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Civil Rights - Federal Remedies: United States Supreme Court Adopts Actual Notice and Deliberate Indifference as the Standards for Title IX Damages for Teacher-Student Sexual Harassment

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CIVIL RIGHTS—FEDERAL REMEDIES: UNITED STATES SUPREME COURT ADOPTS "ACTUAL NOTICE" AND "DELIBERATE INDIFFERENCE" AS THE STANDARD FOR TITLE IX DAMAGES FOR TEACHER-STUDENT SEXUAL HARASSMENT

Gebser v. Lago Vista Independent School District, 118 S. Ct. 1989 (1998)

I. FACTS

In 1991, Alida Star Gebser was an eighth grade student at the Lago Vista Independent School District (Lago Vista) middle school.[1] In the spring of her eighth grade year, she joined a high school book discussion group led by Frank Waldrop,[2] a teacher at Lago Vista's high school.[3] During the book discussion group, Waldrop made "sexually suggestive comments" to the participants.[4] In the fall, Gebser began high school and was assigned to one of Waldrop's classes.[5] Waldrop continued to make inappropriate innuendos in class and began to direct a majority of them towards Gebser.[6]

Waldrop initiated sexual contact by kissing and fondling Gebser when he delivered a book to her home.[7] The two had sexual intercourse numerous times throughout the remainder of the school year, during the summer, and into the following school year.[8] Gebser did not report the relationship to school officials because she wanted to keep Waldrop as her teacher.[9]

In 1992, the parents of two other students complained to the high school principal about Waldrop's inappropriate remarks during class.[10] At a meeting with the parents and the high school principal, Waldrop

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1. Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989, 1993 (1998).

2. *Id.* Gebser joined the group as part of a "gifted and talented" class. Brief for Respondent at 2, Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989 (1998) (No. 96-1866).

3. *Gebser*, 118 S. Ct. at 1993. Waldrop began "teaching after retiring from the military." Brief for Petitioner at 2, Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989 (1998) (No. 96-1866).

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

5. *Id.*

6. *Id.* Initially Gebser thought Waldrop paid attention to her because of "intellectual qualities." Petitioner's Brief at 2-3, *Gebser* (No. 96-1866). The suggestive remarks made to Gebser were not overt but were sexual in content. *Id.* at 3.

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

8. *Id.* The two often had sexual intercourse during class time but never on school property. *Id.*

9. *Id.* Lago Vista terminated the "[g]ifted and [t]alented program" so Gebser's education "depended on the good graces of Waldrop," since he was the only one to teach advanced classes in sociology and psychology in which Gebser could "receive college credit." Petitioner's Brief at 4, *Gebser* (No. 96-1866).

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

claimed that he did not make offensive statements.[11] However, he also apologized and promised that it would not happen again.[12] The high school principal warned Waldrop to be careful about his behavior and told the high school guidance counselor about the meeting.[13] The principal failed to report the parents' complaint to Lago Vista's superintendent, who was the school's Title IX coordinator.[14]

In 1993, a police officer discovered Waldrop and Gebser having sexual intercourse.[15] The officer arrested Waldrop.[16] Lago Vista terminated Waldrop's employment, and his teaching license was revoked.[17] At the time of the affair, Lago Vista was receiving federal funds, had not made or distributed an official grievance procedure for lodging sexual harassment complaints, and had not issued any formal anti-harassment policy.[18]

In November 1993, Gebser and her mother filed suit in state court against Lago Vista and Waldrop.[19] They raised Title IX, and state negligence claims against Lago Vista, and state claims against Waldrop.[20] The case was removed to the United States District Court for the Western District of Texas.[21] The court granted summary judgment in favor of Lago Vista on all claims and remanded the claims against Waldrop to state court.[22] The court rejected the Title IX claim because the statute was created "to counter the *policies* of discrimination," and discrimination can not be a policy of the school district if the district did not know of the discrimination and had no chance to respond to the discrimination.[23] In this case, the evidence was not sufficient to raise a genuine issue of whether Lago Vista had actual or constructive notice of Waldrop's involvement with Gebser.[24]

Gebser only appealed the Title IX claim.[25] The Fifth Circuit Court of Appeals affirmed the district court's decision.[26] The court concluded

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11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* Waldrop never returned to a Lago Vista classroom after his arrest. Respondent's Brief at 4, *Gebser* (No. 96-1866).
18. *Gebser*, 118 S. Ct. at 1993.
19. *Id.*
20. *Id.* "Compensatory and punitive damages" were sought from both defendants. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* at 1993-94.
24. *Id.* at 1994. There was only one complaint lodged against Waldrop, stemming from his classroom comments. *Id.*
25. *Id.*
26. *Id.*

that under Title IX, a school district is not liable for "teacher-student sexual harassment" unless an employee with supervisory power actually knew of the harassment, could have stopped the harassment, and "failed to do so."[27] The United States Supreme Court affirmed the decision by setting the standard of liability under Title IX as actual knowledge by a school official with the authority to correct the harassment coupled with a showing that the official was deliberately indifferent to that harassment.[28]

II. LEGAL BACKGROUND

Schools receiving federal financial assistance to operate their programs under Title IX have a duty to prevent discrimination from taking place in their districts.[29]

A. TITLE IX

Title IX is enforced by the Department of Education.[30] Title IX prohibits discrimination based on sex in "any education program or activity receiving federal financial assistance."[31] Title IX seeks to accomplish two objectives.[32] First, it was enacted to avoid the use of federal funding to support discriminatory practices.[33] Second, it provides individuals with protection from those discriminatory practices.[34] These two objectives are accomplished by terminating federal funding when discriminatory practices are used.[35] Furthermore, individuals who

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27. *Id.* (quoting Doe v. Lago Vista Indep. Sch. Dist., 106 F.3d 1223, 1226 (5th Cir. 1997)). The Fifth Circuit used one of the methods used by the circuit courts in determining Title IX liability for teacher-student sexual harassment. *Id.* The circuit courts are split on this issue. *Id.* Some circuits use actual notice while others use constructive notice (knew or should have known) or agency theories to determine liability. *Id.*

28. *Id.* at 1993.

29. 20 U.S.C. § 1681(a) (1994); *see also* Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 75 (1992) (stating that Congress would not intend to support intentional discrimination with federal assistance).

30. *See Gebser,* 118 S. Ct. at 2004 (Stevens, J., dissenting) (emphasizing that the Department of Education has "a special interest" in enforcing Title IX).

31. 20 U.S.C. § 1681(a).

32. Cannon v. University of Chicago, 441 U.S. 677, 704 (1979).

33. *Id.*

34. *Id.* Funding is terminated only when the violator refuses to voluntarily comply. 20 U.S.C. § 1682(1) (1994).

35. *Cannon,* 441 U.S. at 704.

are discriminated against have a private right of action under Title IX.[36] This private right of action includes a damages remedy.[37]

Title IX does not provide for a private right of action on its face, but the United States Supreme Court determined that such an action is permitted under the statute.[38] To imply a private right of action when not expressly permitted, courts must determine whether: 1) the plaintiff is a member of a special class that the benefit was created for; 2) legislative intent is present which allows or denies a remedy; 3) the purpose of the legislation implies a remedy; and 4) a private right of action is not traditionally assigned to the state because of a state concern, and there is no implication that a private right of action based under federal law is improper.[39] In *Cannon v. University of Chicago*,[40] the United States Supreme Court determined that "an implied remedy" is available under Title IX because the preceding circumstances are all present in the legislation.[41]

In determining what types of remedies are available under a statute, courts assume that "all appropriate remedies" are available unless Congress indicates differently.[42] If Congress does not explicitly identify a remedy, courts may order "any appropriate relief."[43] In *Franklin v.*

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36. *Id.* at 717. In *Cannon*, a woman alleged that she was denied admission to medical school because of her sex. *Id.* at 680-81. The schools she applied to had policies against admitting people over the age of 30. *Id.* at 681 n.2. The woman was 39 years old when she applied to medical school. *Id.* She alleged that the policies prevented her from getting an interview and ultimately barred her from being admitted to medical school. *Id.* She claimed that women have a higher tendency toward "interrupted higher education," and the policies that exclude women are not "valid predictors of success in medical schools or in medical practice." *Id.*

37. Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 76 (1992). In *Franklin*, a tenth grade student was continually sexually harassed by her coach and teacher for two years. *Id.* at 63-64. The teacher had sexual conversations with the student regarding her "sexual experiences with her boyfriend" and posed questions about whether she would have sex with an older man. *Id.* at 63. The teacher kissed her forcibly in the school parking lot. *Id.* The teacher called her at home, asked her to meet him "socially," and took her out of class three times to have "coercive" sex with her in a private office. *Id.* The school district was aware of the harassment but did not try to stop it and even discouraged the student from pressing charges. *Id.* at 64.

38. *See Cannon*, 441 U.S. at 717.

39. *Id.* at 688 n.9.

40. 441 U.S. 677.

41. Cannon v. University of Chicago, 441 U.S. 677, 717 (1979). The Supreme Court found that Title IX "explicitly confers a benefit" on any victim of sexual harassment and that a woman is a member of the class intended to benefit from Title IX. *Id.* at 694. The Court was sure that Congress intended to have an implied right of action for those victims of sexual harassment under Title IX because of the similarities to Title VI which does in fact have an implied right of action. *Id.* at 703. A private cause of action under Title IX does not frustrate the objectives of the statute but rather "provide[s] effective assistance to achieving the statutory purposes." *Id.* at 707. Finally, the "expenditure of federal funds" is not a state concern, and thus implying a private right of action is consistent with Title IX. *Id.* at 708-09.

42. *Franklin*, 503 U.S. at 66. "Where federal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Id.* (citing Bell v. Hood, 327 U.S. 678, 684 (1946)).

43. *Id.* at 69.

Gwinnett County Public Schools,[44] the United States Supreme Court determined that Congress did not intend to support intentional discrimination with federal financial assistance.[45] The Supreme Court then concluded that monetary damages are available in a Title IX action.[46]

Title IX provides that "no person" should be subjected to discrimination.[47] The United States Supreme Court has found teacher-student sexual harassment[48] and employment discrimination actionable under Title IX.[49] Intentional acts of discrimination based on sex are what Title IX prohibits and are always actionable under Title IX.[50] To state a cause of action under Title IX, the student must show: "1) that he or she was excluded from participation in, denied the benefits of, or subjected to discrimination in an educational program; 2) that the program receives federal assistance; and 3) that the exclusion from the program was on the basis of sex."[51]

There are two categories of sexual harassment: 1) quid pro quo; and 2) hostile environment.[52] These categories of sexual harassment come from Title VII which makes it illegal for an employer to discriminate based on sex.[53] Quid pro quo sexual harassment occurs when benefits are conditioned on compliance with sexual advances.[54] This type of harassment can occur when refusal to submit to sexual advances results in a "tangible . . . detriment to some benefit."[55] "[A] prima facie case" of quid pro quo sexual harassment is proven by meeting four

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44. 503 U.S. 60 (1992).

45. Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 75 (1992). The school district had a duty not to discriminate in terms of sex, and when a teacher sexually harasses a student, the school district is engaging in a form of discrimination. *Id.*

46. *Id.* at 76. The Court looked at both monetary and equitable relief. *Id.* Equitable relief of backpay and prospective relief is not appropriate for teacher-student sexual harassment because students have no backpay and the teacher no longer teaches at the school, and in this case, the student no longer attends the school which leaves the student with no remedy at all. *Id.* at 75-76.

47. 20 U.S.C. § 1681(a) (1994).

48. *Franklin*, 503 U.S. at 75.

49. North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 535-36 (1982).

50. *Franklin*, 503 U.S. at 75. There is no problem with notice if discrimination is intentional. *Id.* at 74-75. There is some concern about allowing monetary damages for unintentional discrimination because of the lack of notice to the recipient of federal funds for liability in monetary damages. *Id.* at 74. The Supreme Court was careful to note that it was not deciding the "constitutional source" of the statute because the discrimination was intentional. *Id.* at 75 n.8.

51. Seamons v. Snow, 84 F.3d 1226, 1232 (10th Cir. 1996).

52. Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463, 467 (8th Cir. 1996). The facts of the case and "not the categories of quid pro quo and hostile work environment" are controlling in determining liability. Burlington Indus., Inc. v. Ellereth, 118 S. Ct. 2257, 2265 (1998).

53. *See* Meritor Sav. Bank, F.S.B. v. Vinson, 477 U.S. 57, 65 (1986).

54. *Cf. id.*

55. Cram v. Lamson & Sessions Co., 49 F.3d 466, 473 (8th Cir. 1995). Quid pro quo sexual harassment is unacceptable when the student either resists or the student submits. Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034, 12038 (1997).

factors.[56] These factors include: 1) the person is a "member of a protected class"; 2) the person is targeted with "unwelcome sexual harassment" through "sexual advances or requests for sexual favors"; 3) the harassment is based on sex; and 4) "submission to the unwelcome advances" is a condition to receive benefits, and "refusal to submit" will result in injury to a "tangible . . . benefit."[57] If a student's participation in a school activity is conditioned on "the student's submission to unwelcome sexual advances, requests for sexual favors" or other sexual innuendos, quid pro quo sexual harassment has occurred.[58]

In order to prove a claim of hostile environment sexual harassment, the student needs to show that: 1) he or she is a member of a protected group; 2) he or she is the target of unwelcome harassment; 3) the harassment is based on sex; 4) the harassment is "sufficiently severe or pervasive," in that it unreasonably alters the condition of his or her education and creates "an abusive educational environment"; and 5) institutional liability is established.[59]

To prove the first requirement, being a member of a protected group, the student must show that he or she was sexually harassed because of his or her sex.[60] The second requirement, being subjected to "unwelcome harassment," is proved by showing that the student did not request or invite the harassment.[61] The age of the student and the nature of the harassment are some of the factors used to determine whether the harassment was unwelcome.[62]

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56. *See Cram*, 49 F.3d at 473 (discussing what constitutes a quid pro quo sexual harassment claim).

57. *Id.*

58. *See* Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. at 12038 (defining quid pro quo sexual harassment).

59. Seamons v. Snow, 84 F.3d 1226, 1232 (10th Cir. 1996).

60. *See* Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 75 (1992) (discussing what constitutes intentional discrimination). The Court quoted *Meritor Sav. Bank, F.S.B. v. Vinson*, 477 U.S. 64 (1986), a Title VII case that states "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." *Id.* The Court stated that the *Meritor* statement applies to teacher-student sexual harassment. *Id.*

61. Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463, 468 (8th Cir. 1996). The Eighth Circuit noted that the relevant question is not whether the relationship was voluntary but whether the harassment was unwelcome. *Id.* This is usually a question for the trier of fact. *Id.*; *see* Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. at 12040. Acceptance of the conduct by a student does not mean that the conduct was welcome. *Id.* A student who welcomes the conduct in one instance can later say that the same behavior is unwelcome in another instance. *Id.* When young children in elementary school are the targets of sexual harassment, sexual harassment is always considered unwelcome. *Id.*

62. Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. at 12040. It is difficult to distinguish between a relationship and mere consent to sexual advances. *Kinman*, 94 F.3d at 468. Courts must look to "the power disparity" between those involved. *Id.* The question of whether the behavior was invited ultimately turns "on credibility determinations committed to the trier of fact." *Id.* (quoting *Meritor Savings Bank*, 477 U.S. at 68).

The third requirement of harassment based on sex requires an inquiry into whether the student was "exposed to disadvantageous terms or conditions" that students of the opposite sex are not exposed to.[63] This means that the sex discrimination is unique to the student's sex and similar conduct does not occur to members of the opposite sex.[64]

To prove the fourth requirement of severe and pervasive harassment, the student must show that it affected his or her ability to "participate or benefit from the education program" or the harassment created an "abusive educational environment."[65] Some factors considered in whether the conduct is sufficiently severe or pervasive include: 1) how the conduct affected the student's education; 2) whether there is obvious injury; and 3) "the type, frequency, and duration of the conduct."[66]

B. STANDARD OF LIABILITY UNDER TITLE IX

To prove sexual harassment, the student must prove the basis for institutional liability.[67] The language of Title IX does not set forth a standard of liability.[68] When the Court determined that there was a private right of action[69] and that damages were allowed under that private right of action,[70] it did not define the extent of that liability.[71] The issue of Title IX institutional liability was not addressed by the United States Supreme Court until June 22, 1998, in *Gebser v. Lago Vista Independent School District*.[72] *Gebser* establishes the standard of institutional liability for teacher-student sexual harassment under Title IX as actual knowledge and deliberate indifference.[73] Until *Gebser*, the lower courts were divided on the issue of institutional liability under Title IX.[74]

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63. *Kinman*, 94 F.3d at 468 (citing Harris v. Forklift Systems, Inc., 510 U.S. 17, 25 (1983) (Ginsburg, J., concurring)).

64. *See* Seamons v. Snow, 84 F.3d 1226, 1233 (10th Cir. 1996) (discussing that the conduct engaged in by school officials was not "uniquely male"). It does not matter whether or not the teacher and student are of the same sex. *See Kinman*, 94 F.3d at 468. If the student was "targeted" because of his or her sex, then the student was discriminated against based on sex. *Id.*

65. Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. at 12041.

66. *Id.* All relevant circumstances must be considered in determining whether conduct is severe or pervasive enough to constitute hostile environment sexual harassment. *Id.*

67. *Seamons*, 84 F.3d at 1232.

68. 20 U.S.C. § 1681(a) (1994).

69. Cannon v. University of Chicago, 441 U.S. 677, 717 (1979) (holding that individuals discriminated against under Title IX have a private right of action).

70. Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 76 (1992) (determining that Tittle IX includes a damages remedy).

71. *See* Smith v. Metropolitan Sch. Dist., 128 F.3d 1014, 1022 (7th Cir. 1997) (discussing that *Franklin* did not decide the standard of liability under Title IX).

72. 118 S. Ct. 1989 (1998).

73. Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989, 2000 (1998).

74. *See* Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463, 468-69 (8th Cir. 1996) (indicating that courts have failed to "reach a consensus" about the standard of liability under Title IX).

Some courts looked to Title VII to determine the standard of liability.[75] Courts turned to Title VII because both statutes forbid "sex discrimination."[76] The definition of "sexual harassment" under Title IX comes from Title VII.[77] Title VII subjects an employer to "vicarious liability" for hostile environment sexual harassment.[78] This standard is based on agency principles where the employer is liable for the actions of its employees.[79] Agency theories hold employers liable for "torts committed within the scope" of employment.[80]

Agency principles under Title IX are based on the idea that teachers may use their authority over students to commit sexual harassment.[81] When a teacher uses his or her authority to harass a student, the school should be liable if the school district "knew or should have known" about the harassment but failed to remedy it.[82] This is consistent with the idea that many students may be hesitant to "blow the whistle" on the teacher because of the supervisory relationship.[83]

Other courts turned to the Spending Clause to determine the standard of liability under Title IX.[84] Courts looked to the Spending Clause[85] because the legislative history of Title IX indicated that it may have been established pursuant to the Spending Clause.[86] The Spending

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75. *See* Doe v. Claiborne County, 103 F.3d 495, 514 (6th Cir. 1996) (discussing that courts have looked to Title VII to determine Title IX sexual harassment cases). Title VII applies to employment practices under the 1964 Civil Rights Act. *See Meritor Sav. Bank, F.S.B. v. Vinson*, 477 U.S. 57, 63 (1986). Title VII prohibits employers from discriminating against anyone on the basis of "race, color, religion, sex, or national origin." *Id.*

76. Smith v. Metropolitan Sch. Dist., 128 F.3d 1014, 1023 (7th Cir. 1997).

77. Doe v. University of Ill., 138 F.3d 653, 665 (7th Cir. 1997). When the Supreme Court first recognized teacher-student sexual harassment, it cited *Meritor Savings Bank*, a Title VII case. *Id.*

78. *See, e.g.*, Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2292-93 (1998) (holding that employers are vicariously liable for hostile environment sexual harassment claims); Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257, 2270 (1998).

79. Kracunas v. Iona College, 119 F.3d 80, 87 (2d Cir. 1997). Title VII includes "any 'agent' of an employer" as part of the definition of "employer." *Meritor Savings Bank*, 477 U.S. at 72.

80. *See Burlington*, 118 S. Ct. at 2266 (discussing agency law). Agency principles are a "starting point" under Title VII to determine liability and will be adapted to "the practical objectives of Title VII." *Faragher*, 118 S. Ct. at 2290 n.3.

81. *Kracunas*, 119 F.3d at 88.

82. *Id.* The knowledge in this case can be either actual or constructive knowledge. Mark Blais, *The Department of Education Clarifies its Position Concerning Peer Sexual Harassment: But Will Federal Courts Take Notice?*, 47 CATH. U. L. REV. 1363, 1369 (1998). The "knew or should have known" standard is a negligence standard and is the "minimum standard" for Title VII liability. *Burlington*, 118 S. Ct. at 2267.

83. *See Faragher*, 118 S. Ct. at 2291 (discussing agency relationships).

84. Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648, 654 (5th Cir. 1997). Some circuits determined that Title IX was based on the Spending Clause because the language of Title IX and Title VII is not similar and cannot be interpreted in the same way. *See* Davis v. Monroe County Bd. of Educ., 120 F.3d 1390, 1398-99 (11th Cir. 1997) (discussing the similarities between Title VII, Spending Clause legislation, and Title IX), *cert. granted in part*, 119 S. Ct. 29 (U.S. Sept. 29, 1998) (No. 97-843).

85. The Spending Clause gives Congress the power to "provide for the . . . general [w]elfare of the United States." U.S. CONST. art. I, § 8, cl. 1.

86. *See Davis*, 120 F.3d at 1397 (stating that "When Congress conditions the receipt of federal

Clause disburses federal funds in exchange for the recipient's promise to adhere to certain conditions.[87] This standard of liability requires a showing of actual knowledge by an official with supervisory powers who could stop the harassment but failed to do so.[88] The reason for a showing of actual knowledge arises from the contractual nature of Spending Clause legislation.[89]

Under the Spending Clause, a State accepts federal money by agreeing to comply with known federal conditions.[90] When an agency fails to comply with the conditions, the federal government may terminate funding.[91] Termination of funding does not occur unless the recipient knows of the violation and still decides not to comply with the federal conditions.[92] If a school district is held liable for sexual harassment and damages are awarded, federal funding is, in effect, terminated.[93] Under this theory, in order for a school district to be liable under Title IX, the school district must have had actual knowledge of the discrimination and failed to remedy the situation.[94] In *Gebser v. Lago Vista Independent School District,*[95] the United States Supreme Court, in a 5-4 decision, set the standard for Title IX institutional liability.[96]

III. CASE ANALYSIS

In *Gebser*, an opinion authored by Justice O'Connor, the United States Supreme Court affirmed the Fifth Circuit Court of Appeals decision.[97] The Court *held* that a school district is liable under Title IX for teacher-student sexual harassment only if the school district had

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funding upon a recipient's compliance with federal statutory directives, Congress is acting pursuant to its spending power").

87. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981). Legislation under the Spending Clause hinges on "whether the State voluntarily and knowingly accepts the terms of the contract." *Id.*

88. *Rosa H.*, 106 F.3d at 660. Failure to remedy sexual harassment is analogous to deliberate indifference. *See* Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989, 1999 (1998) (discussing that deliberate indifference could be an official decision to not "remedy the violation"). Deliberate indifference has been defined as disregarding a "known or obvious consequence." Board of County Comm'rs v. Brown, 117 S. Ct. 1382, 1391 (1997).

89. *Pennhurst*, 451 U.S. at 17.

90. *Id.*

91. *Id.* at 28.

92. *See* Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 597 (1983) (emphasizing that a federal funds recipient can terminate or withdraw receipt of federal money instead of assuming additional obligations for compliance).

93. *See Rosa H.*, 106 F.3d at 654 (discussing that forcing the school district to pay for unknown harassment was using federal monies to create a private right of action).

94. Doe v. University of Ill., 138 F.3d 653, 661 (7th Cir. 1998).

95. 118 S. Ct. 1989 (1998).

96. Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989, 1992, 2000 (1998).

97. *Id.* at 2000 (1998). The Court was sharply divided on this case, as it was a 5-4 decision. *Id.* at 1992. Justice O'Connor delivered the opinion of the Court and Chief Justice Rehnquist, Justice Scalia, Justice Kennedy, and Justice Thomas joined the majority opinion. *Id.*

actual notice of the discrimination and was deliberately indifferent to the discrimination.[98]

A. TITLE IX REQUIREMENTS

Under Title IX a school district that receives federal funding cannot discriminate on the basis of sex.[99] The Court noted that the enforcement of Title IX is administrative and is enforced by federal agencies which may terminate the district's federal funding.[100] The Court further noted that Title IX is "enforceable through a private right of action"[101] and monetary damages can be received through that implied private right of action.[102]

Gebser argued two standards of liability for Lago Vista under Title IX.[103] Both standards suggested are used by the courts of appeals to determine Title VII liability.[104] First, she argued that respondeat superior should be the standard under Title IX.[105] Under this standard of liability a school district would be liable in damages if a teacher is "aided in carrying out the sexual harassment of students by his or her position of authority with the institution."[106] This standard would impose liability regardless of whether the school district knew of the harassment and regardless of the school district's response upon discovering the harassment.[107]

Gebser further argued that a school district, at a minimum, should be held liable if the school district had constructive notice of the harassment.[108] Under this theory the school district would be liable if the district knew or should have known about the harassment but did not discover and stop it.[109] The Court noted that these arguments allow damages in more situations than the rule of the court of appeals, which

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98. *Id.* at 2000.

99. *See id.* at 1994 (setting forth the provisions of Title IX).

100. *See id.* (discussing 20 U.S.C. § 1682 (1994)).

101. *See id.* (citing Cannon v. University of Chicago, 441 U.S. 677 (1979)).

102. *See id.* (citing Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992)). The Court stated that *Franklin* established that "a school district can be held liable in damages in cases involving a teacher's sexual harassment." *Id.* at 1995.

103. *Id.* It is important to note that *Gebser* did not differentiate between quid pro quo and hostile environment sexual harassment claims. Liu v. Striulli, No. 96-0137 L., 1999 WL 24961, at *9 (D. R.I. Jan. 19, 1999). In fact, the opinion does not even refer to the terms. *Id.*

104. *Gebser*, 118 S. Ct. at 1995. Title VII cases deal with a supervisor's sexual harassment of an employee in the workplace. *Id.*

105. *Id.* Respondeat superior is the doctrine of "vicarious or imputed liability." *Id.*

106. *See id.* (quoting Sexual Harassment Policy Guidance, 62 Fed. Reg. 12034, 12039 (1997)).

107. *Id.*

108. *Id.* Constructive notice is notice that is regarded as "sufficient to give notice" and is "a substitute for actual notice." BLACK'S LAW DICTIONARY 217 (6th ed. 1991).

109. *Gebser*, 118 S. Ct. at 1995.

required "actual knowledge by a school official with the authority to end the harassment."[110]

The Court looked at some of the basic differences between Title IX and Title VII in analyzing Gebser's argument.[111] Justice O'Connor pointed out that unlike Title VII, Title IX does not call for the application of agency principles.[112] Title IX makes no reference to "agents" of an educational facility, indicating that the "application of agency principles" would be inappropriate.[113] The majority also noted that Title VII has an express cause of action while Title IX has a judicially implied private right of action.[114] The Court discussed that these differences may require different standards in order to recover damages.[115]

B. INTERPRETING TITLE IX

Justice O'Connor stated that since the "private right of action under Title IX is judicially implied," the Court could shape the remedy in a manner that best complied with the statute.[116] The statute must be examined to be sure that the remedy is not "at odds" with the purpose or structure of the statute.[117] The judicially implied remedy must carry out the intent of Congress and "avoid frustrating the purpose of the statute."[118]

The majority determined that it would "frustrate the purposes" of Title IX to allow damages for teacher-student sexual harassment on the theories of respondeat superior or constructive notice, because the statutory language does not show Congress's intent regarding the scope of the remedies available under Title IX.[119] To determine liability, the Court must try to ascertain how Congress would have approached a

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110. *Id.*

111. *Id.* at 1995-96.

112. *Id.* at 1996 (noting that *Meritor Savings Bank*, a Title VII case, as used in *Franklin*, a Title IX case, did not settle the issue of when there is Title IX liability). *Id.* at 1995. That "reference" was to prove that sexual harassment can be sex discrimination under Title IX. *Id.*

113. *Id.* Title VII places requirements on employers and then defines "employer" to include "any agent. " *Id.*

114. *Id.* Title VII explicitly provides for monetary damages set by Congress. *Id.* Since the private right of action is judicially implied under Title IX, there is "no legislative expression" to determine the extent damages are available under Title IX. *Id.*

115. *Id.* The court did note that *Franklin* did provide the circumstances in which damages apply. *Id.*

116. *Id.* Justice O'Connor did note that since Congress had not spoken on the subject of damages, this does include some "degree of speculation." *Id.*

117. *Id.* "[A]ll appropriate relief" can be granted in actions asserting federal rights, but that relief must match congressional intent. *Id.*

118. *Id.* (quoting Guardians Assn. v. Civil Serv. Comm'n, 463 U.S. 582, 595 (1983) (opinion of White, J.)).

119. *Id.* at 1997.

private right of action, if such an action had been an express provision of the statute.[120]

Justice O'Connor noted that when Title IX was enacted, Title VI of the Civil Rights Act of 1964 did not provide for damages for express rights of action.[121] Those statutes only provided for injunctive and equitable relief.[122] She further noted that when damages were allowed under Title VII, damages were limited.[123] From these observations, the Court was confident that Congress had not intended unlimited damages for discrimination taking place when the funding recipient had no knowledge of that discrimination.[124]

The Court looked at the objectives of Title IX to help determine congressional intent.[125] Two principal objectives were found: 1) "[T]o avoid the use of federal resources to support discriminatory practices"; and 2) "[T]o provide individual citizens effective protection against those practices."[126] The majority found it significant that Title IX was modeled after Title VI of the 1964 Civil Rights Act.[127] Justice O'Connor noted that the two statutes are parallel except in reference to sex or race.[128] She also emphasized that Title IX applies to all programs receiving federal funds while Title VI applies only to programs related to education.[129] Justice O'Connor further indicated that the two function by conditioning federal funding on a promise by the recipient not to discriminate.[130]

The majority explained that the contractual nature of Title IX distinguishes it from Title VII because Title VII is "an outright prohibition" while Title IX is "a condition."[131] That contractual nature was significant to the Court because the conditioning of federal money through Congress's spending power requires a close examination of the appropriateness of monetary damages in private actions for noncompliance with the condition.[132] The Court was concerned about whether the

120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.* Congress carefully limited Title VII damages in each individual case based on the size of the employer. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* Title VI prohibits race discrimination while Title IX prohibits sex discrimination. *Id.*
129. *Id.*
130. *Id.*
131. *Id.* Title VII's purpose is to end sexual discrimination and it strives to "compensate victims of discrimination." *Id.* Title IX aims to protect people from discrimination by federally funded entities. *Id.*
132. *Id.* at 1998.

party receiving the federal funds is on notice that it may be liable for monetary damages.[133] The majority recognized that if liability for teacher-student sexual harassment was based on constructive notice or respondeat superior, the school district that received the federal funds would not always be aware that discrimination was taking place.[134] The majority assumed that Congress did not want a recipient to be liable for monetary damages in such a situation.[135]

The Court looked to "clues" in Title IX that showed that Congress did not intend to allow recovery under vicarious liability or constructive notice.[136] Justice O'Connor recognized that Title IX was enforced by administrative agencies that operated on assumptions of actual notice of failure to comply with the statute.[137] The majority found it significant that the administrative agencies could not terminate federal funding until the "appropriate person" was notified that the requirements were not being complied with and compliance was not achieved voluntarily.[138] The purpose of requiring notice to the "appropriate person," and a chance to comply voluntarily before commencement of enforcement proceedings helps to "avoid diverting education funding" from the recipient's use where the recipient: 1) did not know of the discrimination; and 2) would have stopped the discrimination upon learning of it.[139] The Court noted that Gebser's theories of liability did not match this purpose.[140]

Justice O'Connor reasoned that when a school district is liable under a constructive notice or agency theory, it is assumed that the school district had no notice of the harassment and the district is denied an opportunity to end the harassment.[141] The Court found it unsound for a judicially implied action to allow recovery, regardless of the recipient's knowledge or its reaction to that knowledge, while the express system of enforcement requires actual notice to the recipient and an opportunity to voluntarily comply.[142]

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133. *Id.* With unintentional discrimination, it is not "obvious" that there is a violation of the statute. *Id.* (quoting Guardian Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 598 (1983)).

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* Title IX enforcement allows the funding agency "to suspend or terminate funding." *Id.*

138. *Id.* (quoting 20 U.S.C. § 1682 (1994)). If there is a violation, the agency receiving federal funds should take action to remedy the discrimination. *Id.*

139. *Id.* at 1999.

140. *Id.*

141. *Id.* When a statute has an express enforcement scheme of notice and non-compliance, courts cannot imply an enforcement scheme allowing "greater liability without comparable conditions." *Id.*

142. *Id.*

The majority defined an appropriate person to be, at a minimum, an official of the recipient entity who has the authority to end the discrimination.[143] The majority also determined that the response to discrimination must amount to "deliberate indifference."[144] Deliberate indifference was defined as an official decision to not "remedy the violation."[145]

The Court found that the complaint from parents of other students about Waldrop's inappropriate class comments was insufficient to alert the principal of Waldrop's sexual relationship with Gebser.[146] The majority determined that Gebser could not recover under the theory of actual knowledge.[147]

Gebser also argued that Lago Vista's failure to make and publicize grievance procedures for sexual harassment claims according to regulations amounts to deliberate indifference.[148] Justice O'Connor disagreed because the failure to create a grievance procedure is not discrimination under Title IX.[149]

Justice O'Connor noted that this decision does not affect any right of recovery under state law or under Title IX.[150] There is no recovery under Title IX for teacher-student sexual harassment "absent actual notice and deliberate indifference" until Congress legislates otherwise.[151] The Court affirmed the judgment of the Fifth Circuit Court of Appeals.[152]

C. JUSTICE STEVENS' DISSENT[153]

Justice Stevens stated that the majority's decision of actual knowledge as the standard of liability under Title IX actually frustrated the

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143. *Id.* If an "official policy" is not involved, there are no Title IX damages unless the official with authority to stop the discrimination and take corrective measures has actual knowledge and "fails to adequately respond." *Id.*

144. *Id.* The Court noted that a lower standard of liability would submit the recipient to a risk that it would be liable for its employees' independent actions, instead of its own official decision. *Id.*

145. *Id.* If after discovering the violation, the official "refuses to take action," there is deliberate indifference. *Id.*

146. *Id.* at 2000.

147. *Id.* at 1999-2000.

148. *Id.* at 2000.

149. *Id.* The Department of Education regulations require federal funding recipients to "adopt and publish grievance procedures proving for prompt & equitable resolution" of complaints. *Id.* (quoting 34 C.F.R. § 106.8(b) (1998)). Justice O'Connor noted that this could be enforced administratively because agencies can enforce requirements even if those requirements are not considered discrimination under the statute. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. Justice Stevens' dissent was joined by Justice Souter, Justice Ginsburg, and Justice Breyer. *Id.*

purposes of the statute.[154] He interpreted Title IX to be broader than Title VII because Title IX uses passive verbs which focus on the victim instead of on the wrongdoer.[155] The assumption of a statutory duty in Title IX is more significant than a promise to obey the law.[156]

Justice Stevens looked to agency principles in determining liability under Title IX.[157] He pointed out that Waldrop influenced Gebser based on the authority given to him by his employer, Lago Vista.[158] Waldrop had greater authority over his students than employers have over their employees.[159]

Justice Stevens looked to a policy of the United States Department of Education to support his contention that agency principles apply.[160] This policy states that a school district has Title IX liability if a teacher is aided "in carrying out the sexual harassment of students by his or her position of authority with the institution."[161] He considered it significant that the Department of Education's interpretation of the statute would find the school district liable for Waldrop's misconduct because it was made possible by his misuse of authority as a teacher.[162]

Justice Stevens reasoned that there should be liability based on agency principles under Title IX in order to encourage school boards to make and enforce procedures that "will minimize the danger that vulnerable students will be exposed to odious behavior."[163] He argued that the majority rule would encourage boards to "insulate themselves from knowledge" so that they could not be held liable for damages.[164]

Justice Stevens asserted that the majority set an unattainable standard for recovery under Title IX.[165] He stated that the majority rule would "render inutile causes of action authorized by Congress through a decision that no remedy is available."[166] Justice Stevens mentioned

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154. *Id.* Judicially implying a remedy is not consistent with a "duty to interpret, rather than to revise congressional commands." *Id.* at 2001. The statutory language should be the basis for the remedial scheme instead of "views about sound policy." *Id.* at 2002.

155. *Id.* Title IX "focuses on the setting in which the discrimination occurred," while Title VII "focuses on the discriminator." *Id.* at 2002 n.5.

156. *Id.*

157. *Id.* at 2003-04. Under agency principles there is liability when there is aid "in accomplishing the tort by the existence of the agency relation." *Id.* at 2003 (quoting RESTATEMENT (SECOND) OF AGENCY, § 219(2)(d) (1957)).

158. *Id.* at 2004.

159. *Id.* Waldrop's "gross misuse" of authority permitted him to "abuse" Gebser's trust. *Id.*

160. *Id.* The Department of Education is responsible for enforcing Title IX. *Id.*

161. *Id.* (quoting Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034, 12039 (1997)).

162. *Id.*

163. *Id.*

164. *Id.* Damages would be avoided if "every teacher" knew of a Title IX violation but did not have the authority to stop and correct the violation. *Id.*

165. *Id.* at 2006. "Few Title IX plaintiffs" will get recovery. *Id.*

166. *Id.*

that creating and enforcing a sexual harassment policy may be an affirmative defense.[167] However, it would not be applicable in this case because there is not enough evidence to determine whether or not an effective sexual harassment policy was in place.[168]

Justice Stevens was concerned about the risk of harm to students.[169] He felt that "the Court ranks protection of the school district's purse above the protection of immature high school students that those rules would provide."[170] Title IX was enacted to benefit the student and the majority did not follow the intent of Congress.[171]

D. JUSTICE GINSBURG'S DISSENT[172]

Justice Ginsburg supports an affirmative defense of effective policies "for reporting and redressing" sexual harassment claims under Title IX.[173] Justice Ginsburg noted that the school district would carry the burden of showing that the remedies were "adequately publicized and likely would have provided redress without exposing the complainant to undue risk, effort, or expense."[174] In a Title IX claim, if a plaintiff failed to use the school district's remedies and suffered avoidable harm, no recovery would be allowed.[175]

IV. IMPACT

The United States Supreme Court in *Gebser* decided for the first time that the standard of liability for teacher-student sexual harassment under Title IX is actual knowledge.[176] This decision had immediate consequences in Title IX litigation.[177] Due to *Gebser*, the law in some

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167. *Id.* The Secretary of Education requires funding recipients to have sexual harassment policies and to distribute them to students. *Id.*

168. *Id.*

169. *Id.* at 2007.

170. *Id.*

171. *Id.*

172. Justice Ginsburg's dissent was joined by Justice Souter and Justice Breyer. *Id.* Justice Ginsburg joined in Justice Stevens' opinion for determining the standard of liability under Title IX, but wrote separately to address whether a school would have an affirmative defense if the school had proper grievance procedures. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 2000. *See* Liu v. Striulli, No. 96-0137 L., 1999 WL 24961, at *8 (D. R.I. Jan. 19, 1999) (stating that "[t]he *Gebser* holding is unambiguous").

177. The Supreme Court vacated and remanded an Eleventh Circuit Court of Appeals decision "for further consideration in light of *Gebser v. Lago Vista Independent School Distict*." Floyd v. Waiters, 119 S. Ct. 33 (1998) (mem.). *Floyd* is a Title IX case concerning the sexual harassment of female students by a school security guard. Floyd v. Waiters, 133 F.3d 786, 788 (11th Cir. 1998). In addition, the security guard was accused of raping one girl. *Id.* The Eleventh Circuit held that since neither the superintendent of schools nor members of the school board were aware of the

circuits was changed from agency principles or "knew or should have known" standards of liability to actual knowledge as the standard of liability under Title IX.[178] *Gebser* did not distinguish between hostile environment and quid pro quo sexual harassment.[179] At least one district court has found that *Gebser* applies to both types of harassment.[180] It is likely that other courts will take the same position.[181]

The Supreme Court in *Gebser* did not explain what constitutes actual notice.[182] In *Burtner v. College*,[183] the United States District Court for the Northern District of Ohio determined that a two day notice is not enough to create Title IX liability.[184] The interpretation of what constitutes actual notice may continue to be litigated in other jurisdictions but it will likely be very fact based and analyzed on a case by case basis.[185]

Gebser did not fully define "deliberate indifference."[186] *Gebser* did explain that deliberate indifference occurs when there is a decision by the school to not stop the harassment.[187] The United States District Court for the Northern District of Indiana recently noted that Title IX liability may be avoided if the school district tried to remedy the sexual harassment complaints in an appropriate manner.[188] In *Chontos v. Rhea*,[189] the United States District Court for the Northern District of Indiana determined that suspension after three official and undisciplined

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discrimination, no Title IX liability existed. *Id.* at 793.

178. *See Gebser*, 118 S. Ct. at 2000 (holding that the standard of liability under Title IX is actual knowledge coupled with deliberate indifference to that discrimination); *see also* Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034, 12039 (1997) (indicating that liability for sexual harassment is established through agency principles). The circuit courts were split as to the standard of liability under Title IX. See *generally, e.g.*, Smith v. Metropolitan Sch. Dist., 128 F.3d 1014, 1034 (7th Cir. 1997) (determining that the standard of liability under Title IX is actual knowledge); Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463, 469 (8th Cir. 1996) (deciding "knew or should have known" is the appropriate standard of liability in teacher-student hostile environment sexual harassment); Doe v. Claiborne County, 103 F.3d 495, 514 (6th Cir. 1996) (holding Title VII agency principles should be used to determine Title IX liability).

179. *Liu*, 1999 WL 24961, at *9.

180. *Id.*

181. *See Gebser*, 118 S.Ct. at 2000 (applying the actual knowledge standard to a hostile environment claim); *Liu*, 1999 WL 24961, at *9 (discussing cases that applied *Gebser* to quid pro quo sexual harassment claims).

182. Burtner v. College, 9 F. Supp.2d 852, 857 (N.D. Ohio 1998).

183. 9 F. Supp.2d 852 (N.D. Ohio 1998).

184. Burtner v. College, 9 F. Supp.2d 852, 855, 857 (N.D. Ohio 1998).

185. *Id.*

186. *See* Chontos v. Rhea, 29 F. Supp.2d 931, 934 (D. N.D. 1998) (stating that *Gebser* did not apply the term deliberate indifference to the facts).

187. *See Gebser*, 118 S. Ct. at 1999 (noting that there must be an official decision to not remedy the violation).

188. *See generally Chontos*, 29 F. Supp.2d at 931-34. In *Chontos*, an associate professor in physical education and recreation was twice accused of sexual harassment. *Id.* at 934-35. The university knew of both incidents and failed to discipline the professor for either incident, except referring him to a psychiatrist and warning him that another complaint would result in suspension. *Id.* at 935. Five years later the professor sexually harassed another student. *Id.* at 936. He was suspended and not allowed on campus without an escort. *Id.* The professor resigned. *Id.*

189. 29 F. Supp.2d 931 (D. N.D. 1998).

complaints coupled with numerous unofficial complaints could amount to deliberate indifference.[190] The definition of deliberate indifference will likely continue to be litigated in other jurisdictions.[191] What constitutes deliberate indifference will vary with the particular circumstances of each case and will be judged according to the case's facts instead of a rigid definition of deliberate indifference.[192]

An area that will be significantly impacted by *Gebser* is peer harassment.[193] The text and history of Title IX do not mention liability for peer harassment.[194] The circuit courts are divided on whether Title IX liability extends to peer harassment.[195] The lower courts have used three different liability standards for peer sexual harassment under Title IX: "1) the Rowinsky approach; 2) the actual notice and intentional discrimination approach; and 3) the 'knew or should have known' approach."[196]

The Rowinsky approach establishes institutional liability for peer sexual harassment when the school district, not the student alone, discriminates based on sex.[197] Under the actual notice and intentional discrimination approach, there is institutional liability when the school district knew of the harassment but failed to take any action to stop the harassment.[198] The final approach of "knew or should have known" establishes institutional liability when a school district knew or reasonably could have discovered the harassment and failed to correct the situation.[199]

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190. *See* Chontos v. Rhea, 29 F. Supp.2d 931, 936-37 (D. N.D. 1998) (concluding that a reasonable jury could have found that the university was deliberately indifferent to the sexual harassment).

191. *See id.* at 938 (noting that not "all other judges would reach the same result" in determining what constitutes deliberate indifference by a school district).

192. *Id.*

193. *See* Doe v. Petaluma City Sch. Dist., 54 F.3d 1447, 1451 (9th Cir. 1995) (discussing that it's unclear whether a school official "ha[s] a duty to prevent peer harassment").

194. Davis v. Monroe County Bd. of Educ., 120 F.3d 1390, 1401 (11th Cir. 1997), *cert. granted in part*, 67 U.S.L.W. 3186 (U.S. Sept. 29, 1998) (No. 97-843).

195. *See* Doe v. University of Ill., 138 F.3d 653, 661 (7th Cir. 1998) (discussing that the decision is not consistent with other court of appeals decisions). The United States Department of Education, Office for Civil Rights (OCR) states that a school district is liable for "peer sexual harassment" if it knew or should have known harassment existed and it failed to take "proper remedial action." Blais, *supra* note 81, at 1369. The OCR establishes that a school district may be liable under actual or constructive knowledge of harassment. *Id.*

196. Blais, *supra* note 81, at 1387.

197. *Id.*

198. *Id.* at 1393. This standard is similar to the standard set forth in *Gebser* for teacher-student sexual harassment. *See* Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989, 2000 (1998) (holding that a school district is liable for teacher-student sexual harassment when it has actual knowledge of the discrimination and is deliberately indifferent to the discrimination).

199. Blais, *supra* note 81, at 1397. This standard of liability is the same as the Title VII standard of liability. *Id.* at 1396. This is a lower standard of liability than actual knowledge or the Rowinski approach. *Id.* at 1389, 1393.

It is likely that the lower courts will follow the United States Supreme Court decision in *Gebser* where Title IX prohibits discrimination based on sex, and a school will be held liable for peer sex discrimination if it has actual knowledge of the discrimination and is deliberately indifferent to that discrimination.[200] However, at least one court has cautioned that "not every unwanted interaction of a physical or sexual nature between adolescents states a Title IX claim."[201]

On September 29, 1998, the United States Supreme Court granted certiorari, in part,[202] to *Davis v. Monroe County Board of Education,*[203] to determine whether Title IX "encompasses a cause of action for peer hostile environment sexual harassment."[204] Since the Court has already determined that the standard of institutional liability under Title IX is actual knowledge and deliberate indifference,[205] it may find that the school district is liable for peer harassment if it had actual knowledge of the peer harassment and was deliberately indifferent to the harassment by failing to stop it.[206]

Another issue in Title IX litigation that may become important is whether a school district has publicized adequate grievance procedures.[207] Failure to have grievance procedures does not establish discrimination under Title IX.[208] However, creating, publicizing, and utilizing grievance procedures could lead to an affirmative defense.[209] If a student fails to use grievance procedures that would have remedied the harassment quickly, Title IX liability would disappear.[210] However, if a school district had actual knowledge of the discrimination without the

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

201. Carroll K. v. Fayette County Bd. of Educ., 19 F. Supp.2d 618, 622 (S.D. W.Va. 1998) (quoting Collier v. William Penn Sch. Dist., 956 F. Supp. 1209, 1214 (E.D. Pa. 1997)). The court did note that sexual contact or conversations between teachers and students is sexual harassment. *Id.*

202. 67 U.S.L.W. 3186 (U.S. Sept. 29, 1998) (No. 97-843).

203. 120 F.3d 1390 (11th Cir. 1997).

204. 67 U.S.L.W. 3186 (U.S. Sept. 29, 1998) (No. 97-843).

205. *See Gebser*, 118 S. Ct. at 2000 (determining that a school is liable for teacher-student sexual harassment if the school district had actual notice of the discrimination and was deliberately indifferent to that discrimination).

206. *See* 67 U.S.L.W. 3186 (U.S. Sept. 29, 1998) (No. 97-843) (granting certiorari). During oral arguments, the Supreme Court posed several questions on what constitutes sexual harassment by students. Davis v. Monroe County Bd. of Educ., No. 97-843, 1999 WL 20710, at **4-5 (U.S. Jan. 12, 1999). There were numerous references to boys teasing girls and vice versa. *Id.*

207. *See Gebser*, 118 S. Ct. at 2000 (discussing that grievance procedures are required by the Department of Education but failure to have a grievance procedure is not Title IX discrimination).

208. *Id.*

209. *Id.* at 2007 (Ginsburg, J., dissenting). A recent Title VII case held that an employer can raise an affirmative defense to liability if it exercises "reasonable care" to stop and remedy sexual harassment and the plaintiff "unreasonably failed" to use any "preventive or corrective opportunities" given by the employer to avoid sexual harassment. Faragher v. City of Boca Reton, 118 S. Ct. 2275, 2293 (1998).

210. *Gebser*, 118 S. Ct. at 2007. If a student suffered "avoidable harm" from failing to use grievance procedures, he or she would not be eligible for Title IX relief. *Id.*

student using the grievance procedures, and it failed to remedy the discrimination, Title IX liability would still attach.[211] By setting forth the standard of liability for sexual harassment under Title IX, the courts can dispense with Title IX cases more quickly and efficiently.[212]

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211. *Id.* at 2000 (establishing student-teacher sexual harassment standard of liability under Title IX as actual knowledge and deliberate indifference).

212. *Id.*