

1999

Lack of Knowledge of Sexual Harassment Shields School Districts From Employer Liability Under Title IX Gebser v. Lago Vista Indep. School Dist.

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Recommended Citation

Higgins, Latosha (1999) "Lack of Knowledge of Sexual Harassment Shields School Districts From Employer Liability Under Title IX Gebser v. Lago Vista Indep. School Dist.," *Saint Louis University Public Law Review*. Vol. 18 : No. 1 , Article 14.

Available at: <https://scholarship.law.slu.edu/plr/vol18/iss1/14>

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**LACK OF KNOWLEDGE OF SEXUAL HARASSMENT SHIELDS
SCHOOL DISTRICTS FROM EMPLOYER LIABILITY UNDER
TITLE IX *GEBSER V. LAGO VISTA INDEP. SCHOOL DIST.*¹**

Shortly after Justice Sandra Day O'Connor delivered the majority opinion in *Gebser v. Lago Vista Indep. School Dist.*, the local presses were burning with harsh criticisms of the opinion.² The *Gebser* Court held that school districts would not be held liable for damages in teacher-student hostile environment sexual harassment claims unless a school district official authorized to take remedial measures had actual knowledge of the teacher's misconduct and failed to act to remedy the situation.³ The Court was primarily criticized for "making the classroom easier than the office for sexual harassers."⁴ However, the decision in *Gebser* followed precedent, legislative intent, statutory purpose, and public policy.

The 5-4 decision was consistent with case precedent because the Supreme Court Justices carefully avoided legislating, instead merely construing the broad and unclear statute. Critics who sought a different outcome failed to

1. *Gebser v. Lago Vista Independent School District*, 118 S. Ct 1989 (1998). During the same term, three other major decisions were handed down regarding employer liability in sexual harassment cases. Bernadette Marczely, *Mixed Messages: Sexual harassment in public schools*, The Clearinghouse, May 1, 1999; see also, *Burlington Industries, Inc. v. Ellereth*, 118 S.Ct. 2259 (1998) (The Court affirmed appellate court's reversal of grant of summary judgment to employer in case where the employer was unaware of the supervisor's misconduct); *Faragher v. City of Boca Raton*, 118 S.Ct. 2275 (1998)(holding that employers are vicariously liable for actionable discrimination by a supervisors, but reasonableness employer and plaintiff conduct may be used as an affirmative defense); and *Oncale v. Sundowner Offshore Services*, 118 S.Ct. 998 (1998) (holding that sexual discrimination includes same sex sexual harassment and is actionable under Title VII).

2. See e.g. Richard Carelli, *Sexual Harassment Lawsuits Against Schools Made Harder by Sup. Ct. Damages May Not be Recovered Unless an Official With Powers To Do Something About the Problem Knew and Was Indifferent*, The Daily Record (Baltimore) June 23, 1998 at 1C; Margo L. Ely, *Bare Majority Strips Students of Sex Harassment Shield*, Chicago Daily Law Bulletin, Aug. 10, 1998; Deborah L. Rhode, *Sex Harassment Remains a Problem in Schools*, The National Law Journal, Oct. 5, 1998; Linda Greenhouse, *School Liability Limited in Sex Cases Top Court Split on Harassment*, New Orleans Times-Picayune, June 23, 1998, at A1.

3. *Gebser*, 118 S.Ct. at 1992.

4. Ellen Goodman, *Mixed Messages on Sexual Harassment*, Rocky Mountain News, July 5, 1998 News 4B. Goodman's column criticized the *Gebser* decision but praised the Court for making it easier for employees to succeed on sexual harassment suits by holding an employer could be held for a supervisor's misconduct or inappropriate behavior even if it did not know of the violation.

realize that the function of Supreme Court Justices is to interpret the law. The responsibility to make laws rests with the legislature.⁵ Supreme Court Justices cannot rewrite a law simply because it yields an unpopular decision. “[W]hile prior court rulings went far afield in permitting damage suits under Title IX, it would have been an even greater abuse of congressional intent for the court to have decided that school districts were liable for discriminatory practices when no official had any inkling of anything amiss.”⁶

Furthermore, the language of the statute does not directly address the issue of “whether the independent misconduct of a teacher is attributable to the school district that employs him under a specific federal statute designed primarily to prevent recipients of federal assistance from using the funds in a discriminatory manner.”⁷ Absent an express congressional indication that school systems should be liable for private sexual harassment lawsuits, the Supreme Court properly concluded that school districts should remain properly immune from liability.⁸

The Court’s decision also made for good public policy. Although schools will not be held liable for teacher misconduct if the school is unaware of the indiscretion, teachers may still be held accountable for their actions. For example, teachers who sexually harass students may face criminal charges.⁹ Critics of the decision assume that “the propagation of federal lawsuits is the only means of preventing school officials from gross negligence in protecting their charges.”¹⁰ This “assume[s] that large numbers of them are irresponsible, morally demented and uncaring about their future employment.”¹¹ Teachers will be deterred from sexually harassing students because of fear of criminal and civil prosecution.¹² Teachers may also be deterred by the fear of suffering pecuniary damages such as large punitive awards and the loss of current and future employment in the educational field.¹³ Consequently, federal lawsuits

5. *A Blow for Common Sense The Issue: Supreme Court Limits Legal Damages Against Schools Our View: Majority Followed Clear Legislative Intent*, Rocky Mountain News, June 24, 1998 at 43A.

6. *Id.*

7. *Gebser*, 118 S.Ct. at 2000. *See also* 20 U.S.C. “1681-1688.

8. *Gebser*, 118 S.Ct. at 2000.

9. *See supra* n. 6.

10. Goodman, *supra* n. 4.

11. *Id.*

12. Deborah L. Volberg, *Sexual Harassment Under Title IX, The Same But Different*, N.Y.L.J. July 21, 1998. Plaintiff attorneys may be able to fashion a variety of civil action suits against teachers. “[P]otential causes of action might include negligent hiring, negligent supervision, prima facie tort, and intentional or negligent infliction of emotional distress.”

13. *Id.* “[S]tate courts may provide plaintiff-friendlier forums that the more formal federal arena frequented under Title IX.” However, plaintiffs may seek to avoid civil suits because tort claims brought in state court against the teacher may yield small financial awards. Furthermore, schools may argue the *Gebser* standard should also apply to tort claims.

are not the only means of recourse for students. There are other means of deterrence and prevention currently in existence.

Part I of this casenote provides a definition of sexual harassment, Title IX and Title IX's legislative history. Part II examines the provisions of Title VII, the statute applicable to workplace sexual discrimination and harassment. In addition, this section will examine whether workplace sexual harassment claims and sexual harassment claims arising in the educational setting should be adjudicated similarly. Part III will analyze both the majority and dissenting opinions in *Gebser*, focusing on the Court's interpretation of the statute in defining the scope of the remedies available under the act and its application to the facts of *Gebser*. The last section will analyze how the Court's holding followed case precedent, legislative intent, statutory purpose and made for good public policy.

I. SEXUAL HARASSMENT DEFINED

There are two types of sexual harassment recognized by the US courts.¹⁴ The Supreme Court has defined both quid pro quo and hostile environment sexual harassment.¹⁵ The definitions of sexual harassment are the same regardless of whether the harassment occurs in a school or office setting.¹⁶ Quid pro quo sexual harassment includes "sexual advances, requests for sexual acts, or other verbal or physical conduct of a sexual nature. . .when an educational institution, its employees, or its agents make submission to such conduct either explicitly or implicitly a condition of a student's advancement, or uses submission to or rejection of such conduct by a student as the basis for evaluating or grading a student."¹⁷ The conduct is unwelcome behavior which conditions the receipt or denial of benefits on the performance of sexual favors. The marked difference between quid pro quo and hostile environment sexual harassment is the type of benefit used to inappropriately solicit sexual favors.¹⁸ For example, a student's grades may be conditioned on compliance with the unwelcome behavior in quid pro quo sexual harassment. In hostile

14. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1979). The Court held that "a claim of hostile environment sexual harassment is actionable under Title VII." (internal quotes omitted) *Id.* at 73.

15. *Id.* at 65. The Court relied upon 1980 EEOC Guidelines as authority for recognizing the two distinct forms of possible sexual harassment in the employment context.

16. *Franklin v. Gwinnett County Schools*, 503 U.S. 60, 75 (1992).

17. Carrie N. Baker, *Proposed Title IX Guideline on Sex-Based Harassment of Students*, 43 EMORY L. J. 271, 293 (1994).

18. *Id.* at 276. This is the common definition of sexual harassment; however, this definition is not completely accurate when "applied to sexual abuse and harassment of students, whether welcome or not, sexual contact between adults and minors is a criminal act." Carol Shakeshaft and Audrey Cohen, *Sexual abuse of students by school personnel*, Phi Delta Kappan, 512, Mar. 1995.

environment sexual harassment the benefit being withheld is a peaceful and less stressful school environment. “[H]ostile environment sexual harassment occurs when unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct have the effect or purpose of unreasonably interfering with an individual’s performance or creating an intimidating, hostile, or offensive environment.”¹⁹ The alleged conduct must be sufficiently severe or pervasive, “so as to alter the conditions of education and create an abusive educational environment.”²⁰ An isolated incident of misconduct is not sufficient to establish a claim of hostile environment sexual harassment.²¹

Despite the differences in the definition of the two types of sexual harassment the affects, of the harassment on children are the same regardless if the harassment is quid pro quo or hostile environment sexual harassment. Sexual harassment may seriously affect a students ability to function both in and out of the classroom.²² Students may not want to talk in class; may find it difficult to focus on their lessons; may make lower grades; feel “embarrassed, less confident, and scared” because of the harassment.²³

In sexual harassment claims, the issue is not whether compliance with or submission to the advances was voluntary, but rather whether the alleged behavior was unwelcome.²⁴ “To distinguish between actual desire for a relationship on one hand, and a mere acquiescence to tendered sexual advances on the other, it is necessary to consider the power disparity between the individuals involved.”²⁵ A teacher may appear to be a very powerful person to a child in school.²⁶ Teachers are “armed with the power to administer moderate correction, when, . . . [it is believed]. . . to be just and necessary. The teacher is the substitute of the parent; he is charged in part with the

19. See *Kinman v. Omaha Public School District*, 94 F.3d 463, 467 (8th Cir. 1996). In *Kinman*, a high school student filed suit against the school for sexual harassment by a teacher. The court identified the elements of a prima facie case for hostile environment sexual harassment. The court held that the “knew or should have known standard” is the appropriate standard for applying liability in student teacher sexual harassment claims. *Id.* at 469.

20. *Id.* at 468.

21. *Id.*

22. Jeffery A. Thaler, *Are Schools Protecting Children From Harassment?*, 35-Aug Trial 32, 34 (1999).

23. *Id.*

24. *Kinman*, 94 F.3d at 468. The Court of Appeals relied upon the Supreme Court holding in *Meritor*.

25. *Id.* at 468. The dicta implied that the disparity in status between the accused and the accuser may explain why the victims acquiesced to the advances. Further, the court also noted that the question of proof is difficult and is a issue of credibility to be determined by the trier of fact.

26. See Thaler, *supra* n. 22 at 34.

performance of his duties, and, in the exercise of these delegated duties, is invested with his power.”²⁷

The type of sexual harassment is not determinative of employer liability in sexual discrimination and harassment claims.²⁸ The distinctions between quid pro quo and hostile environment primarily serve to provide a guide to employees in proving claims of sexual harassment.²⁹ For example, in hostile environment sexual harassment, the student carries the burden of proof and the burden is greater than that of a quid pro quo claim.³⁰ The student must show the unwelcome behavior was sufficiently hostile or pervasive enough to disrupt the work environment and constitute abuse to put forth a prima facie hostile environment sexual harassment claim.³¹

II. TRACING THE CASE HISTORY OF TITLE IX SEXUAL DISCRIMINATION AND SEXUAL HARASSMENT CLAIMS

Title IX of the Education Amendments of 1972 prohibits any sex discrimination by any “education program or activity receiving Federal” support.³² The act provides: “No person in the United States shall, on the basis of sex, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”³³ To state a cause of action students must show that they were discriminated against in an educational program, that the program received federal funds, and that the discrimination was gender based.³⁴ The purpose of the act is to “protect

27. *Id.* (citing *Patterson v. Nutter*, 7A 273, 274 (Me 1886) quoting *State v. Pendergrass*, 19 N.C. 365, 365-6 (1837)).

28. *See Burlington Industries, Inc.*, 118 S.Ct. at 2264. The Court held that an employer was liable although it had no knowledge of the sexual harassment. Whether harassment was of quid pro quo or hostile environment type was not dispositive.

29. *Id.* at 2264. The Court held that “[t]he terms quid pro quo and hostile environment are helpful, perhaps, in making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether, but beyond this are of limited utility.” The Court noted that the term quid pro quo does not appear in the Title VII statute and first appeared in academic literature and was later applied in *Meritor*. Further, the Court finds that *Meritor’s* discussion of the two terms “served a limited and specific purpose” of aiding the court in determining whether an employer’s conduct constituted sexual discrimination or harassment for the purposes of Title VII.

30. *Id.*

31. *Id.* at 2265.

32. 20 U.S.C. “1681-1688 (1994).

33. *Id.*

34. Gregory G. Pinski, *Civil Rights—Federal Remedies: The Eighth Circuit Recognized Same-Sex Harassment Under Title IX and Adopts the “Knew or Should have Known Standard for School District Liability,”* 74 N.D. L. REV. 141, 145 (1994).

To successfully prove a claim of hostile environment sexual harassment, in addition, to the basic Title IX elements delineated above, a plaintiff must show: “(1) that he or she is a member of a protected group; (2) that the plaintiff was subject to unwelcome harassment;

individuals from sex discrimination by denying federal financial aid to those educational institutions that bear responsibility for sexually discriminatory practices.”³⁵

Title IX was enacted through the Spending Powers Clause.³⁶ The Supreme Court determined the statute was a Spending Powers statute because it concerns the expenditure of federal funds.³⁷ “Title IX is essentially a contract

(3) that the harassment was based on sex; (4) that the charged sexual harassment had unreasonably interfered with the plaintiff’s education and created an intimidating, hostile or offensive educational environment that seriously effected the psychological well-being of the plaintiff; and (5) that some basis for institutional liability has been established.”

Students may show they are members of a protected group by introducing evidence that “members of one sex are exposed to disadvantages, terms or conditions,” to which members of the opposite sex are not.

The second element may be met by introducing evidence that the harassment was unsolicited. Factors such as a student’s age, the nature of the harassment, and the degree of authority exercised over the student are considered in determining whether the harassment was unsolicited. Considerations of a student’s age address a harassers affirmative defense of consent. Younger students are presumed unable to consent to a sexual relationship with an adult.

To prove the third element the student must show, that “but for the [student’s] sex, that harassment would not have occurred.” Last, to prove the fourth element a student must show that the harassment severely or sufficiently altered the student’s educational environment. *Id.* at 146. Students must show that the harassment was pervasive and habitual to establish severity or a sufficient effect on the educational environment.

35. *Id.* at 144. “Legislative history shows a determination to remedy “access factors.” such as admission standards and hiring procedures, which have historically denied women the opportunity to enter academic institutions.” Kimberly A. Mango, *Students Versus Professors Combating Sexual Harassment Under Title IX of the Education Amendments of 1972*, 23 CONN. L. REV. 355, 372 (1991). There was little focus on sex discrimination after women gained access to educational opportunities once denied to them.

36. Elizabeth G. Livingston, *Canutillo Independent School District v. Leija: Imputing Liability For Teacher Student Sexual Harassment Under Title IX*, 71 TUL. L. REV. 1849, 1851 (1997). See also *Cannon v. University of Chicago*, 441 U.S. 677, 708-9 (1997). Title IX may be interpreted as a statute enacted through the Spending Powers Clause because it uses the same language and was modeled after another act authorized by the Spending Powers Clause, Title VI. *Rowinsky v. Bryan Independent School*, 80 F.3d 1006, 1012 (5th Cir. 1996) (held no Title IX liability imposed on school’s in peer hostile environment sexual harassment claims unless the school directly discriminates on the basis of sex).

37. *Cannon*, 441 U.S. at 708-709. In *Franklin v. Gwinnett County Pubic Schools*, the Court refused to revisit the issue of what congressional power authorized the statute, despite the school’s argument the statute was not created solely under Congress’ Spending Clause powers. 503 U.S. 60, 75 n. 8 (1992)(“[M]oney damages remedy available under Title IX for an intentional violation” of the statute.) The Court held the constitutional source of Congress’ authority to enact the statute was immaterial because money damages were available irrespective of the source of the Congress’ authority.

The school in *Franklin*, argued that the statute was also enacted under congressional powers derived from ‘5 of the Fourteenth Amendment. However, in *Rowinsky v. Bryan Independent School*, the court noted that, “[w]hile the receipt of state funding may transform a private school into a state actor for Fourteenth Amendment purposes, the receipt of federal funds

between the federal government and educational institutions.”³⁸ The statute conditions the grant of federal funds on a school’s agreement not to discriminate on the basis of gender.³⁹ Only schools receiving federal funds are bound by the legislation and subject to liability for their failure to comply with the grant’s conditions.⁴⁰ “While it is plausible that the condition[s] imposed could encompass ending discriminatory behavior by third parties, the more probable inference is that the condition[s] prohibit certain behavior by the grant recipients themselves.”⁴¹

Title IX sexual harassment claims have gradually expanded the scope of the statute while not departing from the original purpose of the statute.⁴² At the time of the statute’s adoption in 1972, neither gender discrimination suits nor claims of sexual harassment were commonplace.⁴³ Since there was limited case law and litigation on the issues, the scope of the act remained limited.⁴⁴ As society developed and changed and the roles of women in society underwent dramatic changes, new issues began to arise as sex discrimination and sexual harassment litigation began to flood the courts.⁴⁵

In one of a series of early groundbreaking cases interpreting the act, the Supreme Court recognized that Title IX is enforceable through a private right of action.⁴⁶ In *Cannon v. University of Chicago*, a female student alleged that her application for admission to medical school was denied on the basis of sex.⁴⁷ The Court of Appeals held that Title IX did not authorize a right to

does not make a private school a state actor.” 80 F.3d at 1013 n. 14. It would exceed the bounds of the Fourteenth Amendment to impose liability on private schools not receiving state funds. The courts are hesitant to recognize the Fourteenth Amendment as Congress’ authority for enacting legislation because of the absolute obligations Fourteenth Amendment legislation places on the states.

In *Rowinsky*, the court also noted that statutes enacted under the authority of the Fourteenth Amendment tend to impede upon traditional state autonomy. *Id.* The courts are also hesitant to tread upon traditional notions of state autonomy.

38. Marczely, *supra* n. 1.

39. *Rowinsky*, 80 F.3d at 1013. *See also* 20 U.S.C. ‘1681 (1994).

40. *Id.*

41. *Id.*

42. *Mango*, *supra* n. 33 at 380.

43. *Id.*

44. *Id.*

45. *Id.* A review conducted by the National Advisory Council on Women’s Educational Programs collected several anecdotes by female students detailing the existence of sexual harassment and the need for regulation. (citing F. Till, *SEXUAL HARASSMENT, A REPORT ON THE SEXUAL HARASSMENT OF STUDENTS REPORT OF THE NATIONAL ADVISORY COUNCIL ON WOMEN’S EDUCATIONAL PROGRAMS* (Aug. 1980)).

46. *See Cannon*, 441 U.S. at 677.

47. *Id.* at 680. The Supreme Court had yet to hear a case of hostile environment sexual harassment and consequently had yet to release a holding that sexual harassment was a form of

private action, although Cannon's allegations were accepted as true.⁴⁸ The Supreme Court reversed the lower court's decision based upon two factors.⁴⁹ The Court found that Cannon was excluded on the basis of sex and that the school in question was the recipient of federal financial assistance.⁵⁰ The statute expressly states that education programs or activities receiving federal funds are prohibited from discriminating on the basis of gender.⁵¹ *Cannon* established (1) that the alleged school did receive federal financial assistance⁵² and (2) that the decision to reject her application was circumstantially based upon her sex.⁵³ Consequently, the Court held that the school clearly violated Title IX.

While the Court easily made the determination that a violation had occurred based on the express language of the statute, the Court had difficulty finding an expressed right to private action evidenced in the statute.⁵⁴ The right to private action was inferred from a close analysis of Congressional intent, legislative history, and a plain reading of the statute.⁵⁵ On conclusion of its in-depth survey the Court held that Cannon belonged to a class which the statute was enacted to protect⁵⁶ and that the legislative history indicated an intent to create a private cause of action.⁵⁷ Furthermore, the Court noted that an implied right of action would not frustrate the purpose of the act.⁵⁸ "The award of individual relief to a private litigant who has prosecuted her own suit is not only sensible but is also fully consistent with—and in some cases even necessary to the orderly enforcement of the statute," held the Court.⁵⁹ *Cannon* marked the beginning of the expansion of the scope of Title IX by expanding the scope of Title IX to include the right of private action.

sexual discrimination. *Cannon* is relevant because it is the basis for all private actions arising under Title IX.

48. *Id.*

49. *Id.*

50. *Id.* at 689. The failure to admit the student on the basis of sex was evidenced by the school admission criteria.

51. *See* 20 U.S.C. § 1681 (1994).

52. *Cannon*, 441 U.S. at 680 n. 2. The school admitted receipt of federal financial assistance.

53. *Id.*

54. *Id.* at 683. The apparent difficulty existed because the statute does not expressly grant a private right of action.

55. *Id.* at 683-684.

56. *Id.* at 684.

57. *Id.* at 694. (citing *Cort v. Ash*, 422 U.S. 66, 82 (Cort v. Ash., 422 US 66, 82 (1975)). In *Cort* the Court held "it was not necessary to show an intention to create a private cause of action, although an explicit purpose to deny such a cause of action would be controlling."

58. *Id.* at 705-706.

59. *Id.* at 708. Before the *Cannon* ruling the Court found a private right of action in six other cases and damage remedies in three of those six cases. *Franklin*, 503 U.S. at 72.

Since the *Cannon* ruling, Congress has amended Title IX twice, never reversing the *Cannon* holding of an implied right of private action.⁶⁰ The Supreme Court noted Congress' silence in *Franklin v. Gwinnett County Public Schools* and held that Congress' acquiescence to the *Cannon* holding failed to limit the remedies available in a suit brought under Title IX.⁶¹

In *Franklin*, a high school student was subjected to continued sexual harassment by a sports coach and teacher employed by the school district. Teachers and school district administrators learned of the harassment, but failed to act appropriately to address the problem and put an end to the sexual harassment. Rather than attempting to halt the harassment, the teachers and school administrators discouraged the student from filing charges. The teacher later resigned on the condition that the charges be dropped and the school administrators cease their investigation. The District Court dismissed the claim finding Title IX did not authorize damage awards and the Court of Appeals affirmed.⁶² The Supreme Court reversed, and held that remedies are presumed unless Congress has prescribed otherwise.⁶³

Following *Cannon* and *Franklin*, the lower federal courts shifted their attention towards setting the standard for when employer liability would be imposed in student teacher sexual harassment claims.⁶⁴ The recovery of damages from employers in sexual harassment claims is predicated on the showing of institutional liability.⁶⁵ "Due to the slow development of legal standards under Title IX, courts have often looked to standards for employer liability under Title VII for guidance when considering institutional liability for Title IX claims."⁶⁶

Before *Gebser* there was a division among the courts regarding the appropriate standard for school district liability under Title IX.⁶⁷ "These standards include[d] (1) strict liability for school district or institutional liability, (2) institutional liability if the school district knowingly failed to act, (3) no institutional liability unless there was direct discrimination, and (4) liability if the school district knew or should have known of the discrimination."⁶⁸ The Fifth and Seventh Circuits did not apply strict liability

60. *Franklin*, 503 U.S. at 73. "Congress made no effort to restrict the right of action recognized in *Cannon*. . . or to alter the traditional presumption in favor of a federal right."

61. *Id.*

62. *Id.* at 64.

63. *Id.*

64. *Kinman*, 94 F.3d at 469.

65. Pinski, *supra* n. 34 at 148.

66. *Id.*

67. *Id.* at 149.

68. *Id.*

or agency principles to Title IX claims of sex discrimination.⁶⁹ Instead, both circuits held that school districts would not be held liable for an employee's misconduct unless a school district employee with the authority to end the abuse knew of the abuse and failed to act to end the abuse.⁷⁰ Meanwhile, the Second, Eighth, Sixth, and Fourth Circuits "embraced the Title VII standards of liability for Title IX claims."⁷¹

Before the enactment of Title IX no statute addressed gender discrimination.⁷² However, there was a statute to address racial and ethnic discrimination, Title VI, which Title IX is closely modeled after. Title VI reads in part: "[n]o person in the United States shall, on the basis of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."⁷³ "The purpose of Title VI is to end discrimination based on race, color or national origin in any program or activity receiving federal funds including discrimination in educational institutions."⁷⁴ The conditions for the grant of federal funds under Title VI are clear.⁷⁵ Schools receiving federal funds under Title VI "must conform to the antidiscrimination policy set by Title VI or be denied continued access to the federal monies often necessary to the continued survival of the institution."⁷⁶

Cases brought under Title VI in the educational context tend to address racially discrimination admission policies and their effects upon minorities.⁷⁷ "Title VI was long seen as the way to remedy discrimination against minorities in the admission policy."⁷⁸ Although Title VI adequately addressed issues of race discrimination and their effect upon minorities, it did not address the issue of gender discrimination.

69. See Kelly Frels and Lisa A. Brown, *Dangerous Liaisons It's Up To The Supreme Court to Chart The Liability Of School Districts For A Teacher's Sexual Harassment Of A Student*, Texas Lawyer, Jan. 26, 1998 at 24. The article analyzed lower court rulings regarding school district liability in sexual harassment cases involving teachers harassing students.

70. See generally, *Canutillo Indep. School Dist. v. Leija*, 101 F.3d 393 (5th Cir. 1996); *Rosa H. v. San Elizario Indep. School Dist.*, 106 F.3d 648 (5th Cir. 1997); *Smith v. Metropolitan School Dist.*, 128 F.3d 1014 (7th Cir. 1997).

71. Frels and Brown, *supra* n. 69.

72. Mango, *supra* n.35 at 366.

73. See 42 U.S.C. '2000d (1994).

74. Elizabeth J. Grant, *Applying "Title VII Hostile Work Environment" Analysis to Title IX of the Education Amendments of 1972 An Avenue of Relief for Victims of Student-to Student Sexual Harassment in the Schools*, 98 DICK. L. REV. 489, 495 (1994).

75. Mango, *supra* n.35 at 362.

76. *Id.*

77. *Id.*

78. *Id.*

The statutory language of Title IX is similar to the 1964 Civil Rights Act, Title VI.⁷⁹ In addition to the similar language in the statutes, both statutes share a similar purpose. Both Title VI and Title IX seek to prohibit discrimination in the admission policies of educational institutions.⁸⁰ Title VI focuses on addressing discrimination on the basis of race or national origin. Meanwhile, Title IX focuses on prohibiting discrimination on the basis of gender in admission decisions. Essentially the two statutes are contracts between the federal government and grant recipients.⁸¹ The federal government promises to provide needed financial assistance to educational programs on the condition that the educational programs do not discriminate on the grounds of race, color or national origin under Title VI; nor on the grounds of sex under Title IX.⁸²

It may be inferred from the similarity in the statutory language of Title IX and Title VI that the same legal standards should apply to both statutes.⁸³ However, “[t]he problem for the student litigant under this scheme is that she would be forced to refer to another federal statute and regulatory scheme equally silent on the existence of environmental harassment and less flexible in response to student-victim’s needs.”⁸⁴

After examining the Title VI legislative history and comparing the statutory language of Title IX and Title VI, the Court in *Cannon* noted additional similarities.⁸⁵ “Both statutes provide the same administrative mechanism for terminating federal financial support for institutions engaged in prohibited discrimination.”⁸⁶ In addition, neither statute expressly provides for a private right of action.⁸⁷ The Court reasoned that the language of Title VI

79. 42 U.S.C. ‘2000d. “Except for the substitution of the word “sex” in Title IX to replace the words “race, color, or national origin” in Title VI, the two statutes use identical language to describe the benefitted class.” *Cannon*, 441 U.S. at 694-695.

80. *Mango*, *supra* n. 35 at 387. There is a marked difference between Title IX and Title VI. Title VI applies to all programs receiving federal funds, not just educational programs. See 42 U.S.C. ‘2000d (1994).

81. *Guardians Association, etc. v. Civil Service Commission of the City of New York*, 463 U.S. 582, 599(1983).

82. *Id.*

83. *Mango*, *supra* n. 35 at 387.

84. *Id.* at 385. There are concerns about what adjudicatory standard to apply because of silence in the statute and its regulations and an unclear legislative history of the congressional intent as to “who Title IX was designed to help and in what capacity.” *Id.* at 384.

85. *Cannon*, 441 U.S. at 694-6. *Cannon* laid the procedural foundation for comparisons between Title IX and Title VI. *Mango*, *supra* n. 33 at 387.

86. *Cannon*, 441 U.S. at 695-6.

87. *Id.* The Court reasoned that Congress assumed Title IX would be construed similar to Title VI. The Court’s conclusion was based upon the statements of Senator Birch Bayh, a Democrat from Indiana and staunch supporter of women’s rights, during the congressional debates regarding the enactment of Title IX. *Id.* at 696 n. 19 (noting Senator Bayh’s advocacy of women’s rights).

had been interpreted to provide a private right of action and Congress knew or should have known the law when it enacted Title XI with the same language as the already construed and generally accepted interpretation of Title VI.⁸⁸ The Court assumed that the congressional representatives, “were aware [of] the prior interpretation [of Title VI].”⁸⁹ In addition, the Court assumed Congress’ silence following the previous interpretation reflected Congress intent with respect to Title IX.⁹⁰

The Court’s presumptions are supported by the regulatory scheme of Title IX.⁹¹ Title IX defers to Title VI for procedure.⁹² Title IX procedures outline, “a system of evidence, a code of conduct for investigations, and a provision for judicial review.”⁹³ “Such deference is perhaps the clearest indication by the Department of Education that the two statutes are aimed at remedying so nearly the same grievance, that any established procedure to dealing with complaints under one is necessarily applicable and adequate to deal with complaints under the other.”

Although Title IX and Title VI bear some strong similarities, historically the courts have applied different legal standards in analyzing race and gender discrimination suits.⁹⁴ The different standards apply because gender classifications and discrimination are not considered suspect. Discrimination against women does not rise to the level of the “traditional indicia of suspectness.”⁹⁵ Consequently, the courts turn to Title VII for guidance in interpreting Title IX.⁹⁶

Title VII provides in part: “It shall be an unlawful employment practice for an employer. . . to discriminate against any individual with respect to his

In *Cannon*, the Court relied upon its interpretation of Title VI in finding an implied right of private action for violations of Title IX. *Id.* at 696.

88. *Id.* at 696-697. The Court noted that a distinguished Fifth Circuit Court of appeals opinion had been cited with approval and not questioned for the five years leading up to the *Cannon* holding. The noted opinion was written by Judge Wisdom and the panel included then Judge (Chief) Brown and then Judge (Chief Justice) Burger. See e.g. *Bossier Parish School Board v. Lemon*, 370 F.2d 847 (5th Cir. 1967). *Cannon*, 441 U.S. at 698 n. 20.

89. *Cannon*, 441 U.S. at 697.

90. *Id.*

91. Mango, *supra* n. 35 at 386.

92. See 34 C.F.R. ‘106.71 (1997).

93. Mango, *supra* n. 35 at 387.

94. For example, the courts apply strict scrutiny to any statute that is based on a suspect classification such as race. See e.g. *Palmore v. Sidoti*, 466 U.S. 429 (1984). Intermediate scrutiny applies in gender discrimination cases. See e.g. *Craig v. Boren*, 429 U.S. 190 (1976).

95. Discrimination is suspect when the victimized “class [is]. . .subjected to such a history of purposeful unequal treatment or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.” *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1993).

96. Neera Rellan Stacy, *Seeking a Superior Institutional Liability Standard Under Title IX for Teacher-Student Sexual Harassment*, 71 N.Y.U. L. REV. 1338, 1347 (1996).

compensation, terms, conditions, or privileges of employment, because of such individuals race, color, religion, sex or national origin.”⁹⁷ Title VII allows for the recovery of monetary damages with a cap of up to \$300, 000.⁹⁸ When Congress amended Title VII to allow for the recovery of monetary damages, this broadened the scope of Title VII.⁹⁹

The Courts have recognized two types of sexual harassment under Title VII, quid pro quo and hostile environment sexual harassment.¹⁰⁰ Since Title VII recognizes two types of sexual harassment it is frequently used as a guide to interpreting Title IX.¹⁰¹ Furthermore, since both Title VII and Title IX address the issue of sex discrimination, the courts are inclined to look toward Title VII for guidance in deciding Title IX cases.¹⁰²

III. GEBSER V. LAGO VISTA INDEPENDENT SCHOOL DISTRICT

Gebser resolved the issue of what standard of liability to impose in teacher-student sexual harassment cases. In *Gebser*, the Supreme Court addressed the issue of when a school district may be liable under Title IX for sexual harassment by one of its teachers against one of its students.¹⁰³ The Court held that it “will not hold a school district liable for damages under Title IX for a teacher’s sexual harassment of a student absent actual notice and deliberate indifference.”¹⁰⁴

While *Gebser* was a student in high school her teacher began making inappropriate comments to her. The comments continued and the teacher later initiated a sexual relationship with *Gebser*. *Gebser* did not report the teacher’s misconduct¹⁰⁵ and the relationship continued until the two were caught by police engaging in sexual relations. The teacher was arrested, fired by the school district and had his teacher’s license revoked by the state. Before his arrest the school had received only one notice about the teacher’s misconduct when the parents of two students complained about a comment made by the teacher in the class. The teacher was advised by the high school principal to be

97. 42 U.S.C. ‘2000e-2(a)(1) (1994).

98. Before 1991 only injunctions and equitable relief were available. , Kaija Clark, *School Liability And Compensation for Title VI Sexual Harassment Violations By Teacher And Peers*, 66 GEO. WASH.L.REV. 352, 361 (1998).

99. *Id.* at 362. Remedies traditionally associated with Tort actions were made available to litigants.

100. *See generally, Meritor*, 477 U.S. 57 (1986)(explained there are two types of sexual harassment).

101. Clark, *supra* n. 98 at 363.

102. Baker, *supra* n. 18 at 286.

103. *Gebser*, 118 S.Ct. at 1993.

104. *Id.*

105. *Gebser* testified that “although she realized. . .[the teacher’s] conduct was improper, she was uncertain how to react and she wanted to continue to have him as a teacher.” Marczyly, *supra* n. 1.

more careful with his comments and the school guidance counselor was made aware of the principal's meeting with the teacher. The school district superintendent and Title IX coordinator, however, were not made aware of the any of parental complaints or of the principal's meeting with the teacher.

After the arrest, Gebser filed suit in state court against the school district and the teacher. The case was removed to the United States District Court for the Western District of Texas which held that Gebser failed to raise a genuine issue as to whether the school district had notice of the harassment, and granted summary judgment in favor of the school. The Court then remanded the claims against the teacher to state court.¹⁰⁶ "[T]he court determine[d] the parents' complaint to the principal concerning . . . [the teacher's] comments in class . . . [was] the only [notice] Lago Vista had received about . . . [the teacher], and that evidence was inadequate to raise a genuine issue on whether the school district had actual or constructive notice that the teacher was involved in a sexual relationship with a student."¹⁰⁷ The Fifth Circuit Court of Appeals affirmed the District Court holding. The court held that Gebser failed to meet her burden of proof because she failed to establish the school had notice of the alleged sexual harassment.¹⁰⁸ In addition, the court held that strict liability was not consistent with the purpose of Title IX and that the agency principles of vicarious liability did not apply in the educational context.¹⁰⁹ The Supreme Court granted certiorari and affirmed.¹¹⁰

Gebser advanced two theories under which Lago Vista could be held liable for the teacher's misconduct.¹¹¹ First, Gebser sought to hold the school liable under a theory of respondeat superior, vicarious or imputed liability.¹¹² "[U]nder which recovery in damages against a school district would generally follow whenever a teacher's authority over a student facilitates harassment."¹¹³ Second, Gebser contended the school should be held liable at a minimum under the alternate theory of constructive notice.¹¹⁴ Under a constructive notice theory, a school district would be liable under Title IX, for a teacher's

106. *Id.* Gebser also sued the school district for negligence and under '1983, in addition to the violations of Title IX. *Doe v. Lago Vista Indep. School Dist.*, 106 F.3d 1223, 1224 (5th Cir. 1997). She later conceded her negligence claim could not succeed under Texas law. The District Court granted summary judgment on both the '1983 and Title IX claims. .

107. *Gebser*, 118 S.Ct. at 1994.

108. *Lago Vista Indep. School Dist.*, 106 F.3d at 1223-1224. The Court of Appeals granted the school's motion for summary judgement based upon its holding in *Rosa H. v. San Elizario Indep. School Dist.*, 106 F.3d 648 (5th Cir. 1997), and *Canutillo Indep. School Dist. v. Leija*, 101 F.3d 393 (5th Cir. 1996).

109. *Lago Vista Indep. School Dist.*, 106 F.3d at 1223-1224.

110. *Gebser*, 118 S.Ct. at 1994.

111. *Id.* at 1995.

112. *Id.*

113. *Id.*

114. *Id.*

misconduct if the district knew or should have known about the harassment, but failed to act to remedy the discrimination.¹¹⁵

The majority found that Gebser's petition for damages under the theories of respondeat superior and constructive notice were the "most critical in resolving the case."¹¹⁶ Justice O'Connor, joined by Chief Justice Rehnquist, Justices Scalia, Kennedy and Thomas, reasoned that since Congress had not specifically addressed the issue of damages or relief under Title IX, and because there was no legislative history indicative of intent regarding monetary damages the Court had a wide degree of "latitude to shape a sensible remedial scheme that best comported with the statute."¹¹⁷

The majority used Title IX as a guide in fashioning its remedial scheme to avoid creating a remedy exceeding the statute's scope and purpose.¹¹⁸ After analyzing the statute the majority concluded that it would "frustrate the purposes of Title IX to permit damages recovery against a school district for a teacher's sexual harassment of a student based on principles of respondeat superior or constructive notice, i.e. without actual notice to a school district official."¹¹⁹ Much of Justice O'Connor's analysis concerning Congress' intent was based upon a comparison of Title IX and Title VII.¹²⁰ For example, she reasoned that Congress' silence on the subjects of both a private right of action and a monetary damages remedy were evidence Congress did not intend to

115. *Id.* The Court found that the issue of "whether educational institutions [could] . . . be said to violate Title IX based solely on principles of respondeat superior or constructive notice was not resolved by *Franklin's* citation of *Meritor*." Furthermore, the reference to *Meritor* in *Franklin* was made to establish that sexual harassment did constitute sexual discrimination under Title IX.

The school district's liability in *Franklin* did not turn on any constructive notice or imputed liability theories because the school district knew of the sexual harassment, but failed to take any action to remedy the situation. *Franklin*, 503 U.S., at 64.

In addition, the majority found that the language of Title IX did not support the application of agency principles as a legal standard. *Gebser*, 118 S.Ct. at 1996. The majority reasoned that *Meritor's* application of agency principles as a guide to imputed liability under Title VII applied because of the statutory language of Title VII which expressly indicates an intent for agency principles to apply. *Id.* at 1996. The Court found no such statutory language suggesting agency principles should apply to Title IX claims. The Court also noted that Title VII explicitly defines any employee to include any agent. *See also* 42 U.S.C. '2000e(b)(1994). Again, the Court noted the absence of agency language in Title IX.

116. *Gebser*, 118 S.Ct., at 1996.

117. *Id.* The Court recognized that Title VII has an express cause of action, provides for monetary damages, and has a cap on the amount of monetary damages available to successful litigants. *See also* '2000e-5(f) (provides an express cause of action); '1981a (provides for monetary damages); '1981a(b) (places a cap on the amount of monetary damages available). The Court found no express provision contained in Title IX. Furthermore, the judicially recognized cause of action and absence of express congressional intent authorized a judicially constructed remedial scheme. *Gebser*, 118 S.Ct. at 1996.

118. *Id.*

119. *Id.* at 1997 (internal quotes omitted).

120. *Id.* at 1997.

provide recovery of monetary damages as a remedy.¹²¹ Civil rights statutes enacted before Title IX had included an express right to action.¹²² These statutes did not provide for the recovery of monetary damages; rather they provided for injunctive and equitable relief.¹²³ In addition, Justice O'Connor noted that Congress did not make provisions for recovery of monetary awards under Title VII until 1991.¹²⁴ Even then, Congress placed a cap on the amount of monetary damages recoverable.¹²⁵ Therefore, based upon Congress' refusal to permit the unlimited recovery of monetary damages under other civil rights statutes, Justice O'Connor concluded that Title IX should not permit the unlimited recovery of monetary damages in private action litigation.¹²⁶ Justice O'Connor cited to Title VII which, although it permitted the award of monetary damages, limited the available recovery to an individual.¹²⁷ The maximum recovery under Title VII for violations is closely linked to the size of the employer.¹²⁸ Justice O'Connor wrote, "adopting . . . [Gebser's] position would amount, then, to allowing unlimited recovery of damages under Title IX where Congress has not spoken on the subject of either the right or the remedy, and in the face of evidence that when Congress expressly considered both in Title VII it restricted the amount of damages available."¹²⁹

Relying on the case precedent established by *Cannon*, Justice O'Connor found that the purpose of Title IX was to avoid the use of federal funds to support discriminatory practices.¹³⁰ She also acknowledged that the statute was patterned after the Civil Rights Act of 1964 and that "[t]he two statutes operate in the same manner, conditioning an offer of federal funding on a promise by the recipient not to discriminate, in what amounts to a contract between the Government and the recipient of funds."¹³¹ It is the contractual framework of Title IX that distinguishes it from Title VII.¹³² Title VII expressly prohibits discrimination regardless of whether or not an employer receives federal funds.¹³³ "Title VII aims centrally to compensate victims of discrimination, [while] Title IX focuses more on 'protecting' individuals from

121. *Id.*

122. *Id.*

123. *Id.* (citing 42 U.S.C. '2000a-3(a) (1970 ed.); '2000e-5(e), (g) (1970 ed. Supp.II).

124. *Gebser*, 118 S.Ct. at 1997.

125. *Id.* (citing 42 U.S.C. '1981a(b)(3)).

126. *Id.* at 1997.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* See also '2000e-2.

discriminatory practices carried out by recipients of federal funds.”¹³⁴ The contractual framework of Title IX was crucial to the holding because “[w]hen Congress attache[s] conditions to the award of federal funds under its spending power, U.S. Const., Art. I ‘8, cl. 1, as it ha[d] in Title IX and Title VI, . . . [the Court has] examine[d] closely the propriety of private actions holding the recipient liable in monetary damages for noncompliance with the condition.”¹³⁵ In *Gebser*, special attention was paid toward ensuring that the recipient of federal funds had notice that it would be liable for monetary damages.¹³⁶ Actual notice is required because the recipient of federal funds may be unaware of its violation of the conditions of the grant, and the majority “assume[d] that Congress did not envision a recipient’s liability in damages in that situation.”¹³⁷

In addition, the text of the statute and its regulations aided the majority in concluding that Congress did not intend to allow recovery of damages under respondeat superior or absent actual notice.¹³⁸ The administrative enforcement procedures indicated “Congress did not intend to allow recovery in damages where liability rests solely on principles of vicarious liability or constructive notice.”¹³⁹ Justice O’Connor noted that grant recipients are provided with actual notice of their failure to comply with express conditions of their contract with the government, and afforded the opportunity to remedy the situation. Upon continued noncompliance, the government takes further action which may include termination of assistance or refusal to grant or continue federal assistance.¹⁴⁰

134. *Gebser*, 118 S.Ct. at 1997. The Court found that this distinction explained why the Court, in *Cannon*, “[referred] to injunctive or equitable relief in a private action, but not to a damages remedy.” *Id.* at 1997-8 (citations omitted).

135. *Id.* at 1997.

136. *Id.*

137. *Id.* at 1998. In *Rosa H. v. San Elizario Indep. School Dist.*, the Fifth Circuit Court of Appeals found that “[w]hen the school board accepted federal funds, it agreed not to discriminate on the basis of sex. . . [it is] unlikely that it further agreed to suffer liability whenever its employees discriminate on the basis of sex.” 106 F.3d 648, 654 (5th Cir. 1997) (held Title IX does not create liability on the part of a public school for negligently failing to prevent a teacher from sexually abusing a student).

The Court reasoned that, “[a]s a statute enacted under the Spending Clause Title IX should not generate liability unless the recipient of federal funds agreed to assume liability.”

138. *Gebser*, 118 S.Ct. at 1998.

139. *Id.*

140. *Id.* See also 20 U.S.C. ‘1682 (1994) which reads in part: “That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.”

In addition, the administrative regulations prohibit the government from beginning enforcement actions until the grant recipient has been notified, afforded the opportunity to

The purpose of requiring notice is to provide the grant recipient with the opportunity to bring its actions into compliance with the statute before much-needed federal funds are diverted “from beneficial uses when a recipient was unaware of discrimination in its programs and is willing to institute prompt corrective measures.”¹⁴¹ Justice O’Connor found that the relief sought by Gebser was contrary to the purpose of the notice requirement.¹⁴² The majority found that it would not be prudent for the judicial scheme of enforcement to be contrary to the statute’s express administrative enforcement policies.¹⁴³ Furthermore, Justice O’Connor feared that “an award of damages in a particular case might well exceed a recipients level of federal funding.”¹⁴⁴ For instance, “many school districts receive relatively small amounts of federal money, \$120,000 a year in the case of Lago Vista.”¹⁴⁵ However, “jury verdicts in sexual harassment cases can exceed \$1 million.”¹⁴⁶

Justice O’Connor concluded that the judicial remedies available under Title IX should comply with the Congressional intent expressed in the language of Title IX and the administrative enforcement regulations.¹⁴⁷ She proceeded to interpret the regulations and provide guidance to future litigants.¹⁴⁸ She wrote “in cases like this one that do not involve the official policy of the recipient entity, we hold that a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient’s behalf has actual knowledge of discrimination in the recipient’s programs and fails adequately to respond.”¹⁴⁹

A school district must respond with deliberate indifference to meet the discrimination component of the statute.¹⁵⁰ The Court based its findings on the express language in the administrative enforcement scheme.¹⁵¹ The basis of a cause of action under Title IX must be an official action by the grant recipient, and no action can be taken absent actual notice and a response.¹⁵² The

remedy the violation, and it has been determined that voluntary compliance is not attainable. *See* 34 C.F.R. ‘100.8(c),(d)(1997).

141. *Gebser*, 118 S.Ct. at 1999.

142. *Id.*

143. *Id.*

144. *Id.*

145. *See* Greenhouse, *supra* n. 2 (citing school board brief).

146. *Id.*

147. *Gebser*, 118 S. Ct at 1999.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* The Court found that “[t]he administrative enforcement scheme presupposes that an official who is advised of a Title IX violation refuses to take action to bring the recipient into compliance.”

152. *Id.*

recipient must officially act in a discriminatory manner.¹⁵³ Absent a standard of deliberate indifference a school district would be held liable not for its own official actions, but for the misconduct of one of its “employee’s independent actions.”¹⁵⁴

After concluding that schools would not be held liable under Title IX absent actual notice of sex discrimination and deliberate indifference by an official with the authority to remedy discriminatory practices, the Court applied the facts of *Gebser* to the new rule and concluded that the school district was not liable under Title IX.¹⁵⁵ First, Gebser conceded that she should not prevail under the actual notice standard.¹⁵⁶ The only school official with knowledge of any misconduct was the principal, and he knew only of inappropriate comments the teacher had made in class.¹⁵⁷ Consequently, the Court concluded that the school district lacked actual notice.¹⁵⁸

Second, upon learning of its employee’s misconduct, the school district took appropriate action to remedy the situation by terminating the teacher.¹⁵⁹ This official decision adequately addressed the problem and did not constitute deliberate indifference.¹⁶⁰ The majority concluded its opinion by acknowledging that sexual harassment of students was not uncommon, but announced that it would “not hold a school district liable in damages under Title IX for a teacher’s sexual harassment of a student absent actual notice and deliberate indifference,” unless Congress enacted legislation directly addressing the issue.¹⁶¹ In concluding the majority opinion Justice O’Connor acknowledged the harm caused by sexual harassment in the educational context and the availability of other means of redress available to injured students.¹⁶² It may be inferred that Justice O’Connor realized the opinion might draw criticism and be seen as making sexual harassment suits more difficult for injured students to pursue.¹⁶³ However, the acknowledgment of other remedies available showed that students were not left without any legal recourse after *Gebser*. The holding simply meant that to successfully bring a suit under Title IX, students alleging sexual harassment would have to show

153. *Id.*

154. *Id.* The deliberate indifference standard also applies to causes of action under ‘1983.

155. *Id.*

156. *Id.* at 1999.

157. *Id.* at 2000.

158. *Id.* The Court declared that the teacher’s knowledge of his misconduct was not pertinent.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* The Court stated that its holding did not effect a students ability to bring suits against a school district under state law or “against the teacher in his individual capacity or under 42 U.S.C. 1983.”

163. *Id.*

that an official with the authority to remedy the situation failed to act appropriately. Justice O'Connor and the majority carefully noted that sexual harassment suits holding school districts liable for a teacher's misconduct suits are not barred by Title IX, but that specific evidence of knowledge must be shown for students to succeed in a private action against the school district under Title IX.

Justice Stevens joined by Justice Souter, Justice Ginsburg, and Justice Breyer dissented. Justice Stevens accused the majority of failing to accurately interpret the statute, failing to adhere faithfully to the Court's duty to interpret the law, straying from Court precedent and thwarting the purpose of Title IX.¹⁶⁴ While Justice Stevens noted that Congress took no express action contrary to the Court's holdings in *Cannon* and *Franklin*,¹⁶⁵ he interpreted Congress' silence as validation of the Court's previous holdings as well as an indication of Congress' implicit acknowledgment that damages are available.¹⁶⁶

Justice Stevens concluded that, "[b]ecause these constructions of the statute have been accepted by Congress and are unchallenged here, they have the same legal effect as if the private cause of action seeking damages had been explicitly rather than implicitly, authorized by Congress."¹⁶⁷ Therefore, Justice Stevens disagreed with the majority's presumption that the Court had a wide degree of latitude in accessing the appropriate remedy available under Title IX.¹⁶⁸ Instead, Justice Stevens asserted that the Court should have adhered to the "text of the statute and settled legal principles."¹⁶⁹ Although, Justice Stevens did not believe that the Court had a wide degree of latitude, he did believe the remedies available under Title IX should be as broad as the scope of Title IX.¹⁷⁰ The majority's holding was not far reaching enough according to Justice Stevens, because it was "at odds with settled principles of agency law."¹⁷¹ Justice Stevens advocated the application of agency principles because (1) the teacher's misuse of the authority vested in him through his employment relationship with the school district "allowed him to abuse his young students' trust,"¹⁷² and (2) the absence of the use of the term 'agent' in

164. *Id.*

165. *Id.* at 2002.

166. *Id.* (citing *Franklin*, 503 U.S. at 78, Justice Scalia concurring). Congress amended Title IX after the Court's ruling in *Cannon* to "eliminate the States' Eleventh Amendment immunity." See also 42 U.S.C. '2000d-7(a)(1).

167. *Gebser*, 118 S.Ct. at 2002.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at 2003.

172. *Id.*

the text of the statute is not dispositive.”¹⁷³ Justice Stevens noted that, “the Court suggest[ed] that agency principles are inapplicable to this case because Title IX does not expressly refer to an “agent” as Title VII does.¹⁷⁴ “Title IX’s focus on the protected classes rather than the fund recipient fully explains the statute’s failure to mention “agents” of the recipient,” argued Justice Stevens in a footnote.¹⁷⁵ Furthermore, Justice Stevens reasoned that Title VII’s agency language was limiting language.¹⁷⁶ He opined, “Congress’ decision to define ‘employee’ to include any ‘agent’ of an employer, . . . surely evince[d] an intent to place some limits on the acts of employees for which employers under Title VII are to be held liable.”¹⁷⁷ Justice Stevens relied heavily on the restatement of Torts and agency principles in his dissent.¹⁷⁸ He also asserted that the Department of Education, Office of Civil Rights interpretation of the statute was significant.”¹⁷⁹ The Department of Education promulgated a policy that stated that, school districts should be held liable if teachers are “aided in carrying out the sexual harassment of students by his or her position of authority with the institution.”¹⁸⁰

Justice Stevens also found the majority’s carefully constructed rule thwarted the purpose of Title IX.¹⁸¹ He argued that the rule did not provide any incentive for school districts “to adopt and enforce practices that . . . [would] minimize the danger that vulnerable students . . . [would] be exposed to such odious behavior.”¹⁸² He reasoned that the rule allowed school districts to insulate themselves from knowledge of a teacher’s misconduct to shield themselves from liability.¹⁸³ Justice Stevens refrained from denouncing

173. *Id.* at 2004, n. 9. Justice Stevens found that, “Title IX’s focus on the protected class rather than the fund recipient fully explained the statute’s failure to mention “agents” of the recipient, however. . . Title VII’s reference to an “agent” as a limitation on the liability of the employer.”

In addition, Justice Stevens advocated the application of agency principles because it Acomport[ed] with the relevant agency’s interpretation of Title IX. Justice Stevens cited the policy guidelines released by the United States Department of Education through its Office of Civil Rights. “[T]he Department’s interpretation of the statute wholly supports the conclusion that . . . [Lago Vista] is liable in damages for . . . [the teacher’s] sexual abuse of his students, which was made possible only by . . . [the teacher’s] affirmative misuse of his authority as her teacher.”

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* (citing *Meritor*, 477 U.S. at 72). (internal citations omitted)

178. *Id.*

179. *Id.*

180. Department of Education, Office of Civil Rights, *Sexual Harassment Guidance: Harassment of Students or Third Parties*, 62 Fed. Reg. 12034, 12039 (1997).

181. *Id.* at 2004.

182. *Id.*

183. *Id.* He added, “[i]ndeed, the rule that the Court adopts would preclude a damages remedy even if every teacher at the school knew about the harassment but did not have authority

the new rule as inferior to common law agency principles and rules but accused the Court of failing to justify its rule.¹⁸⁴ He asserted that the “Court bears the burden of justifying its rather dramatic departure from settled law, and to explain why its opinion fails to shoulder that burden.”¹⁸⁵

Justice Stevens dismissed the other rationales proffered by the Court for its rule.¹⁸⁶ First, he found the Court’s reliance on a comparison between Title IX and Title VII in its analysis to be erroneous.¹⁸⁷ He argued that Congress’ failure to provide for the recovery of monetary damages in other civil rights statutes did not bar recovery of monetary damages under Title IX.¹⁸⁸ Justice Stevens relied on the Court’s ruling in *Franklin*, and concluded the *Franklin* ruling dispelled the notion that monetary damages were not available under Title IX.¹⁸⁹ He noted the *Franklin* Court “concluded that the same contextual approach used to justify an implied right of action more than amply demonstrate[d] the lack of any legislative intent to abandon the traditional presumption in favor of all available remedies.”¹⁹⁰

Secondly, Justice Stevens criticized the majority’s conclusion that the school district was unaware that it could be held liable for the individual misconduct of one of its employees who sexually harasses a student.¹⁹¹ He argued that school district counsel could have assumed based on Court precedent that they would be held liable for sexual harassment by a teacher against a student because sexual harassment is a violation of Title IX’s conditions for grant recipients.¹⁹² He concluded that the majority’s reliance on the administrative enforcement scheme of Title VI was inappropriate because few students would be able to succeed under the high standard imposed by the majority’s rule.¹⁹³

to institute corrective measures on the district’s behalf.” *Id.* at 2004 (citing the majority opinion at 1993 (internal quotes omitted)).

184. *Id.*

185. *Id.* He commented that the Court was wrong to conclude that the ruling did not effect a student’s right to recovery. *Id.* at 2004, n. 11. For example, Gebser’s ‘1983 claim was dismissed on summary judgment and the state law Aimmunize[d] school districts from tort liability in cases like this one.

186. *Id.*

187. *Id.* Furthermore, Justice Stevens found that the cap on the amount of damages available had “no bearing on when damages may be recovered from a defendant in a Title IX case,” and the amount of damages recoverable was not of issue in the *Gebser* case. *Id.* at 2005.

188. *Id.*

189. *Id.*

190. *Id.* at 2005 (citing *Franklin*, 503 U.S. at 72).

191. *Id.*

192. *Id.* Justice Stevens was referring to the Court’s holding in *Franklin* which preceded Waldrop’s misconduct toward Gebser.

193. *Id.* at 2006.

Finally, Justice Stevens wrote, it is “not relevant . . . whether the school district or the injured student should bear the risk of harm—a risk against which the district, but not the student, can insure.”¹⁹⁴ He accused the majority of finding the protection of the school districts “purse” higher than the protection of its students.¹⁹⁵ He summarized his dissent reiterating that absent further justification, the majority’s new rule thwarted the purpose of Title IX, which was to protect students from gender discrimination.¹⁹⁶

Justice Ginsburg joined by Justice Souter, and Justice Breyer, agreed with Justice Stevens dissent, but went a step farther in an effort to provide guidance to future litigants. Justice Ginsburg’s dissent sought to address an issue left open by the majority opinion and Justice Steven’s dissent: “whether a [school] district should be relieved from damages liability if it has in place, and effectively publicizes and enforces, a policy to curtail and redress injuries caused by sexual harassment.”¹⁹⁷ Justice Ginsburg asserted that the issue should be addressed because: “(1) the dimensions of a claim are determined not only by the plaintiff’s allegations; but by the allowable defenses and (2) this Court’s pathmarkers are needed to afford guidance to lower Courts and school officials responsible for implementation of Title IX.”¹⁹⁸ Justice Ginsburg advocated a rule which would allow school districts to assert an affirmative defense if they had an effective policy to address issues of sexual harassment,¹⁹⁹ the school district would bear the burden of asserting the affirmative defense.²⁰⁰ Justice Ginsburg found support for her position in the procedures and regulations released by the Department of Education which instruct school districts to “install procedures for prompt and equitable resolutions of complaints. . . and the Department of Education’s Office of Civil Rights. . . detailed elements of an effective grievance process, with specific reference to sexual harassment.”²⁰¹

IV. ANALYSIS

The agency principles of employer liability advocated by *Gebser* should not apply to Title IX claims because neither the statute nor its regulations indicate a Congressional intent to impose common law liability on

194. *Id.* at 2007

195. *Id.*

196. *Id.*

197. *Id.* at 2007.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* (citing 34 C.F.R. ‘106.8(b)(1997)); 62 Fed.Reg. 12034, 12044-12045 (1997) (internal quotes omitted).

employers.²⁰² Title IX regulations are framed around the presumption of notice and opportunity.²⁰³ The regulations prohibit government agencies from withdrawing federal funds or taking any other enforcement action until a school district has received notice of its noncompliance with the conditions of Title IX.²⁰⁴ The notice is required to give the school district the opportunity to remedy the discrimination before the government commences enforcement proceedings.²⁰⁵ After a school district is given notice and the opportunity to rectify its discriminatory practice(s), the government may commence enforcement proceedings if the school district has not come into compliance with Title IX's requirements.²⁰⁶

The Title IX guidelines support the majority conclusion that school districts may only be held liable for their official actions.²⁰⁷ For example, school districts must officially disseminate their policies against gender discrimination, and must officially make institutional decisions which adhere to that policy to uphold their contract with the government under Title IX.²⁰⁸ This does not coincide with common law agency principles which hold employers liable for acts and decisions of employees which may not be authorized as official acts of the employer.

It may be inferred from the regulations that the government is hesitant to punish school districts that are willing to comply with the Title IX requirements. It may also be inferred that Congress and the appropriate regulatory agencies are aware that Title IX is broad and unclear, so rather than hold school districts responsible for interpreting the act, the government will grant school district's the opportunity to redeem themselves should they unknowingly act in a discriminatory manner.²⁰⁹

The majority did not stray from precedent but rather continued its practice of carefully interpreting overly broad and unclear statutes. *Cannon* remains intact because students still may bring a private right of action against school

202. See 20 U.S.C. '1681. As the majority noted, the statute does not include any language referring to the common law agency principles. See *Gebser*, 118 S.Ct. 1995-6.

203. See 34 C.F.R. 100.8(c),(d).

204. *Id.*

205. *Id.*

206. *Id.*

207. See 34. C.F.R. '106.9. The regulations require schools to disseminate their policy against gender discrimination to all "applicants for admission and employment, students and parents of elementary and secondary school students, employees, sources or referral of applicants for admission and employment. . ."

208. *Id.*

209. Both the majority and dissenting opinions note that Title IX is broad and unclear. See generally *Gebser*, 118 S.Ct. at 1989. Both the majority and dissent drew upon a variety of sources to aid them in interpreting the statute because the language and the legislative history did not clearly indicate the goals of Congress in enacting the statute.

districts for violations of Title IX.²¹⁰ *Franklin*, also remains intact because monetary damages may still be available under Title IX;²¹¹ the Court's opinion merely limits the application of the *Franklin* rule.

The *Gebser* rule is beneficial to future litigants seeking recovery of monetary damages from school districts, because it expressly tells plaintiffs what elements they need to prove to recover monetary damages from employers. The *Gebser* rule lays the foundation for making a successful claim under Title IX for the recovery of monetary damages from school districts. Before *Gebser*, students were left to wonder what standard of liability the courts would impose on a school district. Now the last element of proving a Title IX claim is laid out for plaintiffs. Plaintiffs need to show that (1) they notified someone about the harassment, (2) the person notified had the authority to act to remedy the harassment, and (3) the individual, once notified, failed to act appropriately to end the harassment, *i.e.* acted with deliberate indifference.²¹²

The majority's reliance on the text of the statute and its regulations as guidance in fashioning a remedy, aided the Court in refraining from exceeding the scope of Title IX. The Court's rule continues to protect students without inflicting financial ruin on schools receiving federal funds. This is consistent with the purpose of the statute, which is to protect students from sex discrimination, while also seeking to provide much needed financial assistance to educational institutions. Furthermore, the Court's analysis is consistent with the regulatory scheme fashioned by the rules released by the Department of Education.²¹³ As the majority opinion noted, the Department of Education presumed that some notice would be given to school districts so that they may have the opportunity to remedy any discriminatory practices.²¹⁴ Contrary to Justice Stevens interpretation of the Court's ruling, the Court did not imply that school districts were unaware that sexual harassment by a teacher against a student was a violation of Title IX. Rather the majority implied that the text of the statute, when read closely, penalized schools which act officially to

210. See Ely, *supra* n. 2.

211. *Id.* Although, a criticism of the *Gebser* rule, the article accurately described the amount of skill used by the Court to avoid disrupting *Franklin*. However, Ely drew the wrong conclusion from the Court's crafty preservation of the rule in *Franklin*. The new rule is crafty because it is advisory in nature. The majority offers guidance to future litigants by expressly telling them what is necessary to make a successful claim for damages.

212. The opinion also described what actions might be an appropriate response to a student's complaints of sexual harassment. For example, the Court was satisfied with the Lago Vista School District's handling of *Gebser*'s situation. The teacher was dismissed. Dismissal of a teacher was an appropriate response to a student's complaints of hostile environment sexual harassment.

213. See 34 C.F.R. 106.8(b)(1997).

214. *Gebser*, 118 S.Ct. at 2000.

discriminate against students on the basis of gender.²¹⁵ The school district in *Gebser* was unaware that it could be held liable for actions that were not the official actions of the school. To hold a school district liable for unofficial actions of its employees would be contrary to the express statutory language of Title IX. Consequently, the Court's ruling did not thwart the purpose of Title IX.

Public policy strongly advocates a narrow scope of liability for schools to protect school districts and students. All the Justices acknowledged that the ruling was not beneficial to the victims of sexual harassment.²¹⁶ Students bear the burden of talking about an embarrassing and hurtful experience at the hands of a trusted adult. While placing a great burden upon students in proving their claims, however, the ruling also challenged Congress to amend Title IX for the safety of students.²¹⁷ In addition, schools were put on notice that they may be held liable for damages if they neglect to heed a student's complaints. Many schools may take this ruling and promulgate stringent sexual harassment policies to avoid lengthy and costly litigation and to protect its student body. Although the ruling shields schools from liability when there is no notice of the sexual harassment, the ruling also posed several new questions. For example: What exactly is notice? Who must give notice? Who has the authority to address the issue of sexual harassment? And what type of action is reasonable and adequate to address the issue of sexual harassment?²¹⁸

V. CONCLUSION

The Court's ruling in *Gebser* should be viewed as a challenge to Congress and schools, not as a burden upon the victims of teacher-student sexual harassment. The Court challenged Congress to amend Title IX to clarify its position regarding the types of damages that should be awarded to private litigants and in what instances. In addition, the Court delivered a strong message to schools. School districts must begin to acknowledge the seriousness of sexual harassment and address the issue now, before Congress does act and the holding in *Gebser* is superceded by an amendment to Title IX.

Despite the unpopularity of the holding, the *Gebser* decision shed much-needed light on the issue of sexual harassment. The numerous articles written regarding the decision and the cases pending in the Supreme Court are evidence that neither students nor schools are willing to sit back and allow

215. See 20 U.S.C. '1681 (1994).

216. *Gebser*, 118 S.Ct. at 2000 (majority opinion), *Id.* at 2006 (Justice Stevens dissenting), *Id.* at 2007 (Justice Ginsburg dissenting).

217. *Id.* at 2000.

218. See Marczely, *supra* n.1 .

more young people like Gebser to suffer at the hands of a few depraved teachers.²¹⁹

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219. See e.g. Kathleen Weron Toth and Margaret Webb Egler, *Current Supreme Court Term Promises to Offer Long-Awaited Guidance On Sexual Harassment*, *Tex Lawyer*, June 22, 1998 at S26; Ruth Raisfeld and Adam Heft, *Applying Title IX To Sex Harassment*, *N.Y.L.J.* Oct. 8, 1998.