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Striking out with Title IX: Horner v. Kentucky High School Athletic Ass'n and the Sixth Circuit's Interpretation of Unintentional Discrimination under Title IX and the Possibility of Recovering Monetary Damages

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TITLE IX has had a tremendous impact on women in the United States. One important benefit of Title IX is the impact it has had on female participation in intercollegiate sports. It has been called the "landmark legislation that bans sex discrimination in schools in both academics and athletics." Despite its positive impact, discrimination still occurs, and many turn to the courts for a remedy. Thus, the courts must determine what is a viable remedy, and what a plaintiff must show in order to get that remedy.

The judicial development in the area of Title IX is important because gender equity in sports has an important effect on our lives. Often, when discrimination occurs, it is not done intentionally. For example, it is not unusual for a federally funded institution to make a facially neutral policy that is not intended to discriminate, but the policy nevertheless has a discriminatory effect against a class of people. When such unintentional discrimination happens, a remedy must be available to the victims of the discrimination.

This Note discusses this type of discrimination in the case of Horner v. Kentucky High School Athletic Association. First, the Note discusses the facts of the case and explores the background of Title IX.
IX and several of its important and relevant cases to the issue at hand. The Note then examines the Sixth Circuit’s holding in Homer, focusing on the issue of whether compensatory damages are available when a facially neutral policy is challenged under Title IX without a showing of an intentional violation. The Note also analyzes the dissent in Homer, which determined that the standard of deliberate indifference should govern in Title IX cases. Finally, this Note discusses the holding of Homer in greater depth, focusing on its strengths and weaknesses, and concludes that the Sixth Circuit was correct in its interpretation of the law and holding in this area.

II. FACTS

The Kentucky High School Athletic Association ("KHSAA") manages interscholastic athletics in public and private high schools in Kentucky. Due to limited resources, the Kentucky State Education Board’s ("Board’s") policy was that a new sport would not be sanctioned unless at least twenty-five percent of the member schools were willing to participate (the "twenty-five percent rule"). In 1988, survey results showed that twenty-six schools, approximately nine percent of the member schools, indicated that they would participate in girls' fast-pitch softball. A second survey, taken in 1992, indicated that fifty schools, or about seventeen

6. See infra notes 10–92 and accompanying text.
7. See Homer, 206 F.3d at 689-92 (holding that Title IX plaintiffs must prove intentional violation in order to receive compensatory damages); see also infra notes 93-120 and accompanying text.
8. See Homer, 206 F.3d at 698; see also infra notes 121-30 and accompanying text.
9. See infra notes 131–79 and accompanying text.
10. See Homer v. Ky. High Sch. Athletic Ass’n, 43 F.3d 265, 268-69 (6th Cir. 1994) ("Homer I") (citing 702 Ky. ADMIN. REGS. 7:065(1) (1993)). The KHSAA "sanctions" certain interscholastic sports, meaning that it recognizes and sponsors state tournaments in those sports. See Homer I, 43 F.3d at 269. The KHSAA is a voluntary and self-managing association of public, private and parochial schools. See id. The member schools must be in compliance with the KHSAA’s constitution, by-laws, policies and procedures. See id.
11. See id. at 269 (noting that, in 1994, KHSAA sanctioned eighteen sports, ten for boys and eight for girls). The Board has exclusive control and management of all of the Kentucky common schools, as well as the programs operated in the schools, including interscholastic athletics. See id. at 268. Pursuant to the statute, the Board can delegate its responsibility of managing and controlling interscholastic athletic programs to an agent. See Homer I, 43 F.3d at 268 (citing Ky. REV. STAT. ANN. § 156.070(2) (Banks-Baldwin 1995)). Here, the Board had designated the KHSAA to be such an agent. See id.
12. See id. at 269.
percent, would participate in girls' fast-pitch softball. Thus, because the KHSAA's minimum twenty-five percent rule had not been met, the KHSAA refused to sanction girls' fast-pitch softball.

In response, the plaintiffs, a group of female student athletes attending Kentucky high schools, filed suit. They claimed that the KHSAA's refusal to sanction fast-pitch softball violated, *inter alia*, 20 U.S.C.S. § 1681 ("Title IX"). The plaintiffs specifically alleged that the KHSAA's failure to sponsor girls' fast-pitch softball reduced the female students' abilities to compete for college fast-pitch softball athletic scholarships.

In 1994, the Sixth Circuit in *Horner I* reversed the district court on the plaintiffs' Title IX claim, holding that "issues of fact abounded" as to whether the KHSAA had complied with Title IX. On remand, the district court again found for the defendants, finding the plaintiffs' claims under Title IX moot due to a recent amendment by the Kentucky General Assembly regulating high school sports eligibility rules.

13. *See id.* (noting that record did not reflect whether female athletes at member schools were either polled or consulted before schools responded to survey).

14. *See id.* In the district court, the Board defended this action on the basis of their "twenty-five percent rule;" the court granted the Board's motion for summary judgment. *See id.*

15. *See Horner I*, 49 F.3d at 270 (contending that defendants violated Title IX, the Equal Protection Clause and state law by sanctioning fewer sports and by refusing to sanction fast-pitch softball).

16. *See Horner v. Ky. High Sch. Athletic Ass'n*, 206 F.3d 685, 687 (6th Cir. 2000). The plaintiffs also claimed that the defendants had violated the Equal Protection Clause and state law. *See Horner I*, 43 F.3d at 276. As to the equal protection claim, the *Horner I* court affirmed the district court's dismissal because the plaintiffs had failed to prove that the defendants had intentionally discriminated against them, as is required by the Equal Protection Clause. *See id.* Specifically, the court held that the plaintiffs had not alleged that the defendants had adopted the twenty-five percent rule because of, rather than in spite of, its disparate impact on females, and that disparate impact alone was insufficient to demonstrate an equal protection violation. *See id.* Title IX is Title IX of Act June 23, 1972, P.L. 92-318, 86 Stat. 373; it generally appears as 20 U.S.C. § 1681. *See 20 U.S.C. § 1681 (1972).*

17. *See Horner*, 206 F.3d at 688 (comparing female students with male students who played high school baseball and then competed for college baseball athletic scholarships). The plaintiffs in this case were asserting a "disparate impact" theory; that, although the Board's twenty-five percent rule was neutral on its face, it had a disparate and discriminatory impact on females. *See id.*

18. *See id.* (citing *Horner I*, 43 F.3d at 275). The district court granted defendants' motions for summary judgment on the Title IX claim, holding that the KHSAA had complied with Title IX because they had offered equal opportunities in accordance with the interests and abilities of the students. *See id.* (citing same). The district court also dismissed the suit due to the association and Board's contention that the twenty-five percent rule had been upheld. *See High School Softball Players Strike Out With Title IX Suit*, SPORTS & ENT. LITIG. REP., Apr. 2000, at 14; see also *supra* notes 11, 14 and accompanying text.
school sports. On appeal, the plaintiffs challenged the district court's finding that money damages were not available under Title IX without evidence of intentional discrimination. Having considered the plaintiffs' claims, the Sixth Circuit ultimately held that monetary damages under Title IX are only available when a facially neutral policy is challenged when the plaintiff proves that the defendant intentionally violated Title IX.

III. BACKGROUND

A. Title IX History

Congress passed Title IX of the Education Amendments in 1972. Title IX states that "[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any educational program or activity receiving federal financial assistance . . . ." The statutory purpose of Title IX is to prevent the use of federal funds to support discriminatory practices and to give individuals protection against such discriminatory practices; in other words, Title IX is used to eliminate gender discrimination in educational institutions. The legislative history of Title IX shows that it was to be "a strong and comprehensive measure [that would] provide women with solid legal protection from the persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women."
In 1975, the United States Department of Health, Education and Welfare ("HEW") adopted regulations that interpreted Title IX. These regulations made it clear that Title IX applied to educational sports programs. In addition, 34 C.F.R. 106.41(a) includes both intercollegiate and interscholastic athletics within the "program or activity" requirements of Title IX. The regulations, therefore, make up an important part of litigation to enforce Title IX's requirement on interscholastic athletic programs.

An early and important Title IX case is Cannon v. University of Chicago. In Cannon, the Supreme Court interpreted § 1681 as providing an implied right of action under Title IX. This decision signified that an individual could bring an action pursuant to Title IX directly, without having to exhaust administrative procedures.

In the same year that the Supreme Court decided Cannon, the Office of Civil Rights of HEW, in an attempt to further clarify Title IX's statutory and regulatory mandate, issued a policy interpretation of Title IX ("Policy Interpretation"). This Policy Interpretation does not have the same "force of law" status as the Title IX statute and regulations, but still has been used as standard of Title IX compliance by many courts.
tion states that educational institutions must provide equal athletic opportunities in three general areas in order to comply with Title IX and its regulations. The three general areas are: (1) equivalent awarding of scholarships; (2) equal participation opportunities in athletics; and (3) equal treatment and benefits for both sexes.

An obstacle to Title IX, however, arrived with the Supreme Court decision of Grove City College v. Bell. In Grove City, the Court held that Title IX extended only to certain programs or activities that received federal funding, not to an educational institution as a whole. With respect to interscholastic athletics, Grove City consequently indicated that Title IX was applicable to a school's sports programs only if the school's athletic department received federal funds directly.

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34. See Policy Interpretation, supra note 33, at 71,413.
35. See id. at 71,414. With regard to the second requirement, the Policy Interpretation sets out a test to determine whether an institution is in compliance with Title IX's requirement of equal opportunity for participation. See id. The overall test is composed of three separate tests:

1. Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
2. Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
3. Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

Id. at 71,418.
37. See id. at 572 (noting that opposite holding would be inconsistent with the "program-specific" nature of the statute); see also O'Connor v. Davis, 126 F.3d 112, 117 (2d Cir. 1997) (recognizing that Supreme Court defined "education program or activity" narrowly in Grove City decision). In O'Connor, a student alleged that she had been subjected to sexual harassment by an employer at her internship program. See id. at 118-19. The Second Circuit held that a Title IX claim could not be asserted against the internship program center, since the center did not qualify as an education program as contemplated by Title IX. See id. at 118-19.
38. See Yasser & Schiller, supra note 22, at 373 (noting that Grove City limited Title IX scope to only include specific programs or activities within educational institution that directly received financial support from federal government).
Congress reacted to the *Grove City* decision by passing the Civil Rights Restoration Act of 1987 ("Section 1687"). Section 1687 was enacted in order to partially overrule the *Grove City* decision. According to Section 1687, Title IX applies to an education program or activity in its entirety if "any part" of such program or activity is given federal financial assistance. In demonstrating that *Grove City*'s "program-specific" approach was not the intended application of Title IX, Congress further clarified that, for the purposes of Title IX, a "program or activity" meant any program or activity of an educational institution so long as any part of the institution received federal financial assistance.

**B. Titles VI and VII**

Title IX was modeled after 42 U.S.C. § 2000d ("Title VI") of the Civil Rights Act of 1964. Title IX was enacted to "supplement the Civil Rights Act of 1964's ban on racial discrimination in the workplace and in universities." Title IX and Title VI share the same goals; in fact, the statutes have been said to mirror each other's substantive provisions. As a result, many courts, including the Su-

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40. See O'Connor, 126 F.3d at 117. *Grove City* held that an entity that receives federal funding indirectly may also be held to be a recipient of federal financial assistance for the purposes of Title IX. See id; see also Klinger v. Dep't of Corr., 107 F.3d 609, 615 n.7 (8th Cir. 1997) (recognizing that legislation was deemed to reverse Supreme Court's decision in *Grove City*, which had narrowed Title IX's application to institutions).

41. See Buckley v. Archdiocese of Rockville Centre, 992 F. Supp. 586, 588 (E.D.N.Y. 1998) (citing 34 C.F.R. § 106.2(h)(1975)). For the purposes of Title IX, a "recipient" is defined as follows:

> [A]ny State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any private agency, institution or organization, or other entity, or any other person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee or transferee.

*Id.*

42. See Yasser & Schiller, *supra* note 22, at 373-74 (citing 20 U.S.C. § 1687 (1994)). Also noted was *Horner I* 's statement that "Congress has made clear its intent to extend the scope of Title IX's equal opportunity obligations to the furthest reaches of an institution's programs." *Horner I*, 43 F.3d 265, 272 (6th Cir. 1994).

43. See Cohen v. Brown Univ., 101 F.3d 155, 167 (1st Cir. 1996) (noting Supreme Court statement in *Cannon* that "[t]he drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been . . . .").

44. Yusuf v. Vassar Coll., 35 F.3d 709, 714 (2d Cir. 1994).

45. See *id.* (citing Grove City Coll. v. Bell, 465 U.S. 555, 566 (1984)); see also Jeffrey H. Orleans, *An End to the Odyssey: Equal Athletic Opportunities for Women*, 3
Supreme Court, have interpreted Title IX issues by looking to Title VI caselaw. In addition, many courts have also looked to 42 U.S.C. § 2000e ("Title VII"), which prohibits discrimination in employment, in interpreting and applying Title IX.

Guardians Association v. Civil Service Commission of the City of New York is a Title VI case that has provided helpful analysis in evaluating Title IX cases. In Guardians, black and Hispanic police officers sued the city of New York under Title VI, alleging discriminatory examinations that resulted in disproportionate layoffs of their members. Although unable to agree on an opinion, five members of the Court agreed that one did not have to prove discriminatory intent to establish a violation of Title VI. The

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DUKE J. GENDER L. & POL'Y 131, 133-34 (1996) (noting that Title IX and Title VI share same constitutional underpinnings); Jill Suzanne Miller, Note: Title VI and Title VII: Happy Together as a Resolution to Title IX Peer Sexual Harassment Claims, 1995 U. ILL. L. REV. 699, at 715 (stating that "the similarity [between Title VI and IX] is striking and intentional" and that "[t]itle IX's provisions themselves suggest that Title VI's regulations should be incorporated into those of Title IX").

46. See Yusuf, 35 F.3d at 714 (citing Mabry v. State Bd. of Cmty. Colls. and Occupational Educ., 813 F.2d 311, 316-17 (10th Cir. 1987)); see also Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 286 (1998) (noting that Title VI and Title IX operate in same manner and are parallel to each other except that Title IX prohibits sex discrimination while Title VI prohibits race discrimination); Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 70 (1992) (citing Guardians for its Title VI analysis on Title IX issue).

47. See Mabry, 813 F.2d at 317 (finding "no persuasive reason" not to apply Title VII's substantive standards to Title IX suit). The Mabry court regarded Title VII as the most appropriate analogue to Title IX because the two statutes prohibited the same conduct (sex discrimination), and because the two titles used similar language used in portions of the titles. See id.


49. See Horner, 206 F.3d at 690 (noting that Spending Clause analysis was applied to Title IX case as it had been applied in Guardians, a Title VI case).

50. See Guardians, 463 U.S. at 585. The written examinations were administered by New York City and were used to make entry-level appointments to the city's Police Department. See id. Each plaintiff involved in the suit had passed the test and had been hired as a police officer. See id. Appointments, however, were made in order of test score, and the plaintiffs were hired later than similarly situated whites. See id. This appointment process therefore, lessened the plaintiffs' seniority and related benefits. See id. Additionally, when the Police Department hired officers, the Department first hired those officers, who had scored lower on the exams. See id. As a result, the layoffs disproportionately affected plaintiff black and Hispanic officers. See id. The district court found that the challenged examinations had a discriminatory impact on the scores and pass rates of blacks and Hispanics and therefore, were not job-related. See id. The Court of Appeals affirmed these findings. See id.

51. See id. at 592-93 (stating that, "it must be concluded that Title VI reaches unintentional, disparate-impact discrimination"). The Court looked to the legislative history of Title VI and recognized that the statute had been consistently applied in that manner for almost two decades without Congressional interference. See id.
Court majority, however, went on to conclude that a private plaintiff should only recover injunctive, non-compensatory relief for unintentional violations of Title VI.\(^\text{52}\) In announcing the judgment of the Court, Justice White looked to statutory language and past cases to conclude that Title VI includes unintentional, disparate-impact discrimination as well as intentional discrimination.\(^\text{53}\) Justice White then turned to a discussion of the Spending Clause analysis to determine whether compensatory damages should be allowed for unintentional violations of Title VI.\(^\text{54}\) In making this determination, the Court relied on *Pennhurst State School and Hospital v. Halderman*, stating that "'in no [Spending Clause] case . . . have we required a State to provide money to plaintiffs, much less required' a State to assume more burdensome obligations."\(^\text{55}\) Justice White (as well as four other justices) thus concluded that compensatory relief, or any other relief based on violations of conditions of federal funds, was unavailable as a private remedy for unintentional Title VI violations.\(^\text{56}\)

In response to this conclusion, Justice Marshall dissented to argue specifically that compensatory relief should be awarded to private Title VI plaintiffs without proof of discriminatory animus.\(^\text{57}\) Additionally, Justice Stevens, joined by Justices Brennan and Blackmun, dissented to state that private individuals should be able to recover appropriate relief to victims of discrimination from federal funding recipients.\(^\text{58}\) The next term, a unanimous Court read the *Guardians* opinion to state that "[a] majority of the Court agreed

\(^{52}\) See id. at 607 (stating, "I am convinced that discriminatory intent is not an essential element of a Title VI violation, but that a private plaintiff should recover only injunctive, noncompensatory relief for a defendant's unintentional violations of Title VI."). The Court arrived at this conclusion in part by comparing Title VI to Title II, observing that, "'[l]ike the drafters of Title II, they did not intend to allow private plaintiffs to recover monetary awards." Id. at 601.

\(^{53}\) See id. at 592 (noting that, because the word "discrimination" is ambiguous, it should be subject to same construction that had been given to Title VII, at least concerning disparate-impact discrimination).

\(^{54}\) See id. at 595-96 (recognizing that "make whole" remedies are not usually appropriate in private actions seeking relief for violations of statutes that had been passed by Congress pursuant to its Spending Clause power (citing Pennhurst State Sch. and Hosp. v. Halderman, 451 U.S. 1, 15 (1981))).

\(^{55}\) *Guardians*, 463 U.S. at 597 (quoting *Pennhurst*, 451 U.S. at 29).

\(^{56}\) See id. at 602-03 (observing that no legislative history rebuts *Pennhurst* presumption of granting only limited injunctive relief for unintentional violations of statutes passed pursuant to spending power).

\(^{57}\) See id. at 615 (Marshall, J., dissenting). Marshall supported his dissent by noting that when Congress intends to place restrictions on private rights of action, it has explicitly said so; however, nothing in Title VI or its history supported such a restriction on a court's ability to remedy a statutory violation. See id. at 628.

\(^{58}\) See id. at 638 (Stevens, J., dissenting).
that . . . relief is available to private plaintiffs for all discrimination, whether intentional or unintentional, that is actionable under Title VI."59 Although the Guardians case is comprised of a variety of concurrences and dissents, it is useful for its majority's decision that Title VI does not allow compensatory damages without a showing of an intentional violation.60

C. Title IX Sexual Harassment Cases

At the time of its enactment, many plaintiffs used Title IX to challenge discriminatory admissions policies, sex-based allocation of funds in school sports programs, and discriminatory hiring and promotion policies.61 Recent cases, however, often use Title IX to combat sexual harassment.62 Many cases have looked at intentional discrimination under Title IX in this context.63

Franklin v. Gwinnett County Public Schools64 examines teacher-on-student sexual harassment under Title IX. In this case, a female student alleged that the school and its employees knew that a teacher sexually harassed her but did nothing to stop it.65 Until this case, lower courts had been split on the issue of whether Title IX authorized an award of monetary damages.66

60. See Guardians, 463 U.S. at 607; see also Ferguson v. City of Phoenix, 157 F.3d 668, 674 (5th Cir. 1998). The Ferguson court looked to Guardians to determine whether compensatory relief should be allowed under Title II of the American With Disabilities Act and Rehabilitation Act. See id. The court ultimately held that compensatory damages were not available under Title II without a showing of discriminatory intent. See id.
62. See id. at 381. The Note argued that in peer harassment cases, school districts should be liable under a "knew or should have known" standard where the school's intent to discriminate would be determined by circumstances of each case. See id. at 382.
64. 503 U.S. 60 (1992).
65. See id. 63-64. The district court dismissed the complaint on the grounds that Title IX does not authorize an award of damages; the Court of Appeals affirmed this finding. See id. at 64.
66. Compare Franklin v. Gwinnett County Pub. Sch., 911 F.2d 617, 622 (11th Cir. 1990) (holding that Title IX did not allow monetary damages recovery), with Pfeiffer v. Marion Ctr. Area Sch. Dist., 917 F.2d 779, 787-89 (3d Cir. 1990) (holding that Title IX did allow monetary damages recovery).
The Supreme Court in *Franklin* referred to its earlier decision in *Guardians*, stating that "a clear majority expressed the view that damages were available under Title VI in an action seeking remedies for an intentional violation . . . ." 67 In doing so, the *Franklin* Court recognized the general rule that, without direction to the contrary from Congress, federal courts may award any appropriate relief brought pursuant to a federal statute.68 The Court then addressed the issue of whether Congress intended to limit relief under Title IX.69 In considering Congress' intent, the Supreme Court ultimately concluded that Congress did not intend to limit the remedies available in a Title IX suit, and that a damages remedy was available for an action brought to enforce Title IX.70

Finally, and most importantly, the *Franklin* Court discussed respondents' argument that the normal presumption, favoring all appropriate remedies, should not apply because Congress enacted Title IX pursuant to its Spending Clause power.71 In its discussion, the Court referred to the *Pennhurst* decision, in which the Court previously observed that remedies were limited under Spending Clause statutes "when the alleged violation was *unintentional*."72 As the *Franklin* Court explained, "[t]he point of not permitting monetary damages for an unintentional violation is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award."73

68. See id. (noting past cases in which courts granted relief under Title VI).
69. See id. at 71 (observing that *Cannon* Court concluded that statute did not support express right of action, and Congress said nothing about applicable remedies for implied rights of action).
70. See id. at 72, 76 (using two amendments to Title IX enacted after *Cannon* as basis for conclusion). The Court determined ultimately that Title IX is enforceable through an implied right of action for monetary damages as well as injunctive relief. See id.
71. See id. at 74 (recognizing that respondents' argument was consistent with Court of Appeals' reasoning).
72. *Franklin*, 503 U.S. at 74 (citing *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 28-29 (1981)). The *Franklin* Court did not expressly state, however, that Title IX was a Spending Clause statute. See *Yasser*, supra note 22, at 374 (observing that although *Franklin* Court had not expressly decided whether Title IX was Spending Clause statute, it held that compensatory damages were available for intentional violations of Title IX); see also infra note 140 and accompanying text.
73. *Franklin*, 503 U.S. at 74-75 (citing *Pennhurst*, 451 U.S. at 17) (noting that notice problem does not arise in case where intentional discrimination is alleged). The Court also relayed its belief that Congress must not have intended for federal moneys to be expended to support intentional actions that it sought to prohibit. See id. at 75.
Furthermore, in *Gebser v. Lago Vista Independent School District*, the Supreme Court held that a recipient of federal funds would be liable in damages under Title IX if it was deliberately indifferent to known acts of sexual harassment by a teacher. In *Gebser*, a student and teacher had a sexual relationship, but the relationship was never reported to school officials. Again, the Supreme Court focused on the issue of notice, concluding that it would "frustrate the purposes' of Title IX to permit a damages recovery against a school district for a teacher’s sexual harassment . . . without actual notice to a school district official."

The Supreme Court further extended its previous rulings concerning teacher-student sexual harassment to include student-student harassment in *Davis v. Monroe County Board of Education*. Again citing the Spending Clause analysis that recipients of federal funding must have adequate notice of potential liability, the Court held that an action under Title IX would lie where a funding recipient acted with deliberate indifference to known acts of harassment. The Court added that the harassment had to be "so severe, pervasive, and objectively offensive that it can be said to deprive the


75. See *Gebser*, 524 U.S. 274 (observing that, without further direction from Congress, implied damages remedy should be similar to express remedial scheme: that damages remedy would not lie unless official that had authority to address and correct alleged discrimination had actual knowledge of discrimination but failed to respond).

76. See id. at 278. The plaintiff testified that, although she knew that the defendant’s conduct was improper, she did not know how to react and she wanted to continue having him as a teacher. See id. The relationship was discovered when a police officer found the couple engaging in sexual intercourse. See id.

77. Id. at 285 (noting that Congress did not expressly create private right of action under Title IX; therefore, statutory text did not shed light on Congressional intent in terms of available remedies). Thus, the court tried to infer how the 1972 Congress would have addressed the issue if the action had been included as an express provision in the statute. See id. (citing Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 178 (1994)).

78. 526 U.S. 629 (1999). In the *Davis* case, a female student sued under Title IX, alleging that she had been the victim of sexual harassment by another student in her class. See id. at 632. The district court had dismissed the case on the grounds that "student-on-student," or peer, harassment did not provide a private cause of action under the statute. See id. at 633. The Court of Appeals affirmed this finding. See id. The Supreme Court reversed, finding that a plaintiff may bring a private damages action against a school board in cases of student-on-student harassment, but only where the funding recipient acted with deliberate indifference to known acts of harassment. See id.

79. See id. at 640, 648. The Court observed that since Title IX was consistently treated as Spending Clause legislation, private damages must only be available when federal funding recipients had notice of their alleged misconduct. See id. at 640. Again quoting *Pennhurst*, the Court noted that there cannot be an acceptance of a contract if a State is not aware of conditions imposed on it. See id.
victims of access to the educational opportunities or benefits provided by the school."\(^{80}\)

D. Other Courts' Decisions

In *Pederson v. Louisiana State University*,\(^ {81}\) female students attending Louisiana State University ("LSU") filed suit against the school, alleging that LSU was in violation of Title IX.\(^ {82}\) The district court concluded that a Title IX plaintiff had to prove intentional discrimination by a federal funding recipient before recovering monetary damages.\(^ {83}\) The *Pederson* appellate court declined to address the accuracy of that conclusion.\(^ {84}\)

Other courts have also discussed the intent requirement of Title IX, although not specifically in the context of compensatory damages.\(^ {85}\) In *Yusuf v. Vassar College*,\(^ {86}\) for example, the district court noted that neither the Supreme Court nor the Second Circuit Court of Appeals has determined whether intent must be shown in Title IX cases.\(^ {87}\) Although recognizing the wide range of views on this issue, the *Yusuf* court leaned towards the conclusion that a Title IX plaintiff could prevail on the basis of disparate impact alone.\(^ {88}\)

\(^{80}\). *Id.* at 650, 651 (noting that district's knowing refusal to take any action in response to discrimination "would fly in the face of Title IX's core principles . . . ").

\(^{81}\). 213 F.3d 858 (5th Cir. 2000).

\(^{82}\). *See id.* at 864 (alleging that LSU denied students equal opportunity to compete in intercollegiate athletics and for athletic scholarships, equal access to benefits and services provided to varsity intercollegiate athletes, and discriminated against females in terms of athletic scholarships and compensation paid coaches).

\(^{83}\). *See id.* at 879-80. Although the district court found that the claims at issue in the case were a "very close" question, it ultimately held that LSU did not intentionally violate Title IX. *See id.* at 880. The appellate court reversed, holding that LSU did intentionally violate Title IX. *See id.*

\(^{84}\). *See id.* at 880 n.17 (noting that court need not address that issue because LSU did intentionally violate Title IX, and appellants had not argued issue of whether damages should be available for unintentional discrimination).

\(^{85}\). *See, e.g.*, Roberts v. Colo. State Bd. of Agric., 998 F.2d 824, 833 (10th Cir. 1993) (holding that Title IX claim required proof of discriminatory intent); Haffer v. Temple, 678 F. Supp. 517, 540 (E.D. Pa. 1987) (holding that plaintiffs need not prove discriminatory intent to succeed on Title IX claim).


\(^{87}\). *See Yusuf*, 827 F. Supp. at 956 (noting that courts examining issue are divided).

\(^{88}\). *See id.* at 956-57 (observing that "a number of courts have held that a Title IX plaintiff could prevail on the basis of disparate impact"). *Compare Cannon v. Univ. of Chi.*, 648 F.2d 1104, 1109 (7th Cir. 1981) (finding that violation of Title VI requires intentional discriminatory act and same standard should be used for Title IX); Fulani v. League of Women Voters Educ. Fund, 684 F. Supp. 1185, 1193 (S.D.N.Y. 1988) (holding that Title IX requires showing of intentional discrimination); *and Nagel v. Avon Bd. of Educ.*, 575 F. Supp. 105, 111 (D. Conn. 1983) (stating that, since plaintiff had failed to prove intentional discrimination, her
Furthermore, in *Roberts v. Colorado State Board of Agriculture*, the Tenth Circuit also faced the question of whether Title IX required proof of discriminatory intent. The defendant used a Title VI analogy to argue that intent was a requisite for a Title IX violation. The court concluded that a Title IX plaintiff need not prove an intentional violation in order to succeed on a claim.

**IV. NARRATIVE ANALYSIS**

**A. The Majority Opinion**

The *Homer* court concluded that the plaintiffs’ claims for monetary damages failed because the plaintiffs had not shown any evidence of intentional discrimination. In response to the district court’s holding, the plaintiffs argued that Title IX does not require intentional discrimination in order to recover monetary damages. In rejecting this argument, the Sixth Circuit relied on a number of pertinent Supreme Court cases, as well as other statutes after which Title IX was modeled.

In reaching its decision, the *Homer* majority looked at a history of key Title IX cases and ultimately determined that proof of intent is required in order to get compensatory relief for any kind of Title IX claim under Title IX must fail); *with* Sharif v. N.Y. State Educ. Dept., 709 F. Supp. 345, 361 (S.D.N.Y. 1989) (holding that plaintiffs need not prove intentional discrimination under Title IX); *and* Hafer v. Temple Univ. of Pa. Sys. of Higher Educ., 678 F. Supp. 517, 539 (E.D. Pa. 1988) (same).

89. 998 F.2d 824 (10th Cir. 1993).

90. *See Roberts*, 998 F.2d at 832. The court ultimately determined that the district court did not err in failing to require proof of discriminatory intent. *See id.* at 833.

91. *See id.* at 832. The defendant reasoned that, since Title IX was modeled after Title VI, and discriminatory intent is required to prove a violation of Title VI, then discriminatory intent must be required to prove a violation of Title IX as well. *See id.*

92. *See id.* at 833. In making this decision, the court chose to look to Title VII over Title VI, since, “despite the fact that Title IX was explicitly modeled on Title VI, this court has held that Title VII . . . is ‘the most appropriate analogue when defining Title IX’s substantive standards.’” *Id.* at 832. The court then concluded by observing that it was “well settled that Title VII does not require proof of overt discrimination.” *Id.* at 833.


94. *See id.* (contending that district court erred in granting summary judgment to defendants).

95. *See, e.g.*, Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 76 (1992) (holding that monetary damages were available for intentional violation of Title IX); Guardians Ass’n v. Civil Serv. Comm’n, 463 U.S. 582, 597 (1983) (noting relationship between monetary damages and proof of intent); Cannon v. Univ. of Chi., 441 U.S. 677, 728 (1979) (affirming that implied right of action exists under Title IX).
The Sixth Circuit focused its discussion on cases that had been interpreted under the Spending Clause analysis, particularly focusing on the notice requirement of such legislation, as well as the Supreme Court's more recent interpretations concerning sexual harassment in schools.

The court began its discussion with cases that analogized Title IX to Title VI. It began with Cannon v. University of Chicago, which first construed an implied right of action under Title IX. The majority then turned to the Court's decision in Guardians Association v. Civil Service Commission of the City of New York, in which a plurality of the Court held that Title VI allowed a private right of action providing certain declarative and injunctive relief for unintentional violations. The Horner majority also noted that a different plurality of the Court in Guardians espoused the view that monetary damages were not available for unintentional discrimination. In espousing this view, the Horner court noticed the Spending Clause rationale invoked by Guardians.

The Sixth Circuit then examined various cases involving sexual harassment in schools, beginning with teacher-on-student situations, then extending to student-on-student situations. In Franklin v. Gwinnett County Public Schools, the Supreme Court held that damages were not available for Title IX violations from the school district in a teacher-on-student sexual harassment case unless the discrimination was intentional. The Sixth Circuit again noted the same Spending Clause analysis applied in Franklin that had

96. See Horner, 206 F.3d at 689 (noting that, in all relevant cases, Supreme Court consistently has invoked "contract" rationale; that, under Spending Clause legislation, relationship between federal government and federal funding recipient is consensual and recipient must have notice before being subject to money damages).

97. See id. (explaining Supreme Court's rationale that Title IX was patterned after Title VI of Civil Rights Act of 1964, which had been construed as containing implied right of action) (citing Cannon, 441 U.S. at 696-703).

98. See id. at 690 (noting that relationship between monetary damages and proof of intent first emerged in Guardians).

99. See id. (recognizing that Justice White's rationale for ruling did not gain majority).

100. See id. (explaining that "make whole" remedies are not ordinarily appropriate in private actions seeking relief for violations of statutes passed by Congress pursuant to its power under the Spending Clause") (quoting Pennhurst State Sch. and Hosp. v. Halderman, 451 U.S. 1, 15 (1981)).

101. See Horner, 206 F.3d at 690-93 (noting that all cases cited Spending Clause analysis from Guardians).

102. See id. at 690 (observing that Justice White applied same Spending Clause analysis to Title IX that he used in Guardians under Title VI).
been applied in *Guardians*. The *Horner* court then turned to another peer harassment case, *Gebser v. Lago Vista Independent School District*, which also invoked the Spending Clause rationale of *Guardians*. The *Horner* majority looked to the *Gebser* case to note the distinctions between Title IX and Title VII. Finally, the Sixth Circuit in *Horner* looked at the most recent Supreme Court case in the sexual harassment context, *Davis v. Monroe County Board of Education*. In *Davis*, the Court considered whether a damages action under Title IX would lie against a school board for student-on-student harassment. The Sixth Circuit recognized that *Davis* extended the *Gebser* rule to student-on-student sexual harassment and again cited the Spending Clause analysis, holding that private damages actions were available only where “federal funding recipients act[ed] with ‘deliberate indifference’ to ‘known’ acts of harassment.”

The *Horner* majority ultimately determined the intent issue by noting that, although the Supreme Court had not expressly ruled on this point, the Court would likely hold that proof of intentional discrimination was required for money damages under Title IX when a facially neutral policy was challenged. The court ended this conclusion by reiterating the importance of the Spending Clause analysis and observing that notice was the crucial factor in not allowing monetary damages for unintentional violations. As the *Horner* court quoted from *Franklin*, “[t]he point of not permitting monetary damages for an unintentional violation is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award.”

The *Horner* majority then addressed the question of which standard to apply in determining intent when a facially neutral policy

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103. See id. at 690-91 (noting that Court applied *Pennhurst* rationale that remedies were limited under Spending Clause statutes when alleged violation was unintentional).

104. See id. at 691 (observing once again that Title IX was modeled after Title VI) (citing *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 288-89 (1998)).

105. See id. (explaining that conceptual framework distinguished Title IX from Title VII).

106. See *Horner*, 206 F.3d at 692.

107. See id. (holding that federal funding recipients must act with deliberate indifference to known acts of harassment) (citing *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 639-40 (1999)).

108. Id.

109. See id. (observing that Supreme Court consistently has applied Justice White’s Spending Clause analysis from *Guardians* in Title IX decisions).

110. Id. at 692 (quoting *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 74 (1992)).
was challenged. The court noted that the current test, the deliberate indifference test, had only addressed cases involving sexual harassment, and thus would not be appropriate to apply in the present situation. Stating that this case was the Title IX equivalent to Guardians, the Sixth Circuit emphasized that Justice White, in Guardians, advocated the "discriminatory animus" standard for intentional discrimination when a plaintiff challenged a facially neutral policy. Ultimately, the Homer majority concluded that no standard needed to be adopted at that time.

The Homer majority then turned to the question of the plaintiffs' proofs of intentional discrimination under Title IX. In making its decision, the court looked to the district court as well as the Homer I findings. The court noted that the Homer I panel looked to the Policy Interpretation and its requirements for a Title IX violation. The Homer court ultimately held that the plaintiffs

111. See Homer, 206 F.3d at 692-93 (noting that only current and clear test was that of deliberate indifference).
112. See id. at 693 (citing Pederson v. La. State Univ., 213 F.3d 858, 882 (5th Cir. 2000)). The Homer court further noted that "intent" in the sexual harassment context meant "actual notice" of third party abuse and a failure to stop the known abuse. See id.
113. See id. (citing Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 584 (1983)).
114. See id. (concluding that court need not adopt any test since plaintiffs in present case did not even demonstrate violation of Title IX, let alone intentional violation).
115. See id. at 693-94 (asserting as incorrect plaintiffs' argument that they had established prima facie case under Title IX).
116. See Homer, 206 F.3d at 694 (noting Homer I panel's holding that there were genuine issues of fact regarding Title IX violation).
117. See id. at 694-95. The Homer I panel observed that Title IX regulations required that institutions provide gender-blind equality of athletic opportunity to students. See id. at 694 (citing Homer I, 43 F.3d at 273). Such a determination in turn required an evaluation of several factors, including "[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members in both sexes[.]") Id. at 694 (citations omitted). To satisfy the effective accommodation requirement, 34 C.F.R. § 106.41 (c)(1) states that "an institution must effectively accommodate the interests of both sexes in both the selection of sports and the levels of competition, to the extent necessary to provide equal athletic opportunity." Id. (citing Policy Interpretation, Section VII.C.1., 44 Fed. Reg. at 71,417 (1979) (to be codified at 45 C.F.R. pt. 86) (emphasis omitted). Regarding the interests of both sexes, Homer I observed that the interests of member schools was not necessarily the same as the interests of the students, and the record did not reveal the interests of female students at other schools. See id. at 695 (citing Homer I, 43 F.3d at 274). As to the selection of sports, the Homer I court noted that Title IX plaintiffs must establish that:

(1) The opportunities for members of the excluded sex have historically been limited;
(2) There is sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team; and
had not proven a Title IX violation.\textsuperscript{118} The court further noted that, even if the plaintiffs had proven a violation in this case, they still would have failed to prove an intentional violation, since there was no evidence of discriminatory animus.\textsuperscript{119} Lastly, the Homer court denied the plaintiffs' request for attorneys' fees.\textsuperscript{120}

B. The Dissenting Opinion

The dissent took a different approach than that taken by the majority. Noting that the primary issue in Homer was whether the plaintiffs produced any evidence of intentional discrimination as a predicate for compensatory damages, the dissent stated that the answer to this question depended entirely on the definition of "intentional discrimination" under Title IX.\textsuperscript{121} In answering this question, the dissent ultimately concluded that the deliberate indifference standard was most appropriate to use.

\begin{itemize}
  \item Members of the excluded sex do not possess sufficient skill to be selected for a single integrated team, or to compete actively on such team if selected. \textsuperscript{\textit{Id.}} (citing Homer \textit{I}, 43 F.3d at 274) (quoting Policy Interpretation, Section VII.C.4.b., 44 Fed. Reg. 71,418 (1979) (to be codified at 45 C.F.R. pt. 86)). With respect to these elements, the Homer \textit{I} court held that although the plaintiffs had proven the first requirement, they had not proven the second or third. \textsuperscript{\textit{Id.}} (citing Homer \textit{I}, 43 F.3d at 274).
  \item As to the selection of the levels of competition, the court stated that the plaintiffs had offered no proof that their interests were not being met, despite the policy that allowed them to play on boys' fast-pitch softball teams. \textsuperscript{\textit{Id.}} at 696.
  \item The Homer court held that although the plaintiffs had proven the first requirement, they had not proven the second or third. \textsuperscript{\textit{Id.}} at 697. According to the majority, the plaintiffs and the dissent merely disguised a "constructive notice" argument as a "deliberate indifference" test; that because there was a male but not female team, the defendants must have known that they were treating males and females differently. \textsuperscript{\textit{Id.}} at 697. The Homer majority rejected this argument because it read Title IX as requiring perfect parity. \textsuperscript{\textit{Id.}} The majority asserted, however, that the statute itself does not require gender balance. \textsuperscript{\textit{Id.}} at 697 (citing 20 U.S.C.A. § 1681 (b) (West 1990)). Moreover, the court noted that it would be "impossible for the defendants to be on notice that they were violating Title IX simply because they had only sponsored boys' fast-pitch softball," and that it was undisputed that females were allowed to try out for traditional male sports. \textsuperscript{\textit{Id.}} Thus, according to the Homer court, there could not be any finding that the defendants had knowingly violated Title IX in this case. \textsuperscript{\textit{Id.}}
  \item The Homer court held that although the plaintiffs had proven the first requirement, they had not proven the second or third. \textsuperscript{\textit{Id.}} at 697-98 (noting that, to recover attorneys' fees, party must either receive at least some relief on merits of claim (such as judgment, injunction, or consent decree), or show that lawsuit was primary "catalyst" for causing defendant to alter conduct favorably toward plaintiff, and that plaintiffs here did not meet burden) (citing Hewitt v. Helms, 482 U.S. 775, 760-61 (1987); Payne v. Bd. of Educ., Cleveland City Sch., 88 F.3d 392, 397 (6th Cir. 1996)).
  \item Homer, 206 F.3d at 698-99 (Jones, J., dissenting) (concluding that deliberate indifference standard was most appropriate standard to use).
\end{itemize}
ference standard governed for “intentional” violations of Title IX.\textsuperscript{122}

The dissent began by stating that, when federal rights have been invaded, it is up to the courts to adjust their remedies to grant such relief as they deem necessary.\textsuperscript{123} The dissent further declared that, in order to engage in a proper analysis, the court must look to Title IX itself.\textsuperscript{124} After defining discriminatory animus, the dissent espoused its view that the animus standard advocated by the majority would almost “never be met in a Title IX athletic-equity case.”\textsuperscript{125} The dissent then explored the inequalities that still exist for women in the area of college athletics, despite the significant gains that have been achieved.\textsuperscript{126}

The dissent examined the discriminatory animus standard and found within it a number of flaws. First, the dissent maintained that the animus standard would only frustrate, rather than promote, the remedial purposes of Title IX.\textsuperscript{127} Next, the dissent declared that the standard itself rested on flimsy legal ground.\textsuperscript{128} The dissent upheld its view by citing a number of Supreme Court cases, as well as many other courts, which have been very reluctant to hold a similar statute to the animus standard.\textsuperscript{129} The dissent particularly focused

122. See id. at 698 (Jones, J., dissenting) (noting that majority suggested in dicta that discriminatory animus was proper standard to evaluate intentional discrimination).
123. See id. (Jones, J., dissenting) (citing Bell v. Hood, 327 U.S. 678, 684 (1946); Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 71 (1992); Justice v. Pendleton Place Apartments, 40 F.3d 139, 143 (6th Cir. 1994)).
124. See id. at 700 (Jones, J., dissenting) (stating that, although majority opinion has many references to Title IX, it never closely examines Title IX’s provisions).
125. Id. at 701 (Jones, J., dissenting) (defining discriminatory animus towards women as having “a purpose that focuses upon women by reason of their sex . . . directed specifically at women as a class” (citing Bray v. Alexandria Women’s Health Clinic, 506 U.S. 263, 269-70 (1993)) (comparing with Guardians Ass’n v. Civil Serv. Comm’n, 463 U.S. 582, 632 (1983) (Marshall, J., dissenting)).
126. See Horner, 206 F.3d at 701 (Jones, J., dissenting) (citing study conducted on Title IX’s Silver Anniversary that recognized that females still did not have their fair share of opportunities to compete).
127. See id. at 701-02 (Jones, J., dissenting) (noting that “animus” standard allowed defendants to remain ignorant of Title IX obligations with little fear of having to pay damages for depriving students of equal athletic opportunities).
128. See id. at 703 n.3 (Jones, J., dissenting) (citing Guardians as sole source for standard and noting that Guardians never produced a consistent ruling for animus standard).
129. See id. at 702-03 (Jones, J., dissenting) (citing Greater L.A. Council on Deafness v. Zolin, 812 F.2d 1103, 1106-07 (9th Cir. 1987); Bartlett v. N.Y. State Bd. of Law Exams, 156 F.3d 321, 330-31 (2d Cir. 1998)). The dissent noted that, in each of these cases, the federal funding recipient denied equal opportunity to plaintiffs under § 504 of the Rehabilitation Act of 1973, another Spending Clause anti-discrimination statute. See Horner, 206 F.3d at 703 n.3 (Jones, J., dissenting).
on *Davis*, where the Supreme Court could have applied the animus standard as a prerequisite for monetary damages under Title IX, but instead ruled that the "deliberate indifference" standard would apply to find intentional discrimination.¹³⁰

V. CRITICAL ANALYSIS

The Supreme Court has not specifically determined whether a plaintiff must show intent in Title IX cases.¹³¹ Many cases, however, have tried to determine what the result would be if the Court did address this issue.¹³² The *Horner* court appropriately found that, because Title IX has been deemed to be enacted under Congress' Spending Clause powers, intent must be shown in these cases in order to prevent liability without notice.¹³³

The *Horner* court correctly noted the Supreme Court's holding in *Franklin* that if a school has intentionally discriminated against a victim, then the victim may receive damages.¹³⁴ Many courts, including *Horner*, have read *Franklin* to mean that an intentional violation of Title IX is *required* in order to recover compensatory damages.¹³⁵ However, "[t]he holding in *Franklin* merely states that compensatory damages are available for intentional violations of Title IX."¹³⁶ Thus, although the *Franklin* Court hinted strongly

In such cases, there was no "animus" against the plaintiff; rather, the defendants were "indifferent" to their federal obligation, which, according to the dissent, was much like Title IX athletic case defendants. *See id.* (Jones, J., dissenting). Still, the violations were held to be intentional because the defendants had full knowledge of their discriminatory conduct. *See id.* (Jones, J., dissenting).

¹³⁰ See *Horner*, 206 F.3d at 703-04 (Jones, J., dissenting).

¹³¹ See *Yusuf v. Vassar Coll.*, 827 F. Supp. 952, 956 (S.D.N.Y. 1993) (stating that Supreme Court has not determined intent element under Title IX).

¹³² See, e.g., *Horner*, 206 F.3d at 692 (stating, "although the Supreme Court has not expressly ruled on this point, we think that it would likely hold that proof of intentional discrimination is a prerequisite for money damages under Title IX . . . .").

¹³³ See *id.* at 692 (noting that Supreme Court has consistently applied Spending Clause analysis and *Guardians* to its Title IX decisions).


¹³⁵ See *Horner*, 206 F.3d at 690 (noting that, "[t]he *Franklin* Court held that damages were not available for Title IX violations . . . unless the discrimination was intentional"); *see also Smith v. Metro. Sch. Dist.*, 128 F.3d 1014, 1032 (7th Cir. 1997) (declaring that, "[t]he Supreme Court in *Franklin* . . . concluded that monetary damages are not available for unintentional violations of Title IX . . . ."").

¹³⁶ Ferguson v. City of Phoenix, 157 F.3d 668, 674 (9th Cir. 1998) (noting that *Franklin* holding was consistent with *Guardians* and *Ferguson* holdings). In *Franklin*, the Supreme Court addressed respondents' argument that, since remedies were limited under Spending Clause statutes when the alleged violation was unintentional, the same should apply to intentional violations. *See Franklin*, 503 U.S. at 73-74. The *Franklin* Court disagreed with this argument, stating that, "[t]he
against monetary damages for an unintentional violation of Title IX, there was no specific holding as such. As a result, the courts must turn elsewhere to determine whether intent is required for compensatory damages under Title IX.

In examining Title IX, the majority in Horner turned to the Spending Clause analysis articulated in Guardians. The Horner court correctly interpreted the Pennhurst holding that remedies were limited under Spending Clause statutes when the alleged violation was unintentional. Although Title IX has not been explicitly stated to be a Spending Clause statute, many courts have interpreted it as such. Indeed, the Supreme Court in Davis stated that, "we have repeatedly treated Title IX as legislation enacted pursuant to Congress' authority under the Spending Clause . . . ."

If Title IX is thus definitively determined to be legislation developed under the Spending Clause authority of Congress, an issue concerning unintentional violations arises, due to the "contract" rationale. The "contract" rationale is defined as follows: when Congress acts pursuant to its Spending power, it creates legislation that is "much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed condi-

point of not permitting monetary damages for an unintentional violation is that the receiving entity . . . lacks notice that it will be liable for a monetary award . . . . This notice problem does not arise in a case . . . in which intentional discrimination is alleged." Id. at 74-75 (citing Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

137. See Franklin, 503 U.S. at 75 (1992); see also Ferguson, 157 F.3d at 674 (stating, "Franklin does not explain what relief may be appropriate in cases of unintentional violations . . . .").

138. See Horner, 206 F.3d at 690 (noting that Justice White applied same Spending Clause analysis to Title IX that he used in Guardians under Title VI).

139. See id. at 690-91 (observing that point of not permitting monetary damages for unintentional violations is that receiving entities of federal funds lack notice that it is liable for monetary awards) (citing Franklin, 503 U.S. at 74-75).

140. See, e.g., Franklin, 503 U.S. at 74-75 & n.8. The defendants in Franklin argued that Title IX should not be viewed solely as having been enacted under Congress' Spending Clause powers, because Title IX also rested on powers derived from Section 5 of the Fourteenth Amendment. See id. at 75 n.8. The Supreme Court concluded that a money damages remedy was available for an intentional violation of Title IX irrespective of the source of Congress' power in enacting the statute. See id; see also Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 287 (1998).

141. Horner, 206 F.3d at 692 (citing Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 639 (1999)).

142. See id. (noting Davis reasoning that, when legislation is treated as under Spending Clause authority, private damages actions are only available when recipients of federal funding had actual notice of potential liability).
In interpreting the language in spending litigation, courts therefore recognize that a state cannot knowingly accept the contract if the state is unaware of the conditions imposed by the legislation or is unable to determine what is expected of it. In light of the "consensual relationship between the federal agency and recipient," the Horner court concluded that, "the recipient must be aware of the conditions attached to the receipt of those funds." Allowing monetary damages for unintentional violations could thus be extremely problematic because the funding recipient may be liable for large sums of money without having any advance notice that they are committing a wrong. In this context, the Horner court correctly concluded that monetary damages should not be available for an unintentional violation of Title IX, specifically when the federal funding recipient did not have notice of their alleged violation.

In accordance with the Horner decision, lower courts have also held that a Title IX plaintiff must prove an intentional violation to recover compensatory damages. Many lower courts that have been faced with the more general issue of intent under Title IX have determined that a plaintiff need not show intent for a Title IX violation. This finding is consistent with the Guardians' holding that, under Title VI, a plaintiff may recover for an unintentional violation. The Supreme Court in Guardians, however, further noted that, for an unintentional violation, only injunctive, non-

143. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981); see also Davis, 526 U.S. at 650 (observing that notice requirement also bears on proper definition of discrimination in sexual harassment private damages action).

144. See Pennhurst, 451 U.S. at 24-25 (noting that crucial inquiry was not whether State would knowingly undertake obligation, but whether State could make informed choice).

145. Horner, 206 F.3d at 692 (resolving that, although Supreme Court had not expressly ruled on this point, it would likely hold that plaintiff must prove intentional discrimination in order to receive money damages under Title IX disparate impact theory).

146. See id. at 690-93 (relying on Spending Clause analysis articulated in Guardians and Pennhurst).

147. See id. at 692; see also Pederson v. La. State Univ., 912 F. Supp. 892, 918 (M.D. La. 1996) (concluding that monetary damages are not available under Title IX without finding of intentional discrimination).


149. See Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 593 (1983) (observing that Title VI had been administered in same manner for almost two decades without Congressional interference).
compensatory relief was available to such a plaintiff. In Pederson v. Louisiana State University, meanwhile, the district court looked at unintentional violations of Title IX specifically in the context of compensatory damages. In doing so, the Pederson court concluded that monetary relief was not available for an unintentional violation of Title IX absent a showing of discriminatory intent.

The Pederson court, as well as other courts, is thus consistent with the Horner holding.

Other guidance for this issue comes from statutes similar to Title IX. Although courts have not explicitly determined Title IX’s intent requirement, several other Acts require a showing of discriminatory intent in order to recover compensatory damages. Many courts, including the Supreme Court, have looked to such other Acts, including Title VI and Title VII, in order to interpret Title IX. Indeed, the Horner court recognized several cases that used Guardians for its analysis of Title VI under the Spending Clause in order to interpret Title IX.

Proof of discriminatory intent is not required to state a disparate treatment claim under Title VII. A plurality of the Guardians Court held that compensatory relief was available only in a Title VI...
suit for intentional violations. Consequently, there is a difference of opinion on the statutes as to the requirement of proof of intentional discrimination in order to recover damages. Many courts have looked to such statutes specifically in order to determine whether or not to require intent under Title IX actions.

An issue persists, however, over the applicability of either Title VI or Title VII with regard to which Act is a more appropriate analogue for Title IX. Courts and commentators alike differ as to which Act is a more appropriate analogy for Title IX. Furthermore, a dispute exists over the true meaning of Guardians, a Title VI case. The Guardians opinion did not gain a majority of the court, and the Justices differed over whether Title VI required proof of discriminatory intent in order to recover compensatory damages.

Despite this debate, however, it appears as though the Supreme Court regards the Guardians decision concerning unintentional violations as binding and precedential law. Also, the Supreme Court in Gebser clearly favored the use of Title VI over Title VII by noting the distinctions between Title VII and Title IX, and by using the Spending Clause analysis invoked in Guardians, a Title VI case. Moreover, courts have used Guardians in other

157. See Guardians, 463 U.S. at 602-03 (also observing that, like Title II, there is no evidence that Congress intended private plaintiffs to recover monetary awards).

158. Compare Roberts, 998 F.2d at 833 (observing that Title VII does not require proof of intentional discrimination) with Guardians, 463 U.S. at 602-03 (holding that proof of intentional discrimination is required for damages under Title VI).

159. See Miller, supra note 45, at 717 (noting that Petaluma court, relying on Guardians' decision, reasoned that, since Title VI required intentional discrimination, so should Title IX claims (citing Doe v. Petaluma City Sch. Dist., 830 F. Supp. 1560 (N.D. Cal. 1993))).

160. Compare Roberts, 998 F.2d at 832 (stating that, "despite the fact that Title IX was explicitly modeled on Title VI, this court has held that Title VII . . . is the most appropriate analogue when defining Title IX's substantive standards . . . .") with Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 286-87 (1998) (recognizing various differences between Title IX and Title VII and noting that Title VI and Title IX are parallel to each other).

161. See Miller, supra note 45, at 717-18 (stating that, "the Court's fragmented opinion will further confuse rather than guide.").


163. See id. at 691 (noting Gebser's statute analysis in furthering conclusion that Title VI was proper standard).

http://digitalcommons.law.villanova.edu/mslj/vol8/iss2/7
cases to help define and interpret other acts.\textsuperscript{164} Lastly, by consistently invoking the "contract rationale" of \textit{Guardians} in Title IX cases, the Supreme Court has assented to the analogy of Title VI to Title IX in at least some circumstances. Most notably, the analogy is made when such Acts are deemed to have been enacted pursuant to Congress' Spending Clause power.\textsuperscript{165} Thus, despite the debate over the fragmented and complex \textit{Guardians} decision, \textit{Guardians} and its Title VI analysis are important and influential in the interpretation and analysis of Title IX.

The \textit{Horner} dissent embarked on the issue of defining "intentional discrimination," and determined that the correct standard was that of deliberate indifference.\textsuperscript{166} The issue of compensatory damages and violations of Title IX have been mostly, if not entirely, looked at in cases of sexual harassment.\textsuperscript{167} Many of these cases have turned to the question of what standard to use to determine intent in order to answer the issue, as did the dissent in \textit{Horner}.\textsuperscript{168} The \textit{Horner} dissent asserted that the correct standard to use in determining whether or not a violation of Title IX has occurred is the "deliberate indifference" standard.\textsuperscript{169} In using a deliberate indifference standard, one must have actual notice of his or her wrongdoing and yet fail to respond.\textsuperscript{170} Thus, in using this standard, the notice problem that plagues so many courts would be eliminated. And yet, the act of purposefully ignoring accounts of discrimination closely resembles intentional discrimination. Consequently, it

\textsuperscript{164}. See Ferguson v. City of Phoenix, 157 F.3d 668, 674 (9th Cir. 1998) (holding that compensatory damages were not available under Title II without a showing of discriminatory intent).


\textsuperscript{166}. See \textit{Horner}, 206 F.3d at 698 (Jones, J., dissenting) (claiming that Supreme Court precedent "clearly dictate[d]" that court use deliberate indifference standard in assessing plaintiffs' claim).

\textsuperscript{167}. See, e.g., \textit{Davis}, 526 U.S. at 630 (holding that deliberate indifference standard governed in cases of sexual harassment under Title IX); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 275 (1998) (same); \textit{Franklin}, 503 U.S. at 61 (holding that Title IX allowed monetary remedy).

\textsuperscript{168}. See \textit{Gebser}, 524 U.S. at 290-91 (holding that damages remedy will not lie under Title IX unless official acts with deliberate indifference to discrimination); see also \textit{Horner}, 206 F.3d at 698 (Jones, J., dissenting) (asserting that deliberate indifference standard should be used to assess case at hand).

\textsuperscript{169}. See \textit{Horner}, 206 F.3d at 698 (stating that, "Supreme Court precedent clearly dictate[d] that [the court] use a deliberate indifference standard in assessing Plaintiffs' claim").

\textsuperscript{170}. See \textit{Gebser}, 524 U.S. at 290 (affirming that, in a deliberate indifference standard, one who knows of violation refuses to take action to bring the recipient into compliance).
would appear as though the Homer majority and dissent are not too far apart on the issue. Still, an issue remains over the correctness of the standard used. A more careful analysis of the issue suggests that the deliberate indifference test advocated by the Homer dissent should apply only to sexual harassment cases and not cases involving gender athletics.

It is important to note that all cases discussing the "deliberate indifference" test involved Title IX claims of sexual harassment.\(^{171}\) One general principle that has emerged in such harassment claims is that courts will generally hold an employer liable under a "knew or should have known" standard.\(^{172}\) An issue over whether sexual harassment and gender athletic cases should be evaluated differently under Title IX, however, may still exist.\(^{173}\)

Past Supreme Court cases involving sexual harassment claims under Title IX also invoked the Guardians' "contract rationale." These cases held that the correct standard to use was the "deliberate indifference" standard. However, although many of these courts cited Guardians, Guardians defined "intentional discrimination" as "discriminatory animus," as did the Homer majority. Furthermore, there may be reason to distinguish sexual harassment cases, such as Franklin, from gender athletics cases, in Homer.\(^{174}\) In Pederson, the Fifth Circuit held that the deliberate indifference test that has been applied in sexual harassment cases "has little relevance" in determining whether an academic institution discriminated by failing to accommodate female athletes.\(^{175}\) As the Pederson court noted, the requirement of sexual harassment cases (that the school have actual notice and yet fail to respond) is not applicable for purposes of determining whether an academic institution discriminated on the basis of sex by denying females equal athletic opportunity.\(^{176}\)

\(^{171}\) See, e.g., Davis, 526 U.S. at 629 (holding that damages could lie against recipient of Title IX funding recipient of peer harassment only where recipient acted with "deliberate indifference to known acts of harassment").

\(^{172}\) See Senatus, supra note 61, at 387 (recognizing that principles emerged from earlier cases).

\(^{173}\) See Miller, supra note 45, at 718 (stating that "Title IX does not require intent to discriminate with respect to peer harassment claims").

\(^{174}\) See Pederson v. La. State Univ., 213 F.3d 858, 882 (5th Cir. 2000) (recognizing that requirement of sexual harassment cases is not applicable for cases concerning gender equality in athletics).

\(^{175}\) See id. (noting past cases where Supreme Court held that schools sued for harassment under Title IX must have actual knowledge of harassment and cannot be liable on theory of strict liability).

\(^{176}\) See id.
The difference between such cases is that, in sexual harassment cases, the issue is "whether the school district should be liable for discriminatory acts of harassment committed by its employees."177 In athletic discrimination cases, however, it is the institution itself that is discriminating.178 The proper test, therefore, is not whether the institution knew of the actions of others or was responsible for such actions; rather, it is whether such institution intended to treat females differently on the basis of their sex by providing unequal opportunities.179 In conclusion, there are important reasons for distinguishing sexual harassment cases from gender athletics cases, and an analysis of this issue suggests that the Homer dissent incorrectly concluded that deliberate indifference is the correct standard to apply in gender athletics cases under Title IX.

VI. IMPACT

Various issues arose after the enactment of Title IX concerning its scope.180 The Supreme Court subsequently had to decide several cases precisely to resolve such issues.181 Although the Court has determined that monetary damages are available in a Title IX action,182 the issue of whether one can receive monetary damages for an unintentional violation has yet to be resolved.183 The Homer majority attempted to solve this issue by relying on a similar statute and the Spending Clause analysis.184 The dissent, however, favored a different technique by relying on what he believed to be the correct standard of intentional discrimination.185

The future of Title IX cases seem to indicate that, in gender athletics cases, one will not be able to receive compensatory dam-

177. Id.
178. See id. (recognizing that sexual harassment cases hold that school districts themselves must have actual discriminatory intent before they will be held liable for discriminatory acts of their employees).
179. See Pederson, 213 F.3d at 882 (concluding that record before court showed intent to discriminate).
181. See Davis, 526 U.S. at 633 (holding that Title IX extended to student-on-student cases of sexual harassment); Franklin, 503 U.S. at 76 (holding that monetary damages were available under Title IX).
182. See Franklin, 503 U.S. at 60.
184. See id. (arguing for discriminatory animus standard).
185. See id. at 698 (Jones, J., dissenting) (arguing for deliberate indifference standard).
ages without an intentional violation.\textsuperscript{186} The trend of the Court is clearly to follow its major Title IX decisions such as \textit{Gebser}, \textit{Franklin}, and \textit{Davis}, as well as \textit{Guardians}, a Title VI case. Despite this trend, the question of whether the cases should be interpreted under the Spending Clause analysis or under the standard of intentional discrimination still exists. Moreover, it remains uncertain whether the cases should be interpreted differently depending on their context. Should sexual harassment be treated differently than intercollegiate athletics? If not, then it would appear as though the \textit{Homer} dissent correctly analyzed the case, and the \textit{Homer} majority was incorrect in its analysis concerning \textit{Guardians} and the Spending Clause.

Until this issue is resolved, courts will not have guidance as to how to construe intercollegiate athletics cases. Few courts have dared to venture into this area; the preference seems to be to refrain from embarking upon such difficult issues when it is not absolutely necessary.\textsuperscript{187} The fact remains that, although the same cases may be cited and used, an entirely different result may be found.

Lastly, it is important to recognize that notice is a crucial factor in determining whether to subject a defendant to damages under Title IX. This point has been illustrated in a number of Supreme Court cases. Still, it has not been definitively decided that Title IX is even legislation enacted under the Spending Clause and thus subject to such conditions.\textsuperscript{188}

In conclusion, the Supreme Court has consistently interpreted Title IX in order to resolve undecided and unclear issues. Under the \textit{Homer} decision, a plaintiff will not be able to recover monetary damages under Title IX in an intercollegiate athletics case without a showing of intentional discrimination.\textsuperscript{189} If other courts choose to follow such a decision, then it follows that such plaintiffs will only “strike out” with Title IX.

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\textsuperscript{186} See \textit{id.} at 692-93 (holding that Title IX requires showing of intentional violation in order to receive compensatory damages).

\textsuperscript{187} See Pederson v. La. State Univ., 213 F.3d 858, 880 (5th Cir. 2000) (stating that, since appellants had not argued that damages should be available for unintentional discrimination, court would not address accuracy of district court holding); see also \textit{Homer}, 206 F.3d at 693 (concluding that, because plaintiffs had not established Title IX violation, court need not adopt any test to determine standard of intentional discrimination).

\textsuperscript{188} See \textit{supra} note 140 and accompanying text.

\textsuperscript{189} See \textit{Homer}, 206 F.3d at 685 (holding that Title IX plaintiff required proof of intentional discrimination in order to recover compensatory damages).