GEBSER V. LAGO VISTA SCHOOL DISTRICT: A LOOK AT SCHOOL DISTRICTS' LIABILITY FOR TEACHER-STUDENT SEXUAL HARASSMENT

INTRODUCTION

In the last several years, the news has prominently featured instances of sexual harassment in schools. For example, in 1996, a Lexington, North Carolina, first grade student was suspended from school for a day for kissing a classmate on the cheek, because the kiss violated the school's sexual harassment policy.[1] While in Seattle, Washington, a former grade school teacher is serving a seven-year prison term for raping a thirteen-year-old student and has now two children fathered by the student.[2] With stories such as these filling newspapers around the country, courts have struggled to articulate standards governing school liability for sexual harassment. Unfortunately, courts adopted inconsistent standards, and, consequently, the ability of a student to recover damages from a

1. Emmalena K. Quesada, Note, *Innocent Kiss or Potential Legal Nightmare: Peer Sexual Harassment and the Standard for School Liability Under Title IX,* 83 CORNELL L. REV. 1014, 1015 (1998). Quesada cites several articles related to the incident, including one in the Boston Globe which reported that the school did not actually suspend the boy, but "sent him to another room for misbehavior, and that the school did not characterize his act as sexual harassment, but as 'unwanted touching.'" *Id.* at 1015 n.5, citing Ellen Goodman, *The Truth Behind "the Kiss,"* BOSTON GLOBE, Oct. 13, 1996, at D7. Regardless of which account is true, the story reported around the nation of a six-year-old suspended for sexual harassment caused many Americans to question whether the sexual harassment issue had gone too far. *Id.* at 1016.

2. Arthur Santana, *Imprisoned Letourneau is Pregnant*, SEATTLE TIMES, Mar. 15, 1998, at A1.

school district for sexual harassment varied depending on the jurisdiction. However, in its 1998 term, the Supreme Court addressed this issue of the liability of school districts under Title IX in teacher-student sexual harassment cases in *Gebser v. Lago Vista Indep. Sch. Dist.*[3] There the Court articulated a standard of deliberate indifference to actual knowledge for determining the liability of school districts when a teacher or administrator sexually harasses students.[4]

This recent development examines the decision in *Gebser v. Lago Vista Independent School District* and its standard for teacher-student sexual harassment.[5] Part I explores the history surrounding this issue and the recent Supreme Court decision. Part II analyzes the Supreme Court's refusal to extend Title VII principles governing employer liability for workplace sexual harassment to the Title IX context. Part III considers the affect of the *Gebser* decision on school districts, as well as the use of this decision in the appeal of *Davis v. Monroe County Board of Education*,[6] a student-student sexual harassment case recently granted certiorari by the Court.[7]

I. HISTORY

In *Gebser v. Lago Vista Independent School District*, the Supreme Court held that a school district is not liable for teacher-student sexual harassment under Title IX unless a school district official had actual notice of, and is deliberately indifferent to, the teacher's misconduct.[8] The decision resolved a circuit split on the issue of

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3. 524 U.S. 274. 118 S. Ct. 1989 (1998).

4. *Id.* Recent studies have shown that over seventy percent of middle and high school students have been sexually harassed at school. *See* Kaija Clark, Note, *School Liability and Compensation for Title IX Sexual Harassment Violations by Teachers and Peers*, 66 GEO. WASH. L. REV. 353, 353 n.1 (1998). Although other students inflict a large proportion of this harassment, approximately eighteen percent of the students who reported an incident of harassment said school staff members also harassed them. *See* LOUIS HARRIS & ASSOCIATES, HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA'S SCHOOLS 4 (1993).

5. 524 U.S. 274.

6. 120 F.3d 1390 (11th Cir. 1997). In *Davis*, the Eleventh Circuit held that Title IX does not allow a claim for damages based upon student-student sexual harassment.

7. Davis v. Monroe County Bd. of Educ., 119 S. Ct. 29 (1998).

8. 118 S. Ct. 1989. The Court defined the term school district official as someone who, at a minimum, has the authority to institute corrective measures on the district's behalf. *Id.* at 1999.

school district liability for teacher-student sexual harassment.[9]

The Court first considered the issue of a student's recovery under Title IX in *Franklin v. Gwinnett County Public Schools*, where they held that there was an available damages remedy for an action brought to enforce Title IX.[10] In making this decision, the Court looked at the legislative history of Title IX and determined that Congress, in enacting Title IX and subsequent amendments, did not intend to limit the available.[11] Therefore, the Court found that a student could recover monetary damages under Title IX. The Franklin Court, however, did not decide on a standard of liability for courts to determine the liability of school districts for teacher-student sexual harassment.[12]

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9. *See, e.g.*, Kracunas v. Iona College, 119 F.3d 80 (2d Cir. 1997) (using Title VII agency principles); Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648 (5th Cir. 1997) (supporting actual knowledge standard); Canutillo Indep. Sch. Dist. V. Leija, 101 F.3d 393 (5th Cir. 1996) (refusing a strict liability standard); Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463 (8th Cir. 1996) (adopting deliberate indifference standard); Lipsett v. Univ. of P.R., 864 F.2d 881 (1st Cir. 1988) (advocating the constructive notice standard); Kadiki v. Va. Commonwealth Univ., 892 F.Supp 746 (E.D. Va. 1995) (advocating the strict liability standard for quid pro harassment).

10. 503 U.S. 60 (1992). *See also* Cannon v. University of Chicago, 441 U.S. 677 (1979), (holding that there is an implied right of action under Title IX). In *Franklin*, the Court went further so to determine what remedies were available under this private right, and noted that the question of what remedies are available under a statute is a different question than whether that right exists in the first place. 503 U.S. at 65.

11. 503 U.S. at 72. *See also Pennhurst State Sch. and Hosp. v. Halderman,* 451 U.S. 1, 28-29 (1981), (observing that remedies were limited under Spending Clause statutes when the violation was unintentional because an entity receiving federal funds lacked notice that it would be liable for damages for an unintentional violation). The Court in Franklin noted that this theory did not apply in Title IX cases such as the one before it because the plaintiff alleged intentional discrimination that was proscribed by the statute at issue. 503 U.S. at 74-75. The Court said, "Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe." *Id.* at 75.

In *Gebser*, however, the Court held that the school district was not liable in damages for the harassment at issue because the school did not have notice of the harassment. In *Gebser*, the Court found an unintentional violation, and therefore held that the school district could not be liable under Title IX without notice, because Title IX is a spending clause statute. 118 S. Ct. at 1998.

12. 503 U.S. 60. Although the Court did not reach this issue, several lower courts have cited *Franklin* for the proposition that the Supreme Court advocated the use of Title VII agency principles in deciding Title IX cases. *See, e.g., Doe v. Claiborne County, Tennessee*, 103 F.3d 495 (6th Cir. 1996). "By citing *Meritor Savings Bank*, ... a Title VII hostile environment case, the Court indicated that it views with approval the application of Title VII principles to resolve similar Title IX cases."). *Id.* at 514. A precise reading of *Franklin*, however, shows that the Court only cited *Meritor* for the proposition that discrimination on the basis of sex constitutes

Prior to the decision in Gebser, courts used several different theories to determine the liability of school districts in cases involving student-teacher sexual harassment.[13] The most commonly used theories consist of the agency principle standard, the "knew or should have known" standard, and the strict liability standard.[14] Under the agency principle standard, a school district is liable for the actions of a teacher acting outside the scope of employment in three situations: if the district intended the discrimination, if the district was negligent or reckless, or if the teacher was aided in accomplishing the harassment because of the existence of the agency relationship.[15]

The "knew or should have known" standard, also known as the constructive notice standard, was the most often used, finding a school district liable for teacher-student sexual harassment if a school district official knew or should have known about the harassment.[16] This standard was borrowed from Title VII cases, and several courts had carried it over to Title IX situations.[17]

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sexual harassment. 503 U.S. at 75.

13. See *Kinman, 94 F.3d 463;* Vickie J. Brady, Note, *Borrowing Standards to Fit the Title—Do They Really Fit? Title VII Standards Applied in Title IX Educational Harassment Claim as the Conflict Among the Courts Continues,* 22 S. ILL U. L.J. 411, 419 (1998).

14. Brady, *supra* note 13, at 423-28.

15. *Id.* at 423.

16. *See* Kracunas v. Iona College, 119 F.2d 80 (holding that if a professor does not rely on his actual or apparent authority to carry out the harassment, the university is only liable if it knew or in the exercise of reasonable care should have known about the harassment and failed to take remedial action); Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463 (finding that Title VII standards of institutional liability should apply to hostile environment sexual harassment cases involving a teacher's harassment of a student); Ward v. Johns Hopkins University, 861 F.Supp. 367 (D. Maryland 1994) ("'In a Title IX case, an educational institution is liable. . . *if* (sic) an official representing that institution knew, or. . . should have known, of the harassment's occurrence, *unless* (sic) that official can show that he or she took appropriate steps to halt it." (citing Lipsett v. Univ. of P.R., 864 F.2d 881, 898-901 (1st Cir. 1988)).

Under the constructive notice standard, a school district is liable for teacher-student sexual harassment if the school district knew about the harassment and failed to remedy it, or if the harassment was pervasive enough that the school district should have been aware of the harassment and failed to remedy it.

17. *See* Kinman, 94 F.3d 463; Lipsett, 864 F.2d 881.

In *Kinman* the court said, "We recently held that Title VII standards for proving discriminatory treatment should be applied to employment discrimination cases brought under Title IX. We now extend that holding to apply Title VII standards of institutional liability to hostile environment sexual harassment cases involving a teacher's harassment of a student." 94 F.3d at 469 (citation omitted).

Under the strict liability standard, school districts were liable for teacher-student sexual harassment in any situation whether or not the school knew or even could have known about the harassment.[18] In *Gebser*, the Supreme Court rejected all of these standard and made it even more difficult for a student to recover damages from a school district under Title IX.[19]

The case arose after a teacher at Lago Vista High School was discovered having sex with a student.[20] The school immediately terminated the teacher's employment, and the state revoked his teaching license.[21] Although the relationship lasted for approximately one year, Gebser, the student, never reported the teacher's conduct to school officials.[22] However, other students had reported inappropriate comments made by the teacher to the school principal, but the principal only gave the teacher a warning.[23] Moreover, the principal never reported the incident to the superintendent, who also served as the district's Title IX coordinator.[24] In November 1993, the police discovered the relationship, and Gebser and her mother filed suit

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The court went on to note that the "knew or should have known" standard was the applicable standard in cases involving a teacher's hostile environment harassment of a student. *Id.*

18. *See* Canutillo Indep. Sch. Dist. v. Leija, 887 F. Supp 947 (W.D. Tex. 1995), *rev'd*, 101 F.3d 393 (5th Cir. 1996); Bolon v. Rolla Public Sch., 917 F. Supp 1423 (E.D. Mo. 1995). *See also*, Kracunas, 119 F.3d 80 (holding that if a professor had a supervisory relationship over a student, and used that relationship to further harassment of the student, the university would be strictly liable for the professor's conduct); Kadiki, 892 F. Supp. 746 (finding that when a professor engages in quid pro quo harassment, a university will be held strictly liable for the conduct).

19. 118 S. Ct. 1989. It is interesting to note that cases deciding upon all three standards in the federal circuits—strict liability, constructive notice, and agency principles—say that they get their standards from Title VII. These courts say that they are base their standards on Title VII principles, even though they are all interpreting those Title VII principles differently. *See supra* note 9. In *Gebser*, the Court rejected the use of Title VII as a standard of liability under Title IX, thereby rejecting all of the standards previously described. 118 S. Ct. 1989.

20. 118 S. Ct. 1993. Frank Waldrop, a teacher at Lago Vista High School, initiated a sexual relationship with Alida Gebser when she was a freshman in high school. The relationship continued until a policeman found the teacher having sex with the student. The teacher and student often engaged in sexual intercourse during class time, but never on the school property. *Id.*

21. *Id.*

22. *Id.* Gebser testified that she did not report the teacher's conduct because she was uncertain how to react and wanted to continue having him as a teacher. *Id.*

23. *Id.*

24. *Id.*

against Waldrop and the school district in state court, raising claims against the school district under Title IX,[25] 42 U.S.C. § 1983,[26] and state negligence law. After being removed to federal court, the district court granted summary judgment in favor of the school district on the Title IX and § 1983 claims.[27] The court remanded the allegations against Waldrop back to the state court.

The Supreme Court heard this case on an appeal of the Fifth Circuit's decision in *Doe*.[28] The Fifth Circuit rejected several theories of liability considered by courts, and held that a school district could not be liable for teacher-student sexual harassment unless an employee with supervisory powers knew of the harassment, had the power to end it, and failed to do so.[29] In making this decision, the

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25. Education Amendments of 1972, §§ 901-909, 20 U.S.C. §§ 1681-1688 (1994). Title IX states, "[n]o 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).

26. 42 U.S.C. § 1983 states,

> "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . .subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

See also Doe v. Claiborne County, Tenn., 103 F.3d 495 (6th Cir. 1996). In Doe, the Sixth Circuit said, "[a] plaintiff can bring a claim under section 1983 when she is deprived 'of any rights, privileges, or immunities secured by the Constitution and laws,' as a result 'of any statute, ordinance, regulation, custom, or usage, of any State.'" *Id.* at 505. The court then laid out a two-pronged inquiry for establishing a § 1983 claim against a school board. First, the plaintiff must assert a deprivation of a constitutional right and second, the school board must be responsible for that violation. To establish liability, both prongs must be satisfied. *Id.* at 505-06.

27. Gebser, 118 S. Ct. at 1993. The district court granted summary judgment on the theory that the discrimination could only be interpreted as a policy of the school district if a school administrator had notice of the discrimination and failed to respond. *Id.* at 1993-94. The Fifth Circuit affirmed the District Court, relying on two of its recent decisions. *Id.* at 1994. *See Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648 (5th Cir. 1997) and *Canutillo Indep. Sch. Dist. v. Leija*, 101 F.3d 393 (5th Cir. 1996). These cases held that school districts were not liable for teacher-student sexual harassment under Title IX unless "a school official who had actual knowledge of the abuse was invested by the school board with the duty to supervise the employee and the power to take action that would end such abuse and failed to do so." Rosa H., 106 F.3d at 660.

28. Doe v. Lago Vista Indep. Sch. Dist., 106 F.3d 1223 (5th Cir. 1997).

29. *Id.* at 1225-26. The court first rejected the strict liability theory, stating that a school district was not absolutely liable because, " '[s]imply put, strict liability is not part of the Title IX contract.' " *Id.* (quoting Leija, 101 F.3d 393, 399). Then, the court considered the constructive notice theory of liability which it approved of, but noted that Doe did not pursue

court relied on its holding in *Rosa H. v. San Elizario Indep. Sch. Dist.*, which had already decided this same issue.[30]

The Supreme Court affirmed the Fifth Circuit's decision.[31] In *Gebser*, the petitioners advanced two theories for holding the school district liable for the teacher's conduct.[32] First, petitioners argued that the school district should be held liable under the vicarious liability principle.[33] Second, they argued that, at a minimum, the Court should hold the school district liable on a theory of constructive notice.[34]

The Court rejected these theories of liability because they frustrated the purposes of Title IX.[35] In determining the appropriate standard of liability, the Court attempted to determine Congress'

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this theory because there was not enough evidence to show that the school had constructive notice of the teacher's behavior. Doe, 106 F.3d at 1225.

Additionally, the court refused to invoke the common law principle of vicarious liability, which held an employer liable when the existence of an agency relationship aided an agent in accomplishing a tort. *Id.* at 1225-26. The court rejected this theory because it would generate vicarious liability in almost all cases of teacher-student sexual harassment, regardless of the circumstances. *Id.* at 1226.

30. 106 F.3d 648. The court in *Doe* said,

> "[u]nder Rosa H., school districts are not liable in tort for teacher-student harassment under Title IX unless an employee who has been invested by the school board with supervisory power over the offending employee actually knew of the abuse, had the power to end the abuse, and failed to do so."

103 F.3d at 1226. Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034 (1997). The Office of Civil Rights, the primary agency responsible for regulating Title IX issues, noted the Fifth Circuit's decisions in *Leija* and *Rosa H. v.*, and stated that these decisions applied Title IX in a "manner inconsistent with OCR's longstanding policy and practice." *Id.* at 12.036. The OCR suggested, however, that these inconsistent decisions did not prohibit school districts located in the Fifth Circuit from following the Final Policy Guidance. In fact, school districts would be better off following the Final Policy Guidance to ensure that they were in compliance with the requirements of Title IX. *Id.*

31. 118 S. Ct. 1989.

32. *Id.* at 1996.

33. *Id.* Petitioners argued that the court should hold the school district liable for damages when his or her position of authority aided a teacher in carrying out the sexual harassment. This liability, petitioners argued, should exist regardless of whether the school district officials had any notice of the teacher's conduct, and irrespective of their response when they became aware of the conduct. *Id. See also* Doe v. Lago Vista Indep. Sch. Dist., 106 F.3d 1223, 1225.

34. Gebser, 118 S. Ct. at 1996. Petitioners argued that the school district was liable because it should have known about the harassment and failed to eliminate it. *Id.*

35. *Id.* at 1997. "[I]t would 'frustrate the purposes' of Title IX to permit a damages recovery against a school district for a teacher's sexual harassment of a student based on principles of respondeat superior or constructive notice, *i.e.* (sic), without actual notice to a school district official." *Id.*

intent regarding available remedies under the act, and concluded that Congress did not intend to allow recovery in damages when liability rested on vicarious liability or constructive notice. A stricter standard is more appropriate to carry out Congress' intent regarding available remedies.[36] Therefore, the Court held that a school district official with the authority to institute corrective measures must have actual knowledge of the harassment and fail to do anything about it before a school district can be held liable for teacher-student sexual harassment.[37]

II. REJECTION OF TITLE VII PRINCIPLES IN TITLE IX CASES

In *Gebser*, the Supreme Court rejected the use of Title VII principles in Title IX cases, and set up a standard making it much more difficult for students to recover damages from school districts in cases of teacher-student sexual harassment.[38] This decision represents a distinct departure from the analysis used by most lower courts in Title IX cases.[39] The resulting standard seems especially harsh in light of the fact that the Court also decided two Title VII cases during the same term as *Gebser* making it easier for employees to recover damages from their employers in similar situations.[40] The Court, however, noted several reasons for rejecting the typical Title VII analysis in Title IX cases.

A. Lower Courts and Commentators Advocated the Use of Title VII Principles in Title IX Cases.

Many lower courts and several commentators advocated the use of

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36. *Id.* The Court noted that requiring school district officials to have actual notice of the discrimination and giving them a chance to correct the situation avoids diverting educational funding from beneficial uses when the recipient was unaware of the discrimination and would be willing to institute corrective measures. *Id.* at 1999.

37. *Id.*

38. 118 S. Ct. 1999.

39. *See supra* notes 16-19 and accompanying text. The new approach also rejected the argument used by lower courts that the Supreme Court embraced Title VII analysis in Title IX cases by citing *Meritor* in the *Franklin* decision. *See supra* note 12.

40. *See* Burlington Indus. v. Ellerth, 118 S. Ct. 2257 (1998); Faragher v. City of Boca Raton, Fla., 118 S. Ct. 2275 (1998). *See infra* notes 41 and 48.

Title VII principles in Title IX cases.[41] One reason for this was because Title VII has been the source of much litigation, and therefore, an organized framework has developed for harassment suits under Title VII.[42] In Title VII hostile environment cases, courts consistently used the "knew or should have known" or "constructive notice" standard to determine liability.[43] Several courts also applied this standard in teacher-student sexual harassment cases.[44] Commentators advocated the use of Title VII principles in these cases because sexual harassment in the education context is similar to, and perhaps more harmful to, students than sexual harassment of

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41. *See* Clark, *supra* note 4. Title VII provides that, "[I]t shall be unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. §§ 2000e to 2000e-17 (1984). Federal courts recognize two different types of sexual harassment claims under Title VII: quid pro quo harassment, in which concrete employment benefits are conditioned on sexual favors, and hostile environment harassment, in which an employer's discrimination creates a sexually hostile or abusive work environment.

When an employer or supervisor commits quid pro quo harassment, the employer is liable if the plaintiff proves that the harassment occurred, regardless of whether the employer knew or should have known about the harassment. *See* Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 70-71 (1986).

Under a hostile environment claim, the employer is subject to vicarious liability for an actionable hostile environment created by a supervisor with immediate (or higher) authority over the employee they victimize. If the supervisor's conduct does not result in a tangible employment action, the employer may raise an affirmative defense to liability or damages. If the harassment does result in a tangible employment action, such as hiring, firing, or failing to promote an employee, the employer is strictly liable. *See* Burlington Indus. v. Ellerth, 118 S. Ct. 2257, 2269; Faragher v. City of Boca Raton, Fla., 118 S. Ct. 2275, 2293.

42. Clark, *supra* note 4, at 375-76.

> "Sexual harassment under Title VII ... has been fully analyzed by federal courts. The Supreme Court has heard multiple Title VII sexual harassment cases and has guided lower courts on appropriate proof constructs for Title VII injury and liability. Because Title VII proof constructs are well established, and because sexual harassment in the educational context is analogous to sexual harassment in the workplace, Title VII standards are useful to apply in Title IX cases."

Id. at 376.

43. *See* Harris v. Forklift Systems, 510 U.S. 17 (1993); Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986). Last term, however, the Supreme Court changed this standard, and now holds employers strictly liable for hostile environment sexual harassment that results in a tangible employment action. *See* Burlington Indus. v. Ellerth, 118 S. Ct. 2257; Faragher v. City of Boca Raton, Fla., 118 S. Ct. 2275.

44. *See* Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463; Lipsett v. Univ. of P.R., 864 F.2d 881.

employees in the workplace.[45] In addition, the Office of Civil Rights ("OCR"), the administrative agency responsible for enforcing Title IX, advocated the use of the "knew or should have known standard."[46]

Many have argued that good public policy mandated it should be at least as easy for students to recover for sexual harassment by their teachers as it is for employees to recover damages for sexual harassment by their supervisors.[47] Although it may be economically infeasible for an employee to leave his or her place of employment, it is almost impossible for a student, especially a young child, to leave his or her school. In addition, the long-term effects of sexual harassment may be greater for school children than for adult employees.[48] Therefore, from a public policy standpoint, it seems odd that the Court would make it more difficult for students to recover damages for sexual harassment than employees. In Gebser, however, the Court set a standard that made it much more difficult for students to recover damages from school districts under Title IX than it was for employees to recover damages from their employers under Title VII.[49]

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45. Clark, *supra* note 4, at 375-76.

46. *See* Sexual Harassment Guidance, *supra* note 30, at 12,034-36.

47. Stephen Ganter, Note, *Sexual Harassment in Elementary and Junior High Schools: The Cruel Dilemma for School Boards,* 22 T. MARSHALL L. REV. 121, 140-41 (1996). In his article, Ganter looks to the Eleventh Circuits' decision in *Davis v. Monroe County,* in which the court argued that the damages caused by sexual harassment are greater in the school context than in the employment context.

> The harassment has a greater and longer lasting impact on its young victims, and institutionalizes sexual harassment as accepted behavior. Moreover, as economically difficult as it may be for adults to leave a hostile workplace, it is virtually impossible for children to leave their assigned school. Finally, [a] nondiscriminatory environment is essential to maximum intellectual growth and is therefore an integral part of the educational benefits that a student receives. A sexually abusive environment inhibits, if not prevents, the harassed student from developing her full intellectual potential and receiving the most from the academic program.

Id. quoting Davis v. Monroe County, 74 F.3d 1186 (11th Cir. 1996).

48. Ganter, *supra* note 47.

49. *See* Gebser, 118 S. Ct. 1989. *But see* Burlington Indus. v. Ellerth, 118 S. Ct. 2257; Faragher v. City of Boca Raton, Fla., 118 S. Ct. 2275.

In *Burlington Industries* and *Faragher,* the Court held that an employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or higher) authority over the employee. If the supervisor's conduct does not result in a tangible employment action, the employer may raise an affirmative defense

B. The Court's Justification for Rejecting the Title VII Framework in Title IX Cases

The Court had several justifications for rejecting the Title VII framework and creating a new standard for Title IX cases. First, the Court noted that Title IX was enacted so that federal money would not support gender discrimination and to protect individuals against such behavior.[50] The Court did acknowledge that Congress modeled Title IX after Title VI, which is the same as Title IX except that it prohibits race discrimination rather than sex discrimination and applies to all programs receiving federal funds, not just educational institutions.[51] Also, both of these statutes were enacted under the Spending Clause of the Constitution. The federal funds are conditioned on a promise by the recipient not to discriminate in violation of the act, therefore creating a contract between the Government and the recipient.[52]

However, Title IX is different from Title VII as Title IX is a condition on the receipt of funding and not an outright prohibition on discrimination. The Court noted this distinction and stated that while Title VII seeks to provide compensation, Title IX looks to protect from gender discrimination perpetuated by those who receive federal money.[53] This distinction is important because it constitutes the main reason why the Court set a different standard of liability for Title IX.

Also, the Court set a stricter standard of liability for Title IX because Title IX awards an entity federal funds if the entity meets

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to liability or damages.

50. 118 S. Ct. 1989, 1997.

51. *Id.*

52. *Id. See* In *Pennhurst State School and Hospital v. Halderman,* 451 U.S. 1 (1981).

> [L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." . . . Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously . . . By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

451 U.S. at 17. *See also* Guardians Assn. V. Civil Serv. Comm'n of New York City, 463 U.S. 582, 599 (1983).

53. Gebser, 118 S. Ct. at 1998.

certain conditions.[54] Under this contract-like relationship between the government and the receiving entity, an entity must be given notice before this receipt of funds can be limited.[55] According to the Court, when a program or entity is to receive funds based on meeting a certain condition, the entity must be put on notice that it may be liable for a monetary award.[56] This notice requirement is the key justification for the Court's strict standard in *Gebser*. If the discrimination by the entity is unintentional, and therefore the entity does not have actual knowledge of it, then the entity is unaware that it is in violation of the condition.[57] For this reason, the theories of constructive notice and respondeat superior are inappropriate in this context.[58]

Additionally, the Court in Gebser found that the methods used to enforce Title IX supported the requirement of actual notice.[59] Administrative agencies primarily enforce Title IX but are not allowed to initiate enforcement proceedings until they have advised the entity of the failure to comply with the condition and determined that voluntary compliance.[60] Only at this point may the agency take action, and even then, the regulations do not contemplate the payment of damages, only the withholding of federal funds to the entity in violation.[61] The Court points out that the central purpose of the notice requirement, allowing an opportunity for voluntary compliance, is to not let federal education money be kept from a school where the school was not aware of the discrimination and is willing to quickly remedy the situation.[62]

For these reasons, the Court rejected the use of Title VII principles for finding school districts liable for teacher-student sexual harassment. The Court's justifications make sense because schools need all of the federal funding they can obtain for educational

54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. 118 S. Ct. at 1998.
60. *Id.*
61. *Id.*
62. *Id.* at 1999.

purposes, and this funding should not necessarily be spent to compensate victims of harassment. Students who have suffered harassment at the hands of their teachers should, be compensated, however, and Title IX is the primary source of recovery.[63]

Although the reasoning behind the Supreme Court's new standard for Title IX cases is logical, this standard may have an adverse effect on students. The high standard for liability may allow school districts to relax their stance on sexual harassment in schools, and may cause more students to suffer from the effects of sexual harassment than ever before.[64]

III. THE EFFECT OF THE *GEBSER* DECISION ON SCHOOL DISTRICTS

After the decision in Gebser, this new standard of liability will affect how school districts deal with sexual harassment. Realistically, the *Gebser* decision should have little adverse effect on school districts. The most likely result is that school districts will now relax their standards on sexual harassment, because it will be more difficult

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63. The *Gebser* Court recognized that sexual harassment is unfortunately a common occurrence in schools. Although, the Court's opinion recognized that harassment is a problem, the Court did not believe that the independent acts of a teacher should make the school district liable under Title IX. The Court said,

> No one questions that a student suffers extraordinary harm when subjected to sexual harassment and abuse by a teacher, and that the teacher's conduct is reprehensible and undermines the basic purpose of the educational system. The issue in this case, however, is 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 financial assistance from using the funds in a discriminatory manner. Our decision does not affect any right of recovery that an individual may have against a school district as a matter of state law or under 42 U.S.C. § 1983. Until Congress speaks directly on the subject, however, we will not hold a school district liable in damages under Title IX for a teacher's harassment of a student absent actual notice and deliberate indifference.

Id at 2000. On this point, the *Gebser* dissent, written by Justice Stevens and joined by Justice Souter, Justice Ginsburg, and Justice Breyer, persuasively states,

> Presumably, few Title IX plaintiffs who have been victims of intentional discrimination will be able to recover damages under this exceedingly high standard. The Court fails to recognize that its holding will virtually 'render inutile causes of action authorized by Congress through a decision that no remedy is available.'

118 S. Ct. at 2006, *citing* Franklin, 503 U.S. 60 at 74.

64. *See* Clark, *supra* note 4.

for students to recover monetary damages against the districts.[65] School districts are not required to establish sexual harassment policies,[66] and those school districts that do establish policies may make them more lenient if the district will only be liable when it knows of the harassment and deliberately ignores it.[67]

Additionally, this standard may cause school administrators to blind themselves to harassment, so that they can claim they did not have actual knowledge. The Court in Gebser avoids this argument by commenting that students will still have causes of action against their school districts under section § 1983 and state law.[68] The Court has, however, taken away a major route to recovery for students who have suffered from sexual harassment at the hands of their teachers.

Next term, the Supreme Court will address a similar issue, that of a school district's liability for student-student sexual harassment in schools.[69] Based upon the Court's justification for limiting liability in

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65. The *Gebser* dissent recognized this problem. The dissent said,

> The reason why the common law imposes liability on the principal in such circumstances is the same as the reason why Congress included the prohibition against discrimination on the basis of sex in Title IX: to induce school boards to adopt and enforce practices that will minimize the danger that vulnerable students will be exposed to such odious behavior. The rule that the Court has crafted creates the opposite incentive. As long as school boards can insulate themselves from knowledge about this sort of conduct, they can claim immunity from damages liability. Indeed, the rule that the Court adopts would preclude a damages remedy even if every teacher at the school knew about the harassment but did not have the 'authority to institute corrective measures on the district's behalf.

118 S. Ct. at 2004, *citing* majority at 2000.

66. 34 C.F.R. § 106.8(b) (1995) The Regulations of the Office of the Department of Education only require schools to "adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by [Title IX]." *Id.*

67. *See* Gebser, 118 S. Ct. at 2000. There, the majority found that the absence of an effective harassment policy and grievance procedure did not establish "The requisite actual notice and deliberate indifference necessary to find liability on the part of the school district." *Id.* The Court found that the failure to establish a grievance procedure did not by itself constitute discrimination under Title IX. *Id.*

68. *See supra* note 26.

69. *See supra* note 6. The Court recently granted certiorari in *Davis v. Monroe County*, 120 F.3d 1390 (11th Cir. 1997), a student-student sexual harassment case decided by the Eleventh Circuit. In *Davis*, the Court stated that it did not think that the school board was on notice that it could be held liable in this type of situation when it accepted Title IX funds. *Id.* at 1400. Following the same type of analysis the Supreme Court used in *Gebser*, the court said,

> "[N]othing in the language or history of Title IX suggests that Title IX imposes

the teacher-student context, it is quite possible that the Court will similarly limit liability in the peer context. The Court may even set a higher standard for liability in that context as a school district has even less authority over the actions of its students than its employees. The school district possibly has less opportunity for notice regarding the situation also. A decision such as this may further increase the possibility that students will continue to suffer from sexual harassment in schools.

CONCLUSION

The standard for school district liability in teacher-student sexual harassment cases set forth in *Gebser*, although logical, may have severe consequences on school children that have been subjected to sexual harassment by their teachers. Because the standard for liability is so difficult for a student to meet, school districts are relatively isolated from liability. This could cause school districts to relax their stance on sexual harassment in schools, and may cause more students to suffer from the effects of sexual harassment than ever before.[70]

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liability for student-student sexual harassment. Second, the imposition of this form of liability would so materially affect schools' decision whether to accept Title IX funding that it would require an express, unequivocal disclosure by Congress."

Id. at 1401.

Because this decision uses the same type of Title IX analysis as Gebser, it is quite likely that the Supreme Court will affirm the decision, making it even more difficult for students to receive damages for the sexual harassment they suffer in school.

70. *See* Clark, *supra* note 4.

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