (“CU”) who was part of an organization much like the Baylor Bruins and was affected by the normalization of the “show ‘em a good time” requirement for recruits and current athletes.<sup>213</sup> In both *Hernandez*<sup>214</sup> and *Doe*,<sup>215</sup> Baylor officials are alleged to have known about the prior sexual violence committed by their student-athletes, yet the university still awarded them scholarships and turned a blind eye when sexual assaults began happening at Baylor. Similarly, in *Williams*, the accused had been previously investigated for sexual violence.<sup>216</sup> Just as CU had in *Simpson*, Baylor had a policy of showing the high-school recruits “a good time,” and the sexual assaults of Hernandez and Doe might have been prevented if Baylor had had an official policy on administering Title IX complaints. Additionally, Baylor—like CU in *Simpson* and UGA in *Williams*—apparently showed “deliberate indifference” to Hernandez and Doe when they each reported their assaults to Baylor officials. In the Hernandez complaint, similar to *Williams*,

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<sup>204</sup> *Id.* at II.1.

<sup>205</sup> *Id.* at III.5, III.7, III.9, and IV.1-12.

<sup>206</sup> *Id.* at V.1-7, VI.1-6.

<sup>207</sup> *Id.* at X.1.

<sup>208</sup> *Id.* at XI.1-4.

<sup>209</sup> Baylor University Board of Regents, *Findings of Fact*.

<sup>210</sup> *Id.* at 4.

<sup>211</sup> *Id.* at 5.

<sup>212</sup> *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170 (11th Cir. 2007).

<sup>213</sup> *Id.* at 1173.

<sup>214</sup> Hernandez, *supra* note 129, at 5.

<sup>215</sup> Doe, *supra* note 130, at 6.

<sup>216</sup> *Williams*, 477 F.3d at 1289.

multiple school officials who were possibly “appropriate persons” are alleged to have known about Elliott’s alleged sexual assault on Hernandez.<sup>217</sup> In her complaint, Hernandez further alleges that she reported the sexual assaults and was told by Baylor officials she had no recourse other than to leave the school.<sup>218</sup> These reports are similar to those in *Williams* in the sense that the UGA men’s basketball coach, UGA athletic director and the UGA president were all alleged to have been aware of the sexual violence of which Cole, Brandon Williams, and Thomas were accused.

## V. Recommendations for Universities

The Pepper Hamilton Report cites numerous recommendations for Baylor to overhaul and replace its Title IX policies. Below are various recommendations based on the Report for all universities to implement.

Personnel reviews and possible changes are among the most important corrections needed at Baylor and other similarly situated universities. Hiring a full-time Title IX Chief Compliance Officer<sup>219</sup> would be the first step to setting up a legitimate Title IX office. A chief compliance officer would be responsible for overseeing the entire office and mandating the training and education requirements, not only for the university’s direct staff, but for the entire athletic department (e.g., coaches, trainers, and general staff). Because many NCAA universities are so large,<sup>220</sup> adding multiple deputy Title IX coordinators would be beneficial. These deputies (and their assistants) would cover intake of complaints and grievances, offer support, and provide general case management as the process progresses. Additionally, the deputies would each take on individual sports and would be the liaisons for one-on-one education with teams and team staff. Ideally, chief compliance officers would have law degrees in order to credibly research and apply the law regarding Title IX (case law, statutory changes, and any new legislative enactments). The deputy coordinators could be paralegals with master’s degrees or related experience, so that they would also have the ability to understand the law and handle “clients” as well.

Title IX education is possibly the most important piece of the puzzle when reviewing and making changes. The overall lesson from the case law and the Baylor cases is that athletes have no knowledge of Title IX and the risky situations they create for their universities when they are non-compliant. Additionally, schools do not educate their students about Title IX requirements, which leaves student victims feeling even more helpless if and when they are attacked. Many universities require freshmen to take a “seminar” class in which they receive general information about their universities and policies that apply when they attend university-sponsored activities. Allocating one class meeting in such a seminar to discuss Title IX in a detailed manner would demonstrate that a school is making a good-faith effort to educate its student body. Chief compliance officers and their deputies could speak to the classes and field

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<sup>217</sup> Hernandez, *supra* note 129, at 5.

<sup>218</sup> *Id.* at 8.

<sup>219</sup> Pepper Hamilton, *supra* note 2, at III.5.

<sup>220</sup> For example, the top 10 universities in the US each had over 50,000 students for the 2017–18 school year. *List Of United States Public University Campuses By Enrollment*, [https://en.wikipedia.org/wiki/List\\_of\\_United\\_States\\_public\\_university\\_campuses\\_by\\_enrollment](https://en.wikipedia.org/wiki/List_of_United_States_public_university_campuses_by_enrollment).

any questions about Title IX. Additionally, many universities, like Texas State University in San Marcos, Texas, hold open-table sessions with their university President.<sup>221</sup> Holding Title IX open-table sessions with students could greatly increase their knowledge about Title IX.

Because scandals and Title IX compliance issues have arisen from athletes' misconduct, education at the student-athlete level is also important. Athletes should be required to attend Title IX education seminars each school year with a quiz at the end of the seminars. Holding these seminars for student athletes would be a small price to pay to extend education to the student athletes about Title IX. The Title IX coordinator, or any deputy coordinator assigned to a specific sport, should be available for all Title IX questions, concerns, and issues, but the deputy should not resolve any complaints filed regarding athletes they supervise. Additionally, student athletes should be held to high standards, especially as scholarship recipients, and should be required to follow rules set by their coaching staff, or risk losing their scholarships and their places on teams. Recruited student athletes should be required to sign an agreement to comply with Title IX standards, and they should receive a brief presentation in an introductory meeting with the Title IX deputy and coaches.

Education of coaching staff and faculty is important to set an example for the student athletes and other students of the university. Coaches and coaching staff should be required to have detailed Title IX training each school year. This training could increase their knowledge to help in educating their athletes when needed.

Finally, a complete review of policy, like the Pepper Hamilton Report, needs to be conducted at each university in light of the commonality of flawed implementation of Title IX policy. Universities should be required to develop specific intake protocols that begin with the submission of a complaint. Making all forms, rules, and procedures readily available to students and faculty (via internet) at all times would be a good way to increase reporting among victims. Additionally, the same information should be given in paper form at both the inquiry of the complaint process and submission of the complaint. University-wide templates should be created for investigation, evaluation, and general case handling and be available to students as well as to chief compliance officers and their deputies.

## **VI. Conclusion**

Title IX of the Education Amendments Act of 1972 (Title IX) requires individual universities receiving federal aid to decide how to implement regulations, including their application to student athletes. The flawed implementation of Title IX in universities has created an unsafe environment, particularly for female students who have been subjected to sexual misconduct by student athletes. The mindset universities sometimes establish among student athletes and athlete recruits generates an expectation that their sexual behavior on college campuses is not subject to any limitations. This false expectation can lead to inappropriate behavior and sexual misconduct. This flawed implementation is a result of a lack of

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<sup>221</sup> See, e.g., Jayme Blaschke, *President Trauth Schedules 'Open Door' Sessions With Students*, TEX. ST. U. NEWS SERV. (Feb. 12, 2014), Texas State University [https://www.txstate.edu/news/news\\_releases/news\\_archive/2014/February-2014/OpenDoor021214.html](https://www.txstate.edu/news/news_releases/news_archive/2014/February-2014/OpenDoor021214.html)<http://www.vpsa.txstate.edu/catchat.html>.

administration within universities and their athletic departments. However, there are multiple remedies that will allow universities to reconstruct their departments to raise awareness and provide services to victims of sexual assault.

