CIVIL RIGHTS – TITLE IX – COMPENSATORY DAMAGES ARE NOT AVAILABLE FOR A TITLE IX VIOLATION WITHOUT A SHOWING OF INTENTIONAL DISCRIMINATION – *Horner v. Kentucky High School Athletic Ass'n,* 206 F.3d 685 (6th Cir. 2000), *cert. denied,* 121 S.Ct. 69 (U.S. 2000).

I. INTRODUCTION

Participation in athletic competition in American high schools has become so widespread that one might argue that the opportunity is taken for granted. For many students, however, high school athletics are more than simply a recreational activity. To the student who excels at a given sport, the rewards can be tremendous. The prospect of college scholarships can make athletic participation at the high school level increasingly important to students who seek to offset the ever-increasing cost of college tuition.[1]

The proliferation of athletic-based college scholarships places added importance on the programs that a high school chooses to sponsor. Due to limited funds, however, a school cannot initiate athletic programs that satisfy every student. A school must allocate funds in a manner consistent with its fiscal ability, and therefore, some sports will not and cannot be incorporated into a school's athletic program.

Given the fact that a school cannot satisfy the athletic preference of every student, several questions arise. How should a school determine which athletic programs to initiate? Does the law grant protection to those students whose interests are underrepresented by a school's choice of athletic programs?[2] Additionally, what if a school's failure to sponsor a particular sport serves to limit the opportunities for female students to compete for college-level athletic scholarships? What protection should the law provide these students, and lastly, what should the standard be for determining the appropriate remedy when a school's policy amounts to discrimination on the basis of sex?

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1. According to the most recent data released by the NCAA, 66,938 Division I student athletes were receiving some form of athletic-based aid in the fall 1997 semester. *See* THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION 1999 DIVISION 1 GRADUATION-RATES REPORT, 637 (1999).

2. *See, e.g.,* Horner v. Ky. High Sch. Athletic Ass'n, 206 F.3d 685 (6th Cir. 2000), *cert. denied,* 121 S.Ct. 60 (U.S. 2000).

These were the issues that the United States Court of Appeals for the Sixth Circuit confronted in the case of *Horner v. Kentucky High School Athletic Ass'n.*[3] In *Horner*, the court sought to determine the appropriate standard for awarding compensatory damages to female students who alleged that a school's failure to sponsor female fast-pitch softball amounted to sexual discrimination in violation of Title IX.[4] The court held that, barring proof of intentional discrimination, Title IX did not provide the students with a right to compensatory damages.[5]

II. *HORNER V. KENTUCKY HIGH SCHOOL ATHLETIC ASS'N* 206 F.3d 685 (6TH CIR. 2000)

A. *Statement of Facts*

When this suit arose, the Kentucky State Board for Elementary and Secondary Education (Board) was the exclusive agency charged with the management and control of all common schools within the state of Kentucky.[6] Pursuant to statutory authority, the Board delegated its responsibility for the management of interscholastic athletics to the Kentucky High School Athletic Association (Association).[7]

In pursuit of its obligation to administer the athletic programs for its member schools, the Association sanctioned numerous interscholastic sports.[8] In accordance with the Association's policy, a minimum of twenty-five percent of its member schools must have indicated a

3. *Id.* at 692.

4. *Id.* at 692. 20 U.S.C. § 1681-1688, which in pertinent part, states, "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." 20 U.S.C. § 1681(a).

5. *Horner,* 206 F.3d at 696.

6. Horner v. Ky. High Sch. Athletic Ass'n, 43 F.3d 265, 268 (6th Cir. 1994) [hereinafter *Horner I*].

7. *Id.* at 268-69. The Association was a voluntary, unincorporated association consisting of public, private, and parochial schools located throughout Kentucky. *Id.* at 269. Although the Association was not funded directly by the federal government, a portion of its revenue was derived from dues collected from member schools. *Id.* at 270. Many of these schools, however, were recipients of funds distributed by the Kentucky General Assembly, which in turn received a substantial portion of this money through federal financial assistance programs. *Id.* This fact is important, because Title IX prohibits only those entities that receive federal funding from engaging in gender discrimination. *See* 20 U.S.C. § 1681(a). The statute does not provide blanket protection against sexual discrimination. *See id.* Therefore, federal funding is an indispensable element in any cause of action based on Title IX. *See Horner I*, 43 F.3d at 271.

8. *Id.* at 269. Although the Association specifically sanctioned certain sports, it did not prohibit its members from sponsoring programs that fell outside of the Association's official sponsorship program. *Id.*

willingness to participate in the proposed program for the sport to be sponsored.[9] Furthermore, for an athletic program to maintain sponsorship by the Association, the sport was required to maintain a participation rate of at least 15 percent of the Association's member schools.[10]

In 1982, the Association conducted a survey of its member schools to determine the viability of instituting a female slow-pitch softball program.[11] At that time, forty-four percent of the member schools indicated a willingness to participate, and the program was subsequently sponsored.[12] In 1988 and 1992, the Association conducted similar surveys, seeking to ascertain the level of interest in female fast-pitch softball.[13] After both surveys revealed that less than the mandatory twenty-five percent of member schools showed interest, the project was abandoned.[14]

B. *Procedural History*

In 1992, Plaintiffs, a group of Kentucky high school female athletes, filed suit in the United States District Court for the Western District of Kentucky, alleging that Defendants, Kentucky High School Athletic Association and the Kentucky State Board for Elementary and Secondary Education, violated Title IX and the Equal Protection Clause of the Fourteenth Amendment[15] by refusing to sponsor female fast-pitch softball.[16] Plaintiffs asserted that the Association's policy amounted to sexual discrimination, inasmuch as female athletes were at a disadvantage in competing for collegiate athletic scholarships in comparison to their male counterparts.[17] As a result, the plaintiffs sought certification as a class, as well as declaratory and injunctive relief ordering the defendants to sponsor female fast-pitch softball.[18] Furthermore, the plaintiffs

9. *Horner I*, 43 F.3d at 269.
10. *Id.*
11. *Id.*
12. *Horner I*, 43 F.3d at 269.
13. *Id.*
14. *Id.*
15. U.S. CONST. amend. XIV, § 1, which states in pertinent part, "...nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Id.*
16. *Horner*, 206 F.3d at 687-88.
17. *Id.* at 688. Plaintiffs based their discrimination claim on the fact that male athletes who played on high school baseball teams were able to compete for college baseball scholarships. *Id.* However, while the National Collegiate Athletic Association (NCAA) and the National Association of Intercollegiate Athletics (NAIA) sponsor fast-pitch softball, neither organization sanctions female slow-pitch softball. *Horner I*, 43 F.3d at 269. This fact, the plaintiffs alleged, placed female softball players at a disadvantage in attempting to obtain college athletic scholarships. *Id.*
18. *Horner*, 206 F.3d at 688.

demanded compensatory damages together with attorneys' fees and cost of suit.[19]

The Board and Association moved for summary judgment, claiming that their acts were not discriminatory. They maintained that their refusal to sponsor fast-pitch softball was based on insufficient interest in the sport by member schools.[20] The court granted the defendants' motion for summary judgment on both plaintiffs' Title IX and Equal Protection claims.[21] The court held that the Board and Association had not violated the Equal Protection Clause, because students were permitted to participate in existing sports without regard to gender.[22] Additionally, the court found that there was no Title IX violation, due to the fact that the plaintiffs had been afforded "equal opportunities in accordance with the interests and abilities of students."[23]

Plaintiffs appealed to the United States Court of Appeals for the Sixth Circuit.[24] The circuit court affirmed the grant of summary judgment in favor of the defendants on the Equal Protection claim, holding that the plaintiffs had not established intentional discrimination by the defendants.[25] The court reasoned that the mere disparate impact of the defendants' conduct was insufficient to establish an Equal Protection violation.[26] According to the judges, in order for the plaintiffs to maintain a cause of action based on an Equal Protection violation, the plaintiffs were required to establish that the defendants instituted the twenty-five percent rule *because of* its discriminatory effect, not simply *despite* it.[27]

The Sixth Circuit reversed the district court's grant of summary

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19. *Id.*

20. *Id.* In 1988 and 1992, the Board and Association conducted surveys that revealed that only nine percent and seventeen percent, respectively, of its member schools were interested in sponsoring fast-pitch softball. *Id.* Under the twenty-five percent rule, defendants would only initiate a new sports program if twenty-five percent of their member schools indicated an interest in fielding a team. *Id.*

21. *Horner,* 206 F.3d at 688.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Horner I,* 43 F.3d at 275. In holding that the Equal Protection Clause only protects against intentional discrimination, the court relied on *Washington v. Davis*. *See* 426 U.S. 229 (1976). In *Washington*, the Supreme Court held that a police department's use of a verbal skill test, which allegedly discriminated against African-American applicants seeking positions within the department, did not violate the Equal Protection Clause. *See id.* at 245. According to the Court, in order to establish an Equal Protection violation, it was incumbent upon the plaintiffs to establish that the policy was adopted with a racially discriminatory purpose. *See id.* at 246. The fact that the policy may have resulted in a disparate impact, in and of itself, did not implicate the Equal Protection Clause. *See id.* at 245.

26. *Horner,* 206 F.3d at 688.

27. *Id.*

judgment in favor of the defendants on the plaintiffs' Title IX claim, however, holding that "issues of fact abounded."[28] The court remanded the case, directing the district court to resolve the outstanding issues of fact.[29]

While the case was on appeal, the Kentucky legislature amended its statute governing the regulation of high school athletics.[30] The revised statute mandated that, if a school intended to offer one of two similar sports, the Board and Association must adopt the sport for which the NCAA offered athletic scholarships.[31] Following this legislative mandate, the Association amended its bylaws, directing member schools that intended to adopt a softball program to offer fast-pitch as opposed to slow-pitch softball.[32]

On remand, the district court again granted the defendants' motions for summary judgment.[33] The court held that the legislature's amendment of Section 156.070 of the Kentucky Revised Statutes Annotated rendered the plaintiffs' Title IX claims for class certification, injunctive relief and declaratory relief, moot.[34] With regard to plaintiffs' claims for compensatory damages, the court held that the plaintiffs failed to prove that the defendants had engaged in intentional discrimination, a necessary element in any Title IX action seeking compensatory damages.[35]

Upon the district court's refusal to alter judgment, the plaintiffs appealed on the basis of the court's denial of compensatory damages.[36] Plaintiffs asserted that the district court erred in holding that compensatory damages could only be granted on a Title IX claim upon a finding of intentional discrimination.[37] Alternatively, the plaintiffs argued that, if the appropriate standard was intentional discrimination, the defendants' gender-based classification was sufficient to satisfy such standard.[38] However, the United States Court of Appeals for the Sixth Circuit

28. *Id.* (citing *Horner I*, 43 F.3d at 275). Although there was evidence in the record that athletic opportunities for girls were more limited than for boys, the record was silent as to the interest of all high school girls with respect to fast-pitch softball. *Horner I*, 43 F.3d at 274.

29. *Horner I*, 43 F.3d at 275.

30. *Horner*, 206 F.3d at 688.

31. *See* KY. REV. STAT. ANN. § 156.070(2) (Banks-Baldwin 1995).

32. See KHSAA Bylaw 40 § 2(2). Female fast-pitch softball is an NCAA sponsored sport, whereas slow-pitch softball is not. *See Horner I*, 43 F.3d at 269.

33. *Horner*, 206 F.3d at 688.

34. *Id.* at 689.

35. *See id.*

36. *Id.*

37. *Horner*, 206 F.3d at 689.

38. *Id.*

affirmed the district court's ruling,[39] finding that compensatory damages could only be awarded under Title IX upon a showing of intentional discrimination.[40]

C. Prior Law

Although the United States Supreme Court had entertained several appeals construing the right to compensatory damages for a violation of Title IX, the issue of the standard to be applied when a facially neutral policy was challenged on the basis of its disparate impact was unclear.[41] Recognizing this ambiguity, the circuit court began its analysis of determining the proper standard for awarding monetary damages to a Title IX plaintiff by noting that Title IX did not grant an express private right of action.[42] Therefore, the court focused on the history of Title IX and its statutory predecessor – Title VI.[43] Because Title IX was modeled after Title VI, which granted an implied private right of action, the court found that Congress had indeed intended that Title IX be interpreted as creating an implied private right of action as well.[44]

1. Guardians Ass'n v. Civil Service Commission of New York City[45]

In *Guardians,* the Supreme Court, for the first time, addressed the issue of whether intentional discrimination was the proper standard for awarding monetary damages in a Title VI case.[46] Plaintiffs, a group of African-American and Hispanic police officers, sued the New York City Police Department, alleging that the department's "last-hired, first-fired" policy violated, inter alia, Title VI.[47] The district court awarded

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39. *Id.*

40. *Id.* at 698.

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

42. *See id.* at 689.

43. *See id.* at 689-90. Title VI is the race-based equivalent to Title IX. This statute prohibits the recipient of federal funding from discriminating on the basis of race, color or national origin. 42 U.S.C. § 2000(d) (2000).

44. *Id.* at 689 (citing Cannon v. Univ. of Chicago, 441 U.S. 677, 696 (1979)). In *Cannon,* the Court held that Title IX had been patterned after Title VI, which had been interpreted as containing an implied private right of action. 441 U.S. at 696. Because Congress was aware of this fact when it drafted Title IX, the Court construed Congress' act as explicitly adopting a private right of action under Title IX. *See id.*

45. 463 U.S. 582 (1983).

46. *See Horner*, 206 F.3d at 689.

47. *Guardians*, 463 U.S. at 585-86. According to departmental policy, applicants were hired in rank order on the basis of their test scores. *Id.* at 585. During cutbacks, officers with the least seniority were the first to be laid off. *Id.* Plaintiffs alleged that because applicants were hired in order of their test scores, African-Americans and Hispanics were hired later than white applicants,

compensatory damages to the plaintiffs, holding that proof of discriminatory effect was sufficient to satisfy Title VI.[48] The Court of Appeals for the Second Circuit reversed the ruling of the district court, finding that proof of discriminatory intent was required in order to grant compensatory damages under Title VI.[49]

The United States Supreme Court granted the plaintiff's petition for certiorari in order to determine the appropriate standard to be applied in a private action under Title VI.[50] In a plurality decision, in which six separate opinions were filed, the Court upheld the ruling of the Second Circuit.[51] Pursuant to the Court's decision, compensatory damages, for an alleged Title VI violation, were not available to a private citizen without a showing of intentional discrimination.[52]

2. Franklin v. Gwinnett County Public Schools[53]

In 1992, in the *Franklin* case, the United States Supreme Court recognized for the first time that monetary damages were available as a remedy in a private Title IX action.[54] In *Franklin*, a female student sought compensatory damages from her school district, alleging that the district, aware that a teacher was sexually harassing her, refused to take action.[55]

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thereby creating a situation where African-American and Hispanic officers were laid off in disproportionately large numbers. *Id.*

48. *Guardians*, 463 U.S. at 587-88 (citing Guardians Ass'n of New York City Police Dept., Inc. v. Civil Serv. Comm'n of City of New York, 466 F.Supp. 1273, 1285-87 (D.C.N.Y. 1979)).

49. *Id.* at 589.

50. *See id.*

51. *See id.* at 607.

52. *See Guardians*, 463 U.S. at 607. The opinion of the Supreme Court in *Guardians* cannot be read as approving an award of compensatory damages upon a finding of intentional discrimination under Title VI. *See id.* Although the Court was able to achieve a majority decision that compensatory damages were *not* available in the absence of intentional discrimination, the Court was divided on whether a finding of intentional discrimination *would* entitle a private citizen to monetary damages. *See id.* at 607 n.27. Justices Rehnquist and White found that no compensatory damages were available without a showing of intentional discrimination. *Id.* Justice O'Connor held that, barring intentional discrimination, all relief should be denied, while Justice Powell and Chief Justice Burger opined that no private right of relief existed under Title VI, regardless of the circumstances. *Id.*

53. 503 U.S. 60 (1992).

54. *See Horner*, 206 F.3d at 690-91.

55. *Franklin*, 503 U.S. at 63-64. Christine Franklin, a high school student at North Gwinnett High School, alleged that Andrew Hill, a North Gwinnett High School teacher, had sexually harassed her for a period of two years. *See id.* at 63. Ms. Franklin claimed that Mr. Hill had initiated sexually explicit conversations about her sexual encounters; called her home to ask her to meet him; forcibly kissed her on school grounds, and, on three separate occasions, forced her to have sexual intercourse with him in a private school office. *Id.* Ms. Hill further alleged that the school district had been made aware of the situation, and took no action to protect her from Mr. Hill's harassment. *Id.* at 64.

In *Franklin* the United States District Court for the Northern District of Georgia, dismissed the plaintiff's complaint, ruling that monetary damages were not available under Title IX.[56] The Court based its decision on the fact that Title IX had been derived from Title VI, and should therefore be interpreted in accordance with prior Title VI cases.[57] Finding that the plurality opinion in *Guardians* left the question of compensatory damages unresolved, the Eleventh Circuit relied on binding precedent within the jurisdiction,[58] to affirm the decision of the district court, stating that it would "'proceed with extreme care' to afford compensatory relief absent express provision by Congress or clear direction from [the Supreme Court]."[59]

The Supreme Court, noting a conflict between the Eleventh Circuit's decision in *Franklin* and relevant decisions in the Third Circuit,[60] granted certiorari to determine whether monetary damages were available to a Title IX plaintiff.[61] Justice White, writing for the majority, held that monetary damages were indeed available under Title IX.[62] The Court reasoned that, barring an express limitation by Congress, the existence of a cause of action necessarily gave a court the power to grant all appropriate remedies.[63] Furthermore, the Court found that Congress was aware of the judiciary's "common-law tradition regard[ing] the denial of a remedy as the exception rather than the rule."[64] Therefore, the Court concluded that, by modeling Title IX after Title VI, which had been construed as creating an implied private right of action, Congress did not intend to limit a court's power to award monetary damages for a violation of Title IX.[65]

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56. *Franklin*, 503 U.S. at 64.

57. *Id. See supra* text accompanying note 44.

58. *See* Drayden v. Needville Indep. Sch. Dist., 642 F.2d 129 (5th Cir. 1981). In *Drayden*, a group of African-American female teachers brought suit against the school district, alleging that their termination without a hearing amounted to racial discrimination in violation of Title VI. *Id.* at 131. The Court of Appeals for the Fifth Circuit affirmed the district court's dismissal for failure to state a claim, holding that compensatory damages were not available for a violation of Title VI. *Id.* at 133.

59. *Franklin*, 503 U.S. at 65 (quoting Franklin v. Gwinnett County Pub. Schs., 911 F.2d 617, 622 (Former 5th Cir. 1990)).

60. See Pfieffer v. Marion Ctr. Area Sch. Dist., 917 F.2d 779 (3d Cir. 1990). In *Pfieffer*, the United States Court of Appeals for the Third Circuit held that, if, upon remand, the plaintiff were able to establish intentional discrimination by the school district, compensatory damages would be a possible remedy for a violation of Title IX. *Id.* at 781.

61. *Franklin*, 503 U.S. at 65.

62. *Id.* at 76.

63. *Id.* at 70-71.

64. *Id.* at 71. (quoting Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 375 (1982)).

65. *Franklin*, 503 U.S. at 71-72.

3. Gebser v. Lago Vista Independent School District[66]

Although *Franklin* established that monetary damages were an available remedy for a Title IX violation, the decision did not define the standard under which the remedy was available.[67] It was not until *Gebser* that the United States Supreme Court sought to definitively set the outer boundaries for awarding compensatory damages in a private action brought pursuant to Title IX.[68] *Gebser*, like *Franklin*, involved a female high school student that sought to recover compensatory damages under Title IX for the school district's failure to prevent a teacher from sexually harassing her.[69]

In *Gebser*, the Supreme Court held that compensatory damages were available for a Title IX violation only where it was established that the defendant had actual notice of the violation and acted with deliberate indifference.[70] The Court expressly rejected the plaintiff's argument that liability should be imputed to the school district on the theories of either respondeat superior[71] or constructive notice.[72] According to the Court, the purpose of Title IX was to prevent federal resources from being used to support discriminatory practices in America's schools and to provide the public with an effective means of combating possible abuses of this legislative policy.[73]

In support of its holding that compensatory damages were only available pursuant to an actual notice-deliberate indifference standard, the Court explained the contractual nature of Title IX.[74] Justice O'Connor, writing for the majority, stressed the fact that Title IX was an exercise of the federal government's spending clause power[75] to attach conditions to

66. 524 U.S. 274 (1998).

67. *Horner*, 206 F.3d at 691.

68. *See Horner*, 206 F.3d at 691.

69. *See Gebser*, 524 U.S. at 278-79. Alida Star Gebser, an eighth grade student in a Lago Vista Independent School District middle school, "joined a high school book discussion group" taught by Frank Waldrop. *Id.* at 277. During the group meetings, Waldrop began to make sexually explicit remarks to many of the students. *Id.* Upon entering high school the following year, Ms. Gebser was assigned to classes taught by Frank Waldrop. *Id.* During this time, Waldrop's sexual remarks became more frequently directed toward Ms. Gebser. *Id.* at 278. This course of conduct culminated in a sexual relationship in which Waldrop and Ms. Gebser engaged in intercourse on numerous occasions. *Id.*

70. *Gebser*, 524 U.S. at 292-93.

71. The doctrine of respondeat superior imputes liability to the master for the wrongful acts of his servant, while acting within the scope of the master's employ. BLACK'S LAW DICTIONARY 1313 (7TH ed. 1999).

72. *Gebser*, 524 U.S. at 285.

73. *Id.* at 286.

74. *See id.* at 287.

75. *See* U.S. CONST. art. I, § 8, cl. 1, which has been interpreted as conferring upon Congress

the award of federal funds.[76] Therefore, the Justice reasoned, it was the Court's paramount concern, in fashioning the appropriate award, that the recipient of funds be placed on notice prior to being held liable for monetary damages.[77] According to the majority, awarding compensatory damages on a theory of imputed liability would violate this fundamental precept.[78]

4. Davis v. Monroe County Board of Education.[79]

Prior to *Horner*, the most recent case to construe the meaning of Title IX was *Davis*. In *Davis*, the plaintiffs sought to recover compensatory damages for the school board's failure to protect a young female student from sexual harassment by one of her classmates.[80] The Supreme Court, in reversing the trial court's dismissal of the plaintiff's complaint for failure to state a claim upon which relief could be granted, applied the actual notice-deliberate indifference test as espoused in *Gebser*.[81]

The *Davis* court, in support of its position that the actual notice-deliberate indifference test was the appropriate standard for awarding compensatory damages to a Title IX plaintiff, emphasized that the degree of control that a funding recipient had over the discriminatory act was a primary factor in determining liability.[82] According to the Justices, the plain language of the statute called for liability where a recipient's deliberate indifference to known harassment could be said to have "subject[ed]" its students to discrimination.[83] Finding that school authorities generally had sufficient authority to control the actions of their students, the Court determined that a school could be held liable for

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the power to attach conditions to the award of federal funds. *See* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 28 (1981). Legislation enacted pursuant to Congress' Spending Clause power creates a contractual relationship between the funding recipient and the federal government. *Id.* Upon receiving the federal funds, the recipient agrees to comply with the conditions attached thereto. *Id.* Due to the contractual nature of this relationship, Congress must set forth all conditions attached to funding in a clear and unambiguous manner. *Id.*

76. *Gebser*, 524 U.S. at 287.

77. *Id.*

78. *Id.*

79. 526 U.S. 629 (1999).

80. *See id.* at 632-34. In *Davis*, the plaintiff, a fifth grade girl, was sexually harassed by a fellow student for a period of several months. *Id.* at 633-35. Although she had complained to school officials on several occasions, the school took no affirmative steps to protect her. *Id.* at 634-35. The situation grew so severe that the plaintiff's attacker eventually pled guilty to sexual battery. *Id.* at 634.

81. *See Davis*, 526 U.S. at 633.

82. *See id.* at 644-46.

83. *Id.* at 644.

compensatory damages for "subjecting" students to discrimination if the school acted with deliberate indifference to known acts of discrimination.[84]

D. The Opinion of the Horner Court

In *Horner*, the Court of Appeals for the Sixth Circuit addressed the issue of whether, under Title IX, the mere disparate impact of a facially neutral policy was sufficient to entitle a plaintiff to compensatory damages.[85] Writing for the majority, Judge Suhrheinrich held that, where a plaintiff seeks to recover compensatory damages under the theory that a facially neutral policy violates Title IX, the plaintiff must establish that the violation was intentional.[86]

In determining that intentional discrimination was the appropriate standard, the court adopted the reasoning behind *Franklin*, *Gebser* and *Davis*.[87] The majority agreed with Justice White's spending clause analysis in *Franklin*, which explained that "the 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."[88] However, the court refused to apply the actual notice-deliberate indifference standard of earlier Supreme Court cases, finding that *Franklin*, *Gebser* and *Davis* were distinguishable on their facts.[89]

Although it abandoned the actual notice-deliberate indifference test, the Court determined that intent was a necessary element in a cause of action seeking compensatory damages for the alleged disparate impact of a facially neutral policy.[90] Finding that *Guardians* was analogous to the case at hand, the court followed Justice White's plurality opinion that compensatory damages should only be awarded where the recipient of

84. *Id.* at 646-47.

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

86. *Id.*

87. *See id.* at 692-93.

88. *Horner*, 206 F.3d at 692 (quoting Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 74 (1992)).

89. *Id.* at 693. The majority explained that *Franklin*, *Gebser* and *Davis* dealt with intentional discrimination in the context of a school's failure to prevent sexual harassment against a student. *Id.* Therefore, the court determined that intent in those cases was equivalent to actual notice of third party malfeasance and a failure to take action to eliminate the wrongdoing. *Id.* According to Judge Suhrheinrich, these cases were not analogous to the case sub judice. *Id.* For additional support of this proposition, the court cited the recent Fifth Circuit case of *Pederson v. Louisiana State University.*, 201 F.3d 388 (5th Cir. 2000), which held that the actual notice-deliberate indifference test was of little relevance in determining whether a school intentionally discriminated against female athletes by failing to adopt an accommodating athletic program. *Horner*, 206 F.3d at 693 (citing *Penderson*, 201 F.3d 388 (5th Cir. 2000)).

90. *Id. at* 692-93.

federal funds had engaged in intentional discrimination that amounted to discriminatory animus.[91] However, concluding that the record revealed no evidence of a Title IX violation, particularly an intentional one, the majority refused to adopt a specific test for determining intent.[92]

In its determination that the plaintiffs had not established a violation of Title IX, the court relied on the factors set forth in *Horner I*.[93] Although the plaintiffs had established the requisite statistical disparity, the judges found that the plaintiffs had failed to show that the athletic interests of the female students had not been met.[94] Holding that the plaintiffs did not satisfy their burden of proving a Title IX violation, the court affirmed the trial court's grant of summary judgment in favor of the defendants.[95]

In a vigorous dissent, Judge Nathaniel R. Jones concluded that the actual notice-deliberate indifference standard was the appropriate test to determine the plaintiffs' right to compensatory damages.[96] The judge also criticized the majority's determination that the plaintiffs had failed to establish any violation of Title IX.[97] According to the dissent, whether there had been a violation of Title IX was completely dependent upon the standard that the court used to define intent.[98] Therefore, the judge argued, the case should have been remanded in order to allow the plaintiffs the opportunity to meet the actual notice-deliberate indifference standard.[99]

According to Judge Jones, the congressional purpose behind Title IX supported the imposition of the actual notice-deliberate indifference standard.[100] Adopting the rationale of *Gebser*, the dissent stated that the purpose of Title IX was to prevent the use of federal funds to promote gender discrimination and to provide individuals with an effective

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91. *Id.* at 693. In *Guardians*, Justice White alone argued for a discriminatory animus standard of intentional discrimination when a facially neutral policy was challenged. *See Guardians*, 463 U.S at 607 n. 27.

92. *Horner*, 206 F.3d at 693.

93. *See id.* at 693-95. *Horner I* established that, in order to state a prima facie case for a Title IX violation, the plaintiffs must show that there is a statistical disparity between males and females with regard to intercollegiate level athletic opportunities. *Id.* at 695. If the plaintiffs are successful, the burden shifts to the school to prove that it has engaged in an ongoing practice of program development, which is responsive to the interest and abilities of the underrepresented group. *Id.* If the school is unable to establish ongoing program development, the plaintiffs will prevail by a showing that the underrepresented group has an interest in the opportunity that has been withheld. *Id.*

94. *See Horner*, 206 F.3d at 695-96.

95. *Id.* at 697-98.

96. *See id.* at 698 (Jones, J., dissenting).

97. *See Horner*, 206 F.3d at 699 (Jones, J., dissenting).

98. *Id.* at 699 (Jones, J., dissenting).

99. *Id.* (Jones, J., dissenting).

100. *See id.* at 700 (Jones, J., dissenting).

mechanism for protecting against potential discrimination.[101] Judge Jones stressed that, because the discriminatory animus test would shelter a Title IX defendant in all but the most egregious cases, schools would have little incentive to comply with the dictates of the statute.[102]

The dissent further focused on the fact that the contractual nature of Title IX did not mandate the application of the discriminatory animus standard.[103] According to Judge Jones, the contract argument was equally supportive of the actual notice-deliberate indifference test.[104] The judge reasoned that, upon accepting the grant of federal funds, the recipient had contracted not to discriminate on the basis of sex.[105] This fact, the dissent concluded, provided the requisite notice to hold funding recipients liable for a violation of Title IX, where the recipient acted with deliberate indifference to the known discriminatory effect of its athletic policy.[106]

Judge Jones' final objection to the imposition of the discriminatory animus test was its lack of precedential support.[107] The Judge argued that the only support that could be found for the discriminatory animus test was in the plurality opinion of Justice White in *Guardians*.[108] However, the dissent noted that the United States Supreme Court had refused to apply the discriminatory animus standard on three separate occasions, despite Justice White's plurality opinion in *Guardians*.[109]

III. CONCLUSION

The majority's opinion in *Horner*, that discriminatory animus is the proper standard to be applied when challenging a facially neutral policy

101. *Horner*, 206 F.3d at 700 (Jones, J., dissenting).
102. *Id.* at 701 (Jones, J., dissenting).
103. *See id.* at 700 (Jones, J., dissenting).
104. *See Horner*, 206 F.3d at 700 (Jones, J., dissenting).
105. *Id.* (Jones, J., dissenting).
106. See *Horner*, 206 F.3d at 704 (Jones, J., dissenting).
107. *Id.* at 702 (Jones, J., dissenting).
108. *Id.* (Jones, J., dissenting).
109. *See Horner*, 206 F.3d at 703-04 (Jones, J., dissenting). Judge Jones focused on the fact that, in *Gebser* and *Franklin*, the Supreme Court used the concept of notice to determine whether there had been an intentional violation of Title IX. *See id.* at 704 (Jones, J., dissenting). In *Franklin*, the Court remanded the case for further findings of fact, holding that an intentional violation of Title IX was present where the school had notice of the discriminatory conduct, yet took no action to remedy the situation. *See Franklin*, 503 U.S. at 76. Likewise, the *Gebser* court held that no intentional violation existed where the plaintiffs could not establish that the school had actual knowledge of its employee's wrongdoing. *See Gebser*, 524 U.S. at 292-93. Furthermore, the *Davis* court expressly adopted the actual notice-deliberate indifference standard, stating, "[t]he district's knowing refusal to take any action in response to [known acts of harassment] would fly in the face of Title IX's core principles, and such deliberate indifference may appropriately be subject to claims for monetary damages." *Davis*, 526 U.S. at 651.

under Title IX, is unpersuasive. The decision violates both the spirit and letter of the law as expressed by the United States Supreme Court. In *Franklin*, *Gebser* and *Davis*, the Supreme Court consistently focused on the issue of notice in determining whether an intentional violation had occurred. Where it was established that the party to be charged with a Title IX violation had actual knowledge of the discriminatory activity and failed to take measures to eliminate the source of that discrimination, the Supreme Court has found an intentional violation of Title IX.

The *Horner* majority distinguishes these cases on the ground that they dealt with abuses perpetrated by third parties, rather than violations by the principals themselves.[110] Where the party sought to be charged with the violation is the principal, the *Horner* court reasons that the proper standard for establishing an intentional violation is that of discriminatory animus.[111] This approach is disingenuous, because a party that is directly responsible for a violation is afforded greater protection than a party that simply fails to stop its agents from engaging in discriminatory conduct.[112]

Under the majority's approach, a school district knowingly could adopt an athletic program that limits female participation. As long as the program was not instituted for the purpose of preventing female participation, the district would be protected. On the other hand, if the district sponsored an athletic program that was believed to offer equal opportunities to males and females alike, and later received notice that the coach of such program did not allow the majority of female applicants to participate, the district would be liable under Title IX if it did not take steps to remedy the violation. In both cases, the district is aware of the discrimination, yet only in the latter situation, where a third party perpetrates the wrong, and the actual notice-deliberate indifference standard is applied, would the district be held liable.

In rejecting the actual notice-deliberate indifference test, the majority ignores the fundamental purpose of Title IX. As the Supreme Court held in *Gebser*, Title IX was enacted to prevent federal funds from being used to support discrimination and to provide private citizens effective protection against abuses of this policy.[113] By adopting the discriminatory animus standard, the court ensures that school districts will be sheltered from liability for all but the most flagrant violations of Title IX.[114] Due to

110. *See Horner*, 206 F.3d at 693.

111. *See id.* at 693 n. 4.

112. *See id.* at 701 (Jones, J., dissenting).

113. *Horner*, 206 F.3d at 700 (Jones, J., dissenting)(citing *Gebser*, 524 U.S. at 286).

114. *See id.* at 701 (Jones, J., dissenting). In his dissent, Judge Jones opined that, under the discriminatory animus test, a school would be immune from liability for almost all violations short of

this high level of protection, schools will have little incentive to administer their athletic programs in compliance with Title IX.

The dissent's opinion, advocating the actual notice-deliberate indifference standard, states a sound approach for awarding compensatory damages for a Title IX violation. Support for this test can be drawn from two distinct sources. First, Supreme Court precedent supports the actual notice-deliberate indifference test.[115] Second, and more importantly, the standard serves to promote the fundamental purpose of Title IX; namely, the prevention of gender-based educational discrimination supported by federal funds.

The actual notice-deliberate indifference test strikes the appropriate balance between ensuring that recipients of federal funding comply with their Title IX obligations and protecting school districts from vexatious and frivolous litigation. The threat of possible monetary awards provides schools with a strong incentive to administer their athletic programs in accordance with the dictates of Title IX. At the same time, schools would be sheltered from liability for innocent or unknowing violations. Barring actual notice of the discriminatory effect of an athletic policy, a school could not be held liable for a monetary award. Furthermore, upon receiving notice that its athletic policy violates Title IX, a school need only take reasonable steps to remedy the situation in order to protect itself against a possible monetary judgment.[116] Only when a school fails to take action to correct known infractions, would it be liable for compensatory damages.

The purpose of Title IX is to prevent gender-based discrimination in America's educational system. In interpreting the outer bounds of the statute, it is the court's duty to give effect to this congressional intent. Therefore, courts should fashion remedies that best seek to promote the eradication of gender discrimination within our nation's schools. This can only be accomplished where the remedy available for a violation of Title IX provides the proper incentive for adhering to the statute. The actual notice-deliberate indifference standard serves this purpose, while at the

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a school's failure to adhere to a court ordered injunction. *Id.* (Jones, J., dissenting).

115. *See id.* at 703-04 (Jones, J., dissenting). In *Davis*, the most recent Supreme Court case to examine the issue of the availability of compensatory damages for a violation of Title IX, the Court adopted the actual notice-deliberate indifference test. *See Davis*, 526 U.S. 629, 633.

116. *See Davis*, 526 U.S. at 649. The deliberate indifference standard does not create absolute liability for a failure to cure all infractions. In *Davis*, the Supreme Court expressed the view that reasonable steps taken to remedy a discriminatory policy would shelter a school from monetary liability. *See* 526 U.S. at 649. Only where a school acts in a clearly unreasonable manner, in response to a known infraction, would a funding recipient be held liable for compensatory damages. *See id.*

same time prevents open-ended liability for those who seek to comply with Title IX in good faith.

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