

Institutional liability for student-athlete misconduct

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**Legal aspects
Session 16**

**Friday, May 30, 2008
3:00 PM - 3:25 PM**

**Presentation (25-minute)
Abstract 135**

Male athletes are named in 23% of sexual assault cases even though they only comprise approximately 2% of a campus' population (Duffy & Osborne, 2005). Colleges and universities are becoming increasingly entangled in sexual harassment lawsuits and settlements involving student-athletes. These incidents are costly both monetarily, and in damage to the reputation and integrity of the school and its athletic program (Duff & Osborne, 2005). This trend of incidents has fostered a growing concern as to whether or not a university should be held legally responsible for the behavioral misconduct of its student-athletes. Athletic departments and their administrators are under increased scrutiny with regard to student-athlete behavior, specifically sexual harassment and assault. The purpose of the study, therefore, is to review recent legal precedent with regard to the issue of student-athlete misconduct in order to propose recommendations to assist administrators in understanding and managing these liability issues. The study explores the availability of Title IX as a vehicle for imposing legal liability at an institutional level on colleges and universities for acts of sexual harassment and sexual violence committed by their student-athletes (Davis & Parker, 1998).

The United States Supreme Court has held that a private Title IX action may lie against an educational institution in cases of student-on-student harassment, where the institution, as a Title IX funding recipient, has been deliberately indifferent to sexual harassment, despite actual knowledge of such harassment. (See *Davis v. Monroe County Board of Education*, 526 U.S. 629, 640, 119 S.Ct. 1661-70, 143 L. Ed. 2d 839 (1999)). Davis identified three factors to use in determining whether a school is liable under Title IX. The university is liable under Title IX if the plaintiff can prove all three of the following factors (Hogan, 2006):

- (1) A school official who has the authority to institute corrective measures has notice of the harassment. In other words, the official knows that harassment is occurring.
- (2) The school official with knowledge was deliberately indifferent to the harassment.
- (3) The harassment is so severe, pervasive, and objectively offensive that it effectively limits the harassed student's access to an educational opportunity or benefit.

Several recent high profile suits involving the issue of institutional liability for student-athlete misconduct give insight as to how courts have applied the above standard promulgated by the Supreme Court in *Davis*.

One such recent case concerning student-athlete sexual harassment and alleged Title IX violations involves Brittany Benefield and the University of Alabama at Birmingham (UAB) (*Benefield v. The Board of Trustees of the University of Alabama at Birmingham*, 214 F. Supp. 2d 1212, 2002 U.S. Dist. LEXIS 14266 (2002)). The plaintiff Benefield entered UAB at the age of 15 on the basis of an academic scholarship. During her first quarter of college, she achieved a GPA of 3.5. However, the plaintiff was subsequently moved to Blazer Hall, a residential dorm housing many UAB football and basketball players. The plaintiff was given beer by football players, which escalated into the plaintiff becoming the football players "play thing" and she was sexually exploited by the football and basketball players. UAB officials questioned the plaintiff about her sexual activities with student-athletes, which she denied. Later, she recanted her denial but maintained that the sexual activities were consensual. The plaintiff began using drugs supplied by the student-athletes, and she contends the resident assistants were aware of her sexual activities and drug use. The plaintiff's grades fell to a 1.9 GPA and she stopped attending classes. Benefield and her mother brought a Title IX lawsuit against UAB claiming it was aware of the illegal activities taking place in the residence hall and did nothing to prevent it, which constituted a deliberate indifference to sexual harassment so severe, pervasive, and objectively offensive that it deprived her of access to educational opportunities. The District Court later dismissed the case based upon the defendants (UAB) request. The court found the university's promise to protect Benefield did not invoke Title IX (Parent, 2003). The court reasoned that UAB did not show deliberate indifference in investigating the allegations because the plaintiff never complained to the UAB administration or her parents and when confronted by UAB officials she lied and stated the rumors were untrue, when in fact the sexual activity was consensual. Because of the schools attempts to ascertain the truth the court could not find that they were deliberately indifferent (Benefield *supra*, at 1223).

One of the most notable examples regarding the issue of institutional liability involves allegations of sexual harassment and assault surrounding the University of Colorado football program. On September 7, 2007, the U. S. Court of Appeals for the 10th Circuit reversed a grant of summary judgment to CU and the case was remanded for further proceedings. In *Simpson v.*

2008 North American Society for Sport Management Conference (NASSM 2008)

University of Colorado Boulder, 2007 U.S. App. LEXIS 21478. Lisa Simpson and Anne Gilmore (plaintiffs) allege they were sexually assaulted on December 7, 2001, by CU football players and recruits. They sued under Title IX, claiming the university deprived them of an equal education by allowing a pattern of sexual harassment to go unchecked within the football-recruiting program (Spies, 2006). The District Court granted a CU summary judgment motion and ruled that no rational person could find that CU had actual notice of sexual harassment of CU students by football players and recruits before Plaintiff's assaults or that there was a lack of evidence that CU was deliberately indifferent to such harassment. In granting the plaintiffs' appeal The 10th Circuit stated, "The central question in this case is whether the risk of such an assault during recruiting visits was obvious. In our view, the evidence could support such a finding" (Simpson, *supra* at 27). The Court enumerated many instances in which CU football recruiting was a specific focus of concern. The oversight of the football recruiting program had garnered negative scrutiny from university administrators, local law enforcement agencies and national media. The Court stated that the guidance of the player hosts and recruits regarding sexual harassment had proved inadequate and CU had not made a sincere effort to effectively deal with the issue. The evidence showed that coach Barnett, had general knowledge of the serious risk of sexual harassment, knew that assaults occurred during CU recruiting visits, nevertheless maintained an unsupervised program to show recruits a "good time," and there was no attempt on his or the institutions part to change the atmosphere conducive to this misconduct. Therefore, the Court reasoned that there was sufficient evidence for a jury to infer that the institution displayed deliberate indifference to the need for more or different training for football player hosts and recruits. The need for such training was obvious and the inadequacy likely to result in further sexual assaults and potential Title IX violations.

The university should educate all student-athletes of the rising trends regarding sexual harassment. Universities must take appropriate steps in educating their athletes and protecting themselves from possible litigation.