NOT PART OF THE GAME PLAN: SCHOOL DISTRICT LIABILITY FOR THE CREATION OF A HOSTILE ATHLETIC ENVIRONMENT

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Title IX has played a crucial role in changing our nation's treatment of women in education, leading to awareness about the harms of sexual harassment on both female and male students. However, in one area, Title IX jurisprudence draws a line between protected students and students who are not protected from sexual harassment. That line is determined by whether the harassment facing the student is because of perceived sexual orientation or perceived failure to adhere to gender stereotypes. School athletics is an environment wrought with such harassment that can include gender insults, i.e. "you throw like a girl" or sexual orientation insults, i.e. "stop playing like a sissy." Often this language can develop into serious and continuous harassment of a young student athlete. Students may not have a claim against such harassment, however, if courts conclude the harassment is based on sexual orientation instead of gender.

INTRODUCTION

Jason was a very talented singer and was always the star of his high school's musical productions. To make his dad happy, Jason tried out for football and was a decent wide receiver on his freshman team. In his sophomore year, the coach tried to have him switch to tight-end but Jason was not very good at blocking. Over Christmas break, he contracted mononucleosis and lost 40 pounds. Several junior boys on the football team told everyone that Jason had AIDS and must be a "fag." After he got healthy, he worked out hard in order to be able to play football the next fall. His teammates teased him mercilessly and told him to quit because they didn't want any "fairies" on the team. The football coach would constantly shout at Jason, "you block like a @#$% girl!" The rest

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of the team would shout back, "that's because he is one." Jason endured insults and rough-housing for about a month before he complained to the coach. The coach replied, "That is what a homo can expect if he plays football." Jason's father called the athletic director and the principal but they both told him that "boys will be boys" and that "stuff happens" on football teams. Jason quit football but was nevertheless teased in school by members of the football team until the day he graduated. He dreaded going to school every day.

Jill was a stand-out midfielder on the high school girl's soccer team but still sported her tomboy haircut from elementary school. Kids in her class often teased her and called her a boy and a "dyke." The girls on the team complained to the coach that they were afraid of having a "lesbo" on the team and wanted her to shower in a different place. The coach talked to Jill and told her to start acting more feminine because she was causing problems among the team. To encourage Jill to change, the coach would take her out of the game if she was being "too aggressive and rough." However, Jill was an excellent player and the team's leader in scoring because of her aggressive drives to the goal. Jill refused to change her appearance or her style for anyone and the teasing continued. Other parents called the athletic director and threatened to have the coach fired if she didn't do something about the lesbian in the locker room. The coach, fearing for her job and concerned about team cohesiveness, benched Jill until she started to act more ladylike. Eventually, Jill quit soccer. Unfortunately, soccer had been the only thing that interested her at school. Unable to play, she dropped out of school all together.[1]

These two fictional school districts are failing Jason and Jill and leaving their districts vulnerable to Title IX[2] or other statutory claims because of the actions of coaches and teammates. Unfortunately, these fictional situations are reality for some students throughout the nation's schools. In a recent study, eighty-three percent of girls and seventy-nine percent of boys reported that they were repeated targets of sexual harassment on and off the athletic field.[3] This note argues that school districts should aggressively address the serious problem of same-sex sexual harassment, especially the harassment that can frequently occur in ath-

1. Jason and Jill are fictional characters that are based on an amalgamation of real situations.

2. Title IX prohibits sex-based discrimination in education. This also includes prohibiting sexual harassment in educational settings. 20 U.S.C. § 1681(a) (2000). *See also infra* Part II.

3. AM. ASS'N OF UNIV. WOMEN EDUC. FOUND., HOSTILE HALLWAYS: BULLYING, TEASING, AND SEXUAL HARASSMENT IN SCHOOL 4 (2001), *available at* http://www.aauw.org/member_center/publications/HostileHallways/hostilehallways.pdf [hereinafter HOSTILE HALLWAYS].

letic programs. Same-sex sexual harassment occurs when peers or coaches use sexual stereotypes to imply that an athlete is failing to act like the appropriate gender or is acting like the opposite gender. As shown in the above situations, same-sex sexual harassment is part of the culture of many athletic programs. If schools fail to adequately address this issue, current school harassment jurisprudence should be expanded and Title IX of the Civil Rights Act should give harassed students a legitimate claim against school districts.

Title IX should be expanded to cover students harassed by same-sex peers at least to the same extent that adults are covered under Title VII[4] harassment law as to constructive knowledge of harassment. In addition, courts have been inconsistent in dealing with harassment that may be based on a student's failure to conform to a gender stereotype and harassment based on perceived homosexuality, especially on the athletic field.[5] Harassment based on non-conformance to a gender stereotype may be actionable under Title IX, however, harassment based on perceived sexual orientation is not. This paper argues that this is a distinction without a difference. Failure to conform to a gender stereotype is so closely linked to perceived sexual orientation that both should be covered under Title IX.

Part I of this comment investigates the problems of same-sex sexual harassment and the impact of gender-stereotypes and gender-insults on young men and women like Jason and Jill. Part II discusses the development of Title IX and whether same-sex sexual harassment can create a "hostile athletic environment" in violation of federal law. It also focuses on the similarities between Title VII (workplace discrimination) and Title IX. Because of these similarities, this paper argues that Title IX should be expanded to prohibit the harassment which is currently prohibited under Title VII. Part III examines several other federal civil rights laws and state laws dealing with same-sex harassment in schools. Finally, Part IV discusses steps school districts can take to protect students and themselves from legal liability.

I. THE IMPORTANCE OF RECOGNIZING GENDER-STEREOTYPES AND GENDER-INSULTS

In a nationwide survey of high school students, one researcher found that a student will hear slurs such as "homo," "faggot," and "sissy"

4. 42 U.S.C. § 1981 (2000). Title VII prohibits employment discrimination based on race, color, religion, sex, and national origin.

5. *See, e.g.*, Montgomery v. Indep. Sch. Dist. No. 709, 109 F. Supp. 2d 1081 (D. Minn. 2000).

about twenty-six times a day or once every fourteen minutes.[6] The use of these types of gender-insults by teachers, coaches, and peers only reinforces harmful gender stereotypes. Many of these insults occur on the athletic field. Examples of sports-related gender-insults are: "You're not hurt—take off the pink panties and get in there!"; "Get your balls out of your purse and play tough!"; "I've seen girl scouts play better than you guys"; "Nice girls don't foul"; or "She's just trying to act like a man."[7] Such insults may be thought to motivate and improve performance; however, they can carry a high cost for a young person in search of his or her identity.[8] They also negatively impact the way men and women develop relationships with each other.[9] Along with reinforcing negative stereotypes of male and female gender roles, gender insults often subtly or directly imply homosexuality.[10] These insults reinforce homophobia and instill a deep sense of shame in a student who thinks he or she may be gay or lesbian.

A. The Impact of Harassment on Young Women and Men

Coaches and peers who harass based on gender-stereotypes can negatively impact the emotional well-being, educational experience, and athletic participation of male and female students. Harassment victims often become less trusting of people in general.[11] In addition, students who have been sexually harassed report feelings similar to rape victims.[12] Many students who have experienced harassment said that it made them feel less sure of themselves, more self-conscious, and afraid or scared.[13]

In addition, harassment can have extremely negative effects on the educational experience of the student. Students who reported that they have been sexually harassed in school indicated that as a result, they did

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6. Maurice R. Dyson, *Safe Rules or Gays' Schools? The Dilemma of Sexual Orientation Segregation in Public Education*, 7 U. PA. J. CONST. L. 183, 188 (2004).

7. Comments collected from classmates.

8. *See generally* MICHAEL A. MESSNER, PH.D & DONALD F. SABO, PH.D, SEX, VIOLENCE & POWER IN SPORTS: RETHINKING MASCULINITY (1994).

9. Timothy Jon Curry, *Fraternal Bonding in the Locker Room: A Profeminist Analysis of Talk About Competition and Women*, *in* GENDER AND SPORT: A READER 169, 185 (Sheila Scraton & Anne Flintoff eds., 2002).

10. Dyson, *supra* note 6, at 188.

11. NANCY LAYMAN, SEXUAL HARASSMENT IN AMERICAN SECONDARY SCHOOLS: A LEGAL GUIDE FOR ADMINISTRATORS, TEACHERS, AND STUDENTS 38 (1994).

12. Susan Strauss, *Sexual Harassment in the School: Legal Implications for Principals*, Nat'l Assoc. of Secondary Sch. Principals Bulletin (Mar. 1988), *available at* http://www.straussconsult.com/article1.htm.

13. HOSTILE HALLWAYS, *supra* note 3, at 34.

not want to go to school anymore, were not talking as much in class, or were now finding it hard to study or pay attention in school.[14] Others reported that as a result of the harassment they physically lost their appetite or were not interested in eating.[15] Sixteen percent of harassed students said that they stayed home or cut class because of sexual harassment.[16] In another study, students who experienced sexual harassment also experienced negative physical health effects and were more likely to report more psychosomatic health concerns.[17] More specifically, victims also reported suffering from depression, anxiety and/or panic attacks, post-traumatic stress disorder (PTSD), and sleeplessness and/or nightmares as a result of the harassment.[18]

While most of the students who reported a negative impact from sexual harassment were girls, harassment can also negatively impact young men. Some young men report harassment as being a major reason that they did not wish to participate in sports. As two male sport sociologists explain, "[t]he fact that we both experienced more agony than ecstasy in doing what we loved most, playing sports, made us feel as though something was seriously deficient or wrong with us as individuals."[19] This all-too-common experience runs counter to the mission of our nation's school system.

B. Impact on Male/Female Relationships

Gender insults and stereotypes can have a negative impact on the relationships developed between men and women by encouraging derogatory images of young women that may lead to increased sexual assault and harassment. Gender insults and other sexualized conversations in locker rooms have been identified as contributing to the "rape culture" of men involved in sports.[20] Insults that are derogatory towards women express disdain or even hatred toward women and can lead to perceptions that women are merely sexual objects.[21] "[S]triving to do gender appropriately within the constraints of the fraternal bond involves talk that

14. *Id.*; *see also* LAYMAN, *supra* note 11.

15. HOSTILE HALLWAYS, *supra* note 3, at 34.

16. *Id.*

17. Greetje Timmerman, *Adolescents' Psychological Health & Experiences with Unwanted Sexual Behavior at School*, ADOLESCENCE, Winter 2004, *available at* http://www.findarticles.com/p/articles/mi_m2248/ is_156_39/ai_n9487168.

18. SexualHarassmentSupport.org, Effects of Sexual Harassment, http://www.sexualharassmentsupport.org/effects.html (last visited Feb. 27, 2006).

19. SPORT, MEN, AND THE GENDER ORDER: CRITICAL FEMINIST PERSPECTIVES 10 (Michael A. Messner & Donald F. Sabo eds., 1990) [hereinafter SPORT, MEN, AND GENDER].

20. Curry, *supra* note 9, at 180–81.

21. *Id.* at 181.

manages to put down women while also ridiculing or teasing each other."[22] This "locker room" talk about women makes it more difficult for young men to recognize that young women also desire success from hard work and discipline.[23] In sports, young men are taught that discipline and effort are needed for success and when they fail to achieve these ideals they are called "women."[24] Success is male while failure is female. This perception of women can hinder men's equal acceptance of women in the workforce.

If young men are being shaped to carry negative and derogatory attitudes about women on the athletic field, these attitudes can continue after school and in the workplace. There these attitudes can significantly cost future employers. For example, in February 2004, Federal Express was ordered to pay 3.2 million dollars to a female truck-driver who was frequently subjected to gender insults and threats from male co-workers.[25] The truck driver's brakes were sabotaged after she made numerous complaints about the gender insults at work.[26] Negative attitudes about women are inconsistent with the gender equity goals of both Title IX and VII.[27] Therefore, the use of gender insults in school athletics teaches the wrong life lessons about male/female relationships. Society should question whether school athletics are properly preparing participants for life in the workplace.

C. Impact on Gay, Lesbian, or Questioning Youth

Gender insults often reinforce homophobia, however, this is not their primary purpose. Their primary purpose is "to maintain gender stereotypes and only secondarily [are they] a vehicle for regulating sexual behavior."[28] In reality, they are not aimed at gays, but rather at men and women who challenge stereotypical gender roles. Even if homosexuality is not the direct target of the harassment, these insults do nega-

22. *Id.*
23. *Id.*
24. *Id.*
25. EEOC v. Fed. Express Corp., 2005 U.S. Dist. LEXIS 5834 (M.D. Pa. 2005).
26. *Id.*
27. The goal of Title VII is "striking at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971) (quoted with approval in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64 (1986)). *See also* Bruce Kidd, *The Mens' Cultural Centre: Sports and the Dynamic of Women's Oppression/Men's Repression*, *in* SPORT, MEN, AND GENDER, *supra* note 19, at 37 ("Sports contribute to the underdevelopment of the female majority of the population and the undervaluing of those traditionally 'feminine' skills of nurturing and emotional maintenance, which are essential to human growth and survival.").
28. MESSNER & SABO, *supra* note 8.

tively impact the emotional health of students who are wrongly perceived as gay as well as students who may be gay, lesbian, or questioning their sexuality. These impacts may affect male and female athletes differently.

In a recent study, ninety-seven percent of students in public schools reported hearing anti-gay remarks from peers and fifty-three percent reported hearing anti-gay remarks from school staff.[29] Many of these comments are heard on the athletic field. The consequences of these types of comments can be dire. In one study, researchers found that young men who were identified by their peers as effeminate were more likely to attempt self-harm.[30] These young men also experienced a higher than average rate of depression because they experienced severe isolation and rejection from their peers.[31] Harassment based on real or perceived sexual orientation can lead to poor overall academic performance, increased truancy, and even increased risk of dropping out of school altogether.[32] In addition, forty-five percent of gay men and twenty percent of lesbian women reported suffering verbal harassment and/or physical violence during high school.[33] Of those who suffered such an attack, forty-two percent of lesbian students and thirty-four percent of gay male students attempted suicide.[34] Gender insults are putting gay, lesbian, or questioning youth at greater risk for suicidal death or injury.

For young men, gender insults and perceived sexual orientation harassment can frequently occur in school athletics. Male athletes are credited with positive characteristics such as strength, power, and aggressiveness. [35] On the other hand, effeminate men are seen as weak and unable to be successful in sports.[36] Male role models threaten boys with derogatory terms like "sissy" to encourage "traditional masculine behav-

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29. Dyson, *supra* note 6, at 188.

30. Amy Lovell, *"Other Students Always Used to Say, 'Look at the Dykes'": Protecting Students from Peer Sexual Orientation Harassment*, 86 CAL. L. REV. 617, 627 (1998).

31. *Id.*

32. *Id.* at 626 (this effect can also be seen for gay youth who witness another classmate being teased about their sexual orientation). A similar study estimated "that gay youth are five times more likely to skip school at least once a month in order to avoid humiliation, verbal abuse, and physical violence." Vanessa H. Eisemann, *Protecting the Kids in the Hall: Using Title IX to Stop Student-on-Student Anti-Gay Harassment*, 15 BERKELEY WOMEN'S L.J. 125, 126 n.8 (2000).

33. Dyson, *supra* note 6, at 188.

34. *Id.*

35. Julie A. Baird, *Playing It Straight: An Analysis of Current Legal Protections to Combat Homophobia and Sexual Orientation Discrimination in Intercollegiate Athletics*, 17 BERKELEY WOMEN'S L.J. 31 (2002).

36. *Id.*

ior."[37] These traditions of masculine behavior can lead to outrageous cases like *Montgomery,*[38] *Seamons,*[39] and *Oncale*[40] (discussed *infra* Part II).

Female athletes face different challenges and are often teased if they fail to conform to "femininity" in sports. As a discussion of *Price Waterhouse* will later illustrate, it can be hazardous for a female to display "masculine" traits in the workplace.[41] It can be equally hazardous for young girls in schools. For example, Alana Flores from Northern California received numerous death threats because a classmate thought she was a lesbian.[42] One of the threats included a pornographic picture of a woman bound and gagged with her throat slit.[43] Young girls often face a conflict in sports because "[a]thletic success is still equated with masculinity, and women and girls must choose between being a successful girl and being a successful athlete."[44] This successful female athlete who is equated with masculinity fails to conform to a more feminine stereotype and is often labeled a lesbian.[45] Often female teams have to go to outrageous lengths to highlight their femininity and counter such stereotypes. For example, the media guide for the Northwestern Louisiana State women's basketball team featured a large photo of the team members in uniform wearing bunny ears and tails. The caption read, "These Girls Can Play, Boy."[46] This reinforces the stereotype of female athletes as sexual objects who are judged on appearance more than athletic ability.[47] Female athletes often adopt these extreme feminine behaviors to counter perceptions that they may be lesbian.[48] Fear of being labeled a lesbian often leads successful young female athletes to feel in-

37. *Id.*

38. Montgomery v. Indep. Sch. Dist. No. 709, 109 F. Supp. 2d 1081 (D. Minn. 2000).

39. Seamons v. Snow, 84 F.3d 1226 (10th Cir. 1996).

40. Oncale v. Sundowner, 523 U.S. 75 (1998).

41. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), *superseded by statute,* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1072, *as stated in* Landgraf v. USI Film Prods., 511 U.S. 244 (1994).

42. Eisemann, *supra* note 32, at 126.

43. *Id.*

44. CATHERINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 120 (1987).

45. Pat Griffin, *Changing the Game: Homophobia, Sexism, and Lesbians in Sport, in* GENDER AND SPORTS: A READER, *supra* note 9, at 193, 196.

46. Baird, *supra* note 35, at 36.

47. Sheila Scranton & Anne Flintoff, *Sport Feminism: The Contribution of Feminist Thought to Our Understandings of Gender and Sport, in* GENDER AND SPORT: A READER, *supra* note 9, at 30, 35 ("For example, the clothing for international women's beach volleyball competitions states that the bikini bottoms must not have a side deeper than 6cm. This is less to do with appropriateness of dress for the sport and more about the objectification of women's bodies.").

48. *Id.*

timidation, fear, and shame in their athletic accomplishments instead of pride.[49]

II. TITLE IX AND SEXUAL HARASSMENT IN SCHOOL ATHLETICS

The most frequent discussion of Title IX involves girls' right to equal participation in sports.[50] However, the coverage of Title IX extends beyond equal sports teams. Congress enacted Title IX of the Education Amendments of 1972 to prohibit sex discrimination in education.[51] This includes prohibiting sexual harassment in schools. Title IX covers a range of educational programs including academics, extracurricular activities, and athletic programs.[52] It states that "[n]o 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."[53] Because it applies to all educational institutions, public or private, that receive federal funds, Title IX has played a significant role in how schools carry out their educational missions.[54] In order to understand this role, it is important to look at the history of early Title IX cases, the inter-relationship of Title VII cases, and the elements of Title IX claims.

A. Early Title IX Cases

The first Title IX cases dealt mainly with the question of who could be a party to a lawsuit over discrimination in educational opportunities. Within Title IX, Congress created an administrative enforcement system where a student could file a complaint with the Department of Education ("DOE").[55] The DOE was required to investigate the situation, try to resolve the issue, and, if not resolved, was to pull federal funding from the institution.[56] Initially, individual students could not sue under the statute because there was no explicit private cause of action granted in Title

49. *Id.*

50. *See* ELLEN VARGYAS, NAT'L WOMEN'S LAW CTR., BREAKING DOWN BARRIERS: A LEGAL GUIDE TO TITLE IX (1994).

51. Anne-Marie Harris & Kenneth B. Grooms, *A New Lesson Plan for Educational Institutions: Expanded Rules Governing Liability Under Title IX of the Education Amendments of 1972 for Student and Faculty Sexual Harassment*, 8 AM. U.J. GENDER SOC. POL'Y & L. 575, 577 (2000).

52. *Id.* at 580.

53. 20 U.S.C. § 1681(a) (2000).

54. Harris & Grooms, *supra* note 51, at 579; *see also* VARGYAS, *supra* note 50.

55. Harris & Grooms, *supra* note 51, at 579; *see also* VARGYAS, *supra* note 50.

56. Harris & Grooms, *supra* note 51, at 581.

IX.[57] However, in 1979, the Supreme Court found an implied right of action for individuals to enforce Title IX against school districts mainly because the Department was failing to enforce Title IX's mandates.[58] In 1992, this private right of action was expanded by the Court to cover claims by students for sexual harassment in school.[59]

Title IX was initially interpreted by the Supreme Court to only prohibit sex discrimination in programs that directly received federal funds.[60] For example, if students received federal grants to go to college, those grants "did not automatically trigger institution-wide Title IX coverage, [but] only triggered coverage of the school's financial aid program."[61] In response to this narrow ruling, Congress enacted the Civil Rights Restoration Act of 1987 to make the whole educational entity subject to Title IX and other anti-discrimination laws if any segment of the institution receives federal money.[62]

B. Title VII

In developing the Title IX cause of action, courts frequently began to look to other civil rights jurisprudence.[63] Specifically, courts looked to case law under Title VII of the 1965 Civil Rights Act which has addressed parallel situations because it is more developed on issues of sexual harassment.[64] Title VII aims to eliminate sex discrimination in the workplace and contains similar legislative language to Title IX.[65] Title VII makes it "unlawful . . . to discriminate against an individual with respect to his compensation, terms, *conditions*, or privileges of employment, because of such individual's . . . sex."[66] Because sexual harassment affects the conditions of a workplace, it is a violation of Title VII. Sex discrimination in the workplace includes both "quid pro quo" sexual harassment (where a supervisor demands sex from an employee) and the

57. *Id.* at 584.
58. Cannon v. Univ. of Chicago, 441 U.S. 677 (1979).
59. Franklin v. Gwinnett, 503 U.S. 60, 75 (1992).
60. Grove City College v. Bell, 465 U.S. 555 (1984).
61. Harris & Grooms, *supra* note 51, at 581.
62. 20 U.S.C. § 1687 (2000).
63. *See, e.g.*, Montgomery v. Indep. Sch. Dist. No. 709, 109 F. Supp. 2d 1081, 1091 (D. Minn. 2000).
64. Karen L. Michaelis, *Title IX and Same-Gender Sexual Harassment: School District Liability for Damages*, 2000 BYU EDUC. & L.J. 47, 50 (2000).
65. Title VII also tried to eliminate discrimination based on race, color, religion, sex, or national origin. Civil Rights Act of 1964, Pub. L. No. 88-352, § 704(a), 78 Stat. 241, 257–58 (1964).
66. *Id.* (emphasis added).

creation of a "hostile work environment" from derogatory sexual innuendos and negative gender stereotyping.

1. "Quid Pro Quo" and "Hostile Work Environment"

In *Barnes v. Costle*, the United States Court of Appeals for the D.C. Circuit found that the plaintiff, Paullette Barnes, had an actionable claim when she was fired for refusing to have sex with a supervisor.[67] This was described as the "quid pro quo" category of sexual harassment in which employment is conditioned upon granting sexual favors.[68] The supervisor's conduct was recognized as a discriminatory condition of employment because "but for the plaintiff's sex," she would not have been subjected to such a situation.[69] It was a condition of employment that was not placed on her male counterparts.

A second category of Title VII sexual harassment claims, "hostile work environment," was recognized in *Meritor Savings Bank v. Vinson*.[70] In *Meritor*, the Supreme Court held that a work environment filled with pervasive sexual harassment creates a "barrier to sexual equality at the workplace."[71] Vinson had to endure a hostile work environment where her supervisor frequently requested sexual favors, inappropriately groped her, and even tried to rape her.[72] The Court found that the purpose of Title VII was to end discriminatory treatment of women in the workplace and that Vinson was harassed simply because she was a woman.[73] Therefore, the Court held that Title VII should be expanded as an effort to end hostile environment sexual harassment in the workplace.[74] The ruling signaled to employers that they may be found liable for a hostile work environment that makes enduring sexual harassment a condition of the workplace.[75]

Later in *Harris v. Forklift Systems, Inc.*, the Court again expanded the scope of Title VII by holding that sexual harassment could be based on gender-degrading insults and sexual innuendo.[76] In *Harris*, the male president of the company would call the plaintiff "a dumb ass woman"

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67. 561 F.2d 983, 989 (D.C. Cir. 1977).
68. Jaimie Leeser, Note, *The Causal Role of Sex in Sexual Harassment*, 88 CORNELL L. REV. 1750, 1755 (2003).
69. *Id.* at 1754.
70. Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986).
71. *Id.* (quoting Henson v. Dundee, 682 F.2d 897, 902 (11th Cir. 1982)).
72. *Id.* at 60.
73. *Id.* at 64.
74. *Id.* at 73.
75. *Id.*
76. 510 U.S. 17, 22 (1993).

and say "you're a woman, what do you know" in the presence of other employees.[77] He also joked that the plaintiff should "go to the Holiday Inn to negotiate [her] raise."[78] The company's president refused to stop his behavior so Harris quit her job.[79] In the case, Justice O'Connor, writing for the majority, recognized that the president's harassment was a violation of Title VII.[80] The Court found that requiring a woman to endure a workplace that was "permeated with 'discriminatory intimidation, ridicule, and insult'" was a condition of employment that violated Title VII.[81] Had Harris been a man, she would not have been a target of such behavior and would not have had to work under such conditions. Gender harassment suffered by Harris was an unequal condition of employment that negatively impacted her but not the men who worked at Forklift Systems. As a result, sexual harassment involving gender-insults and sexual innuendos also became a violation of Title VII.

2. Same-sex Sexual Harassment

In 1998, the Supreme Court recognized a same-sex sexual harassment claim of a man harassed by other men as a violation of Title VII.[82] In *Oncale v. Sundowner*, a male oil-rig worker was subjected to horrendous treatment from male supervisors and crew members.[83] Two heterosexual male supervisors repeatedly exposed themselves to Oncale and then threatened to rape him on several occasions.[84] Oncale complained to the company's compliance clerk who confided that he also had been harassed by Oncale's supervisors.[85] The company took no action and Oncale felt he was forced to quit because he was afraid of eventually being raped.[86] In a decision written by Justice Scalia, the Supreme Court unanimously determined that "nothing in Title VII necessarily bars a claim of discrimination . . . merely because the plaintiff and the [harasser] are of the same sex."[87] Therefore, Oncale had a Title VII claim against his employer for the severe and pervasive conduct that was "so objectively offensive as to alter the 'conditions' of the victim's employ-

77. *Id.* at 19.
78. *Id.*
79. *Id.*
80. *Id.* at 22.
81. *Id.* at 21.
82. Oncale v. Sundowner, 523 U.S. 75 (1998).
83. *Id.* at 77.
84. Dabney D. Ware & Branley R. Johnson, Oncale v. Sundowner Offshore Services, Inc.: *Perverted Behavior Leads to a Perverse Ruling*, 51 FLA. L. REV. 489, 495–96 (1999).
85. *Id.* at 496.
86. *Id.*
87. *Oncale*, 523 U.S. at 79.

ment."[88] The Court noted that ending male-on-male sexual harassment was not the primary goal of Congress when it enacted Title VII, but that statutes could go beyond addressing "the principal evil to cover reasonably comparable evils."[89]

Justice Scalia also emphasized the need to look to the "social context" of the same-sex harassing behavior.[90] He used the example of the athletic field where a coach slapping a football player on the buttocks is not harassment while the same behavior would be abusive to the coach's secretary (male or female) in the office.[91] It appeared that Scalia may have been distinguishing athletic environments, where roughhousing can be expected, from other environments. Scalia indicated that the context of the harassment, such as an athletic environment, may create an exemption from same-sex sexual harassment.

3. Gender Stereotyping and Discrimination

In another line of Title VII jurisprudence, sex discrimination and harassment claims have been based on gender stereotyping. In *Price Waterhouse v. Hopkins,* Ann Hopkins was denied partnership in the company even though she had outstanding work performance.[92] A main reason for the denial was that she lacked femininity.[93] In partnership decision meetings, she was rejected for partnership because she was described as "macho" and needed to take "a course at charm school."[94] The partner that told Hopkins of her rejection for partnership suggested that she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[95] In essence, had she conformed to a more female gender stereotype, she would likely have become a partner.[96] The Supreme Court found that in Title VII "Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[97] The Court determined that an employer who acts on the basis of gender stereotyping is discriminating on the basis of sex.[98] Therefore, because

88. *Id.* at 81.
89. *Id.* at 79.
90. *Id.* at 81.
91. *Id.*
92. Price Waterhouse v. Hopkins, 490 U.S. 228, 233 (1989).
93. *Id.* at 235.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* (internal citations omitted).
98. *Id.*

Ms. Hopkins was denied partnership for failing to conform to a feminine stereotype, Price Waterhouse had discriminated against her and violated Title VII.

A similar case, *Nichols v. Azteca Restaurant Enterprises, Inc.*, was decided in the United States Court of Appeals for the Ninth Circuit and involved a male plaintiff who did not conform to male stereotypes.[99] The court held that the ruling in *Price Waterhouse* applied "with equal force to a man who is discriminated against for acting too feminine."[100] In this case, Nichols had been subject to daily "insults, name-calling, and vulgarities" from his supervisor and co-workers.[101] They would often refer to the plaintiff in Spanish with words in the feminine gender.[102] The court determined that the perpetrators of the frequent verbal abuse believed that the plaintiff did not act as a man should act.[103] The court found that the harassment was "closely linked to gender."[104] As such, harassment that is based on the belief that a man fails to conform to a male stereotype is a violation of Title VII.

As a result of these Title VII cases, a very fine line has been drawn between harassment based on gender and harassment based on sexual orientation. As discussed in Part II.C, this line may create a distinction without a difference because the primary purpose of apparent sexual orientation harassment is often to reinforce gender stereotypes. In addition, a sexual harassment claim can depend on how the court understands the harassing behavior. For example, in *Higgins v. New Balance Athletic Shoe, Inc.*, the United States Court of Appeals for the Second Circuit concluded that *Oncale* implied that "a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity."[105] Higgins had no claim based on sex discrimination because of his sexual orientation.[106] Therefore, Higgins would have to parse his claim to only instances where his coworkers mocked his effeminate characteristics, which would support "an argument for harassment based on sexual stereotypes."[107] The court seemed to believe that such behavior, if pervasive and severe, would

99. 256 F.3d 864 (9th Cir. 2001).
100. *Id.* at 874.
101. *Id.* at 870.
102. *Id.* In addition, they would mock him for "carrying his serving tray 'like a woman'" and called him "faggot" and "fucking female whore." *Id.*
103. *Id.* at 874.
104. *Id.*
105. 194 F.3d 252, 261 n.4 (1999).
106. *Id.* at 259.
107. *Id.* at 261.

constitute sexual harassment under *Oncale*.[108] However, Higgins's claim only included those instances of harassment that appeared to be linked to his homosexuality.[109] The court held that Higgins did not state a claim because his same-sex harassment was not because of sex but rather because of sexual orientation.[110]

This has led to a split in the lower courts on the issue of gender harassment when following *Oncale* and its intersection with *Price Waterhouse*. Some courts ignore *Price Waterhouse* and the issue of gender stereotyping affecting male plaintiffs.[111] Other courts treat such claims as non-actionable sexual-orientation discrimination.[112] Still other courts have recognized such discrimination claims.[113] The synthesis of *Price Waterhouse* and *Oncale* should lead courts to recognize claims by victims who were harassed because of their failure to fit a gender stereotype. Courts should not be diverted by issues regarding perceived or actual sexual orientation. As discussed above, same-sex sexual harassment often utilizes sexual orientation labels but actually represents an attempt to reinforce gender stereotypes.[114]

C. Defining Title IX Claims for Sexual Harassment

The history of Title VII is important to Title IX jurisprudence because courts often transfer Title VII ideas of the workplace into educational environments because both laws focus on gender equity. This trend started in *Bougher v. University of Pittsburgh* where the court punished the "quid pro quo" sexual harassment of a student by a teacher.[115] In *Franklin v. Gwinnett*, the Supreme Court adopted the "hostile education environment" category for sexual harassment in schools.[116] The Court explicitly embraced the *Meritor Savings Bank* ruling under Title VII for schools saying, "[w]e believe the same rule should apply when a teacher sexually harasses and abuses a student."[117] *Franklin* also held

108. *Id.* at 261 n.4.

109. *Id.* at 257 n.1 (including putting a sign on his desk saying "Blow Jobs 25 cents" and being told that his kind would give co-workers AIDS).

110. *Id.* at 259. "Title VII does not proscribe harassment simply because of sexual orientation."

111. Matthew Fedor, Comment, *Can* Price Waterhouse *and Gender Stereotyping Save the Day for Same-Sex Discrimination Plaintiffs Under Title VII? A Careful Reading of* Oncale *Compels an Affirmative Answer*, 32 SETON HALL L. REV. 455, 468 (2002).

112. *Id.*

113. *Id.*

114. *See* discussion *supra* p. 770.

115. 713 F. Supp. 139 (W.D. Pa. 1989).

116. Franklin v. Gwinnett, 503 U.S. 60 (1992).

117. *Id.* at 75.

that a student had a private right of action for damages against a school district under Title IX for sexual harassment by a teacher or school employee.[118]

However, after *Franklin*, there was conflicting authority on whether students could pursue a "hostile environment" claim if they were subject to sexual harassment from their peers.[119] The Supreme Court ended a circuit split in 1999 with its decision in *Davis v. Monroe County School District,* which held that students could sue schools for peer sexual harassment if schools failed to act.[120] In *Davis*, a female student endured recurrent sexual harassment that included offensive comments and inappropriate touching by a male classmate.[121] While aware of the situation, the school district did not put an end to the continuing harassment.[122] In its decision, the circuit court adopted five factors for determining actionable peer-to-peer sexual harassment in schools.[123] These factors are similar to the Title VII guidelines designed to determine a "hostile work environment."[124] The five factors a plaintiff must prove to succeed on a Title IX claim of sexual harassment are: (1) the student is a member of a protected group; (2) the student was subject to unwelcome harassment; (3) the harassment was based on sex; (4) the sexual harassment was so severe or pervasive as to unreasonably create an abusive educational environment; and (5) there is some basis for holding the school district liable.[125] The Supreme Court's review of the case focused on the fifth factor alone and concluded that a school district could be held liable if it acted with deliberate indifference.[126] The first factor is a preliminary Title VII and a Title IX threshold question.[127] The second and third factors can be traced to *Meritor Savings Bank*, while the fourth comes from *Harris v. Forklift.*[128] The fifth factor will be discussed *infra* in Part III.

In light of the ruling in *Davis*, the Office of Civil Rights in the United States Department of Education defined sexual harassment as "[s]exually harassing conduct . . . by an employee, by another student, or by a third party that is sufficiently severe . . . to limit a student's ability to participate in or benefit from an education program" because of

118. *Id.* at 65.
119. Davis v. Monroe County Bd. of Educ., 74 F.3d 1186, 1994 (11th Cir. 1996).
120. 526 U.S. 629 (1999).
121. *Id.* at 633.
122. *Id.* at 635.
123. *Id.*
124. Michaelis, *supra* note 64, at 74.
125. Seamons v. Snow, 84 F.3d 1226, 1232 (10th Cir. 1996).
126. *Davis*, 526 U.S. at 654.
127. Michaelis, *supra* note 64, at 74.
128. *Id.*

sex.[129] The Office suggests that gender-based harassment from peers may violate Title IX even if it does not explicitly involve conduct of a sexual nature.[130] As one author explained, gender-based harassment in education often conflicts with the goals of Title IX and Title VII which attempt "to root out . . . gender stereotypes and break down barriers to women's full participation in society."[131]

While there are no Supreme Court cases on sexual harassment by same-sex peers in the educational environment, several lower courts have addressed the issue. In *Montgomery v. Independent School District No. 709*, a case involving the severe sexual harassment of one boy by other boys, a federal court in Minnesota looked to Title VII and the *Oncale* decision to determine the question of same-sex harassment.[132] In this case, a male student, Jesse, had been repeatedly harassed since kindergarten because he was somewhat effeminate and did not conform to stereotypical masculinity.[133] As he got older, the students called him "'faggott,' 'fag,' 'gay,' 'Jessica,' 'princess,' 'fairy,' 'homo,' 'freak,' 'lesbian,' 'femme boy,' 'queer,' 'pansy,' and 'queen.'"[134] He also endured physical assaults where male students grabbed his crotch and pretended to rape him.[135] He claimed the harassment "deprived him of the ability to access significant portions of the educational environment."[136] He would miss school several times a year because of the harassment, would not participate in intramural sports, and would only go to the bathroom if it was an emergency.[137] The court looked to *Oncale* and *Price-Waterhouse* where "a claimant's failure to satisfy the stereotypes associated with his or her sex constitutes discrimination 'because of sex' within the meaning of Title VII."[138] Analogizing to Title VII jurisprudence, the district court held that Jesse's Title IX sexual harassment claim based on

129. U.S. DEP'T OF EDUC., SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (1997), http://www.ed.gov/about/offices/list/ocr/docs/sexhar01.html [hereinafter DOE GUIDANCE].

130. *Id.* ("It is also important to recognize that gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex, but not involving conduct of a sexual nature, may be a form of sex discrimination that violates Title IX if it is sufficiently severe, persistent, or pervasive and directed at individuals because of their sex.").

131. Rhonda Reaves, *"There's No Crying in Baseball": Sports and the Legal and Social Construction of Gender*, 4 J. GENDER RACE & JUST. 283, 304 (2001).

132. Montgomery v. Indep. Sch. Dist. No. 709, 109 F. Supp. 2d 1091 (D. Minn. 2000).

133. *Id.* at 1084.

134. *Id.*

135. *Id.*

136. *Id.* at 1085.

137. *Id.*

138. *Id.* at 1092.

sex could survive the defendant's motion for summary judgment.[139] However, his Title IX claim of harassment based on perceived sexual orientation was dismissed because the court could not find another case dealing with this type of harassment where the harassers perceived the victim to be a homosexual.[140] The court appeared to be drawing the same fine line that was drawn in *Higgens* and *Nichols*, which ignored the differing purposes behind apparent sexual orientation harassment. One of its purposes is to reinforce gender stereotypes which should be covered under Title IX.

In another case, the United States Court of Appeals for the Tenth Circuit found that the hazing of a male football player was not based on sex and therefore not cognizable as Title IX sexual harassment in *Seamons v. Snow*.[141] Following football practice and after showering, Brian Seamons was grabbed and taped to a towel bar by his football teammates.[142] His genital area was also taped and Brian's girlfriend was brought into the locker room by a member of the team.[143] Brian reported the incident to the coach and principal.[144] The school district responded by canceling the final game of the season, a playoff game.[145] In response, the coach ordered Brian to apologize to the football team for bringing the issue before the administrators.[146] He refused and was cut from the team.[147] Brian claimed that afterward he had to endure a constant "hostile environment" of harassment because he "caused" the team to miss the playoffs.[148] When he complained of this harassment to the principal, he was told "he should have taken it like a man" and "boys will be boys."[149] Eventually, the principal suggested to Brian and his parents that he should leave the school.[150] Brian had to enroll in a distant county to finish high school.[151] The court concluded that Brian failed to "allege any facts that would suggest he was subjected to unwelcome sexual advances or requests for sexual favors, or that sex was used to contribute to a hostile environment."[152] The harassment was not "be-

139. *Id.* at 1093.
140. *Id.*
141. Seamons v. Snow, 84 F.3d 1226, 1230–31 (10th Cir. 1996).
142. *Id.* at 1230.
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.* at 1233.

cause of sex" and therefore not actionable under Title IX.[153] The court determined that the statements "he should have taken it like a man" and "boys will be boys" by the defendants were not about being a male but rather "promoting . . . team loyalty and toughness."[154] Therefore, the court ruled that Brian had no case under Title IX for sexual harassment.[155]

The Tenth Circuit may have dismissed Brian's Title IX case because he did not show in the lower court that he was harassed because he was effeminate or failed to conform to a gender stereotype. Instead, he claimed that school required male students to subject themselves to "locker room pranks" as part of participation in football.[156] However, the lower court dismissed this allegation in the complaint as insufficient to support a Title IX claim because it merely showed that "students . . . by virtue of their birth to be male, occasionally commit immature and inappropriate acts during their path (hopefully) to maturity."[157] In the court's eyes, such acts were not intentional discrimination based on sex.[158] However, Brian's complaints arguably were met with indifference by the school because he did not take the harassment "like a man" and therefore could be considered discrimination based on sex. The courts refused to see that Brian's complaints were dismissed by the school because he was not "taking them like a man." The school was failing to act because of Brian's gender. The school appeared to believe that his response was an over-reaction, especially for his gender. This gender stereotype forced him to find another school. Neither *Montgomery* nor *Seamons* has been subsequently reviewed by a higher court.

Both cases highlight the difficulty in classifying harassing behavior. How the harassment is classified—i.e. sexual orientation harassment or locker room pranks—may cause some students to lose the protections of Title IX. If the judge sees "take it like a man" as a gender insult, the student is protected by Title IX; however, if the judge sees "take it like a man" as teasing an effeminate gay student, the student is not protected from such harassment. This distinction is not much of a difference to a harassed student. This distinction without a difference also highlights why Title IX should be expanded to cover sexual orientation harassment since its purpose and effect are actually gender stereotype harassment.

153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.* at 1117.
157. *Id.* at 1118.
158. *Id.*

D. Differences between Title VII and Title IX

Though similar in many respects, there are three significant ways in which Title IX and Title VII are different. These differences may protect school children from harassment less than they protect adults. First, as described above in Part II, Title IX does not create an explicit cause of action.[159] Second, institutional liability is different for school districts than for employers. Third, Title VII and Title IX have different notice requirements.

1. Implied Cause of Action

The Title IX private right of action was implied by the Supreme Court from the language of the statute.[160] In contrast, a private right of action was explicitly given in Title VII.[161] This difference may lead courts to block any effort to expand Title IX to cover same-sex harassment and gender insults. Courts may worry about allowing a broader cause of action under Title IX because such a cause of action is not explicitly granted by Congress in the text of the statute. This may also explain why courts are reluctant to expand coverage of Title IX to cases where there is an appearance of harassment because of perceived sexual orientation. Title IX and Title VII were intended to promote equality for women. An implicit cause of action may be perceived as a weak basis for addressing concerns about perceived sexual orientation harassment.

2. Institutional Liability

Title IX also differs significantly from Title VII in its scope of institutional liability. Under Title VII, businesses may be vicariously liable for the sexual harassment perpetrated by other employees if an employee suffers a tangible harm.[162] Conversely, school districts often escape liability because Title IX does not hold them liable for the actions of other parties. In addition, while both statutes require the institution (the employer or the school) to have actual knowledge of the claimed sexual harassment, there are several important exceptions to this requirement in Title VII. Title IX does not follow these exceptions and maintains a

159. See *infra* text accompanying notes 57–58.

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

161. 42 U.S.C. §1981 (2000).

162. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998) (both were handed down by the Supreme Court on the same day).

strict "actual notice" requirement before a school district will be found liable.[163]

Two 1996 Supreme Court cases define liability for employers when employees allege Title VII sexual harassment.[164] The cumulative result of these cases is that the employer is only held vicariously liable in cases where an employee suffered a negative "tangible employment action" because of sexual harassment.[165] For example, an employer is liable if an employee is fired or not promoted because she refused to sleep with her supervisor.[166] However, there is no "tangible employment action" if a supervisor jokes that he will fire an employee if she does not sleep with him, but then never follows through on the threat.[167] The lack of a "tangible employment action," can be an affirmative defense under *Faragher v. City of Boca Raton.*[168] In that decision, the Court recognized that employer liability may make sense in supervisory harassment because the employer has an "opportunity and incentive to screen [supervisors], train them, and monitor their performance."[169] On the other hand, the Court determined that the primary goal of Title VII was to prevent harm, not to offer private causes of action.[170] Therefore, the Court concluded that the goals of Title VII would best be served by creating liability rules that give incentives for employers to create proactive solutions to prevent the negative employment consequences of harassment and thereby limited private courses of action.[171] The affirmative defense identified in *Faragher* was assumed to create such an incentive.

3. The Actual Notice Requirement and Exceptions

In addition, with some exceptions, Title VII requires employers to have notice of sexual harassment before liability is assessed. However,

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163. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277 (1998).

164. *Ellerth*, 524 U.S. 742; *Faragher*, 524 U.S. 775.

165. *Ellerth*, 524 U.S. at 760.

166. *Id.* at 765.

167. *Id.* at 761 ("A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.").

168. 524 U.S. 775 (1998). *Faragher* held that an employer can avoid vicarious liability if the employer can show "that [it] exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and . . . that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise." *Id.* at 807.

169. *Faragher*, 524 U.S. at 803. *See also* Catherine Fisk & Erwin Chemerinsky, *Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983, and Title IX*, 7 WM. & MARY BILL RTS. J. 755, 772 (1999).

170. *Faragher*, 524 U.S. at 806. *See also* Fisk & Chemerinsky, *supra* note 169, at 772.

171. *See* Fisk & Chemerinsky, *supra* note 169, at 772.

there are no exceptions to the actual notice element for Title IX cases making it more difficult for harassed students to state a claim. In Title VII harassment cases, there are limited circumstances in which a plaintiff can prove employer liability even if he or she did not give actual notice of the harassment to the employer.[172] These circumstances are: (1) if the employee reasonably believes that complaining or using the company's internal procedures will result in retaliation, (2) if the company has a policy that is overly burdensome to the employee, or (3) if the company's complaint process requires the employee to first report harassment to the harassing supervisor.[173] However, some commentators have argued that employers should be held vicariously responsible to an employee harassed by a supervisor, regardless of notice or a tangible employment outcome.[174] A company that gives the supervisor the power to control the work environment should be liable if the supervisor uses that power to make a female employee endure discriminatory employment conditions.[175] The employer should be on notice that such a power difference could lead to harassing behaviors.

The notice standard with exceptions adopted in *Burlington* and *Ellerth* may abdicate the employer's role in controlling the workplace. Employers claim that they need to control many aspect of the work-life of their employees: employee wages, hours, tools, breaks, fringe benefits, and dress. In addition, employers claim to need "employment-at-will" concepts to maintain this level of control over their private workplaces. If they exercise such control, then it is not unreasonable to assume that they should know when an employee is being sexually harassed just as they should know when an employee is late for work or taking too long on breaks. Adequate supervision is part of the effective management function of chartered corporations and public organizations.

As for notice, in Title IX harassment cases the Supreme Court took an even more restrictive approach to actual notice than in Title VII by strictly requiring actual notice.[176] In 1998, the Supreme Court heard the case of Alida Gebser and decided that school districts are not liable for

172. *See Faragher*, 524 U.S. at 808 (holding city liable even though plaintiff failed to take advantage of sexual harassment procedure because the city failed to disseminate its policy and there was no way to bypass the supervisor in the reporting procedure if the supervisor was the harasser).

173. Harris & Grooms, *supra* note 51, at 611.

174. B. Glenn George, *The Back Door: Legitimizing Sexual Harassment Claims*, 73 B.U. L. REV. 1, 36–37 (1993).

175. *Id.* ("An employer's prompt investigation of an employee's sexual harassment complaint, as well as a sincere effort to remedy the situation, no doubt would affect the determination of an appropriate remedy. It should not, however, alter the determination of whether the employer violated Title VII.").

176. Fisk & Chemerinsky, *supra* note 169, at 777.

the sexual abuse of a student by a teacher if the school did not have actual notice of the abuse. Gebser was an eighth grader who joined the bookclub of a high school teacher, Waldrop.[177] Waldrop frequently made sexually suggestive comments to all the participants.[178] Several parents complained to the principal about Waldrop's comments in class.[179] The principal warned Waldrop, but did not report the complaint to the Title IX coordinator.[180] A few months later, Waldrop was arrested for engaging in sexual intercourse with Gebser and was immediately fired.[181] Gebser and her mother filed suit against the school district.[182] The Court found that the school district could not be liable for Waldrop's harassment of Gebser unless it had actual notice of the harassment and took no action to address the situation.[183] Therefore, the Court dismissed Gebser's claim for sexual harassment against the school district.[184]

As a result, the Supreme Court rejected the principle of constructive notice (the school should have known) when deciding the scope of a school district's liability for Title IX sexual harassment cases.[185] The Court's rationale was that Title IX limits liability only to the federal educational grant recipients, i.e., school districts.[186] As such, the school district is only liable for its own actions or inaction. "Title IX contains no comparable reference to an educational institution's 'agents,' and so does not expressly call for application of agency principles."[187] The Court was also concerned that allowing constructive notice under Title IX would give plaintiffs greater damage amounts than are available under Title VII because Title VII actions are subject to damage caps.[188] The Court also rejected constructive notice for schools because Title IX created a contract with grant recipients.[189] As such, it requires that grant recipients receive notice of liability from the DOE so the school can cor-

177. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277–78 (1998).
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.* at 279.
184. *Id.*
185. *Id.* at 288. *See also* Janet Philibosian, Comment, *Homework Assignment: The Proper Interpretation of the Standard for Institutional Liability if We Are to Protect Students in Cases of Sexual Harassment by Teachers*, 33 SW. U. L. REV. 95 (2003).
186. Reaves, *supra* note 131, at 307–08.
187. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 283 (1998).
188. Fisk & Chemerinsky, *supra* note 169, at 779.
189. *Id.*

rect the problem before federal funds are cut off.[190] The Court interpreted this "contractual framework" as underlying all of Title IX.[191] Therefore, the Court analogized that school districts must not be held liable by the judicial system without having received proper notice to correct the problem.[192] However, in *Gebser*, the Court found that the only notice the school district had was general complaints by parents to a principal of inappropriate comments.[193] It determined that this was not enough for the school to be alerted to a sexual relationship with a student.[194] The school did not have enough actual notice to be liable under Title IX. Conversely, under Title VII, adult workers are not required to provide actual notice if (1) they fear retaliation, (2) the notice process is overly burdensome, or (3) notice is required to be given through the harasser.[195] Had Gebser been an adult she could have possibly argued that she feared retaliation from Mr. Waldrop or that she didn't know how to report his treatment of her in order to fit an exception to the actual notice element. Because Title IX does not recognize these exceptions, a school child is required to handle sexual harassment more directly than an adult worker in order to sustain a cause of action under Title IX. This leads to the unfair result that adult workers are better protected from poorly implemented sexual harassment policies than school children. In order to better reflect reality, the actual notice element of Title IX should be loosened to greater protect younger victims of harassment.

On the other hand, unlike Title VII, actual notice under Title IX may come from other sources and need not come directly from the student. According to the Department of Education:

> A student, parent, or other individual may have contacted other appropriate personnel, such as a principal, campus security, bus driver, teacher, an affirmative action officer, or staff in the office of student affairs. An agent or responsible employee of the school may have witnessed the harassment. The school may receive notice in an indi-

190. *Id.*

191. *Id.*

192. *Id.* However in *Franklin*, this "contractual framework" had failed because the Department of Education refused to cut funding to a discriminating school. This led to the creation of a private cause of action. *Id.* at 780 (discussing Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992)). The private cause of action circumvented the DOE's apparent lack of action even after placing a school on notice. This notice requirement appeared to be of lesser concern to the Court in *Franklin* because both the DOE and the school district failed to take the sexual harassment seriously. *Id.*

193. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 291 (1998).

194. *Id.*

195. *See* Harris & Grooms, *supra* note 51, at 611.

> rect manner, from sources such as a member of the school staff, a member of the educational or local community, or the media.[196]

The Department of Education also suggests that school districts, which have constructive notice—if the school should have known about the harassment—may also be liable under Title IX.[197] However, the Supreme Court has never held school districts liable on the grounds that they had constructive notice of harassment.

4. Deliberate Indifference

In addition, *Gebser* held that plaintiffs must show that the school district acted with deliberate indifference after being put on actual notice of the harassment.[198] "Deliberate indifference" was clarified three years after *Gebser* in *Davis v. Monroe County Board of Education*.[199] As discussed above, *Davis* involved student-to-student sexual harassment.[200] The Supreme Court held that the school district may be "deemed 'deliberately indifferent' to acts of student-on-student harassment only where the recipient's response to the harassment or lack thereof is clearly unreasonable."[201] The majority emphasized that Title IX only prohibits the school district from acting "clearly unreasonabl[y]" in the face of known harassment.[202] However, the school district does not have to prove the reasonableness of its response in order to prevail.[203] Instead, a court could grant a motion to dismiss if the school's response to the harassment was not "'clearly unreasonable' as a matter of law."[204] In addition, other factors are considered. For example, one possible justification for a school district's failure to act would be its lack of control over the "context in which the harassment occurs . . . [and] significant control over the harasser."[205] Synthesizing *Gebser* and *Davis*, the Supreme Court appears to have moved away from direct agency principles suggested in *Franklin* and also away from the modified vicarious liability of Title VII.[206] Plaintiffs bringing Title IX claims for same-sex harassment

196. DOE GUIDANCE, *supra* note 129.
197. *Id.*
198. *Gebser*, 524 U.S. at 290.
199. 526 U.S. 629 (1999).
200. *Id.* at 648.
201. *Id.*
202. *Id.* at 649.
203. *Id.*
204. *Id.*
205. *Id.* at 646.
206. Fisk & Chemerinsky, *supra* note 169, at 780.

must show that a school district (1) had actual notice of harassment and (2) was deliberately indifferent to the harassment.

III. SHOULD THERE BE A CLAIM FOR JASON AND JILL UNDER TITLE IX?

In the fictional situation described in the introduction to this comment, a school district may face valid Title IX claims by both Jason and Jill. To analyze their situations, we would begin by looking to the factors for determining sexual harassment. Pursuant to *Davis*, the five factors that a plaintiff must prove to succeed on a Title IX claim of sexual harassment are: (1) the student is a member of a protected group, (2) the student was subject to unwelcome harassment, (3) the harassment was based on sex, (4) the sexual harassment was so severe or pervasive as to unreasonably create an abusive educational environment, and (5) there is some basis for holding the school district liable.[207]

Under the first factor, both men and women are protected from sexual harassment under Title VII.[208] Similarly this analogy has been carried to Title IX and addresses sexual harassment claims based on sex regardless of which sex does the harassing.[209] Under the second factor, both Jason and Jill were subject to unwelcome harassment—gender insults, stereotypes, and in Jason's case, assault. Under the fourth factor, it would be reasonable to suggest that both Jason and Jill faced severe harassment in an abusive school athletic program. This may be exacerbated in the context of a school environment because both are young people struggling with self-esteem and other important developmental concerns.

Under the more difficult third factor, the question may turn on whether Jason's or Jill's harassment was because of their sex or because of their perceived sexual orientation. From *Montgomery*, we can gather that harassment based on sexual orientation is not actionable.[210] However, both athletes can also claim that they were called derogatory homosexual epithets because of their failure to conform to male and female gender stereotypes. The harassment of Jason and Jill was based on sex if Title IX follows the analogous Title VII cases *Price Waterhouse* and *Nichols*. This "because of sex" requirement may be more difficult for Jason because under the precedent in *Seamons*, the court could find the coaches' actions were in the context of "promoting . . . team loyalty and

207. Seamons v. Snow, 84 F.3d 1226, 1230–31 (10th Cir. 1996).

208. Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993); Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 80 (1998); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

209. Ray v. Antioch Unified Sch. Dist., 107 F. Supp. 2d 1165, 1169 (N.D. Cal. 2000).

210. Though it may be under 42 U.S.C. § 1983. *See* Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996). *But see Ray*, 107 F. Supp. 2d 1165.

toughness" and not because he was male.[211] To use Scalia's comment in *Oncale*, context is important in sexual harassment and action in the football context is unique. On the other hand, Jill has a better claim that her coach's harassment was based on her success at conforming to the male stereotype rather than the female stereotype. The school's repeated requests and commands to be more ladylike are very similar to the harassment Ann Hopkins faced at Price Waterhouse.

Jason and Jill may also have problems meeting the final *Davis* factor—whether there is a basis for holding the school district liable. From *Gebser* and *Davis*, the standard for liability is whether the school had (1) actual notice and (2) acted with deliberate indifference. In the case of Jason, his father gave notice to the principal and athletic director and received an indifferent response. A court would have to decide whether this was enough notice and whether the notice was given to the correct authorized people to meet the *Gebser* standard. Jason could also argue that the coach's actions after the assault and the school's comment "boys will be boys" amounted to "deliberate indifference" to the harassment. Jill may have a weaker claim because she never put the school administration on actual notice. However, there were others who gave notice to the school. The complaints from parents about Jill could have put the coach and the athletic director on notice that Jill was facing harassment for failing to conform to a female stereotype. In addition, both employees acted with "deliberate indifference" by continuing to try to force Jill to be more ladylike. They not only had notice that Jill was being targeted for harassment but they joined in the chorus of harassers. In addition, their claims may depend on how the court characterizes the harassment each faced. If the court sees comments such as "fag" or "lesbo" as the core of the harassment, then the court may hold that neither has a claim because the harassment is based on perceived sexual orientation. However, if the court sees comments like "you block like a girl" or "be more ladylike" as gender insults, the court may uphold their claims. Therefore, the court's characterization of the underlying harassment may color its opinion of the legal merits of the case. The harassment's negative impact on the student's educational experience, unfortunately, may play no role in the characterization of the harassment.

The final issue would be whether the school district is liable only for the harassment by employees or also for the harassment by Jason's and Jill's peers. Under *Franklin* and *Gebser*, schools can be vicariously liable for the actions of their employees. After *Davis*, they may also face vicarious liability for failing to end peer sexual harassment. Given this

211. *Seamons*, 84 F.3d at 1233.

analysis, these fictional school districts may face liability under Title IX for the sexual harassment that Jason and Jill faced while participating in school athletics.

IV. OTHER POSSIBLE FEDERAL LIABILITY UNDER 42 U.S.C. § 1983: DUE PROCESS AND EQUAL PROTECTION

Outside of the Title IX framework, school districts should be aware that they might face liability under other federal statutes or state statutes in situations like Jason's and Jill's. Under federal law, same-sex harassment in schools may also violate a student's constitutional rights and statutory civil rights. However, some courts have held that these statutes may be pre-empted by Title IX or that school districts may have qualified immunity. Students may also face evidentiary hurdles within the federal system. At the state level, school districts may also face state tort liability or sanctions under state civil rights laws or education statutes.

A. Due Process Claims

Federal statutory law allows citizens to sue local governmental agencies and specific employees if they violate the citizen's constitutional rights, especially Fourteenth Amendment due process and equal protection rights.[212] Claims to enforce these federal rights fall under 42 U.S.C. § 1983.[213] The Supreme Court has identified two possible theories for recovery under this statute for due process violations.[214] The government or governmental actor may be liable if either the government has a "special relationship" with the victim or if the victim was subjected to a "state-created danger."[215]

Historically, courts have not extended the "special relationship doctrine" to schools.[216] However, it is more likely that school districts would be liable for sexual harassment under the second § 1983 doctrine, "state-created danger." Under this doctrine, a governmental actor may be liable to a victim harmed by a third party if the government actor took

212. Jeff Horner & Wade Norman, *Student Violence & Harassment*, 182 WEST'S EDUC. L. REP. 371, 375 (2004).

213. *Id.*

214. *Id.* at 376.

215. *Id.* Under the "Special Relationship Doctrine" of § 1983, a special relationship exists where the government has custody of a person and the person is removed from other means of aid. The government is then liable if it fails to protect the person from harm. The standard examples are when the government places people against their will in mental hospitals or prisons.

216. *Id.* at 375–76.

affirmative acts that placed the victim in danger.[217] A few school districts have been held liable under § 1983 for assaults committed on students.[218] The most important factor in the "state-created danger" doctrine is that it requires an *affirmative act* by the government actor.[219] Most sexual harassment claims are brought against schools because the school failed to protect children from harassment.[220] However, *failure to act* usually does not trigger the "state created danger" doctrine against schools.[221]

B. Equal Protection Claims

Claims under the Equal Protection Clause of the Fourteenth Amendment, as opposed to the Due Process Clause discussed above, may be more successful under 42 U.S.C. § 1983.[222] In *Nabozny v. Podlesny*, the Seventh Circuit held that there may be a claim for gender and sexual orientation harassment under § 1983 where a school district violates a student's right to equal protection.[223] On facts eerily similar to those in *Montgomery*, a young male student was teased continuously and frequently assaulted because of his perceived sexual orientation. At one point, Jamie Nabozny was pushed to the floor of a science classroom and "mock rape[d]" in front of twenty other students who laughed. Nabozny reported the incident immediately to the principal who allegedly responded "boys will be boys."[224] Later he was also attacked and beaten in the bathroom and he endured other similar incidents throughout the school year.[225] Nabozny even attempted suicide twice to escape the har-

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217. *Id.* at 377–78.

218. *Id.* at 378.

219. *Id.*

220. *Id.*

221. *Id.* For example, in one case, the court refused to hold a school liable for repeated sexual, verbal, and physical abuse to girls that occurred in a school darkroom. D.R. by L.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364 (3rd Cir. 1992). The parents alleged that the teacher and principal were aware of the situation but did not report it or make the conduct stop. *Id.* at 1373. The parents also claimed the school had created a dangerous situation by placing control of the classroom in the hands of a student teacher who was neither adequately-trained nor able to deal with the situation. *Id.* The Third Circuit called the case "an extremely close case" but nevertheless ruled that the school's failure to act did not create a danger that would violate a person's 14th Amendment Due Process rights. *Id.* at 1374. As the court explained, "[w]e readily acknowledge the apparent indefensible passivity of at least some school defendants . . . but they do not rise to the level of constitutional violation." *Id.* at 1376.

222. Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996); Montgomery v. Indep. Sch. Dist. No. 709, 109 F. Supp. 2d 1081 (D. Minn. 2000).

223. *Nabozny*, 92 F.3d 446.

224. *Id.* at 454.

225. *Id.*

assment and tried to drop out of the ninth grade.[226] Instead of looking to Title VII and Title IX, the court relied on the Fourteenth Amendment Equal Protection Clause and § 1983. It ruled that Nabozny had a claim because the school's response to a mock rape was "boys will be boys."[227] In an incredulous tone the court stated, "[w]e find it impossible to believe that a female lodging a similar complaint would have received the same response."[228]

C. Title IX Pre-emption

The U.S. Courts of Appeals are split on whether Title IX pre-empts § 1983 suits. For example, the Second Circuit found that it was Congress's intent in creating Title IX's administrative and judicial remedies to pre-empt § 1983 suits.[229] However in *Seamons*, the Tenth Circuit held that Congress did not create a "comprehensive enforcement scheme" under Title IX and therefore did not intend for Title IX to subsume a plaintiff's § 1983 claim.[230] The Supreme Court in *Gebser* appears to align more closely with *Seamons*. In *Gebser*, the Court stated, "[o]ur decision does not affect any right of recovery that an individual may have against a school district as a matter of state law or against the teacher in his individual capacity under state law or under 42 U.S.C. § 1983."[231] This implies that the Supreme Court would allow actions to be brought under Title IX along with a § 1983 claim against an individual.[232]

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226. *Id.* at 452 (he was eventually ordered back to school by the Department of Social Services).

227. *Id.* at 455.

228. *Id.* at 454–55. Nabozny offered evidence that the school district handled male-on-female harassment differently than in his case. *Id.* The school district argued that they addressed every one of Nabozny's complaints. *Id.* at 455. The court concluded that it was up to the trier of fact to determine the credibility of the competing evidence. *Id.* The court sustained Nabozny's equal protection claim not only based on gender but also on sexual orientation. *Id.*

229. Bruneau v. S. Kortright Cent. Sch. Dist., 163 F.3d 749, 757 (2d Cir. 1998).

230. Seamons v. Snow, 864 F. Supp. 1111, 1234 (D. Utah 1994).

231. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 292 (1998). Before *Gebser*, the First Circuit found that individual doctors who headed a surgery residency program at a VA hospital could be held liable under 42 U.S.C. § 1983 for gross indifference to harassment of a female resident. Lipsett v. Univ. of P.R., 864 F.2d 881, 914–15 (1st Cir. 1988). In this case, the female resident had to face on-going sexual and non-sexual harassment because the chief resident announced a "regime of terror" with the goal of eliminating all female residents. *Id.* at 887.

232. Jennings v. Univ. of N.C. at Chapel Hill, 240 F. Supp. 2d 492, 501 (M.D. N.C. 2002).

D. Liability under State Law

Schools may also face state law liability for situations like Jason's and Jill's. Under state tort law, school boards generally are not held to be the insurers of student safety.[233] However, schools do have a duty to reasonably supervise children while they are in school.[234] Student victims of school violence have successfully sued districts under tort law for failure to protect them from foreseeable harm,[235] failure to adequately supervise other students in the school's charge,[236] or infliction of emotional distress.[237] Sexual harassment plaintiffs have succeeded against school districts with tort claims for negligent hiring and supervision,[238] negligent retention,[239] and intentional infliction of emotional distress.[240] However, one plaintiff failed in attempting to hold the district responsible in a claim of gross negligence.[241] Usually, however, tort claims are often dismissed or limited because of state tort immunity acts.[242]

In addition to common law tort claims, some states have also adopted statutes to expressly protect students against sexual harassment based on gender stereotypes or sexual orientation (whether perceived or real). This eliminates the confusing dichotomy experienced in Title IX cases between gender stereotype harassment and sexual orientation harassment. The California state legislature passed the California Student Safety and Violence Prevention Act of 2000, which bans discrimination

233. Convey v. City of Rye Sch. Dist., 710 N.Y.S.2d 641, 645 (N.Y. App. Div. 2000).

234. Cirillo v. City of Milwaukee, 150 N.W.2d 460, 466 (Wis. 1967).

235. M.W. v. Panama Buena Vista Union Sch. Dist., 1 Cal. Rptr. 3d 673 (Cal. Ct. App. 2003). *See also* Taylor v. Oakland Scavenger Co., 110 P.2d 1044 (Cal. 1941); Dailey v. Los Angeles Unified Sch. Dist., 470 P.2d 360 (Cal. 1970).

236. Mirand v. City of New York, 637 N.E.2d 263, 266–67 (N.Y. 1994). *See also* Broward County Sch. Bd. v. Ruiz, 493 So.2d 474, 477 (Fla. Dist. Ct. App. 1986) (requirement for adequate supervision may also extend beyond just the school day).

237. Burrow v. Postville Cmty. Sch. Dist., 929 F. Supp. 1193 (N.D. Iowa 1996).

238. Doe Parents No. 1 v. Dep't of Educ., 58 P.3d 545, 598 (Haw. 2002).

239. Zimmer v. Ashland Univ., No. 1:00CV0630, 2001 U.S. Dist. LEXIS 15075, at *39 (N.D. Ohio Sept. 5, 2001) (where University could be held liable for retaining a women's swimming coach even after the University was made aware of his alleged sexual harassing behavior).

240. DiSalvio v. Lower Merion Sch. Dist., No. 00-5463, 2002 U.S. Dist. LEXIS 7238 (E.D. Pa. Apr. 25, 2002) (individual coach and his supervisor could be held liable for IIED for reprehensible sexual behavior with a young plaintiff because a jury could reasonably find such conduct was "outrageous"). However, failure to respond adequately to sexual harassment may not rise to the level of outrageousness needed to sustain an IIED claim. *Zimmer*, 2001 U.S. Dist. LEXIS 15075, at *31, *34.

241. Soper v. Hoben, 195 F.3d 845, 851 (6th Cir. 1999).

242. Wilson v. Beaumont Indep. Sch. Dist., 144 F. Supp. 2d 690, 696 (E.D. Tex. 2001); *Doe Parents No. 1*, 58 P.3d at 598.

in education because of sexual orientation.[243] In Hawaii, however, the Civil Rights Commission is empowered to handle sexual orientation discrimination complaints from a wide range of areas including education.[244] Minnesota has a combination approach that uses an administrative process while also allowing a private right of action under its Human Rights Act which specifically bans sexual orientation discrimination.[245] Similarly, Wisconsin has a state statute in its Education Code that explicitly prohibits denying the benefits of an educational or extracurricular program because of sexual orientation—perceived or real.[246] Vermont covers same-sex sexual harassment in its "Harassment and Hazing Prevention Policies."[247] It also requires every school board to create their own harassment policies at least as strict as these model policies.[248] Either an administrative or private right of action model will provide protection for students who are caught in the fine line between gender harassment and sexual orientation harassment.

V. SUGGESTIONS FOR SCHOOLS, COACHES, AND PARENTS TO ADDRESS SAME-SEX HARASSMENT

Because I argue for expanded coverage of Title IX, it would only be fair to offer possible suggestions to schools, coaches, and parents to meet this expanded coverage. Most school districts have made enormous efforts to address sexual harassment in the educational environment; however, it may be difficult to counter the long held traditions of motivation in athletics. In order to address sexual harassment in athletics and the concerns raised in this comment, school districts should closely follow

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243. Jennifer C. Pizer & Doreena P. Wong, *Arresting "The Plague of Violence": California's Unruh Act Requires School Officials to Act Against Anti-Gay Peer Abuse*, 12 STAN. L. & POL'Y REV. 63 (2001).

244. Katie Feiock, *The State to the Rescue: Using State Statutes to Protect Children from Peer Harassment in School*, 35 COLUM. J.L. & SOC. PROBS. 317, 330–32 (2002).

245. *Id.* at 332–33. *See also* Montgomery v. Independent Sch. Dist. No. 709, 109 F. Supp. 2d 1081, 1083, 1087 (D. Minn. 2000).

246. The court in *Nabozny v. Podlesny* stated:

> No person may be denied . . . participation in, be denied the benefits of or be discriminated against in any curricular, extracurricular, pupil services, recreational or other program or activity because of the person's sex, race, religion, national origin, ancestry, creed, pregnancy, marital or parental status, sexual orientation or physical, mental emotional or learning disability.

92 F.3d 446, 453 (7th Cir. 1996) (quoting WIS. STAT. § 118.13(1) (regulating general school operations)).

247. Daniel Greene, Comment, *"You're So Gay!": Anti-Gay Harassment in Vermont Public Schools*, 27 VT. L. REV. 919, 928 (2003) (referring to VT. STAT. ANN. tit. 16, § 565(a) (Supp. 2002)).

248. *Id.*

and implement federal regulations on sexual harassment, monitor athletic environments, identify alternative methods of athletic motivation, and react quickly and effectively to incidents of harassment.

Under federal regulations authorized by Title IX, school districts must have policies and procedures to deal with sex discrimination.[249] Schools do not need specific sexual harassment policies and procedures, but their existing discrimination policy "must provide effective means for preventing and responding to sexual harassment."[250] These policies must be applicable to all educational programs including athletic programs.[251] The Supreme Court has not yet ruled on whether an effective sexual harassment complaint procedure would be an affirmative defense under Title IX similar to the affirmative defense in *Ellerth* or *Farragher* for Title VII claims.[252] The key to the defense may be the policy's effectiveness and may depend on "how and when it is communicated, how it is used, and the students' experiences when using the policy."[253]

To minimize potential liability, schools should also look at the underlying conduct of coaches and participants in athletic programs. Coaches and assistants need to understand the consequences to students, to themselves, and the district of using gender-degrading insults to motivate athletes.[254] As discussed above, the consequences on the learning environment for students who face such harassment can be severe. A screening process should be in place for prospective coaches and volunteers to discern their motivational style.[255] In addition, the school's policy on sex discrimination should be explained in interviews with all prospective staff or volunteers.[256] The school district should also provide training and continuing education about sexual harassment in athletics to all coaches, trainers, volunteers, and players.[257] Given that it is common knowledge that gender insults are used frequently in athletics, periodic athletic oversight by a Title IX coordinator and other administrators could also help a school address problems quickly.[258] And finally, to-

249. DOE GUIDANCE, *supra* note 129.

250. *Id.*

251. *Id.*

252. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

253. Harris & Grooms, *supra* note 51, at 614.

254. Women's Sport Foundation, *Addressing the Issue of Verbal, Physical and Psychological Abuse of Athletes: The Foundation Position*, http://www.womenssportsfoundation.org/cgi-bin/iowa/issues/coach/article.html?record=995 (last visited Mar. 1, 2006).

255. *Id.*

256. *Id.*

257. *Id.*

258. Dorothy Lee Hayden, *Female and Male Athletic Coaches' and Female High School Athletes' Perception of Sexual Harassment and the Incidence Among Female High School Ath-*

gether the school administration and coaching staff should work together to develop alternative motivation methods.[259]

Using gender insults as a motivational technique should be replaced with alternative techniques. When coaches use gender insults, they are really speaking in a code which can easily be translated into non-gender related terms. For example, in Jason's case, the coach said "you block like a girl," but he really meant that Jason was not being strong with his blocks or was not pursuing his blocking target. Instead, the coach could have been more direct with his criticism of Jason's blocking performance by stating what he found was inadequate. This would eliminate the gender insult and provide Jason with better, more direct feedback about what to do differently on the next block. Gender insults such as "sissy" or "girl" really mean something else but it is not clear exactly what the coach really wants changed. It is in the best interest of all young athletes and coaches to give up such codes for more direct constructive instruction. There is absolutely no reason that a coach needs to call a player "sissy" rather explicitly explaining to the player what the coach finds wrong in the player's performance. Increased training in alternative motivation techniques may be helpful for coaches to build stronger athletic performance and to end the use of gender-insults on the athletic field.

Another important factor in protecting a school from liability is the adequacy or reasonableness of a school's response to sexual harassment. Some courts have determined that a reasonable response to sexual harassment requires a timely, thorough, and fair investigation.[260] The Department of Education suggests that after a prompt investigation, appropriate steps must be taken to address the situation.[261] While the investigation is underway, interim steps to remove the victim from the harassment may be needed.[262] In addition, school responses like "boys will be boys" or "be more feminine" should be considered unreasonable.[263] These responses do "nothing to stop the sexual harassment and can even send a message that such conduct is accepted or tolerated by the school."[264] The final determination of reasonableness may be whether the school followed its own policy. As shown in Title VII cases, devia-

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letes, (Aug. 30, 2003) (Ph.D. dissertation, George Washington University), *available at* http://etd-gw.wrlc.org/theses/available/etd-07082003-124401, at *157.

259. MESSNER & SABO, *supra* note 8, at 215.

260. DOE GUIDANCE, *supra* note 129.

261. *Id.*

262. *Id.*

263. U.S. DEP'T OF EDUC., SEXUAL HARASSMENT: IT'S NOT ACADEMIC, *available at* http://www.ed.gov/about/offices/list/ocr/docs/ocrshpam.html (last visited Mar. 1, 2006) [hereinafter DOE, IT'S NOT ACADEMIC].

264. *Id.*

tion from sexual harassment policies may show an unreasonable response.[265] Sexual harassment policies and procedures must be applied consistently to all cases, athletic or academic, to show that harassment is taken seriously by the school.[266] A failure to follow sexual harassment policies and procedures may show "deliberate indifference." Finally, the Department of Education also recommends that teachers, coaches, parents and students "work together . . . to develop and implement age-appropriate, effective measures for addressing sexual harassment."[267]

CONCLUSION

Unfortunately, Jason's and Jill's fictional stories may represent reality for many student athletes. School districts that fail to address these situations in their athletic programs may be creating a hostile athletic environment and thereby a hostile educational environment for their students, male or female, straight or gay. Studies have shown that students who endure this kind of hostile educational environment face severe emotional and physical harm.[268] In addition, failure to correct attitudes in school athletics may actually teach students inappropriate behaviors and fail to prepare them for the workplace governed by Title VII. Given the seriousness of the issue, the failure to address a hostile athletic environment should leave individual coaches and school districts liable for claims under Title IX and other federal or state statutes. Title IX liability may be the only impetus available to force change in school athletic departments and prevent schools from turning a blind eye to what is happening on the athletic field. Schools can avoid these harmful situations and prevent liability with proactive steps to address the culture of athletics in the school. The goal of using a Title IX action or other civil rights statute would be to eliminate the use of gender insults and other harassing behaviors in motivating athletes. By achieving this goal, more participants would then experience the positive life-long benefits of participating in school athletic programs.

265. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).

266. Charol Shakeshaft, *Responding to Complaints of Sexual Abuse: New Study Examines How School Districts Are Handling Allegations*, SCH. ADMIN., Oct. 1994, *available at* http://people.hofstra.edu/faculty/charol_s_shakeshaft/publications.html (select the "Download PDF file" link for this article).

267. DOE, IT'S NOT ACADEMIC, *supra* note 263.

268. HOSTILE HALLWAYS, *supra* note 3.