Stetson Conference on Law and Higher Education

Session on: "Sex Discrimination: A Comparison of Judicial Policy on the Issue of the Protection of Students and Workers"

February 20, 2006

SEXUAL HARASSMENT AND RETALIATION CLAIMS UNDER TITLE IX[*]

William A. Kaplin

Visiting Professor of Law

Stetson University College of Law

and

Professor of Law

The Catholic University of America

[*] Most of this paper is adapted from sections 9.3.4, 13.5.3, and 13.5.7.5 of the manuscript for the 4th edition of Kaplin & Lee, *The Law of Higher Education: A Comprehensive Guide to Legal Implications of Administrative Decision Making*, due to be published in summer 2006 by Jossey-Bass, Inc. Publishers. **Other sections of the upcoming 4th edition are also cited periodically in this paper, using the short-hand citation *LHE 4th Section* ___.**

I. Title IX Overview

The central provision of Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681 *et seq.*) declares:

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

The statute contains various exceptions to this prohibition on sex discrimination by federal fund recipients. In particular, it does "not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization" (20 U.S.C. § 1681 (a)(3)); and it does "not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine" (20 U.S.C. § 1681 (a)(4)).

The U.S. Department of Education's regulations implementing Title IX, in 34 C.F.R. Part 106, specify in much greater detail the types of acts that are considered to be prohibited sex discrimination. In addition to these regulations, the Department of Education has published guidelines and interpretive advice on certain, particularly difficult, applications of Title IX. One of the most important of these documents is the *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, which is discussed and cited at various points in this paper.

Litigation brought under Title IX has added considerably to the law set forth in the statute, regulations, and guidelines. In *Franklin v. Gwinnett County Public Schools,* 503 U.S. 60 (1992), the U.S. Supreme Court ruled unanimously that private parties who are victims of sex discrimination may bring "private causes of action" for money damages to enforce their nondiscrimination rights under Title IX. In *Alexander v. Sandoval*, 532 U.S. 275 (2001) (discussed in part VII below), however, the Court limited such private causes of action to suits alleging violations of the Title IX statute, thus prohibiting suits alleging only violations of the Title IX regulations.

As a result of the *Franklin* ruling, an increasing number of students and faculty have used Title IX to sue postsecondary institutions. The availability of a money damages remedy under Title IX is particularly important to students for whom typical equitable remedies, such as back pay and orders requiring the institution to refrain from future discriminatory conduct, are of little use because students are usually due no pay and are likely to have graduated or left school before the litigation has been completed. The Court's ruling in *Franklin* thus greatly increased the incentives for students to challenge sex discrimination in court. (See generally E. J. Vargyas, "*Franklin v. Gwinnett County Public Schools* and Its Impact on Title IX Enforcement," 19 *J. Coll. & Univ. Law* 373 (1993).) It also provided a basis for faculty and other employees with sex discrimination complaints to consider using Title IX instead of Title VII of the Civil Rights of 1964 (42 U.S.C. §2000e *et seq.; see LHE 4th Section 5.2.1*), since Title IX has no caps on damage awards and no detailed procedural prerequisites, as Title VII does. Courts are

split, however, on whether the availability of express private causes of actions for employment discrimination under Title VII precludes the use of Title IX for the same purpose (see LHE 4th Section 5.2.3).

As litigation has progressed after *Franklin,* courts have emphasized the distinction between institutional liability and individual (or personal) liability under Title IX. Title IX imposes liability only on the institution (the college, university, or college or university system as an entity) and not on its officers, administrators, faculty members, or staff members as individuals. This is because individual officers and employees are not themselves "education programs or activities" within the meaning of Title IX and usually are not themselves the recipients of "federal financial assistance." See, *e.g., Soper v. Hoben,* 195 F.3d 845 (6th Cir. 1999).

II. Sexual Harassment Claims under Title IX

The Title IX statute does not explicitly address sexual harassment, nor do the Department of Education's regulations. For many years, therefore, it was unclear when, and the extent to which, Title IX would cover sexual harassment. It was not until 1992 that the U.S. Supreme Court resolved this matter in *Franklin v. Gwinnett County Public Schools,* 503 U.S. 60 (1992) (also discussed in Part I of this paper, above). The plaintiff, a high school student, sued the school board under Title IX, seeking relief from both hostile environment and *quid pro quo* sexual harassment by a teacher. Ultimately the U.S. Supreme Court ruled in the student's favor, determining that the teacher's actions were sexual harassment and that the

district, in failing to intervene to protect the student, had intentionally discriminated against her in violation of Title IX. (See LHE 4th, Section 13.5.9.)

As a result of *Franklin* and lower court cases that followed, it is now well established that sexual harassment is discrimination "on the basis of sex" within the meaning of Title IX. Title IX therefore covers students' sexual harassment complaints against faculty members and other employees (see below) as well as students' sexual harassment complaints against other students (see LHE 4th Section 8.1.5).

The U.S. Department of Education's *Sexual Harassment Guidance* defines sexual harassment as "unwelcome [verbal, nonverbal, or physical] conduct of a sexual nature" (*Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, pt. II, 66 Fed. Reg. 5512 (January 2001)). (For further definitions see *Hostile Hallways: The AAUW Survey on Sexual Harassment in America's Schools* (AAUW Education Foundation, 1993), pp. 6, 8; *Hostile Hallways: Bullying, Teasing, and Sexual Harassment in School* (AAUW Education Foundation, 2001), pp. 9–11; and National Coalition for Women and Girls in Education, *Title IX at 30: Report Card on Gender Equity (*June 2002), p. 40.) Harassment victims can be both male and female, just as perpetrators are both female and male. Moreover, sexual harassment can occur not only when the victim and perpetrator are of the opposite sex but also when they are of the same sex (see *Revised Sexual Harassment Guidance*, pt. III).

Sexual harassment by faculty members (or other employees) may be divided into two categories: "*quid pro quo* harassment" and "hostile environment harassment." The

Education Department's *Sexual Harassment Guidance*, for instance, distinguishes the categories as follows:

> Q*uid pro quo* harassment occurs if a teacher or other employee conditions an educational decision or benefit on the student's submission to unwelcome sexual conduct, [regardless of whether] the student resists and suffers the threatened harm or submits and avoids the threatened harm. . . .
>
> By contrast, [hostile environment] harassment . . . does not explicitly or implicitly condition a decision or benefit on submission to sexual conduct [but does nevertheless] limit a student's ability to participate in or benefit from the school's program based on sex.
>
> Teachers and other employees can engage in either type of harassment. Students . . . are not generally given responsibility over other students and, thus, generally can only engage in hostile environment harassment. [*Revised Sexual Harassment Guidance*, pt. I.A.]

Although the U.S. Department of Education's *Sexual Harassment Guidance* does distinguish between *quid pro quo* and hostile environment harassment, it also acknowledges (as the courts increasingly do) that "in many cases the line between [the two types of harassment] will be blurred" (62 Fed. Reg. at 12039).

In addition to claims under Title IX, students sometimes may also assert sexual harassment claims under Title VII if the student works for the college or university and is harassed by a supervisor or coworker. In

Karibian v. Columbia University, 14 F.3d 773 (2d Cir. 1994), for example, the university was held liable for the sexual harassment of a student employee by her supervisor. See also *Lipsett v. University of Puerto Rico,* 864 F.2d 881 (1st Cir. 1988).

For all sexual harassment claims, it is important, as a threshold matter, to focus on the claim's legal elements. The case of *Waters v. Metropolitan State University,* 91 F. Supp. 2d 1287 (D. Minn. 2000), provides a good shorthand description of the elements that would fit most statutes that cover hostile environment sexual harassment. According to that case, challenged conduct must have been "unwelcome," it must have been "based on sex," and it must have been "sufficiently severe as to alter the conditions of [the student's] education and create an abusive educational environment" (91 F. Supp. 2d at 1291). Further specificity on these elements is provided by the excellent analysis of Judge Calabresi in *Hayut v. State University of New York,* 352 F.3d 733 (2d Cir. 2003), in which he carefully reviewed the severity requirement, a related pervasiveness requirement, the "on the basis of sex" or "because of sex" requirement, and the hostile or abusive educational environment requirement, as they applied to the student's claim in that case (352 F.3d at 746–49). The court in *Hayut* also reviewed the requirement that the educational environment be hostile not only from the victim's subjective perspective but also from the objective perspective of a reasonable person or reasonable fact finder (352 F.3d at 746). In addition, the court demonstrated how Title VII still provides important guidance for making hostile environment determinations under Title IX, even though Title IX's standards for

determining institutional liability for an employee's acts are different from Title VII's (352 F.3d at 744; see also Part IV of this paper, below).

III. Liability Standards Under Title IX

Although the *Franklin* case (Parts I & II above) clearly established that sexual harassment may be the basis for a sex discrimination claim under Title IX, and that money damages is an available remedy in such cases, it remained unclear when, and under what theories, courts would hold schools and colleges liable for money damages under Title IX for an employee's harassment of a student. In *Franklin,* the school administrators had actual knowledge of the teacher's misconduct. But the Supreme Court did not address whether a school could be found liable only in such circumstances or whether a school could be liable even absent actual knowledge because the employee's intentional discrimination may be imputed to the school. (Under agency law, the employer may be held responsible for the unlawful conduct of its agent (called "respondeat superior") even if the employer does not have actual knowledge of the conduct; see LHE 4th, Section 2.1.)

The U.S. Supreme Court resolved these Title IX liability issues in *Gebser v. Lago Vista Independent School District,* 524 U.S. 274 (1998), where the issue was the extent to which "a school district may be held liable in damages in an implied right of action under Title IX . . . for the sexual harassment of a student by one of the district's teachers." In a 5-to-4 decision, the Court majority held that Title IX damages liability is based neither on common law agency principles of *respondeat superior* nor upon principles of constructive notice.

Distinguishing Title IX from Title VII of the Civil Rights Act of 1964 (see LHE 4th, Section 5.2.1), which does utilize such principles, the Court insisted that "[i]t would 'frustrate the purposes' of Title IX to permit a damages recovery against a school district for a teacher's sexual harassment of a student based on [such] principles . . . , i.e., without actual notice to a school district official" (524 U.S. at 285). Thus the Court held that students may not recover damages from a school district under Title IX for teacher-student sexual harassment "unless an official [of the school district], who at a minimum, has authority to address the alleged discrimination and to institute corrective measures on the [district's] behalf has actual knowledge of discrimination and fails adequately to respond" (524 U.S. at 276). Moreover, the official's response to the harassment "must amount to *deliberate indifference* to discrimination" (emphasis added).

Applying these principles to the student's claim, the Court determined that the student had not met the standards and therefore affirmed the lower court's entry of summary judgment for the school district. In reaching this decision, the Court acknowledged that the school district had not implemented any sexual harassment policy or any grievance procedure for implementing such a policy as required by the Department of Education's regulations (34 C.F.R. §§ 106.8(b) & 106.9(a)). But the Court determined that the school district's failure in this regard was not evidence of "actual notice and deliberate indifference," nor did this failure "itself constitute 'discrimination' under Title IX" (524 U.S. at 292).

Four Justices vigorously dissented from the majority's holdings in *Gebser*. Point by point, the dissenting Justices

refuted the majority's reasons for rejecting the application of agency principles under Title IX and for concluding that Title IX is based upon a different model of liability than Title VII. In addition, the dissenting Justices provided an extended argument to the effect that the refusal to provide meaningful protection for students subjected to harassment flies in the face of the purpose and meaning of Title IX. According to Justice Stevens:

> Congress included the prohibition against discrimination on the basis of sex in Title IX [in order] to induce school boards to adopt and enforce practices that will minimize the danger that vulnerable students will be exposed to such odious behavior. The rule that the Court has crafted creates the opposite incentive. As long as school boards can insulate themselves from knowledge about this sort of conduct, they can claim immunity from damages liability. Indeed, the rule that the Court adopts would preclude a damages remedy even if every teacher at the school knew about the harassment but did not have "authority to institute corrective measures on the district's behalf." *Ante,* at 277 [524 U.S. at 300–301,(Stevens, J., dissenting)].

In practice, the *Gebser* liability standards provide scant opportunity for student victims of harassment to succeed with Title IX damages actions against educational institutions. The difficulty of proving "actual knowledge" is compounded by the difficulty of proving "deliberate indifference." (See, for example, *Hayut v. State University of New York*, 352 F. 3d 733 (2d Cir. 2003); *Wills v. Brown University,* 184 F.3d 20 (1st Cir. 1999); and compare

Chontos v. Rhea, 29 F. Supp. 2d 931 (N.D. Ind. 1998).) In addition, since "actual knowledge" must be possessed by an official with authority to take corrective action, there are difficulties in proving that the officials or employees whom the victim notified had such authority. (See, for example, *Liu v. Striuli,* 36 F. Supp. 2d 452, 465–66 (D.R.I. 1999); *Delgado v. Stegall,* 367 F.3d 668 (7th Cir. 2004).)

IV. Title IX Liability Standards Compared with Title VII Liability Standards

The *Gebser* case, as described in Part III above, establishes a two-part standard for determining institutional liability in damages for a faculty member's (or other employee's) sexual harassment of a student:

1. An official of the school district: (a) must have had "actual knowledge" of the harassment; and (b) must have authority to "institute corrective measures" to resolve the harassment problem.

2. If such an official does have actual knowledge, that official: (a) must have "fail[ed] to adequately respond" to the harassment; and (b) must have acted with "deliberate indifference."

In these respects, the *Gebser* test stands in stark contrast to the liability standards under Title VII. In two cases decided in the same court term as the *Gebser* case -- *Faragher v. City of Boca Raton,* 524 U.S. 775 (1998), and *Burlington Industries v. Ellerth,* 524 U.S. 742 (1998)-- the Supreme Court determined that liability under Title VII is based upon agency principles and a *respondeat superior* model of liability (see LHE 4th Section 5.3.3.3). Thus, under Title VII, but not under Title IX, an employer may be liable in damages for a supervisor's acts of harassment

even though the employer did not have either actual knowledge or constructive notice of the harassment. Or, to put the matter another way: the Title IX liability standards are much harder for plaintiffs to meet (see Part III above) than are the Title VII standards, and students therefore have less protection against harassment under Title IX than employees have under Title VII. While Title IX, as a spending statute, is structured differently from Title VII, a regulatory statute, and while courts interpreting and applying Title IX are not bound by Title VII judicial precedents and administrative guidelines, the result in *Gebser* nevertheless seems questionable. Students may be at a more vulnerable age than the typical employee and may be encouraged by the academic environment to have more trust in teachers than would usually be the case with supervisors in the work environment. Moreover, students are not in any way less deserving of protection than employees; nor can it be said that harassment of students occurs much less frequently than harassment of employees, or that students are therefore less in need of protection. It is thus not apparent, as either a matter of policy or law, why students should receive less protection under Title IX than employees do under Title VII.

V. Enforcement of Title IX through the U.S. Department of Education's Administrative Processes

After *Gebser,* lawsuits against institutions for money damages are not the only way students may enforce their Title IX rights. In lieu of or in addition to suit, filing an administrative complaint against the institution with the U.S. Department of Education is an option. (See generally William Kaplin, "A Typology and Critique of Title

IX Sexual Harassment Law After *Gebser* and *Davis,* 26 *J. Coll. & Univ. Law* 615, 636-638 (2000).) Such administrative complaints are apparently not governed at all by *Gebser (*or by the successor *Davis* case on peer harassment; see LHE 4th Section 8.1.5). In the administrative process, the U.S. Department of Education is presumably free to use standards of institutional noncompliance that differ from the *Gebser/Davis* liability standards, as long as its standards are consistent with the nondiscrimination prohibitions in the Title IX statute and regulations. Since the institution would always receive notice of its noncompliance and the opportunity to make appropriate adjustments before any administrative penalty is imposed, and since an administrative proceeding would never result in a monetary damages remedy against the institution (see *Gebser,* 524 U.S. at 287), it appears that the U.S. Department of Education may continue to apply its own *Sexual Harassment Guidance* (see Part II above), and its stricter standards of liability (or noncompliance), to administrative complaints, compliance investigations, and fund cutoff hearings. Indeed, in the aftermath of *Gebser* (and *Davis),* the Department issued a revised guidance that reaffirms the Department's own separate standards that it had first articulated in a 1997 Guidance. (See Revised *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties,*" 66 Fed. Reg. 5512 (January 19, 2001), also available at http://www.ed.gov/offices/OCR/archives/shguide/index.html.

VI. Retaliation Claims: An Overview

Retaliation claims may arise under various nondiscrimination statutes, both federal and state (see,

e.g., Shotz v. City of Plantation, FL, 344 F.3d 1161 (11th Cir. 2003)); under other statutes such as whistleblower statutes (see, e.g., 31 U.S.C. § 3730(h); as well as under federal and state constitutional rights clauses, particularly the First Amendment's free speech clause (see, e.g., *Coszalter v. Salem, Ore.*, 320 F. 3d. 968 (9th Cir. 2003). Lawsuits alleging retaliation are most commonly brought by employees against employers but may also be brought, for instance, by students against their institutions. The thrust of a retaliation claim is that the defendant has taken some kind of adverse action against the plaintiff because the plaintiff has complained about or otherwise opposed the defendant's alleged violation of some statutory or constitutional duty. In some circumstances, especially those concerning discrimination, a retaliation claim may be as important to a plaintiff as the underlying discrimination claim itself. Indeed, a plaintiff may often be able to maintain a retaliation claim even when he/she cannot prove that the defendant violated a legal duty (e.g., a duty not to discriminate) and even if he/she was not the victim of the defendant's alleged violation.

The Title VII employment discrimination statute contains an express provision authorizing employee retaliation claims (42 U.S.C. § 2000e-3(a); see LHE 4th Section 5.1). In contrast, the Title IX statute does not contain any express retaliation provision, nor do any of the other federal nondiscrimination-in-spending statutes (Title VI, Section 504, and the Age Discrimination Act; see LHE 4th Sections 13.5.2, 13.5.4, & 13.5.5). The U.S. Department of Education's regulations for each of these statutes, however, do include a retaliation provision. The Title VI regulations, which came first, provide that:

> No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part [34 C.F.R. § 100.7(e)].

The Title IX regulations include the same provision (34 C.F.R. § 106.71), and the Section 504 regulations do so as well (34 C.F.R. § 104.61). The provision in the Age Discrimination Act regulations is somewhat different:

> [A] recipient may not engage in acts of intimidation or retaliation against any person who: (a) Attempts to assert a right protected by the Act or these regulations; or (b) Cooperates in any mediation, investigation, hearing, or other part of ED's investigation, conciliation, and enforcement process [34 C.F.R. § 110.34; see also 45 C.F.R. § 91.45].

VII. Retaliation Claims Under Title IX

It is clear that the Title IX retaliation regulation (see part VI above) may be enforced by the U.S. Department of Education through its administrative processes. But it is a separate question whether this retaliation regulation may be enforced in court through private causes of action (see part I above) brought by the victims of retaliation. This question does not arise under Title VII, since the statute expressly provides for private causes of action for retaliation claims (see Part VI above). The question about the Title IX regulation became particularly important and

complicated as a result of the U.S. Supreme Court's decision in *Alexander v. Sandoval,* 532 U.S. 275 (2001) (see part I above; and see also LHE 4th Section 13.5.9). The essential holding of *Sandoval* is that: (1) courts may consider only the "text and structure" of the federal nondiscrimination-in-spending statutes when evaluating whether a plaintiff may bring a private cause of action to enforce the statute; and (2) agency *regulations* not based directly on the *statute* may not provide the basis for a private cause of action.

Under *Sandoval,* therefore, the Title IX retaliation regulation could not be enforced in court by a private cause of action unless Congress had intended that acts of retaliation would be considered sex discrimination prohibited by the *statute* itself. After *Sandoval,* the lower courts differed on whether Congress's intent could be so construed. (*Compare Peters v. Jenney,* 327 F.3d 307 (4th Cir. 2003), permitting a private cause of action for retaliation, with *Litman v. George Mason University,* 156 F. Supp. 2d 579 (E.D. Va. 2001), prohibiting such a cause of action.) In 2005, however, the U.S. Supreme Court resolved this issue in favor of private causes of action in *Jackson v. Birmingham Board of Education,* 125 S. Ct. 1497 (2005). The majority opinion, written by Justice Sandra Day O'Connor, is her last great contribution to the law of gender discrimination.

The plaintiff in *Jackson* was a teacher and the former coach of the girls' basketball team at a public high school. He alleged that he was removed as the coach because he had complained to his supervisors about unequal treatment of the girl's basketball team regarding funding, equipment, and facilities; and he claimed that this removal

constituted retaliation violative of Title IX. The federal district court and the U.S. Court of Appeals both determined that the coach's complaint failed to state a claim under Title IX. By a 5-to-4 vote, however, the U.S. Supreme Court reversed and remanded the case for further proceedings.

According to Justice O'Connor's majority opinion in *Jackson*:

> Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX's private cause of action. Retaliation is, by definition, an intentional act. It is a form of "discrimination" because the complainant is being subjected to differential treatment. . . . Moreover, retaliation is discrimination "on the basis of sex" because it is an intentional response to the nature of the complaint: an allegation of sex discrimination [125 S. Ct. at 1504].

Sandoval did not affect this conclusion because the Court in *Jackson* did not rely directly on the Department of Education's Title IX regulation on retaliation (see part VI above) but relied instead on the Title IX statute. As Justice O'Connor explained: "In step with *Sandoval,* we hold that Title IX's private right of action encompasses suits for retaliation, because retaliation falls within the statute's prohibition of intentional discrimination. . . ."

The Court in *Jackson* also made clear that "the victim of the retaliation" need not also have been "the victim of discrimination that is the subject of the original complaint." Even if Jackson had complained only about

discrimination against members of the girls' basketball team, and not about discrimination against him as coach, he could still maintain a cause of action for retaliation. Thus, whenever a Title IX plaintiff can show that he or she had complained about or opposed sex discrimination by a federal fund recipient and that the recipient had taken adverse action against him or her because of this complaint or opposition, the statutory requirements for a retaliation claim are met -- regardless of whether the plaintiff was also the target of the original discrimination.

Jackson was not itself a sexual harassment case. It seems clear, however, that it applies equally to Title IX retaliation claims involving sexual harassment and that it authorizes private causes of action by employees or students who were retaliated against after having complained about or opposed alleged sexual harassment by officers or employees of the institution. As provided by the Court's earlier decision in *Franklin* (part I above), money damages against the institution is an available remedy in such retaliation cases. Moreover, since the cause of action focuses on the retaliation itself rather than the underlying sexual harassment claim, the burdensome *Gebser* standards of liability would apparently not apply to plaintiffs' retaliation claims.

VIII. Recommendations for Institutions

In their policies and procedures on sexual harassment, it is important that colleges and universities do not overemphasize technical questions about legal liability that arise from *Gebser* and the lower court cases that follow. In resolving students' harassment complaints through campus grievance mechanisms, for instance, the

primary focus of attention should be on whether harassment occurred, not on whether the institution would be liable in court if it did occur. Moreover, much of the institution's policy and practice regarding sexual harassment may be driven more by educational and ethical concerns than by legal concerns, as discussed below in this part. The monetary liability standards from *Gebser* (and *Davis)* are not onerous for institutions and should be viewed as the minimum or floor -- not the full extent -- of the institution's responsibilities regarding sexual harassment. The standards for compliance in the U.S. Department of Education's *Revised Sexual Harassment Guidance* are somewhat stricter for institutions but nevertheless leave considerable discretion in the hands of institutional administrators while still providing very helpful guidelines for institutional practice.

Since sexual harassment can do substantial harm to the victims and have substantial adverse consequences for the campus community, and since sexual harassment claims present such sensitive issues, institutions will likely engage in considerable institutional planning and educational programming regarding this matter. A highly pertinent perspective and useful starting point for doing so is contained in the preamble accompanying the Department of Education's *Revised Sexual Harassment Guidance (*see parts II & III of this paper*)*. The preamble emphasizes that a central concern of Title IX is whether schools can recognize when harassment has occurred and take "prompt and effective action calculated to end the harassment, prevent its recurrence, and, as appropriate, remedy its effects." In this regard, the preamble makes two key points. First,

"[i]f harassment has occurred, doing nothing is always the wrong response. However, depending on the circumstances, there may be more than one right way to respond. The important thing is for school employees or officials to pay attention to the school environment and not to hesitate to respond to sexual harassment in the same reasonable, commonsense manner as they would to other types of serious misconduct." Second, it is critically important to have "well-publicized and effective grievance procedures in place to handle complaints of sex discrimination, including sexual harassment complaints. . . . Strong policies and effective grievance procedures are essential to let students and employees know that sexual harassment will not be tolerated and to ensure that they know how to report it."

Following these two key points, there are numerous initiatives that colleges and universities might undertake, including: educational programs for students; workshops and other training programs for instructors, staff, and leaders of student organizations; counseling and support programs for victims; counseling programs for perpetrators; and alternative dispute resolution programs that provide mediation and other nonadversarial means for resolving some sexual harassment complaints. Institutions should also make sure that sexual harassment is covered clearly and specifically in their student disciplinary codes and faculty ethics codes. It is likewise important to ensure that *retaliation* against persons complaining of sexual harassment is clearly covered and prohibited in such codes. In addition, institutions will also want to be sure that mechanisms are in place for protecting the confidentiality of students who report that they--or others--have been

sexually harassed; and for protecting the due process rights and free speech rights of anyone accused of harassment(see generally LHE 4th Sections 6.7,7.1.1 & 7.1.2, 9.4, & 9.5.1). Through such initiatives, colleges and universities can work out harassment problems in a multifaceted manner that lessens the need for and likelihood of lawsuits against them in court. Effectuating such initiatives will require good teamwork between administrators and college counsel (see LHE 4th, Section 2.4.2)

(For further guidance, see Judith Brandenburg, *Confronting Sexual Harassment: What Schools and Colleges Can Do* (1997), especially 49-82; Susan Hippensteele & Thomas C. Pearson, "Responding Effectively to Sexual Harassment: Victim Advocacy, Early Intervention, and Problem Solving," *Change,* January–February 1999, 48–53; Paludi, Michelle A. (Ed.), *Sexual Harassment on College Campuses: Abusing the Ivory Power (*SUNY Press, 1996); "Sexual Harassment: Suggested Policy and Procedures for Handling Complaints," in *AAUP Policy Documents and Reports* (9th ed. 2001), pp. 113–15, which includes due process protections for the accused and provides for a faculty committee as fact finder; and see generally Elsa Cole (ed.), *Sexual Harassment on Campus: A Legal Compendium* (4th ed., National Association of College and University Attorneys, 2003).)