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**A Case Study of the Intersection between Policy, Law and Science:
Sex, Alcohol and Athletic Recruiting on Campus**

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I. Introduction

Institutions of higher education across the country celebrate the successes of their athletic teams. Those successes are not confined to a victory on a scoreboard. Rather, the triumphs borne of student athletic teams are far reaching. They may result in an influx of revenues and publicity, contributing to enhancements of the institution's facilities, academic programs and admission efforts. In addition, the student athletes celebrate their sense of accomplishment, realized from physical and mental endurance and teamwork.

The celebration cheers may become silenced, however, when controversial allegations of abusive behavior involving alcohol and sexual misconduct are lodged against student athletes and/or athletic programs.

Allegations of such improper behavior at various education institutions, and the response of the institutions, have fueled debate that certain athletic teams are cloaked with a privileged status, which causes their institutions to view their behavior with a blind eye.

In response to allegations of misconduct involving alcohol and sex in athletic recruiting programs at the University of Colorado, an independent investigative commission was created by the University of Colorado’s Board of Regents.¹ The commission was charged with determining whether alcohol, drugs and sex were used as recruiting tools within the University’s athletic department, and examining overall policies and programs regarding sex, drugs and alcohol on the University’s campus and within its athletic program. The recent release of the Independent Investigative Commission Final Report to the University of Colorado Board of Regents (the “Colorado Report”)² provides an illustrative case study of the types of complex issues faced by educational institutions addressing allegations of sexual misconduct and alcohol within its athletic programs. That report also offers guidance to educational institutions in developing and implementing effective policies to combat such behaviors and thereby avoid the attendant legal liabilities.

Before we discuss the Colorado Report, we will begin with an overview of a systematic approach to policy development for institutions of higher education, from a legal perspective.

II. Overview of a Systematic Approach to Policy Development for Institutions of Higher Education From a Legal Perspective

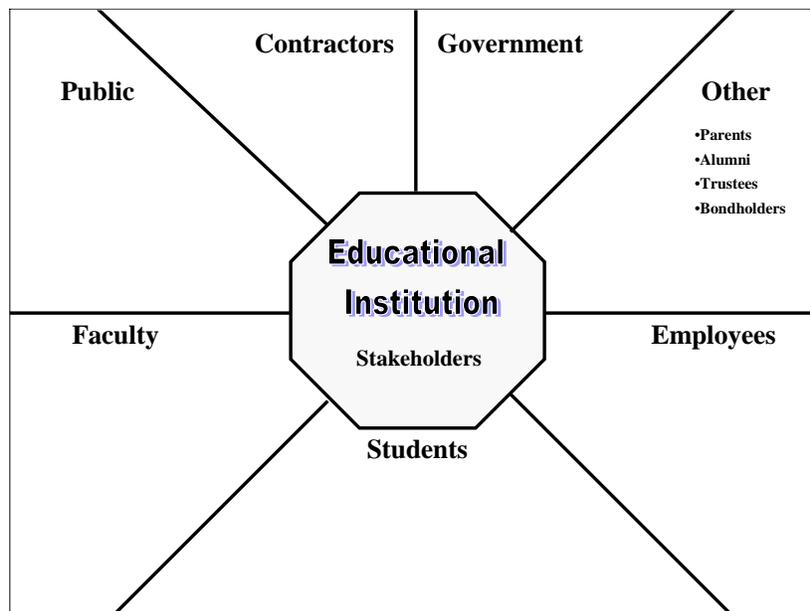
In a previous session paper,³ we have presented the stakeholder model approach to policy development for institutions of higher education (the “Stakeholder Model”).

The Stakeholder Model first recognizes the breadth of the university’s roles and obligations.⁴ The university’s primary role is that of a provider of education,

which renders paramount its obligations to its students. The university's role as an employer of both faculty and non-faculty gives rise to a separate set of legal obligations. The university is also a landlord, to both students living in its residence halls, and to the general public invited onto university owned premises for athletic events and other activities. The university acts as a business entity, entering into contracts with others, as well as a partner with the government, receiving funding and grants with specified purposes and conditions.

Because the university serves each of these individuals and entities, or is otherwise obligated to them in some fashion, they may be described as “stakeholders” of the university. Diagram A illustrates various stakeholders of a university.

Diagram A: Stakeholders of the Educational Institution



The Stakeholder Model next recognizes that all of the stakeholders have their own respective interests. Their interests are many, and may vary at any given

time. The nature of those interests may be dependent on the attributes of the particular university. For example, whether the university is a public or private institution, whether it accepts federal/state fundings (and to what extent and for what use), whether it has scientific research laboratories involving experiments with animals or humans, whether it offers distance education courses, whether its students perform intern-work off campus as part of degree requirements, whether it has any unionized labor forces, and whether its employees are contract employees or employees-at-will, all define the stakeholders' interests.

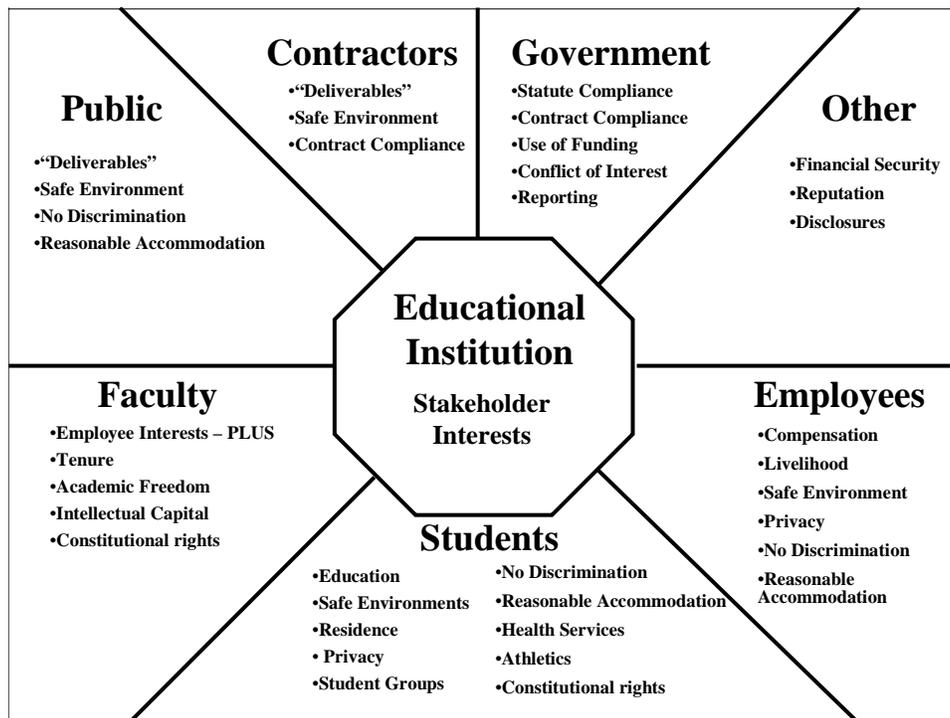
Each stakeholder group has a most basic level (or primal) interest that defines the very essence of that group's relationship with the university. For instance, the primal interest of the student group is to receive an education. The employee group's primal interest is to receive compensation for work performed. The contractor group and the public group share an immediate interest in receiving deliverables (i.e., that which they contracted to receive).

Beyond its primal interest, each stakeholder group has various secondary interests. Many of the secondary interests provide means through which the stakeholders obtain maximum fulfillment of their primal interest. For example, to achieve the maximum value of their education, students must have safe environments and their access to educational opportunities must not be restricted by discrimination.

In addition, the stakeholder may belong to more than one group, and have varying interests due to the changing status. (For example, a student who works for the university may have both student and employee status.)

Diagram B provides a non-exhaustive listing of interests of the university's primary stakeholders.

Diagram B: Interests of the Stakeholders



Once the stakeholders' interests are defined, the Stakeholder Model examines the particular interests of the specified stakeholders to identify the different legal obligations owed by the university. The extent to which the university fails to meet these obligations creates legal liabilities for which the university may be held accountable.

Because an obvious purpose of a policy is to avoid liability to particular stakeholders, “representatives” of the stakeholders should be consulted at the time the policy is being developed. (For example, representatives of student stakeholders may include the Dean of Students. Human Resources managers may be viewed as employee stakeholder representatives.) Stakeholder representatives, in turn, should consult with both experts and legal counsel to assist during the policy development stage. Experts bring scientific data and industry expertise with which to develop and test the emerging policy. Legal counsel are sensitive to the interests (and potential liabilities) inherent to each stakeholder group and the university as a whole.

Once developed, a policy must be disseminated. Appropriate persons must be educated about the underlying rationale of the policy, and be trained about policy implementation. Policies must be updated and assessed regularly. At a minimum, the institution must compile the number of claims (both internal/informal and external/lawsuit) it receives in relation to a particular policy. Often, an institution does not centralize its claim data. Without centralization, the data and resulting assessment analysis is flawed. Claims data should be compared to external statistical data available in the public realm, as well as to the institution’s own past records and internal goals for future performance. The educational institution is wise to conduct formal assessments of its policies by engaging experts to assess the overall effectiveness of its policies and to assist in necessary realigning of its policies.

III. Student Athletes, Recruits, Alcohol and Sex: Legal Liability

In order to develop policies which effectively reduce legal liability in connection with behavior of student athletes involving alcohol and sexual assault, it is first necessary to identify the liabilities the university seeks to avoid. Sources of legal liability generally fall into three categories: (1) statutory violations (which include violations of federal, state and local statutes, regulations and laws), (2) tort claims⁵ (such as, negligence, slander, defamation, libel, invasion of privacy, infliction of emotional distress, etc.), and (3) breach of contract claims (which include breach of written contracts or implied contracts, often created by the existence of policies, such as discipline and grievance policies).

For the purposes of this paper, we will focus primarily on the United States Supreme Court's analysis which makes Title IX available as a private right of action for a student seeking recovery against educational institutions for injuries resulting from sexual misconduct of students in certain situations.⁶

A. Statutory Violations Under Title IX

Since the United States Supreme Court's decisions in the cases of *Gebser v. Lago Vista Independent School Dist.*⁷ and *Davis v. Monroe County Board of Education*,⁸ a prevalent statutory vehicle used to establish liability of an educational institution for claims of student to student sexual harassment, including sexual assault, is Title IX of the Educational Amendments of 1972.⁹

Title IX, which prohibits students from being discriminated against on the basis of sex by educational institutions receiving federal funding, provides, in relevant part, that:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance¹⁰

In the *Gebser* case, a teacher had entered into a sexual relationship with an eighth grade student, and the student sought damages against the school district under Title IX. The Supreme Court held that a recipient of federal funds may be liable in damages under Title IX where it was deliberately indifferent to known acts of sexual harassment by a teacher to a student.¹¹

The *Gebser* court made it clear that it rejected traditional agency principles to impute liability under Title IX to the school district for the misconduct of its teachers.¹² It also rejected imposing Title IX liability against the school district under a negligence standard (i.e., a standard which would result in the school district being liable for its failure to react to the teacher to student harassment of which it knew or should have known).¹³ Rather, the Supreme Court set the standard high in *Gebser*. The Court held that Title IX damages may be recovered against a federally funded educational institution only where such institution itself intentionally acted in clear violation of the mandates of Title IX by remaining deliberately indifferent to acts of the teacher to student harassment of which it had actual knowledge.¹⁴ Thus, Title IX liability arose from the school district's decision not to remedy the known violation, and not simply because of the existence of the teacher's underlying misconduct. This high standard imposed by the *Gebser* Court sought to eliminate the "risk that the [federal fund] recipient would be liable in

damages not for its own official decision but instead for its employees' independent actions."¹⁵

In the *Davis* case, the Supreme Court addressed whether the type of misconduct identified in *Gebser* (i.e., deliberate indifference to known acts of harassment) amounts to an intentional violation of Title IX, capable of supporting a private damages action, where the harasser is a student (as opposed to a teacher).

In *Davis*, a fifth grade girl complained that she was the victim of alleged repeated acts of verbal and physical sexual harassment by a fifth grade boy, over a five-month period, which had a concrete, negative effect on her ability to receive an education.¹⁶ She alleged that the school made no effort to investigate or to put an end to the harassment, and sued under Title IX for the school district's failure to remedy the boy's action.¹⁷ (Multiple other victims had requested meetings with the school's principal because of the boy's conduct.¹⁸)

The *Davis* Court held that a private Title IX damages action may lie against a federally funded institution in cases of student to student harassment, where the funding recipient is deliberately indifferent to sexual harassment, of which the recipient has actual knowledge, and where the harassment is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.¹⁹

The *Davis* Court expounded on the "deliberate indifference" standard. The Court explained that deliberate indifference makes sense as a theory of direct liability under Title IX only where the funding recipient has some control over the

harasser and the environment in which the harassment occurs.²⁰ A recipient cannot be liable for its indifference where it lacks authority to take remedial action,²¹ and the harassment must take place in a context subject to the recipient's control.²² The Court explained that:

[i]f a funding recipient does not engage in harassment directly, it may not be liable for damages unless its deliberate indifference "subject[s]" its students to harassment. That is, the deliberate indifference, must, at a minimum, "cause [students] to undergo" harassment or "make them liable or vulnerable" to it. Random House Dictionary of English Language 1415 (1966) (defining "subject" as to "cause to undergo the action of something specified; expose" or "to make liable or vulnerable; lay open; expose"); Webster's Third New International Dictionary of the English Language 2275 (1961) (defining "subject" as "to cause to undergo or submit to: make submit to a particular action or effect: EXPOSE").²³

These factors combine to limit a recipient's damages liability to circumstances where the recipient exercises control over both the harasser and the context in which the known harassment occurs. Only then can the recipient be said to expose its students to harassment or cause them to undergo it under the recipient's programs.²⁴

The *Davis* Court described the situation where there is overt, physical deprivation of access to school resources as an obvious example of student to student sexual harassment capable of triggering a damages claim under Title IX.²⁵

Then, the Court stated:

Consider, for example, a case in which male students physically threaten their female peers every day, successfully preventing the female students from using a particular school resource, such as an athletic field or a computer lab, for instance. District administrators are well aware of the daily ritual, yet they deliberately ignore requests for aid from the female students wishing to use the resource. The district's knowing refusal to

take any action in response to such behavior would fly in the face of the Title IX's core principles, and such deliberate indifference may appropriately be subject to claims for monetary damages. It is not necessary, however, to show physical exclusion to demonstrate that students have been deprived by the actions of another student or students of an educational opportunity on the basis of sex. Rather, a plaintiff must establish sexual harassment of students that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities.²⁶

Title IX will be continued to be used as a vehicle for recovery. Although the standard of proof is difficult for the complaining party, we would expect to see an increase in this type of litigation, and further evolution of case law interpreting Title IX.

B. Tort Claims

To prove a tort claim, generally, a student must show that the institution owed a duty to the student, and breached that duty proximately causing injury and damages to the student. The facts of each case and the state's own case law (in particular as to the nature of the duties owed by the institution to the student) will govern the extent to which the institution is liable to a student for tort claims.

Two cases which have served as illustrations of the varying outcomes of negligence liability against an educational institution for sexual assault of a female student are *Mullins v. Pine Manor* and *Brown v. North Carolina Wesleyan College*.²⁷ Although both of these cases occurred in the context a student suffering injury by violent acts of an outsider (and not in the context of the institution's athletic programs), they too offer guidance.

In the *Mullins* case, a female student was attacked by a non-student trespasser who broke into her dorm room and dragged her to the college's dining hall, where he raped her.²⁸ The Supreme Judicial Court in Massachusetts held the college had a duty to protect the student from criminal acts, and failed to do so, proximately causing her injuries.²⁹ The court reasoned the student had a reasonable expectation that the college will exercise reasonable care to protect students living on its campuses. The court also held that because the college voluntarily provided campus security, it could be liable for harm resulting from its failure to exercise reasonable care if its failure to do so increased the risk of harm or the harm is suffered because of the student's reliance on the college.³⁰

In the case of *Brown v. North Carolina Wesleyan College*, the family of a student who was kidnapped by a non-student after a campus basketball game, and then raped and murdered, sued the college for negligence.³¹ The Court of Appeals of North Carolina held that a college may be liable for a criminal assault of a student by a third party if the assault was reasonably foreseeable.³² Ultimately, it was determined that the assault was not foreseeable, given the low frequency of related crimes on campus.³³ It may have been that the institution could have been liable if there had been an increased frequency of prior criminal acts.

Both of these cases highlight the institution's need to maintain meaningful knowledge about the type and extensiveness of dangerous conditions facing its students, and to act upon that knowledge to protect its students through effective policy development and implementation.

C. Breach of Contract Claims

Claims for breach of contract, like tort claims, are dependent upon the laws of the particular state. Such claims by students against educational institutions are grounded in allegations that the institution made certain promises to the student, and failed to honor them. For example, breach of contract claims alleging the university failed to follow its student disciplinary procedure are not uncommon in the context of a student claiming he was disciplined unfairly for his own conduct. It would not be surprising to see this type of theory asserted in an effort to create breach of contract claims in situations involving students' claims of sexual assault by student athletes or in the context of athletic programs, where the athletes' prior similar conduct was not addressed under the discipline policy applicable to all other students, especially where statements in the institution's promotional materials or handbooks may be deemed promises to require certain codes of conduct and/or levels of security.

IV. The Colorado Report: Lessons Learned from a Legal Perspective

A. General Principles

In order to address the types of behaviors and (attendant legal liabilities) at issue in the Colorado Report through the establishment of effective policies, these general principles apply:

- The purpose and goal of policy must be identified.
- The institution must be mindful that it serves many roles (for e.g., educator, employer, landlord, contractor) and many “stakeholders” (for e.g., students, employees, faculty, business partners, government, general public) simultaneously. Each role may dictate varying policy goals, and each stakeholder may have varying legal interests.

- The legal liabilities to be avoided by the policy (and possibly created by the policy) must be identified and understood.
- The policy must be developed with input from representatives of the impacted stakeholders, including legal counsel, and industry and scientific experts.
- The policy must be disseminated through publication and education/training.
- The policy must be followed.
- The policy must be updated to reflect changing laws, changes in the university's environment and changes in the interests of the university's stakeholders.
- The policy must be revisited to assess if it is meeting all of its purposes, including the avoidance of legal liabilities.
- The policy must receive support from leadership in the drafting, implementation and assessment stages.

B. Specific Guidance

The behaviors at issue at the University of Colorado³⁴ cannot be assessed or addressed effectively without involving multiple “representatives” of the stakeholders. Involvement of the shareholders’ representatives is necessary in order to identify the presence and frequency of problematic behaviors, develop and implement policies to address those behaviors, and assess the effectiveness of the policies, once implemented.

Representatives of the stakeholders in situations similar to those presented at the University of Colorado include not just the athletic department officials, but also student and residential life administrators, high level administrators, academic deans, and campus security. In addition, input from experts and legal counsel is needed during the problem identification, policy development and assessment

stages. Experts on sports psychology, alcohol and sexual misconduct are useful in providing education on underlying behaviors and identifying myths and stereotypes that often impede problem identification and policy development. Experts on loss prevention, as well as legal counsel, are needed to identify potential liabilities and the potential consequences to the institution.

The situation at the University of Colorado underscores the educational institution's need for centralization of information, consistency of response, education, prevention, accountability, and assessment. It is crucial that the institution centralize its knowledge of frequency of unacceptable behaviors, applicable policies, outcomes of investigations, and compliance data. In regard to consistency of response, institutions must turn their attention to their student discipline policies.³⁵ All students (athletes and non-athletes) must be subject to the same standards of conduct and disciplinary procedures. Similarly, all administrators (athletic department or otherwise) must be subject to the same requirements on reporting and handling of unacceptable student behavior. Education must be addressed to both students and administrators. Both must understand what is deemed to be unacceptable conduct (and why) and how the institution's policies are implemented, and the consequences of non-compliance. The use of creative approaches to preventing occurrences of the unacceptable conduct should not be overlooked. For example, the institution should consider what steps may be taken to prevent behavioral issues at “vulnerable” times, such as championship celebrations, or the last day of classes. In addition to awareness

workshops, student may be given reading requirements to focus them on the consequences of certain behaviors. Administrators and students must be held accountable. The consequences of non-compliance must be meaningful, for both individual deterrence and group deterrence. Assessment of effectiveness of these policies must be made regularly through informal and formal data review and analysis.

V. Case Study

In response to the release of the Colorado Report, you have been given the broad assignment to prepare policies necessary to make certain that similar behavior and liabilities will not be an issue for your educational institution.

Consider using the following as a general framework to address this broad assignment (or any assignment to develop a policy to reduce legal liability):

1. Identify the institution's stakeholders who may be impacted by the behavior at issue.
 2. Identify the representatives of the institution's stakeholders who may be impacted by the behavior at issue.
 3. Identify existing university policies invoked by the behavior at issue.
 4. Identify the potential legal liabilities arising from the behavior at issue.
 5. Identify any policies the university does not have, but perhaps should have, to address the legal issues raised by the behavior at issue.
 6. Identify and balance the interests of the stakeholders and the potential liabilities.
1. Who are the stakeholders?
 - Students

- Student athletes
 - Recruits
 - Government
 - Employees? Faculty?
 - Trustees? Alums? Parents?
 - Others?
2. Who are the representatives of the stakeholders?
- Dean of Students
 - Director of Security
 - Athletic Director, Coach
 - Academic Dean
 - High Level Administrators
 - Experts (Science, Security, Health)
 - Legal Counsel
 - Other?
3. What possible legal liabilities may the university be facing?
- Claims for statutory violation, claims for breach of duties owed, breach of promises made
 - Negligence, privacy, defamation, slander claims
 - Damages? Money, Loss of Funding, Negative Publicity, Criminal
 - Other?
4. What policies may be involved?
- Disciplinary Policies (students and administrators)

- Sexual Harassment Policies (students and administrators)
 - Alcohol/Drug Use Policies
 - Recruiting Policies
 - Eligibility Requirements, Good Standing Requirements
 - Scholarship Conditions
 - Other?
5. Identify (and balance) the stakeholders' interests
- Protection of alleged victims
 - Protection of accused
 - Other immediate safety issues
 - Student's right to be free from harassment
 - Student's right to have access to educational programs and activities
 - Student privacy, freedom of choice/consensual activities
 - Institution's image, public relations, financial consequences
 - Other?

REFERENCES

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¹ Independent Investigative Commission, Final Report to the University of Colorado Board of Regents, May 15, 2004, <http://www.coiic.org/index.htm>.

² *Id.*

³ Miriam J. McKendall, *Solving the Disconnect Between Planning and Evaluation, and the Prevention of Liability: How to Implement Successful Assessment Mechanisms in Law and Policy Initiatives*, Stetson University College of Law 24th Annual National Conference on Law and Higher Education, February 2003.

⁴ A number of excellent resources describe the legal obligations of higher educational institutions, including:

- Robert D. Bickel and Peter F. Lake, *The Rights and Responsibilities of the Modern University: Who Assumes the Risks of College Life?* (Carolina Academic Press, 1999);
- William A. Kaplan and Barbara A. Lee, *The Law of Higher Education: A Comprehensive Guide to Legal Administrative Decision Making*, 3rd ed. (Jossey-Bass, 1995); and
- Norma M. Goonen and Rachel S. Blechman, *Higher Education Administration: A Guide to Legal, Ethical and Practical Issues* (Greenwood Press, 1999).

⁵ For a discussion of tort liabilities faced by institutions of higher education, see Peter F. Lake, *Tort Litigation in Higher Education*, 27 J.C. & U.L. 255 (Fall 2000).

⁶ For discussion of the development of caselaw interpretation of Title IX and compilation of allegations of students subjected to sexual assault by student athletes, see:

- Timothy Davis and Tonya Parker, *Student-Athlete Sexual Violence Against Women: Defining the Limits of Institutional Responsibility*, 55 Wash. & Lee L. Rev. 55 (1998).
- Christopher M. Parent, *Personal Fouls: How Sexual Assault by Football Players is Exposing Universities to Title IX Liability*, 13 Fordham Intell. Prop. Media & Ent. L.J. 617 (2002-2003).
- Thomas N. Sweeney, *Closing the Campus Gates – Keeping Criminals Away from the University – The Story of the Student – Athlete Violence and Avoiding Institutional Liability for the Good of All*, 9 Stetson Hall J. Sport L. 226 (1999).

⁷ *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998).

⁸ *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999).

⁹ Title IX of the Educational Amendment of 1972, 20 U.S.C. § 1681 *et seq.*

¹⁰ 20 U.S.C. § 1681 (a)

¹¹ *Gebser*, 524 U.S. at 287-288.

¹² *Id.* at 283.

¹³ *Id.*

¹⁴ *Id.* at 290.

¹⁵ *Id.* at 290-291.

¹⁶ *Davis*, 526 U.S. at 633-636.

¹⁷ *Id.* at 635-636.

¹⁸ *Id.* at 635.

¹⁹ *Id.* at 646.

²⁰ *Id.* at 644.

²¹ *Id.* at 645-646.

²² *Id.* at 645 (citations omitted).

²³ *Id.* at 645.

²⁴ *Id.*

²⁵ *Id.* at 650.

²⁶ *Id.* at 650-651 (citation omitted).

²⁷ *Mullins v. Pine Manor*, 449 N.E.2d 331, (Mass. 1983) and *Brown v. North Carolina Wesleyan College*, 309 S.E.2d 701 (1983). For further discussion of these cases, see Terry Nichols Steinberg, *Rape on College Campuses: Reform through Title IX*, 18 J.C. and U.L. 39 at 62-67 (1991), and Gil B. Freid, *Illegal Moves Off-The-Field: University Liability for Illegal Acts of Student-Athletics*, 7 Seton Hall J. Sport L. 69, 76-85 (1997).

²⁸ *Mullins*, 449 N.E. 2d at 334-335.

²⁹ *Id.* at 341.

³⁰ *Id.* at 336.

³¹ *Brown*, 309 S.E. 2d at 702.

³² *Id.* at 702-703.

³³ *Id.* at 703.

³⁴ The Colorado Report (see note 1, above) sets forth both an executive summary and detailed accounting of the findings and recommendations. (For further summary, see the companion paper submitted by the co-presenter of this session, Linda Langford.) The alleged conduct discussed in the

Colorado Report is not unique to the University of Colorado. For example, the University of Mississippi, Iowa State University, Arizona State University, and the University of Georgia are among those educational institutions of higher education that have been subjected to allegations of sexual assault by member(s) of their athletic teams, and the attendant publicity and litigation. See Gil B. Freid, *Illegal Moves Off-The-Field: University Liability for Illegal Acts of Student-Athletics*, 7 Seton Hall J. Sport L. 69, 76-85 (1997), and note 6, above.

³⁵ For an interesting and recent commentary on student standards of conduct and discipline, see Edward N. Stoner II and John Wesley Lowery, *Navigating Past the “Spirit of Insubordination”: A Twenty-First Century Model Student Conduct Code With a Model Hearing Script*, 31 J.C. & U.L. 1 (2004).