GEBSER V. LAGO VISTA INDEPENDENT SCHOOL DISTRICT: IS IT REALLY THE FINAL WORD ON SCHOOL LIABILITY FOR TEACHER-TO-STUDENT SEXUAL HARASSMENT?

I. INTRODUCTION

Dear Beth: I'm 18 and in high school. I have this really cute math teacher. . . . One day he asked me to a fancy restaurant to talk about my grades. He just kept telling me how beautiful I was. . . . [H]e asked if I could come over to his house next week . . . he told me it would bring up my grades. I get very bad grades in math. . . . What should I do?[1]

The topic of sexual harassment within our schools has gained national attention in recent years. Disturbing studies have indicated that more than 85% of girls and 76% of boys in grades 8-11 have experienced some form of sexual harassment in school.[2] Although peer sexual harassment is the most prevalent type of harassment in educational settings, one study has found that 18% of harassers were school employees such as "a teacher, coach, bus driver, teacher's aide, security guard, principal, or counselor."[3] Although most victims of sexual harassment tell at least one person about the harassment, girls who are sexually harassed by teachers and school staff are "more likely to do nothing or to walk away without telling the

1. Beth Winship, *Ask Beth*, BOSTON GLOBE, Mar. 6, 1997, at E6. *See also* OFFICE FOR CIVIL RIGHTS, SEXUAL HARASSMENT: IT'S NOT ACADEMIC (last modified May 22, 1997) <http://www.ed.gov/offices/OCR/ocrshpam.html>.

2. *See* AMERICAN ASS'N OF UNIV. WOMEN EDUC. FOUND., HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA'S SCHOOLS 7 (1993) [hereinafter AAUW SURVEY] (reporting results from survey of 1,632 public school students in grades 8-11); *see also* Felicity Barringer, *School Hallways as Gantlets of Sexual Taunts*, N.Y. TIMES, June 2, 1993, at B7 (reporting statistics from AAUW survey on sexual harassment in schools).

3. AAUW SURVEY, *supra* note 2, at 10. In a survey of 4,200 girls in grades 2-12, Stein found that only 4% of reported sexual harassment was by school teachers, administrators, and staff, but recognized that this percentage may be low since the survey only reported the most serious incident for each respondent. *See* NAN STEIN ET AL., WELLESLEY COLLEGE CENTER FOR RESEARCH ON WOMEN, SECRETS IN PUBLIC: SEXUAL HARASSMENT IN OUR SCHOOLS 3, 6, 17 n.6 (1993); *see also* Stefanie H. Roth, *Sex Discrimination 101: Developing a Title IX Analysis for Sexual Harassment in Education*, 23 J. LAW & EDUC. 459, 465 & n.43 (1994) (noting that although the percentage of sexual harassment attributed to teachers is lower than that attributed to peers, "[t]his percentage is not insignificant"); *see generally* Caroline Hendrie, *Sex with Students: When Employees Cross the Line*, EDUC. WEEK, Dec. 2, 1998, 1, 12-14 (examining the issue of sexual relations between teachers and students).

harasser to stop."[4] Research has revealed that such sexual harassment within educational institutions not only affects a student's sense of security in school, but that it can also result in "increased absenteeism, fear of going to school, decreased motivation, and loss of faith in the fairness . . . of school officials and the educational system as a whole."[5] Despite the potentially devastating consequences of school harassment, however, "many incidents of teacher-to-student sexual abuse are not reported,"[6] and until the early 1990s, few cases involving school-related sexual harassment had actually been litigated.[7]

Alida Gebser was one such victim of teacher-initiated sexual harassment. When Alida was only in eighth grade, she first became the target of sexually suggestive comments made by her teacher, Frank Waldrop.[8] By the following year, Waldrop had initiated sexual contact with Alida by fondling and kissing her.[9] Several months later, the teacher began having sexual intercourse with Alida, often during school time.[10] During Alida's sophomore year, a police officer finally discovered Gebser and the teacher having sex in a car and arrested Waldrop.[11] The school district fired Waldrop, who subsequently pleaded guilty to statutory rape[12] and lost his teaching license.[13] In addition, Gebser and her mother sued the school district for sexual harassment under Title IX, a federal law that prohibits recipients of federal funds, such as schools, from discriminating on the

4. STEIN ET AL., *supra* note 3, at 2.

5. Roth, *supra* note 3, at 466.

6. ROBERT SHOOP & DEBRA EDWARDS, HOW TO STOP SEXUAL HARASSMENT IN OUR SCHOOLS 96 (1994). The authors further note that "[t]oo often the offending teacher is given the option of resigning . . . [allowing them] to move to another town and repeat the abuse with other students." *Id.*; *see also* STEPHEN J. MOREWITZ, SEXUAL HARASSMENT AND SOCIAL CHANGE IN AMERICAN SOCIETY 299 (1996).

7. *See* Richard Fossey et al., *Title IX Liability for School Districts When Employees Sexually Assault Children: A Law and Policy Analysis*, 124 ED. LAW REP. 485, 486 (1998) ("Until the mid-1990s, there were few court cases involving sexual harassment of students under Title IX."); *see also* Hendrie, *supra* note 3, at 13; Henry Seiji Newman, *The University's Liability for Professor-Student Sexual Harassment Under Title IX*, 66 FORDHAM L. REV. 2559, 2560-61 (1998) (noting that the debate over the appropriate liability standard is heightened by the "recent increase in sexual harassment litigation across the country").

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

9. *See id.*

10. *See id.*

11. *See id.*; *see also* Robin Wilson, *Ruling on Harassment Seen Affecting Colleges*, THE CHRONICLE OF HIGHER EDUCATION, July 3, 1998, at A10; Perry A. Zirkel, *Teacher-on-Student Sexual Harassment: Monkeying Around?*, PHI DELTA KAPPAN, Oct. 1998, at 171-72.

12. *See* Mary Leonard, *Court Tightens Rules for Damages in School Sex Harassment Cases*, BOSTON GLOBE, June 23, 1998, at A1.

13. *See Gebser*, 118 S. Ct. at 1993.

basis of sex.[14]

Although few would disagree that a school maintains at least some responsibility to protect generally its students, courts have been divided as to the extent educational institutions should be held monetarily liable under Title IX for claims of teacher-to-student sexual harassment.[15] The Supreme Court squarely addressed this issue in its recent decision in *Gebser v. Lago Vista Independent School District*[16] and determined that a school district will not be held liable for acts of teacher-to-student sexual harassment unless there was actual notice to an appropriate school official, who was "deliberate[ly] indifferen[t]" and failed to stop the harassment.[17]

At first glance, the actual notice standard articulated in *Gebser* appears inherently inconsistent with two other Supreme Court sexual harassment decisions handed down merely four days after the *Gebser* decision. In *Faragher v. Boca Raton*[18] and *Burlington Industries, Inc. v. Ellerth*,[19] the Supreme Court addressed claims of workplace sexual harassment, holding that, contrary to the *Gebser* ruling, employers in the workplace may be held vicariously liable for sexual harassment by a supervisor, even though the employer did not have actual knowledge of the harassing conduct.[20] However, in distinguishing between school and workplace harassment, the *Gebser* Court pointed out that while school-based sexual harassment claims are premised on Title IX, workplace harassment claims are derived from Title VII of the Civil Rights Act of 1964 ("Title VII").[21] This statutory distinction is significant since the language of Title VII, unlike Title IX, flatly prohibits employers from discriminating on the basis of sex, thereby providing an outright prohibition on sex discrimination that "aims

14. *See* 20 U.S.C. § 1681 (1994). In addition to the Title IX claim, Gebser also raised claims against the school under 42 U.S.C. § 1983 and state negligence law. *See Gebser*, 118 S. Ct. at 1993.

15. *See* Newman, *supra* note 7, at 2571 (claiming that despite a 1992 Supreme Court decision regarding sexual harassment within schools, "[t]here has been continued confusion over an educational institution's liability for Title IX claims of hostile environment sexual harassment"); *see also* Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463, 468 (8th Cir. 1996) (stating that "courts that have discussed the standard of liability for school districts under Title IX have failed to reach a consensus regarding the appropriate standard"), *rev'd on other grounds*, Nos. 98-1683, 98-2018, 98-2994, 1998 WL 148090, at *2 (8th Cir. Mar. 19, 1999).

16. 118 S. Ct. 1993 (1998).

17. *Id.* at 2000.

18. 118 S. Ct. 2275 (1998).

19. 118 S. Ct. 2257 (1998).

20. *See Faragher*, 118 S. Ct. at 2280; *Burlington Indus., Inc.*, 118 S. Ct. at 2270.

21. *See Gebser*, 118 S. Ct. at 1995-98 (making distinction between Title IX and Title VII); *see also* Mark Walsh, *Riley Restates Rules Against Harassment*, EDUC. WEEK, July 8, 1998, at 30 (quoting Justice O'Connor in stating that "Title VII is a broad prohibition against sex discrimination . . . throughout the economy. But Title IX . . . works as a contract between the federal government and school districts based on federal funding.").

centrally to compensate victims of discrimination."[22] In contrast, the prohibition against sex discrimination under Title IX is premised upon a conditional contract between a school district and the federal government. For a school district, the offer of federal funding is contingent upon the school's promise not to discriminate on the basis of sex.[23] Since a Title IX violation may ultimately trigger the revocation of federal funds, the *Gebser* Court reasoned that notice of a Title IX violation must first be given to an appropriate school official prior to imposing monetary sanctions.[24] As a result, the Court concluded that the statutory language of Title IX mandated a more stringent standard for imposing liability on a school than in imposing liability on an employer under Title VII.

After discussing the relevant background of sexual harassment claims under Title IX, this Note will analyze the Supreme Court's decision in *Gebser* and the future implications of its highly divisive decision. Although the holding in *Gebser* seemingly quiets the debate over school liability for sexual harassment, questions still linger regarding the impact of the *Gebser* standard on a school's responsibility under Title IX. In particular, this Note proposes that: 1) the actual notice standard for imposing liability is sensible given the current statutory language of Title IX and its enactment under the Spending Clause of the Constitution; 2) such a standard will not ultimately affect a school's willingness to act proactively in enforcing and preventing sexual harassment; and 3) despite appearing dispositive on the issue of liability, the resolution in *Gebser* has not yet ended the debate over sexual harassment in schools. In the wake of *Gebser*, future litigation is likely to include debate over what will constitute "actual notice" and what school official will qualify as an "appropriate person," under the *Gebser* standard. In addition, the *Gebser* decision will also increase the tension between the existing enforcement policies of the Office for Civil Rights ("OCR"), the administrative agency charged with ensuring compliance with Title IX, and the judicial remedies available through private action.[25] Although the *Gebser* decision appears to be at odds with the OCR's current investigative policies, this Note will argue that it is unlikely that the Supreme Court's decision will undermine these administrative federal enforcement practices.

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

23. *See id.* at 1997-98; *see also* 20 U.S.C. § 1681 (1994).

24. *See Gebser*, 118 S. Ct. at 1998.

25. OCR guidelines specifically adopt a strict liability standard for cases of quid pro quo sexual harassment and a constructive notice ("knew or should have known") standard in instances of hostile environment sexual harassment claims. *See* Office for Civil Rights, Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,039 (1997) [hereinafter OCR Guidance].

Finally, while not dispositive on the issue of harassment in schools, the Supreme Court's decision in *Gebser v. Lago Vista* provides the framework for judicial resolution of peer sexual harassment cases. In *Davis v. Monroe County Board of Education*,[26] recently decided by the Supreme Court, the Court held that Title IX also encompasses claims of student-to-student sexual harassment.[27] In reaching this conclusion, the Court relied heavily upon the reasoning in *Gebser*, once again articulating and actual notice standard for imposing liability upon a school district. Furthermore, the *Gebser* standard is also likely to filter into future racial harassment litigation brought under Title VI, Title IX's counterpart provision banning race based harassment.[28] While limited to the narrow context of teacher-to-student sexual harassment, the *Gebser* holding regarding institutional liability may impact a wide range of future litigation. Not only does it answer the urgent need to provide clear guidance to school districts and students, it also sends a strong message that the Court is unwilling to create additional judicial remedies for sexual harassment in the absence of clear legislative directives.

II. LEGAL BACKGROUND

A. *Title IX*

Title IX of the Education Amendments of 1972 provides that "[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 . . . ."[29] Since most school districts and universities receive at least some form of federal funds, Title IX has an expansive reach and affects virtually every educational institution in the United States.[30] Even if only part of an educational institution receives some form of federal financial assistance, including student financial aid, Title IX has been broadly interpreted to cover "all of the operations" of the institution.[31]

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26. No. 97-843, 1999 WL 320808 (U.S. May 24, 1999).

27. *See id.* at *3.

28. *See* Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1994).

29. 20 U.S.C. § 1681(a) (1994).

30. *See* Fossey et al., *supra* note 7, at 486. For a comprehensive definition of "educational institution," see 20 U.S.C. § 1681(c) (1994).

31. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (defining "program or activity" broadly); *see also* Roth, *supra* note 3, at 472 (stating that "[a]ccording to the Civil Rights Restoration Act of 1987, the institution is liable for the discriminatory acts of any program within the institution, regardless of whether that program itself receives federal assistance"). This statute represents a legislative response to overturn the holding in *Grove City College v. Bell*,

The goals in enacting Title IX were twofold: "First, Congress wanted to avoid the use of federal resources to support discriminatory practices; [and] second, it wanted to provide individual citizens effective protection against those practices."[32] According to Senator Bayh, the legislative proponent of Title IX, the "heart" of Title IX was to "cover such crucial aspects as admissions procedures, scholarships, and faculty employment, with limited exceptions."[33] As such, Title IX "filled the gender gap in civil rights legislation" left by both Title VI[34] and Title VII[35] of the Civil Rights Act of 1964 ("Title VI" and "Title VII").

Although Title IX was modeled after Title VI in its statutory language, it is perhaps closer to Title VII in its function to eliminate sex discrimination.[36] Instead of Title IX's prohibition against discrimination based on "sex," Title VI expressly prohibits a recipient of federal funds from discriminating on the basis of "race, color and national origin."[37] And while Title VII does address sex discrimination, it is applicable only to the employment context since it makes it "an unlawful employment practice" for an employer to discriminate based on sex.[38] The effect of Title IX was therefore to close "loopholes in existing legislation relating to general education programs and employment resulting from those programs."[39] Since its original enactment in 1972, Congress has since amended Title IX

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465 U.S. 555, 574-75 (1984) (holding that the receipt of federal funds by the financial aid office did not trigger program-wide coverage by Title IX).

32. Cannon v. University of Chicago, 441 U.S. 677, 704 (1976). The Supreme Court referred to congressional debate surrounding Title IX and its model, Title VI, in stating these purposes. *See id.*

33. 118 CONG. REC. 5803 (1972) (*cited in* Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1014 (5th Cir. 1996)). Senator Bayh further stated that "[w]hile the impact of this amendment would be far-reaching, it is not a panacea. It is, however, an important first step in the effort to provide for the women of America something that is rightfully theirs—an equal chance to attend schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice with equal pay for equal work." 118 CONG. REC. 5808 (1972).

34. Title VI states: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (1994).

35. Title VII states: "It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise 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-2(a)(1) (1994).

36. *See The Supreme Court 1997 Term Leading Cases: III. Federal Statutes and Regulations*, 112 HARV. L. REV. 335, 341-42 (1998) [hereinafter *The Supreme Court 1997 Term*]; *see also Cannon*, 441 U.S. at 683 (recognizing that Title IX "was patterned after Title VI").

37. *Cannon*, 441 U.S. at 683; *see also* Title VI, 42 U.S.C. § 2000d (1994).

38. Title VII, 42 U.S.C. § 2000e-2(a)(1) (1994).

39. Emmalena K. Quesada, *Innocent Kiss or Potential Legal Nightmare: Peer Sexual Harassment and the Standard for School Liability Under Title IX*, 83 CORNELL L. REV. 1014, 1021 (1998) (citing 118 CONG. REC. 5803 (1972) (quoting a statement by Senator Bayh)).

on two occasions, allowing for an even broader application of the statute.[40]

1. *Title IX Compared to Title VII*

Unlike Title VII, both Title VI and Title IX have been interpreted as having been enacted pursuant to the Spending Clause of the Constitution.[41] As a Spending Clause statute, Title IX creates a contract between the government and the grant recipient,[42] such that a violation of Title IX by the grant recipient may ultimately result in the revocation of its federal funds.[43] This classification has significant ramifications. First, since the potential consequence of a Title IX violation could be as drastic as the revocation of federal funding, the administrative regulations promulgated to guide Title IX enforcement first require that a grant recipient have an opportunity to take "such remedial action as [is] deem[ed] necessary to overcome the effects of [the] discrimination" before funding is expressly terminated.[44] As a result, this regulation inherently requires that adequate notice be given to the grant recipient in order to achieve the goal of voluntary compliance.[45]

Second, the fact that Title IX is a spending power statute further dis-

40. *See* Rehabilitation Act Amendments of 1986, 42 U.S.C. § 2000d-7 (abrogating the states' Eleventh Amendment immunity under Title IX); Civil Rights Restoration Act of 1987, 20 U.S.C. § 1687 (expanding the definition of "program or activity"); *see also* Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 72 (1992) ("Our reading of the two amendments to Title IX enacted after *Cannon* leads us to conclude that Congress did not intend to limit the remedies available in a suit brought under Title IX.").

41. The Spending Clause reads in part: "The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . ." U.S. CONST. art. I, § 8, cl. 1; *see also* Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989, 1997-98 (1998) (distinguishing Title IX from Title VII); *Franklin*, 503 U.S. at 74-75 ("Title IX was enacted pursuant to Congress' Spending Clause power."); Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 532, 599 (1983) (finding that the "legislative history clearly shows that Congress intended Title VI to be a typical 'contractual' spending-power provision").

42. *See Gebser*, 118 S. Ct. at 1997 (stating that both Title IX and Title VI "condition[] an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds"); *see also Guardians*, 463 U.S. at 599; Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (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."). *But see The Supreme Court 1997 Term*, *supra* note 37, at 342 ("Title IX, like Title VII . . . creates a right belonging to a protected class and is not merely a contract between the government and a school district.").

43. *See* 20 U.S.C. § 1682 (1994). Before such enforcement proceedings may begin, however, a Title IX recipient must first be given the opportunity to come into voluntary compliance. "No such action shall be taken until the department or agency . . . has determined that compliance cannot be secured by voluntary means." *Id.*

44. 34 C.F.R. § 106.3 (1998); *see also Gebser*, 118 S. Ct. at 1998 (explaining the administrative procedures for Title IX enforcement).

45. *See* 20 U.S.C. § 1682 (1994) ("[N]o such action shall be taken until the department or agency concerned has advised the appropriate person . . . of the failure to comply . . . .").

tinguishes it from its workplace counterpart, Title VII. While the language of Title IX focuses on the victim or "person" who is being denied educational benefits, rather than the specific individual perpetrating the discrimination, the textual emphasis of Title VII focuses on the specific discriminatory conduct of an individual employer.[46] In comparison with Title VII, the statutory language of Title IX disregards the source of the discrimination, choosing instead to focus on the effects of sex discrimination. This difference is notable, as it provided the crux for the Court's rejection of Title VII principles in determining a school district's liability under Title IX.[47]

2. *Administrative Enforcement of Title IX*

The Office for Civil Rights of the United States Department of Education (OCR) is the administrative agency charged with the enforcement of Title IX.[48] In order to investigate compliance issues, OCR has promulgated regulations requiring school districts to develop grievance procedures in an effort to eliminate sex discrimination.[49] In addition to pursuing claims of sexual discrimination via school grievance procedures, victims or observers of sex discrimination may also file a complaint directly with OCR.[50] Any complaint filed with OCR is reviewed and investigated, and OCR makes a determination as to whether a Title IX violation has occurred.[51] If a Title IX violation is found, OCR first attempts to seek voluntary compliance and, in the alternative, may begin administrative proceedings to terminate all federal funding to the school.[52] In either event, the OCR regulations do not provide for compensation to individual vic-

46. *See* Roth, *supra* note 3, at 472; *see also* Cannon v. University of Chicago, 441 U.S. 677, 693-94 (1979) ("Title IX explicitly confers a benefit on persons discriminated against on the basis of sex.").

47. *See* Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989, 1995-98 (1998) (comparing Title IX and Title VII).

48. *See* 20 U.S.C. § 3413 (1994).

49. *See* 34 C.F.R. § 106.8(b) (1998) (stating that "[a] recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints"); *see also* Kaija Clark, *School Liability and Compensation for Title IX Sexual Harassment Violations by Teachers and Peers*, 66 GEO. WASH. L. REV. 353, 356 (1998).

50. *See* 34 C.F.R. § 100.7(b) (1998). It may be of interest to note that the procedural provisions for enforcing Title IX are adopted from those applicable to Title VI. *See* 34 C.F.R. § 106.71 (1998). Although OCR currently encourages a complainant to utilize a school's internal grievance mechanisms, it is not a necessary prerequisite to filing a complaint with OCR. *See* Clark, *supra* note 49, at 356 n.29.

51. *See* 34 C.F.R. § 100.7(c)-(d) (1998).

52. *See* 34 C.F.R. § 100.7(d) (1998) (stating that resolution should be obtained by "informal means whenever possible"); 34 C.F.R. § 100.8 (1998) (authorizing administrative proceedings which may include "suspension or termination" of federal funding); 20 U.S.C. § 1682 (1994) (authorizing termination of federal funding).

tims.[53]

In other words, prior to the loss of funding, a school district will have the opportunity to remedy the discrimination. Relief may include "providing equitable relief to the victim,"[54] such as reinstating an unlawfully discharged employee,[55] or requiring that the school district establish a grievance procedure to handle future Title IX complaints.[56] These administrative remedies are distinct from the monetary remedies which were made available through a judicially implied private right of action.[57] Furthermore, the remedies available under the administrative regime of Title IX are in sharp contrast to those made more explicitly available under Title VII.[58] While Title IX's "'silen[ce]' on the issue of available remedies"[59] has been interpreted to allow the recovery of monetary damages under certain circumstances, Title VII more clearly permits, and limits, financial awards to victims of discrimination.[60]

B. *A Private Right of Action Under Title IX:* Cannon v. University of Chicago

In 1979, the Supreme Court determined that Title IX includes an implied private right of action, thereby allowing an individual to bring a private civil suit for sex discrimination.[61] In *Cannon* v. *University of Chi-*

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53. *See* 34 C.F.R. § 100.7-.8 (1998). For a general discussion of OCR enforcement procedures see Clark, *supra* note 49, at 356-57; Monica L. Sherer, Comment, *No Longer Just Child's Play: School Liability Under Title IX for Peer Sexual Harassment*, 141 U. PA. L. REV. 2119, 2135-36 (1993).

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

55. *See* North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 518 (1982).

56. *See* Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 64 n.3 (1992). Despite a finding that the school district had violated Title IX, OCR concluded that the resignation of the teacher/harasser in addition to the implementation of a grievance procedure for sexual harassment complaints were sufficient to bring the district into compliance.

57. *See Franklin*, 503 U.S. at 76 (establishing the availability of monetary damages for a private right of action under Title IX).

58. *See* 42 U.S.C. § 2000e-5(f) (1994) (providing an express cause of action under Title VII); 42 U.S.C. § 1981a (1994) (specifically allowing for compensatory and punitive damages for intentional Title VII discrimination); 42 U.S.C. § 1981a(b) (1994) (establishing a cap on permissible damage award); *see also Gebser*, 118 S. Ct. at 7 (outlining statutory differences in allowing recovery under Title VII and Title IX).

59. *Franklin*, 503 U.S. at 71.

60. *See* Clark, *supra* note 49, at 354 ("Title VII enforces a $300,000 cap for compensatory and punitive damages, whereas Title IX is silent on the issue."). To illustrate the potential for unlimited recovery under Title IX, the author pointed to a recent $1.4 million award made to a student who had been sexually harassed in violation of Title IX. Although the case was ultimately reversed and remanded, the initial award is illustrative of a "jury's willingness" to award damages in excess of the cap imposed by Title VII. *See id.* 354 n.9; *see also* Canutillo Indep. Sch. Dist. v. Leija, 101 F.3d 393, 396 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 2434 (1997).

61. *See* Cannon v. University of Chicago, 441 U.S. 677, 716-17 (1979).

cago,[62] a woman who was denied admission to two private medical schools, both recipients of federal financial assistance, attempted to file a private lawsuit under Title IX.[63] Although the claim was initially dismissed by the trial court, the U.S. Supreme Court ultimately held that the student was not limited to administrative remedies in the event of a Title IX violation and, instead, had a statutory right to bring a private civil lawsuit in federal court.[64]

In reaching its conclusion that Congress intended to provide an implied private remedy for sex discrimination, the Supreme Court analyzed four factors that it deemed indicative of such intent.[65] First, the Court noted that the plaintiff was a member of the class for whose benefit Title IX was enacted.[66] Second, the Court recognized that, according to legislative history, Title IX was "patterned after Title VI of the Civil Rights Act of 1964" and that "[b]oth statutes provide the same administrative mechanism for terminating federal financial support for institutions engaged in prohibited discrimination."[67] This analogy between Title VI and Title IX was used to justify a private remedy since "critical language in Title VI had already been construed as creating a private remedy."[68]

Third, as the Court noted, a private remedy under Title IX would not "frustrate the underlying purpose of the legislative scheme."[69] To support this conclusion, the Court pointed to Congress's objectives in drafting Title IX[70] as well as OCR support for allowing a private cause of action.[71]

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62. 441 U.S. 677 (1979).

63. *See id.* at 680.

64. *See id.* at 717; *see also* Vickie J. Brady, *Borrowing Standards to Fit the Title—Do They Really Fit? Title VII Standards Applied in Title IX Educational Sexual Harassment Claim as the Conflict Among the Courts Continues.* Kinman v. Omaha Public School District, *94 F.3d 463* (8th Cir. 1996), 22 S. ILL. U. L.J. 411, 414 (1998) (noting that "even though there was no express language in the statute authorizing a private action, Congress must have intended to provide a remedy"). At the time of *Cannon*, however, even a private cause of action under Title IX resulted only in equitable, not monetary, relief for the claimant. *See* Clark, *supra* note 49, at 358; Sherer, *supra* note 53, at 2150-51.

65. *See Cannon*, 441 U.S. at 688-89.

66. *See id.* at 693-94. In answering this threshold question, the Court pointed out that Congress had chosen to draft Title IX "with an unmistakable focus on the benefited class" instead of "writing it simply as a ban on discriminatory conduct by recipients of federal funds . . . ." *Id.* at 691-92.

67. *Id.* at 695-96. The Court in *Cannon* cited the following cases to support its finding that Title VI also provides a private cause of action against discrimination: Bossier Parish School Board v. Lemon, 370 F.2d 847, 852 (5th Cir. 1967), *cert. denied*, 388 U.S. 911 (1967); Blackshear Residents Org. v. Housing Auth. of Austin, 347 F. Supp. 1138, 1146 (W.D. Tex. 1972); Hawthorne v. Kenbridge Recreation Ass'n, 341 F. Supp. 1382, 1383-84 (E.D. Va. 1972).

68. *Cannon*, 441 U.S. at 696.

69. *Id.* at 703.

70. *See id.* at 704.

71. At the time of *Cannon*, the agency charged with enforcing Title IX was the Department of Health, Education, and Welfare ("HEW"), the precursor to OCR. HEW supported the existence of a private cause of action under Title IX. *See id.* at 687 n.8. In fact, HEW had "candidly admitted" that

Since one of the objectives was to "avoid the use of federal resources to support discriminatory practices," termination of federal funding to educational institutions was found to be "generally" sufficient to achieve that objective.[72] However, revocation of federal funds may not be an appropriate remedy for an individual who suffered from a severe, yet isolated, incident of discrimination for which subsequent termination of funds would provide insufficient relief.[73] As a result, the Court in *Cannon* concluded that the "award of individual relief to a private litigant . . . is not only sensible but is also fully consistent with—and in some cases even necessary to—the orderly enforcement of the statute."[74]

Finally, the Court in *Cannon* considered whether the creation of a federal remedy would infringe upon a subject matter "traditionally regulated to state law."[75] In dismissing this concern, the Court observed that historically, it has been the federal, and not state, courts that have protected against "invidious discrimination."[76] Furthermore, as the Court noted, it is the "expenditure of federal funds that provides the justification" for the prohibition against sex discrimination."[77]

C. *Sexual Harassment Under Title IX: The Beginnings*

The statutory language of Title IX does not explicitly define sexual discrimination, nor does it expressly prohibit sexual harassment as a form of discrimination. In fact, "[t]here are few clues in either the statute or its implementing regulations regarding the proper analysis for a Title IX claim of sexual harassment."[78] Historically, claims of Title IX discrimination have instead been limited to instances in which discriminatory practices have denied women equal access to educational opportunities, athletic programs, and employment within educational institutions.[79] Therefore, early lawsuits have given Title IX a limited focus, characterizing Title IX simply as a vehicle for providing "equal opportunity for members

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it had insufficient resources to enforce all Title IX violations and that private litigation would not hinder its investigations. *See id.* at 708 n.42. The Supreme Court called the agency's position "unquestionably correct." *Id.* at 708.

72. *See id.* at 704.

73. *See id.* at 704-05.

74. *Id.*

75. *Id.* at 689 n.9.

76. *Id.* at 708.

77. *Id.* at 708-09.

78. Roth, *supra* note 3, at 473.

79. *See* Clark, *supra* note 49, at 356; Quesada, *supra* note 39, at 1023-24. For examples of sex discrimination traditionally covered by Title IX, see *Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288, 1289-90 (N.D. Cal. 1993); Pamela W. Kernie, Comment, *Protecting Individuals from Sex Discrimination: Compensatory Relief Under Title IX of the Education Amendments of 1972*, 67 WASH. L. REV. 155, 157-58 (1992).

of both sexes."[80]

To state a cause of action under Title IX, one must show that: "1) he or she was excluded from participation in, denied the benefits of, or subjected to discrimination in an educational program; 2) that the program received federal assistance; and 3) that the exclusion was on the basis of sex."[81] Despite the apparent initial limitations of Title IX, however, "exclusion on the basis of sex" has been expanded by the courts to include sexual harassment as a legitimate form of sex discrimination.[82] This progression, however, has been tentative and the "'evolution of Title IX substantive law has proceeded slowly.'"[83] Because of the dearth of sexual harassment claims under Title IX, Title IX case law has borrowed heavily from Title VII principles in developing a model for sexual harassment claims.[84] In doing so, Title IX has mirrored the Title VII terminology classifying sexual harassment as either quid pro quo or hostile environment sexual harassment,[85] as well as established similar criteria for determining the existence of viable hostile environment claims.[86]

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80. Kelley v. Board of Trustees, 832 F. Supp. 237, 241 (C.D. Ill. 1993) (citation omitted).

81. Seamons v. Snow, 84 F.3d 1226, 1232 (10th Cir. 1996) (citing Bougher v. University of Pittsburgh, 713 F. Supp. 139, 143-44 (W.D. Pa), *aff'd*, 882 F.2d 74 (3d Cir. 1989)).

82. Although sexual harassment under Title IX was first recognized in *Alexander v. Yale University*, 631 F.2d 178 (1980), it was not until 1992, in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), that Title IX became a more utilized vehicle for sexual harassment claims within educational institutions. *See* Roth, *supra* note 3, at 468-69.

83. Neera Rellan Stacy, *Seeking a Superior Institutional Liability Standard Under Title IX for Teacher-Student Sexual Harassment*, 71 N.Y.U. L. REV. 1338, 1345 (1996) (quoting Thomas M. Melsheimer et al., *The Law of Sexual Harassment on Campus: A Work in Progress*, 13 REV. LITIG. 529, 537 (1994)).

84. *See, e.g.*, *Franklin*, 503 U.S. at 74-75 (making an analogy between the relationship between a supervisor-employee and that of a teacher-student in holding a district liable for teacher-student sexual harassment); Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463, 469 (8th Cir. 1996) (applying Title VII liability standards to a Title IX same-sex hostile environment claim); Mabry v. State Bd. of Community Colleges & Occupational Educ., 813 F.2d 311, 316 n.6 (10th Cir. 1987) ("we regard [Title VII] as the most appropriate analogue when defining Title IX's substantive standards . . . ."); *see also* Stacy, *supra* note 83, at 1347 (arguing that the adoption of Title VII standards does not provide adequate protection to students with Title IX claims).

85. *See* Alexander v. Yale Univ., 459 F. Supp. 1, 4 (D. Conn. 1977), *aff'd on other grounds*, 631 F.2d 178 (2d Cir. 1980) (recognizing quid pro quo sexual harassment under Title IX: "academic advancement conditioned upon submission to sexual demands constitutes sexual discrimination in education, just as questions of job retention or promotion tied to sexual demands from supervisors have become increasingly recognized as potential violations of Title VII's ban against sex discrimination in employment"); Moire v. Temple Univ. Sch. of Med., 613 F. Supp. 1360, 1366 (1985) (acknowledging both quid pro quo and hostile environment claims as legitimate forms of sexual harassment). The OCR also recognizes both quid pro quo and hostile environment claims as actionable claims for sexual harassment. *See* OCR Guidance, *supra* note 25, at 12,038. For a general discussion of the two recognized forms of sexual harassment, see Sherer, *supra* note 53, at 2125-26.

86. To establish a claim for Title IX hostile environment sexual harassment, a plaintiff must show that "1) he [she] is a member of a protected group; 2) that he [she] was subject to unwelcome harassment; 3) that the harassment was based on sex; 4) that the sexual harassment was sufficiently

It was not until *Alexander v. Yale University*[87] that sexual harassment was first held to be actionable sex discrimination under Title IX.[88] In *Alexander*, a female student claimed that she had received a poor grade because she rejected a professor's "outright proposition 'to give her a grade of "A" in the course in exchange for her compliance with his sexual demands.'"[89] When the student complained to university administrators, she was told that there was nothing they could do.[90] In this classic example of quid pro quo sexual harassment,[91] a Connecticut federal court concluded that "academic advancement conditioned upon submission to sexual demands constitutes sex discrimination in education, just as questions of job retention or promotion tied to sexual demands from supervisors have become increasingly recognized as potential violations of Title VII . . . ."[92] In reaching its decision, the court relied heavily on this analogy between the workplace and an educational environment, finding persuasive the existing Title VII principle that sexual harassment may qualify as a form of sex discrimination.[93] Under this analogy, the court further concluded that liability may be imputed to a school for its failure to act upon a claim of sexual harassment.[94]

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severe and pervasive so as unreasonably to alter the conditions of his [her] education and create an abusive educational environment; and 5) that some basis for institutional liability has been established." Seamons v. Snow, 84 F.3d 1226, 1232 (10th Cir. 1996); *see also* Morse v. Regents of Univ. of Colo., 154 F.3d 1124, 1126-27 (10th Cir. 1998) (addressing claim of student ROTC cadet that fellow students created hostile environment); Brzonkala v. Virginia Polytechnic Inst. & State Univ., 132 F.3d 949, 958-59 (4th Cir. 1997) (involving a college student's claim that a hostile environment was created by the university's failure to adequately respond to rape allegations). Under Title VII, the Supreme Court has established similar criteria for sexual harassment claims. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993) (explaining that under Title VII, a victim need only perceive the work environment as hostile in order to state a claim); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 62, 67 (1986) (discussing the two types of sexual harassment and the criteria needed to establish a harassment claim).

87. 459 F. Supp. 1 (D. Conn. 1977), *aff'd on other grounds*, 631 F.2d 178 (2d Cir. 1980).

88. *See Alexander*, 459 F. Supp. at 4.

89. *Id.* at 3-4.

90. *See id.*

91. According to the regulations corresponding to Title VII, quid pro quo sexual harassment occurs in the workplace when "submission to or rejection of [unwelcome sexual] conduct by an individual is used as the basis for employment decisions affecting such individual." 29 C.F.R. § 1604.11(a)(2) (1998). The most recent OCR Guidance cites *Alexander* when defining educational quid pro quo as occurring when "[a] school employee explicitly or implicitly conditions a student's participation in an education program or activity or bases an educational decision on the student's submission to unwelcome sexual advances, requests for sexual favors, or other . . . conduct of a sexual nature." OCR Guidance, *supra* note 25, at 12,038.

92. *Alexander*, 459 F. Supp. at 4.

93. *See id.*; *see also* Brady, *supra* note 64, at 413.

94. "When a complaint of such an incident is made, university inaction then does assume significance, for on refusing to investigate, the institution may sensibly be held responsible for condoning or ratifying the employee's inviduously discriminatory conduct." *Alexander*, 459 F. Supp. at 4. Following trial, the district court entered judgment for Yale, finding insufficient evidence that

Five years later, the District Court for the Eastern District of Pennsylvania, in *Moire v. Temple University School of Medicine*,[95] further expanded recognition of sexual harassment claims under Title IX by acknowledging that hostile environment claims could also be included as sex discrimination under the umbrella of Title IX.[96] In *Moire*, a female physician alleged that sexual harassment by her medical school supervisor had resulted in a failing grade, preventing her from being promoted to her fourth year.[97] Although the court ultimately made a factual determination that the alleged discriminatory behavior did not rise to the level of a "hostile" educational environment, the court did recognize that under different factual circumstances, such harassment would present a viable claim.[98]

Following *Moire*, Title IX cases continued to manifest the influence of Title VII. For example, in *Mabry v. State Board of Community Colleges and Occupational Education*,[99] the Tenth Circuit declared that "[b]ecause Title VII prohibits the identical conduct prohibited by Title IX, i.e., sex discrimination, we regard it as the most appropriate analogue when defining Title IX's substantive standards."[100] In *Mabry*, the plaintiff claimed that her job as a physical education instructor and coach was terminated based upon both her sex and marital status.[101] Although the Tenth Circuit ultimately held that the Title VII claim precluded the Title IX claim,[102] it did so only after suggesting that "courts should turn to [Title VII] case law for guidance if confronted with an employment-related allegation of discrimination under Title IX."[103] Despite the Supreme Court's earlier declaration that the scope of Title IX should be accorded "'a sweep as broad as its language,'"[104] the *Mabry* court asserted that "Title IX certainly sweeps no broader than Title VII" given their shared purpose to end sex discrimi-

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the sexual proposition did, in fact, take place and that the "C" received by the student was reflective "of any factor other than academic achievement." *Alexander*, 631 F.2d at 183. For further discussion of the early background of Title IX in sexual harassment settings, see Brady, *supra* note 64, at 413, and Clark, *supra* note 49, at 357-58.

95. 613 F. Supp. 1360 (E.D. Pa. 1985), *aff'd mem.*, 800 F.2d 1136 (3d Cir. 1986).

96. *See id.* at 1366-67.

97. *See id.* at 1365.

98. *See id.* at 1369-70.

99. 813 F.2d 311 (10th Cir. 1987).

100. *Id.* at 316 n.6.

101. *See id.* at 313.

102. The Tenth Circuit found that the Title IX claim was precluded since "the district court ruled in [the plaintiff's] Title VII action that defendants committed no sex discrimination . . . [and t]here is no new evidence which she could present under Title IX which she was unable to present under Title VII." *Id.* at 318.

103. *Id.* at 317.

104. North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982) (quoting United States v. Price, 383 U.S. 787, 801 (1966)).

nation.[105]

The Second Circuit subsequently relied on the Tenth Circuit's approach in *Mabry* in addressing a Title IX claim by a surgical resident that she had been subjected to both quid pro quo and hostile environment sexual harassment.[106] In *Lipsett v. University of Puerto Rico*,[107] a female resident filed suit against the university and hospital administrators, attempting to impute liability to the university for failing to respond to her repeated complaints of sex discrimination.[108] In particular, the plaintiff claimed that men in the program "plastered the walls" with centerfolds and a sexually explicit drawing of the plaintiff[109] as well as subjected her to sexually charged nicknames, telling her that they would protect her if she would have sex with them.[110] Furthermore, the plaintiff claimed that she had been warned that many of the men, including the doctors, wanted to eliminate her and other women from the residency program.[111] Although the specific fact context of this case was a "mixed employment-training context"[112] and not purely educational, the *Lipsett* court had "no difficulty extending the Title VII standard to the discriminatory treatment by a supervisor" under Title IX.[113]

Despite these cases, until the mid-1990s, few students actually brought claims of sexual harassment under Title IX, prompting one commentator to criticize that "Title IX as a statutory remedy has proven to be virtually without bite."[114] Much of the absence of litigation of sexual harassment claims was attributable to the fact that, at the time of both *Alexander* and *Moire*, only equitable remedies were available to plaintiffs bringing private claims under Title IX.[115] Although the Supreme Court in *Cannon* had

105. *Mabry*, 813 F.2d at 318.

106. *See* Lipsett v. University of Puerto Rico, 864 F.2d 881, 896, 914 (1st Cir. 1988).

107. 864 F.2d 881 (1st Cir. 1988).

108. *See id.* at 884.

109. *Id.* at 888.

110. *See id.*

111. *See id.* at 887-88.

112. *Id.* at 897.

113. *Id.* The plaintiff in this case was considered "both an employee *and* a student" since she was receiving a salary in addition to her surgical training. *Id.*

114. Kimberly A. Mango, Comment, *Students Versus Professors: Combatting Sexual Harassment Under Title IX of the Education Amendments of 1972*, 23 CONN. L. REV. 355, 411 (1991); *see also* Clark, *supra* note 50, at 358 (noting that "few students brought sexual harassment Title IX claims because their remedies generally were limited to equitable relief"); Fossey et al., *supra* note 7, at 486 (stating that there was a "dearth" of sexual harassment cases due to unavailability of monetary damages).

115. *See* Sherer, *supra* note 53, at 2150-51. In *Alexander*, the plaintiff sought relief in the form of a mandate to the university to implement a complaint mechanism and to commence a formal investigation of alleged sexual harassment. She also requested a notation on her transcript indicating the disputed grade. *See* Alexander v. Yale Univ., 459 F. Supp. 1, 6 (D. Conn. 1977).

intended to provide "individual relief to a private litigant,"[116] equitable relief often came too late to be of any real significance for individual students.[117] Because of the limited legal remedies available under Title IX for sexual harassment, most Title IX claims were therefore limited to promoting equal opportunity and access to educational programs, most notably within the athletic context.[118]

D. Franklin v. Gwinnett: *A Pivotal Development in Title IX Sexual Harassment*

It was not until 1992 that Title IX finally became "a viable legal tool for eliminating sexual harassment in education."[119] That year, in *Franklin v. Gwinnett County Public Schools*,[120] the Supreme Court unanimously held that monetary damages are an available remedy for plaintiffs claiming an intentional violation of Title IX.[121] This decision extended the Court's earlier holding in *Cannon* which, in permitting a private right of action under Title IX, had limited available damages to equitable and injunctive relief.[122] In addition, the *Franklin* decision ratified the earlier positions taken in both *Alexander* and *Moire*, which had previously recognized quid pro quo and hostile environment sexual harassment claims,

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116. Cannon v. University of Chicago, 441 U.S. 667, 705 (1979).

117. *See* Sylvia Bukoffsky, Note, *School District Liability for Student-Inflicted Sexual Harassment: School Administrators Learn a Lesson Under Title IX*, 42 WAYNE L. REV. 171, 179 n.39 (1995); Clark, *supra* note 49, at 358 ("Most student victims . . . did not pursue equitable remedies . . . because the court orders providing relief were often administered after the students left the school, so the remedies essentially were useless to victims.").

118. *See* Bukoffsky, *supra* note 117, at 179; Sherer, *supra* note 53, at 2150-51 (explaining the limited remedies available at the time).

119. Roth, *supra* note 3, at 468.

120. 503 U.S. 60 (1992).

121. *See id.* at 76. The decision in *Franklin* settled the controversy among circuit courts regarding the availability of monetary damages for Title IX sexual harassment claims. *See* Lieberman v. University of Chicago, 660 F.2d 1185, 1188 (7th Cir. 1981) ("[I]f Congress had intended to create a remedy for damages it would have done so explicitly."), *cert. denied*, 456 U.S. 937 (1982). *But see* Pfeiffer v. Marion Ctr. Area Sch. Dist., 917 F.2d 779, 787-89 (3d Cir. 1990) (finding that Title IX supported an award of compensatory damages).

122. *See* Cannon v. University of Chicago, 441 U.S. 677, 717 (1979). Historically, students preferred filing complaints with OCR in order to circumvent the costs of private litigation. This avenue, however, limited complainants to the equitable relief provided by OCR. Even if complainants decided to file private suits in federal court, prior to the Court's decision in *Franklin*, plaintiffs were similarly restricted to equitable remedies. *See* Sherer, *supra* note 53, at 2150-51; *see also* Mark Blais, Comment, *The Department of Education Clarifies Its Position Concerning Peer Sexual Harassment: But Will Federal Courts Take Notice?*, 47 CATH. U. L. REV. 1363, 1375 (1998) ("[D]eclaratory and injunctive relief traditionally have been the only remedies available to aggrieved plaintiffs."); Stacy, *supra* note 83, at 1346 n.46 (noting that "[p]rior to *Franklin*, courts recognized injunctive relief as the primary remedy under Title IX for claims of sexual harassment of a student by a teacher").

respectively, under Title IX.[123]

In *Franklin*, a tenth grade student alleged that she was sexually abused and harassed by a teacher employed by the school district and that teachers and administrators knew of the abuse but failed to respond adequately.[124] In the complaint, the student reported that the teacher had "engaged her in sexually oriented conversations . . . forcibly kissed her . . . and that on three occasions . . . took her to a private office where he subjected her to coercive intercourse."[125] According to the allegations, the school took no corrective action following its investigation of the claim, and had in fact tried to discourage the student from pursuing her charges.[126]

1. *Title VI Supports Award of Monetary Damages for Private Action Under Title IX*

In reaching its decision that Title IX damages included monetary relief, the *Franklin* Court "presume[ed] the availability of all appropriate remedies unless Congress has expressly indicated otherwise."[127] Although the plain language of Title IX reveals no clear intent by Congress to authorize the availability of monetary damages, the Court relied upon the "long-standing rule" that "where legal 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."[128] Furthermore, the Court found this principle to be consistent with its previous decisions to permit compensatory damages for claims of intentional discrimination under Title VI.[129] As with Title VI, the Court reasoned that "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute."[130]

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123. *See* Alexander v. Yale Univ., 631 F.2d 178 (2d Cir. 1980); Moire v. Temple Univ. Sch. of Med., 613 F. Supp. 1360 (E.D. Pa. 1985), *aff'd mem.*, 800 F.2d 1136 (3d Cir. 1986); *see also* Roth, *supra* note 3, at 468-69. For further discussion of these two cases, see discussion *supra* Part II.C.

124. *See* Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 63 (1992).

125. *Id.* at 63.

126. *See id.* at 63-64. Franklin also filed a complaint with OCR. OCR investigated and concluded that the school district had violated Title IX but had subsequently come into compliance since the teacher had resigned and the school had implemented a grievance procedure. *See id.* at 64 n.3.

127. *Id.* at 66.

128. *Id.* (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)).

129. *See id.* at 70 (citing Guardians Ass'n v. Civil Service Comm'n, 463 U.S. 582, 595 (1983); Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 630, n. 9 (1984) (noting that in *Guardians*, the majority of justices had "agreed that retroactive relief is available to private plaintiffs for all discrimination . . . that is actionable under Title VI")).

130. *Franklin*, 503 U.S. at 70-71.

2. Franklin's *Analogy to Title VII Sexual Harassment*

Despite the clarity of the Supreme Court's authorization of compensatory remedies under Title IX, the *Franklin* decision contained little guidance regarding either the specific analysis of a sexual harassment claim under Title IX or the applicable standard for institutional liability.[131] By quoting directly from a Title VII sexual harassment case, however, the Court strongly intimated that Title VII principles would be applicable in deciding sexual harassment claims under Title IX.[132] In *Franklin*, the Court directly compared teacher-student harassment to supervisor-employee harassment:

> Unquestionably, Title IX placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." We believe the same rule should apply when a teacher sexually harasses a student.[133]

Despite this comparison, however, the *Franklin* Court failed to articulate whether Title VII agency principles would also apply to Title IX sexual harassment claims.[134] Nor did the Court establish a bright-line standard for imputing liability to educational institutions.[135] Instead, school liability was predicated upon a finding that the sexual harassment constituted an "intentional" violation of Title IX.[136] Basing its conclusion upon a distinc-

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131. *See id.*; *see also* Gebser v. Lago Vista Ind. Sch. Dist. 118 S. Ct. 1989, 1995 (1998) (referencing the Court's earlier decision in *Franklin* and noting that while it held that "a school district can be held liable in damages in cases involving a teacher's sexual harassment of a student; the decision, however, does not purport to define the contours of that liability"); Newman, *supra* note 7, at 2571 ("The *Franklin* decision leaves unanswered many important questions relating to the standard of institutional liability under Title IX."); Roth, *supra* note 3, at 469 ("*Franklin* leaves unresolved many questions about the extent of the Title VII framework's applicability to claims of sexual harassment brought under Title IX.").

132. *See Franklin*, 503 U.S. at 75 (citing Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986)); *see also* Stacy, *supra* note 83, at 1346 ("Although the *Franklin* Court did not explicitly adopt a rule for institutional liability under Title IX, its reference to *Meritor* has led many lower courts to utilize Title VII standards when deciding Title IX claims.").

133. *Franklin*, 503 U.S. at 75 (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986)).

134. *See id.*; *see also* Roth, *supra* note 3, at 471.

135. *See Franklin*, 503 U.S. 60 (1992); *see also* Stacy, *supra* note 83, at 1346. At the time that *Meritor* was decided, employer liability was determined by the type of harassment alleged. For claims of quid pro quo sexual harassment, employers could be held vicariously liable; for hostile environment claims, employers could be liable under a constructive notice standard if they knew or should have known of the harrassment and failed to take action. *See* Henson v. City of Dundee, 682 F.2d 897, 905, 909 (11th Cir. 1982); *see also* Stacy, *supra* note 83, at 1348 (discussing the then existing standards for employer liability under Title VII).

136. *See Franklin*, 503 U.S. at 74-75; *see also* Newman, *supra* note 7, at 2570 ("The *Franklin* Court also made an important distinction between 'unintentional' and 'intentional' Title IX violations,

tion between an intentional and unintentional violation, the *Franklin* Court noted that "Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe."[137] Monetary damages for an "unintentional" violation, however, would not be available since "the receiving entity of federal funds lacks notice that it will be liable for a monetary award."[138] By operating on the assumption that the discrimination was intentional, the Court was able to sidestep particular findings regarding the level of notice needed to impute liability on a school district.

In addition, relying on the assumption that the teacher-to-student harassment in *Franklin* was an intentional violation of Title IX, the Supreme Court squared its holding with similar findings under Title VI claims.[139] Since the Court had previously held that discrimination under Title VI could be proved by showing 1) discriminatory intent, and 2) discriminatory effects,[140] the *Franklin* decision was consistent in allowing monetary remedies for intentional discrimination.

E. *Post*-Franklin: *Courts Debate the Title IX Standard for Institutional Liability*

Between the Supreme Court's decisions in *Franklin* and in *Gebser*, there had been much debate over the appropriate standard for imputing liability for sexual harassment on an educational institution.[141] Courts had looked to both Title VI and Title VII for guidance in resolving this

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particularly as the distinction relates to an educational institution's 'notice that it will be liable for a monetary award.'") (citations omitted).

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

138. *Id.* at 74.

139. *See id.* at 70 (citing Guardians Ass'n v. Civil Service Comm'n, 463 U.S. 582, 584 (1983), a Title VI case that allowed the recovery of monetary damages for intentional racial discrimination).

140. *See Guardians Ass'n*, 463 U.S. at 607 n. 27; *see also* Newman, *supra* note 7, at 2573. In a later case, the Fifth Circuit described this requirement of intentional discrimination in a teacher-student sexual harassment case to include "direct involvement by the school district." Canutillo Ind. Sch. Dist. v. Leija, 101 F.3d 393, 400 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 2434 (1997). In *Canutillo*, the Fifth Circuit found that the student's Title IX claim failed under both the Title VI standard requiring intent by the school to discriminate as well as under the Title VII standard imposing liability if the school knew or should have known of the harassment. *See id.* at 402-03; *see also* Elizabeth G. Livingston, Canutillo Independent School District v. Leija: *Imputing Liability for Teacher-Student Sexual Harassment Under Title IX*, 71 TUL. L. REV. 1849, 1965 (1997).

141. *See, e.g.*, Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463, 468 (8th Cir. 1996) (stating that "courts that have discussed the standard of liability for school districts under Title IX have failed to reach a consensus regarding the appropriate standard"), *rev'd*, Nos. 98-1683, 98-2018, 98-2994, 1998 WL 148090, at *2 (8th Cir. Mar. 19, 1999) (applying the actual notice standard established by *Gebser*); Bolon v. Rolla Pub. Sch., 917 F. Supp. 1423, 1427 (E.D. Mo. 1996) ("The standard of a school district's liability for sexual harassment by teachers against students under Title IX is not clear."); *see also* sources listed *supra* note 132.

debate.[142] Adopting Title VI analysis in Title IX discrimination cases is logical because of the semantical similarity between the two statutes and the fact that both were enacted by Congress pursuant to its Spending Clause power.[143] However, to prove a Title VI violation, the Supreme Court had held that a plaintiff must show discriminatory intent,[144] and proving such intent was a formidable obstacle in sexual harassment claims. As the Fifth Circuit concluded, even actual or direct notice of the sexual harassment to the school authorities, would not impute liability "absent direct involvement by the school district."[145] Title VI's intentional discrimination standard may also prove difficult in Title IX sexual harassment claims since, as one commentator has noted, "no Title VI case has held environmental harassment to be actionable"[146] and a student claiming sexual harassment would have to "bridge a gap not simply to Title VI . . . but more importantly from Title VI to Title VII, where both environmental and sexual harassment are comprehensively defined."[147]

Many courts instead looked to Title VII principles in an effort to evaluate Title IX claims of sexual harassment within schools.[148] Since

142. *See, e.g.*, Kracunas v. Iona College, 119 F.3d 80, 87 (2d Cir. 1997) (applying Title VII liability standards); *Canutillo*, 101 F.3d at 402-03 (applying both Title VI and Title VII standards); *Kinman*, 94 F.3d at 469 (relying on Title VII standards for deciding school liability); Murray v. New York Univ. College of Dentistry, 57 F.3d 243, 248 (2d Cir. 1995) (relying on Title VII standards); *see also* Newman, *supra* note 7, at 2572 ("Because the standard of institutional liability under Title IX is so imprecise, courts have looked to Title VI and Title VII of the Civil Rights Act of 1964 for guidance.").

143. Title IX merely substitutes "sex" for Title VI's "race, color and national origin." *Compare* Title IX, 20 U.S.C. § 1981 (1994), *with* Title VI, 42 U.S.C. § 2000d (1994). For the exact language of Title VI, see *supra* note 34. *See also Canutillo*, 101 F.3d at 398 (noting similarities between Title VI and Title IX).

144. *See* Guardians Ass'n v. Civil Service Comm'n, 463 U.S. 582, 584 (1983).

145. *Canutillo*, 101 F.3d at 400; *see also* Livington, *supra* note 140, at 1854 (stating that imputing liability on a school under Title VI requires "direct involvement, and even notice would not impute liability to the educational facility"); Newman, *supra* note 7, at 2573-74 (discussing the difficulties in proving "actual discriminatory intent" under Title IX).

146. Mango, *supra* note 114, at 388-89. The absence of such claims may be changing as the Ninth Circuit recently addressed a Title VI racially hostile environment. *See* Monteiro v. Tempe Union High School Dist., 158 F.3d 1022 (9th Cir. 1998). In *Monteiro*, the plaintiff-student claimed that racially hostile graffitti and the frequent use of the word "nigger" by white students created a racially hostile learning envirmonment. *See id.* at 1025. Applying the standards set forth by the Department of Education (OCR), the Ninth Circuit concluded that the complaint satisfied the criteria for establishing a Title VI hostile environment claim. *See id.* at 1034. In determining that the claim was viable under Title VI, the court cited to similar claims under Title VII. *See id.* at 1033-34 (citing Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991); Patterson v. McLean Credit Union, 491 U.S. 164, 180 (1989); Waltman v. International Paper Co., 875 F.2d 468, 477 (5th Cir. 1989); Walker v. Ford Motor Co., 684 F.2d 1355 (11th Cir. 1982)).

147. Mango, *supra* note 114, at 389.

148. *See, e.g.*, *Kracunas*, 119 F.3d at 87; Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 464, 469 (8th Cir. 1996) (stating that "Title VII standards of institutional liability [apply] to hostile environment sexual harassment cases" under Title IX), *rev'd*, Nos. 98-1683, 98-2018, 98-2994, 1998 WL 148090,

much of the case law involving sexual harassment claims under Title VII is well developed and can be easily transferred to the educational environment, it provided many courts with workable guidelines for evaluating Title IX sexual harassment claims.[149] In addition, many courts had attached significance to the reference by the Supreme Court in *Franklin* to *Meritor Savings Bank, FSB v. Vinson*,[150] a Title VII case.[151] Relying upon the analogy created in *Franklin* between the employment and educational context, *Franklin* had therefore been interpreted as a directive towards full application of Title VII analysis to Title IX.[152] Since Title IX analysis had already adopted Title VII's framework for defining both quid pro quo and hostile environment as actionable forms of sexual harassment,[153] some courts had reasoned that Title IX claims should be analyzed under notice standards modeled after an employer's liability under Title VII.[154]

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at *2 (8th Cir. Mar. 19, 1999) (applying *Gebser*'s actual notice standard); Murray v. New York Univ. College of Dentistry, 57 F.3d 243, 249 (1995) ("[I]n a Title IX suit for gender discrimination based on sexual harassment of a student, an educational institution may be held liable under standards similar to those applied in cases under Title VII."); Mabry v. State Bd. of Community Colleges & Occupational Educ., 813 F.2d 311, 316 n.6 (10th Cir. 1987) (Title VII is the "most appropriate analogue" to Title IX).

149. *See* Ronna Greff Schneider, *Sexual Harassment and Higher Education*, 65 TEX. L. REV. 525, 527-28 (1987). The author lists four factors explaining why sexual harassment case law under Title VII is more developed than under Title IX: 1) students are more transient than employees and are therefore less likely to file claims; 2) students lack financial resources or incentives to pursue a cause of action; 3) courts have historically shown reluctance to evaluate the decisions of academic institutions; and 4) "the scope and nature of relief available under Title IX is unclear." *Id.*; *see also* Stacy, *supra* note 83, at 1345 n.44.

150. 477 U.S. 57 (1986).

151. *See, e.g.*, Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp. 1288, 1292 (N.D. Cal. 1993) ("As the Supreme Court acknowledged [in *Franklin*], a student should have the same protection in school that an employee has in the workplace.").

152. For circuit court cases that adopted standards of liability based on Title VII case law, see Krakunas v. Iona College, 119 F.3d 80, 88 (2d Cir. 1997); Doe v. Claiborne County, 103 F.3d 495, 514 (6th Cir. 1996); Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463, 469 (8th Cir. 1996) (applying the "knew or should have known" standard), *rev'd*, Nos. 98-1683, 98-2018, 98-2994, 1998 WL 148090, at *2 (8th Cir. Mar. 19, 1999) (applying *Gebser*'s actual notice standard); Lipsett v. University of Puerto Rico, 864 F.2d 881, 899-900 (1st Cir. 1988); Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp. 1288, 1293 (N.D. Cal 1993).

153. *See, e.g.*, *Lipsett*, 864 F.2d at 897-98 (acknowledging the appropriateness of transferring Title VII's criteria for both quid pro quo and hostile environment sexual harassment claims to Title IX).

154. *See, e.g.*, Brzonkala v. Virginia Polytechnic Inst. & State Univ., 132 F.3d 949, 958 (4th Cir. 1997) (finding that in instances of peer sexual harassment, it is appropriate to "apply[] Title VII principles to define the contours of [the plaintiff's] hostile environment claims"). Such principles included, according to the Fourth Circuit, applying Title VII's constructive notice standard. *See id.*; *see also* Murray v. New York Univ. College of Dentistry, 57 F.3d 243, 249 (2d Cir. 1995) (recognizing that "[t]he Court's citation of *Meritor* . . . indicates that . . . an educational institution may be held liable under standards similar to those applied in cases under Title VII"); *Lipsett*, 864 F.2d at 896 (acknowledging that courts "can draw upon the substantial body of case law developed under Title VII to assess the plaintiff's claims under . . . Title IX"); Mabry v. State Bd. of Community Colleges & Occupational Educ., 813 F.2d 311, 317 (10th Cir. 1987) (recognizing the "well-developed

As a result of the influence of both Title VI and Title VII analysis, three general standards of institutional liability had emerged in evaluating Title IX claims:[155] 1) strict liability, which would hold a school vicariously liable for the actions of its teachers regardless of fault;[156] 2) a constructive notice standard, under which a school is held responsible if it "knew or should have known" of the harassment;[157] and 3) an actual notice standard, premised on intentional discrimination in which a school actually knew and failed to remedy the harassment.[158]

1. *Strict Liability*

Using a strict liability standard, a school would be responsible for the actions of one of its employees without regard to fault or knowledge by the school of the teacher's conduct. Relying in part on agency principles, the District Court for the Eastern District of Missouri, in *Bolon v. Rolla Public Schools*,[159] identified three reasons for imputing liability to a school

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body of case law . . . under Title VII" and encouraging courts to "turn to that case law for guidance if confronted with an employment-related allegation of discrimination under Title IX"). However, the Second Circuit, while relying upon Title VII liability standards (including agency principles), noted that the difference between school and workplace environments "makes precise application of Title VII principles difficult" and therefore courts are not "required to import the entire Title VII jurisprudence and apply it to all issues arising under Title IX." *Kracunas*, 119 F.3d at 87.

155. *See* Fossey et al., *supra* note 7, at 487.

156. *See, e.g.*, *Kracunas*, 119 F.3d at 88 (relying on Title VII's use of agency principles in stating that "if a professor has a supervisory relationship over a student, and . . . capitalizes upon that supervisory relationship to further the harassment . . . the college is liable for the professor's conduct"); Bolon v. Rolla Pub. Sch., 917 F. Supp. 1423 (E.D. Mo. 1996); Hastings v. Hancock, 842 F. Supp. 1315, 1319-20 (D. Kan. 1993) (citing *Meritor* in advocating that agency principles and direct liability would apply in a Title IX case of alleged sexual harassment in a vocational institution).

157. *See, e.g.*, Kinman v. Omaha Pub. Sch. Dist. 94 F.3d 463, 469 (8th Cir. 1996) (applying Title VII's contructive notice standard), *rev'd*, Nos. 98-1683, 98-2018, 98-2994, 1998 WL 148090, at *2 (8th Cir. Mar. 19, 1999) (applying an actual notice standard in light of the *Gebser* decision); Murray v. New York Univ. College of Dentistry, 57 F.3d 243, 248-50 (2d Cir. 1995) (declining to specify the extent to which courts should apply a constructive notice standard given the specific factual context of the claim, however, implying that Title VII principles should govern Title IX sexual harassment cases); *Lipsett*, 864 F.2d at 901 (relying on *Meritor* for support in adopting a constructive notice standard); Doe v. Petaluma City Sch. Dist., 949 F. Supp. 1415, 1426 (N.D. Cal. 1996) (noting that the constructive notice standard should apply in peer sexual harassment cases under Title IX). This constructive notice standard is akin to a negligence standard. *See* Newman, *supra* note 7, at 2593-94 (noting that the negligence standard or "'knew or should have known' standard . . . has some basis in agency principles, particularly Restatement (Second) of Agency § 219(2)(b), which states that a 'master' will be liable for the torts of a servant if 'the master was negligent or reckless'").

158. *See, e.g.*, Smith v. Metro Sch. Dist. Perry Township, 128 F.3d 1014, 1034 (7th Cir. 1997) (following Fifth Circuit precedent in establishing an actual notice standard); Rosa H. v. San Elizario Ind. Sch. Dist., 106 F.3d 648, 650 (5th Cir. 1997) (establishing a standard requiring that "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"); R.L.R. v. Prague Pub. Sch. Dist. I-103, 838 F. Supp. 1526, 1534 (W.D. Okla. 1993); Patricia H. v. Berkeley Unified Sch. Dist., 839 F. Supp. 1288, 1297 (N.D. Cal. 1993).

159. 917 F. Supp. 1423 (E.D. Mo. 1996).

district for the intentional acts of its teachers. According to the court, a strict liability standard is sensible because: 1) Title IX's language is broad; 2) unlike employers, "school districts make express assurances to prohibit sex discrimination in exchange for the acceptance of federal funds;" and 3) mandatory attendance laws require students to attend schools, thereby creating a heightened duty for public school districts to protect the interests of children.[160] Under any other standard, the court reasoned, "the school would be effectively insulated from all Title IX liability."[161]

2. *Constructive Notice: "Knew or Should Have Known"*

Applying the standard of constructive notice, liability would be imputed to a school if the school "knew or should have known" of the harassing conduct. This standard was embraced by the Second, Eighth, and Sixth Circuits, and draws nearly directly from Title VII case law.[162] The "should have known" prong is based on a theory of negligence, rather than intent, and would hold a district liable for failing to be vigilant and to investigate properly potential sexual harassment.[163] In adopting the constructive notice standard, courts have pointed to the *Franklin* Court's reliance on *Meritor*, claiming that by citing a Title VII case, the Court approved of the adoption of Title VII's agency and negligent principles when

160. *Id.* at 1428.

161. *Id.* at 1429.

162. *See* Kracunas v. Iona College, 119 F.3d 80, 88 n.6 (2d Cir. 1997) (involving students' claim that a professor created hostile educational environment); Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463, 469 (8th Cir. 1996) (finding same-sex sexual harassment actionable in the teacher-student context), *rev'd*, Nos. 98-1683, 98-2018, 98-2994, 1998 WL 148090, at *2 (8th Cir. Mar. 19, 1999) (applying an actual notice standard in light of the *Gebser* decision); Doe v. Claiborne County, 103 F.3d 495, 514-15 (6th Cir. 1996) (noting that with the reference in *Franklin* to *Meritor*, "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"); *see also* Brzonkala v. Virginia Polytechnic Inst. & State Univ., 132 F.3d 949, 960-61 (4th Cir. 1997) (applying the constructive notice standard in holding that a university student alleged sufficient facts to state a claim of student-student sexual harassment); Doe v. Petaluma City Sch. Dist., 949 F. Supp. 1415, 1426 (N.D. Cal. 1996) (stating that the constructive notice standard "is the appropriate standard" in deciding a school's liability for student-student sexual harassment); Kadiki v. Virginia Commonwealth Univ., 892 F. Supp. 746, 751 (E.D. Va. 1995). *Cf. Bolon*, 917 F. Supp. at 1429 (adopting a strict liability standard). In *Bolon*, the District Court for the Eastern Division of Missouri criticized the constructive notice standard in the context of teacher-student sexual harassment stating that "sexual misconduct by teachers toward students will almost always occur secretly, making it very difficult for school officials to know. . . . [and f]urther, such a standard could tempt school officials to close their eyes to the problem, with hopes that shielding themselves from knowledge will also shield them from liability." *Id.*

163. *See* Newman, *supra* note 7, at 2593. The theory of holding a school responsible for "negligence" rather than "intentional" discrimination has been rejected by the Seventh Circuit in *Smith v. Metropolitan Sch. Dist.*, 128 F.3d 1014, 1028-29 (1997) ("Negligence cannot support a monetary award for a claim brought under Spending Clause litigation.").

determining institutional liability.[164] The First Circuit further noted that a district could avoid liability under this constructive notice standard by showing that the school took appropriate remedial measures to end the discriminatory behavior.[165]

3. *Actual Notice and Failure to Act*

In contrast, the Fifth and Seventh Circuits had rejected both strict liability and negligence standards in favor of an actual notice standard when imposing Title IX liability on a school district.[166] In *Canutillo Independent School District v. Leija*,[167] the Fifth Circuit rejected the trial court's strict liability standard in favor of actual notice to a management-level employee.[168] Several months later, the Fifth Circuit again held, in *Rosa H. v. Santa Elizario Independent School District*[169] that "when a teacher sexually abuses a student, the student cannot recover from the school district under Title IX unless the school district actually knew that there was a substantial risk that sexual abuse would occur."[170] The Seventh Circuit agreed, adopting a similar standard in *Smith v. Metropolitan School District Perry Township*.[171] In *Smith*, the Court held that under Title IX, a school district is liable for teacher-student harassment "only if 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."[172]

F. *The Office for Civil Rights Supports Strict Liability and Constructive Notice Standards*

The U.S. Department of Education's Office for Civil Rights ("OCR") recently issued guidelines outlining its approach to analyzing Title IX sex-

164. *See, e.g.*, Doe v. Claiborne County, 103 F.3d 495, 514 (6th Cir. 1996) ("By citing *Meritor*, . . . the Court indicated that it views with approval the application of Title VII principles to resolve similar Title IX cases."); Murray v. New York Univ. College of Dentistry, 57 F.3d 243, 248 (2d Cir. 1995) (recognizing that the Supreme Court, in deciding *Franklin*, "invoked Title VII authority and principles").

165. *See* Lipsett v. University of Puerto Rico, 864 F.2d 881, 901 (1st Cir. 1988) ("[F]ollowing *Meritor*, . . . in a Title IX case, an educational institution is liable upon a finding that . . . [the] institution knew, or in the exercise of reasonable care, should have known, of the harassment's occurrence, unless that official can show that he or she took appropriate steps to halt it.").

166. *See* Smith v. Metropolitan Sch. Dist., 128 F.3d 1014, 1034 (7th Cir. 1997); Rosa H. v. Santa Elizario Ind. Sch. Dist., 106 F.3d 648, 660 (5th Cir. 1997); Canutillo Ind. Sch. Dist. v. Leija, 101 F.3d 393, 396, 402 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 2434 (1997).

167. 101 F.3d 393 (5th Cir. 1996).

168. *See id.* at 396, 402.

169. 106 F.3d 648 (5th Cir. 1997).

170. *Id.* at 660.

171. 128 F.3d 1014, 1034 (7th Cir. 1997).

172. *Id.* (quoting *Rosa H.*, 106 F.3d at 660).

ual harassment claims.[173] Intended to guide Title IX investigations and to inform grant recipients of their potential liability, the OCR Guidance borrows from Title VII terminology, categorizing actionable sexual harassment as either quid pro quo or hostile environment as forms of sexual harassment.[174] In applying agency principles to both forms of sexual harassment,[175] the March 1997 Guidance purports to offer maximum protection to students of federally funded educational institutions by making the elimination of sexual harassment a "high priority."[176] In order to achieve such protection, OCR clearly states that under its interpretation of Title IX, both teacher-student and student-student sexual harassment are included as actionable forms of sex discrimination.[177]

In cases of quid pro quo sexual harassment, OCR utilizes a strict liability standard to impute liability to a school. Quid pro quo sexual harassment by "a school employee in a position of authority, such as a teacher or administrator," will always render a school liable, "whether or not it knew, should have known or approved of the harassment."[178] Strict liability also extends to a school employee's conduct if it creates a hostile educational environment for a student and the employee was either acting under apparent authority of the school or was aided by his position of authority in creating the hostile environment.[179]

For claims of hostile environment sexual harassment, OCR advises that a school would be liable if it "knew, or in the exercise of reasonable care, should have known"[180] about the harassment and failed to "take immediate and appropriate corrective action."[181] Again relying on agency principles, the guidelines specify that "as long as an agent or responsible employee of the school received notice, the school has notice."[182] However, a school may avoid liability under Title IX by taking "immediate and

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173. *See* OCR Guidance, *supra* note 25.

174. *See id.* at 12,034, 12,038.

175. "A school's liability for sexual harassment by its employees is determined by application of agency principles . . . ." *Id.* at 12,039.

176. *Id.* at 12,034.

177. *See id.* ("The Office for Civil Rights has long recognized that . . . sexual harassment of students engaged in by school employees, other students, or third parties is covered by Title IX.").

178. *Id.* at 12,039.

179. "A school will also be liable for hostile environment sexual harassment by its employees . . . if the employee (1) acted with apparent authority . . . or (2) was aided in carrying out the sexual harassment of students by his or her position of authority with the institution." *Id.* at 12,039. In adopting this standard, the OCR employs common law principles of agency to impute liability on the school district. *See id.*

180. *Id.* at 12,042. The OCR adopts this standard of notice from Title VII cases. *See id.* at 12,042 n.64 (citing Ellison v. Brady, 924 F.2d 872, 881 (9th Cir. 1991); Swentek v. USAir, 830 F.2d 552, 558 (4th Cir. 1987).

181. *Id.* at 12,039, 12,042.

182. *Id.* at 12,042.

appropriate action upon notice of the harassment"[183] or by implementing effective policies and grievance procedures.[184] This constructive notice standard for hostile environment claims therefore imposes liability for the school's negligence in failing to remedy the harassment and would apply to instances where the harassment was initiated by employees, students, or other third parties. In contrast to the agency principles that result in vicarious liability, under such hostile environment claims, "Title IX does not make a school responsible for the actions of harassing students [and other third parties], but rather for its own discrimination in failing to remedy it once the school has notice."[185]

Courts have given varying degrees of deference to existing OCR policy. For example, in *Doe v. Claiborne County*,[186] the Sixth Circuit relied in part on an OCR policy memorandum to support its conclusion that Title VII agency principles should apply to sexual harassment claims under Title IX.[187] Although it noted that the OCR does "not hav[e] the force of law," the *Claiborne* court recognized that OCR's position of authority furthered its decision to use agency principles to resolve hostile environment claims against a school district.[188] In addition, in a case of student-student sexual harassment, the Seventh Circuit also found that "the interpretations of [OCR] support the imposition of Title IX liability" where a student alleged that university officials had actual knowledge of sexually harassing incidents and failed to promptly respond.[189] Although it noted that the OCR policy "is not entitled to strict deference," the Seventh Circuit found that it "merits . . . consideration."[190]

In contrast, other appellate courts have explicitly decided not to defer to the authority of the OCR Guidance when establishing a standard for institutional liability for sexual harassment.[191] For example, in *Smith v.*

183. *Id.* at 12,039.

184. OCR reasons that the absence of such policies and grievance procedures may "create apparent authority for school employees to harass students." *Id.* at 12,040. For this reason, absence of such policies is, in itself, a violation of Title IX requirements. *See id.*

185. *Id.*

186. 103 F.3d 495 (6th Cir. 1996).

187. *See id.* at 514 (citing OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., SEXUAL HARASSMENT: IT'S NOT ACADEMIC 2 (1988) (citing OCR policy memorandum from Antionio J. Califa, Director for Litigation, Enforcement and Policy Service, OCR, to Regional Civil Rights Directions (Aug. 31, 1981)).

188. *Id.*

189. Doe v. University of Ill., 138 F.3d 653, 667-68 (7th Cir. 1998).

190. *Id.* at 667.

191. *See, e.g.*, Smith v. Metropolitan Sch. Dist. Perry Township, 128 F.3d 1014, 1033-34 (7th Cir. 1997) (refusing to give deference to OCR Guidance since it is "neither a regulation, nor an interpretation of a regulation"); Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648, 658 (5th Cir. 1997) (rejecting OCR's preliminary guidance policy dated August 1996 by refusing to "apply these guidelines retroactively"); Canutillo Indep. Sch. Dist. v. Leija, 101 F.3d 393, 398-402 (5th Cir. 1996),

Metropolitan School District Perry Township,[192] a high school student alleged that the school district should be held liable for a teacher's harassing conduct under both agency principles, as well as under the constructive notice standard that the school "knew or should have known" about the harassment.[193] In rejecting both standards, the Seventh Circuit instead upheld the actual notice standard previously articulated by the Fifth Circuit, thereby explicitly disregarding existing OCR policy.[194] Specifically, the *Smith* court noted that the OCR Guidance "is neither a regulation, nor an interpretation of regulations promulgated by the OCR or DOE [Department of Education]."[195]

The Eleventh Circuit has also disregarded the existence of OCR policy.[196] In *Davis v. Monroe County Board of Education*,[197] the appellate court found that at the time of the alleged student-student sexual harassment, only the preliminary OCR Guidance had been issued and that this policy did not explicitly discuss peer sexual harassment as an actionable form of sex discrimination under Title IX.[198] Furthermore, the Eleventh Circuit added that the final policy guidelines, published in 1997, were a "labyrinth" and did not function so as to put the school district on notice of its potential liability.[199] In a subsequent case involving teacher-student harassment, this same court limited its discussion of the OCR final guid-

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cert. denied, 117 S. Ct. 2434 (1997) (finding, contrary to OCR policy, that notice to a teacher regarding the sexual molestation of a second grade student was not sufficient to impute liability to the district); Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1015 (5th Cir. 1996) (determining that in cases of student-student sexual harassment, official Letters of Finding by the OCR are not entitled to deference since they "are promulgated during investigations of specific institutions, and their purpose is to compel voluntary compliance by an offending institution."). In *Rowinsky*, however, the Fifth Circuit stated that it "accord[s] . . . OCR's interpretations appreciable deference," *id.* at 1014 n.20, but at the time *Rowinsky* was decided, the final 1997 guidance policy was not yet issued by OCR. Since the then-existing implementation regulation contained no specific reference to peer sexual harassment under Title IX, the *Rowinsky* court stated that it would accord little weight to other OCR documents. *See id.* at 1014-15.

192. 128 F.3d 1014 (7th Cir. 1996).

193. *See id.* at 1022.

194. *See id.* at 1034. The *Smith* court was heavily influenced by the Fifth Circuit decision in *Rosa H.*, holding that "a school district is liable for teacher-student sexual harassment 'only if 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.'" *Id.* at 1034 (quoting *Rosa H.*, 106 F.3d at 660.)

195. *Smith*, 128 F.3d at 1033.

196. *See* Floyd v. Waiters, 133 F.3d 786, 790 n.7 (11th Cir. 1998), *vacated*, 119 S. Ct. 33 (1998) (*Floyd* has been vacated and remanded for further consideration in light of the Court's decision in *Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989 (1998)); Davis v. Monroe County Bd. of Educ., 120 F.3d 1390, 1404 n.23 (11th Cir. 1997), *rev'd*, No. 97-843, 1999 WL 320808 (U.S. May 24, 1999).

197. 120 F.3d 1390 (11th Cir. 1997), *rev'd*, No. 97-843, 1999 WL 320808 (U.S. May 24, 1999).

198. *See id.* at 1404 n.23.

199. *See id.*

ance policy to a footnote reference stating that "[w]e say nothing about the significance of these guidelines, except to observe that they may have significance if school districts accept Title IX funds after their announcement."[200]

III. *GEBSER V. LAGO VISTA INDEPENDENT SCHOOL DISTRICT*

A. *Factual Background*

During the 1990-91 school year, Alida Star Gebser was an eighth grade student in the Lago Vista Independent School District in Travis County, Texas.[201] At all pertinent times, the Lago Vista school district received federal funding.[202] In the middle school, Gebser was part of the school's gifted and talented program taught by Trudy Waldrop, the wife of Frank Waldrop.[203] In the spring of 1991, the Waldrops arranged for Gebser to join a "great books" discussion group at the high school led by Frank Waldrop.[204] Waldrop, a "mature man" who had started teaching after military retirement, often made sexually suggestive remarks to the students during this discussion group.[205] At that time, Gebser was fourteen years old.[206]

In the fall of 1991, Gebser entered the ninth grade at the high school.[207] She was enrolled in a social studies class taught by Frank Waldrop and remained his student throughout the year.[208] Waldrop continued making suggestive comments to Gebser, often in the presence of other students, and his remarks became increasingly more personal.[209] Although Gebser admitted that she did not interpret Waldrop's behavior as inappropriate at the time, many of his comments were characterized as "covert flirtation" that was "suggestive but ambiguous."[210]

During the spring of 1992, just before a vacation, Waldrop visited Gebser at her home, ostensibly to deliver a book she needed for a school

200. *Floyd*, 133 F.3d at 790-91 n.7.

201. *See* Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989, 1993 (1998); *see also* Brief for Respondent at 2, Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989 (1998) (No. 96-1866).

202. *See Gebser*, 118 S. Ct. at 1993; *see also* Brief for Respondent at 2, *Gebser* (No. 96-1866) (specifically noting that "[t]he district receive[d] federal fundng for cafeteria food, special-education and drug-free school programs").

203. *See* Brief for Petitioner at 2, *Gebser* (No. 96-1866).

204. *See Gebser*, 118 S. Ct. at 1993; Brief for Petitioner at 2, *Gebser* (No. 96-1866).

205. *See* Brief for Petitioner at 2-3, *Gebser* (No. 96-1866).

206. *See id.* at 2.

207. *See Gebser*, 118 S. Ct. at 1993.

208. *See id.*; Brief for Respondent at 2, *Gebser* (No. 96-1866).

209. *See Gebser*, 118 S. Ct. at 1993.

210. Brief for Petitioner at 3, *Gebser* (No. 96-1866).

project.[211] No one else was home, and during that visit, Waldrop embraced and kissed Gebser, fondled her breasts and genitals and told her that he loved her.[212] Gebser later testified that the "incident was . . . the first absolutely blatant, no questions, no mistaking, sexual advance that he had made towards me. The other things had all been double entendre."[213] She also admitted that she had trusted him because "he was basically [her] mentor . . . it was terrifying."[214] Gebser did not report the incident to her parents, police, or anyone at the school, and, although she did acknowledge to a concerned teacher that something was "very wrong," she made it clear that she did not wish to talk about it with anyone.[215]

For the remainder of the school year, Gebser and Waldrop had sexual intercourse on several different occasions.[216] Although infrequent at first, their sexual relationship continued throughout the summer and into Gebser's sophomore year.[217] The two often had sexual intercourse during class time, although always off-campus.[218] During the summer, Gebser continued a formal teacher-student relationship with Waldrop as a student in his Advanced Placement class.[219] It was the only AP class taught at the school that summer and Gebser hoped to obtain college credit for the course.[220] Although two other students had initially registered to take the course, Gebser ended up being Waldrop's only student.[221] In describing their relationship that summer, Gebser stated that Waldrop "would pick [her] up from my house about once a week . . . [and] made comments about studying psychology, and would say it in such a way that it . . . was obviously just a different way of saying having sex."[222]

During the fall of Gebser's sophomore year, she was again enrolled in classes taught by Waldrop.[223] The sexual relationship between the two continued and, despite knowing that the affair was improper, Gebser testified that she "agreed to conceal the affair because she knew that she would

211. *See Gebser*, 118 S. Ct. at 1993.
212. *See* Brief for Petitioner at 3, *Gebser* (No. 96-1866).
213. *Id.*
214. *Id.* at 3-4.
215. *See* Brief for Respondent at 3, *Gebser* (No. 96-1866).
216. *See Gebser*, 118 S. Ct. at 1993.
217. *See id.*
218. *See id.*
219. *See* Brief for Petitioner at 4, *Gebser* (No. 96-1866).
220. *See id.*
221. *See id.*
222. *Id.*
223. *See id.* Petitioners contended that only Waldrop taught advanced courses in sociology and psychology and that since the high school had "all but terminated the Gifted and Talented Program," Gebser was dependent upon Waldrop for these advanced educational programs. *Id.*

no longer have Waldrop as a teacher if the relationship were exposed."[224] In October, the principal of the high school, Michael Riggs, investigated complaints made by parents of two other students in Waldrop's classes that Waldrop had made inappropriate sexual remarks during class.[225] Riggs conducted a meeting with Waldrop and the parents at which Waldrop apologized and explained that he had not intended to offend anyone with the remarks.[226] At the conclusion of the meeting, Riggs was satisfied that Waldrop would not continue with the inappropriate behavior and advised Waldrop to be more careful in the future.[227] The principal then reported the meeting to the school's guidance counselor, but did not report either the complaints or the meeting to the school superintendent, who was also the district's Title IX coordinator.[228] The school did not conduct any further investigation into Waldrop's behavior and no additional complaints were made to school officials regarding Waldrop.[229]

Waldrop's relationship with Gebser was finally discovered in January 1993 when a police officer encountered the two having sexual intercourse.[230] Waldrop was arrested and subsequently pleaded guilty to statutory rape.[231] In addition, the Lago Vista school district fired Waldrop and the Texas Education Agency revoked his teaching license.[232] Throughout the time that Gebser was a student, the district did not issue or distribute a formal anti-harassment policy, nor were students made aware of an official grievance procedure for filing complaints, as required by the Department of Education regulations.[233]

B. *Procedural Background*

In November 1993, Gebser and her mother filed a suit in state court against Waldrop, alleging a violation of state negligence law and seeking

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224. Brief for Respondent at 4, *Gebser* (No. 96-1866).

225. *See Gebser*, 118 S. Ct. at 1993. According to the school district, Waldrop had specifically commented that the girls had "filled out" and made a suggestive reference about the "size of some of the boys' belt buckles." Brief for Respondent at 4-5, *Gebser* (No. 96-1866).

226. *See Gebser*, 118 S. Ct. at 1993.

227. *See* Brief for Respondent at 5, *Gebser* (No. 96-1866).

228. *See id.* Title IX regulations require that each school district have a designated Title IX coordinator. 34 C.F.R. § 106.8(a) (1998).

229. *See* Brief for Petitioner at 8, *Gebser* (No. 96-1866); Brief for Respondent at 5, *Gebser* (No. 96-1866). In its brief to the Supreme Court, the school district noted that after the relationship between Gebser and Waldrop was revealed, the school received a flood of new complaints which were subsequently investigated. *See id.*

230. *See Gebser*, 118 S. Ct. at 1993; *see also* Zirkel, *supra* note 11.

231. *See Gebser*, 118 S. Ct. at 1993; *see also* Leonard, *supra* note 12, at A6.

232. *See Gebser*, 118 S. Ct. at 1993.

233. *See id.* The Department of Education's regualations regarding grievance procedures can be found at 34 C.F.R. § 106.8(b) (1998).

compensatory and punitive damages.[234] They later amended their complaint to include the Lago Vista school district as a defendant, claiming violations under state tort law, Title IX of the Educational Amendments of 1972, 20. U.S.C. § 1681(a) (hereinafter Title IX) and the Civil Rights Act of 1866, 42 U.S.C. § 1983.[235] The case was subsequently removed to the United States District Court for the Western District of Texas.[236] The district court granted summary judgment in favor of the defendant school district on all claims, and the suit against Waldrop was remanded to state court.[237]

1. *The District Court Decision*

In granting the defendant's motion for summary judgment, the District Court rejected Gebser's argument that the school should be held strictly liable for Waldrop's sexually harassing conduct.[238] The court concluded that Title IX "was enacted to counter *policies* of discrimination . . . in federally funded education programs," and that "[o]nly if school administrators have some type of notice of the gender discrimination and fail to respond in good faith can the discrimination be interpreted as a *policy* of the school district."[239] Stating that there was insufficient evidence as a matter of law of either actual or constructive notice to the school regarding Waldrop's relationship with Gebser, the court refused to hold the school financially liable for her personal injuries and damages.[240]

2. *The Appellate Court Decision*

On an appeal of the Title IX claim, a three-judge panel of the Court of Appeals for the Fifth Circuit unanimously affirmed the lower court's decision in favor of the school district.[241] Relying on its two recent opinions in *Rosa H. v. San Elizario Independent School District*[242] and *Canutillo Inde-*

234. *See Gebser*, 118 S. Ct. at 1993.

235. *See id.*; *see also* Brief for Petitioner at 9, *Gebser* (No. 96-1866).

236. *See Gebser*, 118 S. Ct. at 1993.

237. Brief for Petitioner at 10, *Gebser* (No. 96-1866) (stating that "[b]ecause no federal question had been alleged against Waldrop . . . the complaint against him was remanded to state court, resulting in a final judgment in the action against the school district").

238. *See* Doe v. Lago Vista Indep. Sch. Dist., 106 F.3d 1223, 1225-26 (5th Cir. 1997).

239. *Gebser*, 118 S. Ct. at 1994 (citation omitted).

240. *See id.*; *see also* Brief for Respondent at 6-7, *Gebser* (No. 96-1866); Brief for Petitioner at 10, *Gebser* (No. 96-1866).

241. *See Gebser*, 118 S. Ct. at 1994.

242. 106 F.3d 648 (5th Cir. 1997).

pendent School District v. Leija,[243] the Fifth Circuit reiterated that Title IX does not impose strict liability on a school district for teacher-to-student sexual harassment since it would be "inconsistent with the Title IX contract."[244] Furthermore, the appellate court rejected the application of common law agency principles on the basis that such a finding "would generate vicarious liability in virtually every case of teacher-student harassment."[245] Finally, finding insufficient evidence that a school official either knew or should have known about Waldrop's behavior, the court refused to hold the school liable under a constructive notice standard.[246]

In reaffirming its earlier decision in *Rosa H.*, the Fifth Circuit again concluded that "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."[247] Based on the facts presented in *Gebser*, the Court held that this actual notice standard had not been satisfied. Since the analysis articulated by the Fifth Circuit conflicted with those applied in similar cases in other circuits, the Supreme Court granted certiorari to address the issue of institutional liability under Title IX.[248]

C. *The Majority Opinion*

In a 5-4 decision, the Supreme Court affirmed the decision of the Fifth Circuit, thereby absolving the school district of financial liability.[249] In a decision written by Justice O'Connor and joined by Rehnquist, Scalia, Kennedy, and Thomas, the majority held that a school district is not liable for teacher-student sexual harassment unless an "official who at a minimum has authority to address the alleged discrimination and to institute

243. 101 F.3d 393 (5th Cir. 1996).

244. Doe v. Lago Vista Indep. Sch. Dist., 106 F.3d 1223, 1225 (5th Cir. 1997) (quoting *Canutilla*, 101 F.3d at 399).

245. *Id.* at 1226.

246. *See id.* at 1225. The Fifth Circuit noted that the plaintiff did not "pursue the constructive notice theory because . . . there is not enough evidence for a jury to conclude that a Lago Vista School official should have known about the abuse." For a summary of the Fifth Circuit decision, see *Gebser*, 118 S. Ct. at 1994.

247. *Doe*, 106 F.3d at 1226.

248. *See* Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 595-96 (1997). For decisions by other circuits addressing Title IX teacher-student sexual harassment claims, see *Smith v. Metropolitan School District Perry Township*, 128 F.3d 1014 (7th Cir. 1997); *Kracunas v. Iona College.*, 119 F.3d 80 (2d Cir. 1997); *Doe v. Claiborne County*, 103 F.3d 495 (6th Cir. 1996); *Kinman v. Omaha Public School District*, 94 F.3d 463 (8th Cir. 1996).

249. *See Gebser*, 118 S. Ct. at 1993, 2000. The majority opinion was delivered by Justice O'Connor, joined by Justices Rehnquist, Scalia, Kennedy, and Thomas. Two dissenting opinions were filed: Justice Stevens filed the first dissent, joined by Justices Souter, Ginsburg, and Breyer; and Justice Ginsburg filed the second, joined by Justices Souter and Breyer. *See id.* at 2000, 2007.

corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond."[250] The Court further stated that "the response must amount to deliberate indifference to discrimination."[251]

Petitioners argued that liability should be imputed to the school district on the basis of two distinct theories: 1) respondeat superior; and 2) constructive notice.[252] Under respondeat superior, or vicarious liability, a school district would be liable for sexual harassment under Title IX when a teacher is "aided in carrying out the sexual harassment of students by his or her position of authority with the institution."[253] Relying on the Policy Guidance issued by OCR in 1997,[254] petitioners argued that a school would face liability any time a teacher used his or her authority to facilitate the sexual harassment of a student.[255] In the alternative, petitioners contended that a school should also be liable under a constructive notice standard, which imputes liability if a school "knew or should have known" of the harassment and failed to discover and stop it.[256] Under either theory, student victims would be granted compensatory damages in a "broader range of situations" than under the actual notice standard advanced by the Fifth Circuit.[257]

In its decision, the Court clearly rejected the petitioner's argument that principles of respondeat superior or constructive notice should be applied when determining the scope of a school district's liability for sexual harassment under Title IX.[258] The Court began its analysis by noting that Title IX is primarily enforced through administrative means.[259] According to the explicit mandate of the statute, federal agencies responsible for distributing education funding are authorized to promulgate regulations in order to ensure compliance with the anti-discriminatory provisions of Title IX.[260] These regulations allow the agencies to enforce their regulation through "any . . . means authorized by law," including the revocation of

250. *Id.* at 1999.

251. *Id.*

252. *See id.* at 1995.

253. *Id.*; *see also* OCR Guidance, *supra* note 25, at 12,039.

254. *See* OCR Guidance, *supra* note 25, at 12,039. OCR is the administrative agency charged with the enforcement of Title IX.

255. *See Gebser*, 118 S. Ct. at 1995.

256. *See id.* at 1995.

257. *See id.*

258. *See id.* at 1997. The Court concluded that "it 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." *Id.*

259. *See id.* at 1994. For a general discussion of the role of the U.S. Department of Education Office for Civil Rights, see *supra* Part II.A.2.

260. *See Gebser*, 118 S. Ct. at 1994; *see also* 20 U.S.C. § 1682 (1994).

federal funds.[261]

The Supreme Court acknowledged that its decision in *Franklin* created a judicial remedy for a Title IX violation, rather than recognizing an existing legislative or administrative means to compensate an individual victim of sexual harassment.[262] As a result, the Court believed that it had "a measure of latitude to shape a sensible remedial scheme that best comports with the statute."[263] Furthermore, the Court recognized that, in *Franklin*, the availability of compensatory damages for private claims of teacher-student sexual harassment was limited to instances of intentional discrimination, and, beyond that, the decision did "not purport to define the contours" of institutional liability.[264] Distinguishing the facts in *Gebser* from those in *Franklin*, the Court observed that the Gwinnett County School District not only knew about the sexual harassment, but even discouraged the student from filing charges.[265] Unlike *Gebser*, the Court in *Franklin* based its holding on the assumption that the instance of teacher-student sexual harassment in *Franklin* constituted "intentional discrimination," since evidence suggested that school officials both knew and failed to remedy the situation.[266]

In further limiting the scope of the *Franklin* decision, the Court explained that the reference to *Meritor* did not implicitly authorize a blanket application of Title VII principles to Title IX claims.[267] Instead, the reference to *Meritor* simply supported the more general proposition that sexual harassment is an actionable form of sex discrimination.[268] Additionally, the *Gebser* Court noted that the agency principles applied in Title VII cases are rooted in explicit statutory language that is absent in Title IX. Unlike Title VII, Title IX does not contain such reference to an educational institution's "agents" and cannot therefore support the application of agency principles when determining institutional liability.[269]

Title VII's statutory language further distinguished it from Title IX. Title VII, as the Court pointed out, specifically provides for both a private cause of action and the availability of monetary damages, limited to the

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261. 20 U.S.C. § 1682 (1994).

262. *See Gebser*, 118 S. Ct. at 1996.

263. *Id.*

264. *Id.* at 1995.

265. *See id.* at 1994-95 (citing Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 63-64 (1992)).

266. *Id.* at 1995 (citing *Franklin*, 503 U.S. at 74-75).

267. *See id.* at 1995-96.

268. *See id.* at 1995.

269. *See id.* at 1996. Title VII specifically defines "employer" to include "any agent." 42 U.S.C. § 2000e(b). *See also* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 72 (1986) (discussing inclusion of agents under Title VII).

maximum statutory amounts prescribed by Congress.[270] In contrast, not only does Title IX not contain a statutory provision for a private cause of action, but there is a general absence of legislative directives regarding the possibility of compensatory relief. Because the individual right to private action under Title IX is one that was judicially implied, the Court was resistant to further hypothesize about what Congress may have intended regarding the scope of remedies available for Title IX violations.[271]

In its opinion, the Court relied heavily on both the legislative history and the plain language of Title IX. Although it recognized the judiciary's power to apply the "general rule" that when a legal right has been violated, appropriate relief is available, the Court further noted that "the rule must be reconciled with congressional purpose."[272] Adopting standards of vicarious liability or liability based on constructive notice would, in the opinion of the Court, "frustrate the purposes" of Title IX since "it does not appear that Congress contemplated unlimited recovery in damages against a funding recipient where the recipient is unaware of discrimination in its programs."[273] In support of this claim, the Court pointed out that at the time Title IX was enacted, other civil rights legislation that contained an express cause of action did not include provisions for monetary damages.[274] Even when Congress subsequently authorized the availability of such monetary relief in Title VII cases, it placed a cap on the amount of recoverable damages in accordance with the size of the employer. Such legislative history, according to the Court, undermined the petitioner's position that would permit "unlimited recovery of damages under Title IX where Congress has not spoken on the subject of either the right or the remedy, and in the face of evidence that when Congress expressly considered both in Title VII it restricted the amount of damages available."[275]

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270. *See Gebser*, 118 S. Ct. at 1996. For the explicit Title VII provisions, see 42 U.S.C. § 2000e-5(f) (authorizing a private cause of action); § 1981a (availability of monetary damages); § 1981a(b) (establishing a cap on recoverable damages). During oral arguments, the Supreme Court appeared concerned about the transfer of Title VII principles in their entirety to Title IX claims, asking petitioner's counsel if Title VII's cap on monetary recovery would also apply to Title IX claims. *See* Official Transcript at *10-12, Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989 (1998) (No. 96-1866).

271. The Court stated that determining the scope of available remedies "inherently entails a degree of speculation, since it addresses an issue on which Congress has not specifically spoken." *Gebser*, 118 S. Ct. at 1996.

272. *Id.* at 1996 (quoting Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 68 (1992)); *see also Franklin*, 503 U.S. at 66 (stating that "[w]here legal 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") (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)).

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

274. *See id.*

275. *Id.*

The Supreme Court also addressed the contractual nature of Title IX by making a comparison to Title VI, the parallel civil rights statute that prohibits a recipient of federal funds from discrimination on the basis of "race, color or national origin."[276] Title IX and Title VI "operate in the same manner, conditioning an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds."[277] It is this contractual framework, according to the Court, that ultimately distinguishes Title IX from Title VII, which contains an outright prohibition on discrimination without attaching the federal funding strings.[278]

Once determining that Title IX operates on a contractual basis, the Court focused on the limitations of legislation enacted pursuant to the Spending Clause of the Constitution.[279] Both Title IX and Title VI, as the Court pointed out, reflect Congress's power to award federal funds contingent upon compliance with certain provisions. As a result of this contingency, the Court concluded that it becomes of imperative importance "that the receiving entity of federal funds [has] notice that it will be liable for a monetary award."[280] Following standards that would impose liability based on theories of constructive notice or respondeat superior would, in the Court's opinion, impose liability even in the absence of proper notice to the recipient.

To bolster its finding that Title IX requires actual notice to a recipient, the Court noted that, in enforcing compliance with Title IX, OCR also "operates on an assumption of actual notice to officials of the funding recipient."[281] According to the implementing regulations, OCR will only move to enforcement proceedings after it "has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means."[282] After a violation is found, OCR may then require a recipient to take "such remedial action as [is] deem[ed] necessary to overcome the effects of [the] discrimination."[283] The Court therefore concluded that, by requiring notice to the "appropriate person" and allowing for voluntary compliance, OCR can "avoid diverting education funding from beneficial uses where a re-

276. *See id.* at 1997; *see also* Title VI of the Civil Rights Act 1964, 42 U.S.C. § 2000d (1994).

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

278. *See id.* at 1997 ("Title VII applies to all employers without regard to federal funding and aims broadly to 'eradicat[e] discrimination throughout the economy.'" (citation omitted)).

279. *See id.*; *see also* U.S. CONST. art. I, § 8, cl. 1.

280. *Gebser*, 118 S. Ct. at 1998 (quoting Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 74 (1992)).

281. *Id.* at 1998.

282. *Id.* (quoting 20 U.S.C. § 1682 (1994)).

283. *Id.* (quoting 34 C.F.R. § 106.3 (1998)).

cipient was unaware of discrimination in its programs and is willing to institute prompt corrective measures."[284] Since Title IX explicitly contains a remedial scheme for administrative enforcement, the Court was reluctant to allow greater compensatory damages for a judicially implied right of action "in the absence of further direction from Congress . . . ."[285]

Although the Court appeared to give great weight to requirements of notice to "the appropriate person" and opportunity for "voluntary" compliance,[286] the Court dismissed Gebser's claim that a failure to promulgate and distribute effective grievance policies was, in and of itself, an intentional violation of Title IX.[287] While the Department of Education has adopted regulations requiring a school district to "adopt and publish" a grievance procedure for handling discrimination complaints, the Court stated that the failure to do so "does not itself constitute 'discrimination' under Title IX."[288] Instead, the Court argued, OCR could choose to enforce such requirements through administrative compliance measures since "[w]e have never held . . . that the implied private right of action under Title IX allows recovery in damages for violation of those sorts of administrative requirements."[289]

D. *Justice Stevens' Dissent*

In a dissent joined by Justices Souter, Ginsburg, and Breyer, Justice Stevens criticized the majority's reluctance to assume "lawmaking authority" and stated that the Court's adoption of an actual notice standard "thwarts the purposes of Title IX."[290] Addressing first the issue of statutory interpretation, Stevens revisited the Court's earlier holdings in *Cannon* and *Franklin* as evidence of the Court's "duty to interpret, rather than to revise, congressional commands."[291] Minimizing the majority's distinction between explicit statutory remedies and those that are judicially implied, the dissent argued that both the judicially created cause of action and remedies approved of in *Cannon* and *Franklin* should "have the same legal effect as if the private cause of action seeking damages had been explicitly, rather than implicitly, authorized by Congress."[292]

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284. *Id.* at 1999.
285. *Id.*
286. *Id.* at 1998-99.
287. *See id.* at 2000.
288. *Id.*
289. *Id.* "Agencies generally have authority to promulgate and enforce requirements that effectuate the statute's non-discrimination mandate, 20 U.S.C. § 1682, even if those requirements do not purport to represent a definition of discrimination under the statute." *Id.*
290. *Id.* at 2001 (Stevens, J., dissenting).
291. *Id.*
292. *Id.* at 2002.

According to Justice Stevens, Title IX should be given broad coverage under a strict statutory reading. Citing a recent Seventh Circuit decision,[293] Justice Stevens noted that the passive verb structure in Title IX emphasizes the resulting discrimination rather than focusing on the individual wrongdoer.[294] Stevens interpreted the legislative decision not to specify a particular actor as indicative of a greater concern for the discriminatory effect, irrespective of the assigning fault to a particular actor. Furthermore, Justice Stevens argued that since the duty not to discriminate is phrased as an affirmative duty, it is "more significant than a mere promise to obey the law."[295]

Justice Stevens also criticized the Court's holding requiring actual notice to a school official with "authority to institute corrective measures . . . ."[296] According to Stevens, this holding is "at odds with settled principles of agency law."[297] Stevens also pointed out that, as a teacher, Waldrop has inherent authority to control his students and classroom activity, which is "even greater authority . . . than employers and supervisors exercise over their employees."[298] Stevens further added that the Office for Civil Rights similarly relied on agency principles in drafting its Policy Guidance on sexual harassment liability. Unlike the majority, Stevens found it significant that the agency charged with the administrative enforcement of Title IX "wholly supports the conclusion that respondent is liable in damages" since the sexual abuse "was made possible only by Waldrop's affirmative misuse of his authority as her teacher."[299] In abandoning agency principles, Stevens argued, the Court in effect dissuades school districts from adopting and enforcing effective policies against sexual harassment and will actually allow schools to "insulate themselves from knowledge about this sort of conduct . . . ."[300]

From a more practical standpoint, Stevens further argued that, under

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293. *See id.* (citing Smith v. Metropolitan Sch. Dist. Perry Township, 128 F.3d 1014 (7th Cir. 1997)).

294. *See id.* at 2002 n.5 (Stevens, J., dissenting); *see also Smith*, 128 F.3d at 1047 ("Unlike Title VII . . . which focuses on the discriminator . . . Title IX is drafted from the perspective of the person discriminated against.").

295. *Id.* at 2002 (Stevens, J., dissenting).

296. *Id.* at 2003.

297. *Id.* Stevens cites the RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958), which states, in relevant part, that a principal is liable for the acts of an agent if the agent "was aided in accomplishing the tort by the existence of the agency relation." *Id.*

298. *Gebser*, 118 S. Ct. at 2004. In fact, as Stevens noted, Waldrop "had ample authority to maintain order in the classes he conducted." And had Gebser been complaining about sexual harassment from her classmates, "surely the teacher would have had ample authority to take corrective measures." *Id.* at 2003 n.8.

299. *Id.* at 2004 (Stevens, J., dissenting).

300. *Id.*

the majority's decision, "few Title IX plaintiff's who have been victims of intentional discrimination will be able to recover damages under this exceedingly high standard."[301] By limiting the interpretation of "intentional" to mean only discrimination that is furthered by actual notice and deliberate indifferent response on the part of a school official, the majority placed tremendous emphasis on the administrative procedure that must be followed in order to terminate federal funds. This emphasis, according to Stevens, is misplaced, since it does not distinguish the administrative action from the individual private right of action.[302] In pointing to the Court's earlier decision in *Franklin*, Stevens noted that, in that case, OCR did not terminate funding, despite finding a Title IX violation, because "the district had come into compliance with Title IX" subsequent to the harassment.[303] Despite OCR's decision, however, the Court had held that a damages remedy was still available for the victim of teacher-student sexual harassment.[304]

E. *The Availability of an Affirmative Defense: Justice Ginsburg's Dissent*

Recognizing the need to "afford guidance to lower courts and school officials" Justice Ginsburg proposed that schools be afforded an affirmative defense to claims of Title IX sexual harassment by demonstrating the existence of effective grievance policies and procedures.[305] In a brief dissent joined by Justices Souter and Breyer, Justice Ginsburg concluded that allowing such a defense would be in furtherance of existing OCR guidelines, requiring schools to adopt such procedures, in addition to comporting with the tort law doctrine of avoidable consequences.[306] Noting that the school would still bear the burden of demonstrating that its policy was adequately publicized, Ginsburg suggested that a school district could avoid liability if a plaintiff "unreasonably failed to avail herself of the school district's preventive and remedial measures, and consequently suf-

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301. *Id.* at 2006.

302. *See id.* at 2005. Stevens noted that while OCR is obligated to first provide actual notice to a recipient prior to revoking federal funds, a judicial cause of action may operate under a different standard.

303. *Id.* at 2006 (quoting Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 64 n. 3 (1992)).

304. *See id.* The fact that OCR declined to terminate funds "did not affect the Court's analysis, much less persuade the Court that a damages remedy was unavailable." *Id. See also Franklin*, 503 U.S. at 76 (maintaining damages remedy under Title IX).

305. *Gebser*, 118 S. Ct. at 2007 (Ginsburg, J., dissenting). According to Title IX regulations, a school district is required to "adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints . . . ." 34 C.F.R. § 106.8(b) (1998).

306. *See Gebser*, 118 S. Ct. at 2007 (Ginsburg, J., dissenting).

fered avoidable harm . . . ."[307]

IV. ANALYSIS

Since the enactment of Title IX in 1972, the statute has slowly gained acceptance as a vehicle for achieving gender equity in educational institutions. Despite its continued importance as a means for eradicating sex discrimination, the Supreme Court's recent decision in *Gebser v. Lago Vista* properly limited the use of Title IX in addressing teacher-to-student sexual harassment. Although some have criticized the ruling as "mak[ing] it more difficult for girls and women to pursue harassment cases against institutions at all levels of education,"[308] the Court has judicially restricted Title IX in accordance with the original intent of the statute. In doing so, the Court has shifted the emphasis from providing retroactive monetary relief to victims to encouraging proactive prevention of such abuse. Furthermore, the decision in *Gebser* justifiably shifts the culpability for such reprehensible conduct to the perpetrator of the harassment and not on the "taxpayers, students and other employees."[309] Any criticism that the newly articulated *Gebser* standard will only encourage schools to close their eyes to potential incidents of harassment is simply premature. In fact, "[s]chool districts take sexual harassment very seriously,"[310] and the Court's decision may actually "make schools more, not less vigilant in exposing sexual harassment."[311]

A. *A Justifiable Dual Standard: Title VII Is Distinct from Title IX*

Although much of the Title IX case law surrounding sexual harassment has its foundation in Title VII, the Supreme Court properly distinguished between the two statutes. While true that both statutes share similar intent, it would be inappropriate to "blandly blur the distinctions" between Title VII and Title IX.[312] Title VII, as originally enacted, specifi-

307. *Id.* Stevens, in his dissent, also commented that a jury might consider whether a district had "adopted and disseminated" a sexual harassment policy when determining the amount of damages. *Id.* at 2005 n.12 (Stevens, J., dissenting).

308. Wilson, *supra* note 11, at A10 (referring to comments by Bernice R. Sandler, a senior scholar in residence at the National Association for Women in Higher Education).

309. Ralph R. Reiland, *A Commonsense Ruling on Sex Harassment . . . May Change Rules for Lawyers Harassing Schools for Huge Fees*, INSIGHT MAG., July 27, 1998, para. 5, *available in* 1998 WL 9105678.

310. Walsh, *supra* note 21 (quoting Anne L. Bryant, the executive director for the National School Boards Association).

311. Leonard, *supra* note 12, at A6 (referring to commentary by the National Association of School Boards in response to the *Gebser* decision).

312. Bougher v. University of Pittsburgh, 713 F. Supp. 139, 145 (W.D. Pa. 1989) (refusing to adopt EEOC guidelines in their entirety when deciding Title IX issues), *aff'd on other grounds*, 882 F.2d 74

cally prohibits discriminatory acts by employers.[313] It defines "an employer" to include "any agent," thereby explicitly imputing liability for the acts of certain employees.[314] Furthermore, Title VII offers protection to employers by imposing statutory caps on compensatory and punitive damages.[315] With the enactment of the Civil Rights Act of 1991,[316] Congress amended Title VII to limit specifically monetary damages based on the size of an employer.[317] As noted by the National School Board Association in an amicus curiae brief, had Lago Vista been sued under Title VII by an employee, "its maximum potential damages . . . would be $50,000."[318] This figure is far less than potential jury verdicts for sexual harassment and is far less than the amount of federal funding the district could potentially forfeit in the event that OCR pursued terminating funds.[319]

Title IX, in contrast, differs significantly in its statutory language and its notable lack of specific guidance on available remedies.[320] When Congress established a statutory cap for Title VII damages in 1991, it clearly had an opportunity to include Title IX within the purview of the amendment, yet specifically declined to do so.[321] At that time, Congress had al-

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(3d Cir. 1989); *see also* North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 530 (1982) (stating that courts "must not fail to give effect to the differences between [Title VII and Title IX]").

313. Compare the language of Title VII, 42 U.S.C. § 2000e-2(a) (1994) ("It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his . . . employment, because of such individual's race, color, religion, sex, or national origin"), with Title IX, 20 U.S.C. § 1681(a) (1994) ("No person . . . 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").

314. 42 U.S.C. § 2000e(b) (1994).

315. *See* 42 U.S.C. §§ 1981a(b)(3), 2000e-5 (1994).

316. *See* Pub. L. No. 102-166, 105 Stat. 1071 (codified at 42 U.S.C. § 1981 (1994)).

317. *See* 42 U.S.C. § 1981a(b)(3) (1994). The maximum amount of compensatory and punitive damages that can be recovered is limited to $300,000. This provision also allows for jury trials in Title VII claims. *See id.*

318. Brief of *Amici Curiae* National School Boards Association and New Jersey School Boards Association in Support of Respondent at *13-14, Gebser v. Lago Vista Indep. Sch. Dist, 188 S. Ct. 1989 (1998) (No. 96-1866). This figure is based upon an estimated size of the district of less than 101 employees. *See id.*

319. *See* Canutillo Indep. Sch. Dist. v. Leija, 101 F.3d 393, 396 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 2434 (1997) (illustrating the high end of potential jury verdicts in a case where a student victim was awarded $1.4 million in a sexual harassment suit); *see also* Clark, *supra* note 49, at 354 n.9. According to counsel for the Lago Vista School District, the district received approximately $120,000 in federal funds during the 1992-1993 school year. *See* Oral Argument of Wallace B. Jefferson on Behalf of the Respondent at *35, *Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989 (1998) (No. 96-1866).

320. *See* 20 U.S.C. §§ 1681-1688 (1994). For Title IX's implementing regulations, see 34 C.F.R. § 106.01-.61 (1998).

321. *See* Civil Rights Act of 1991, § 102, 42 U.S.C. § 1981a (1994); *see also* Rosa H. v. San Elizario Indep. Sch. Dist, 106 F.3d 648, 656-57 (1997); Clark, *supra* note 49, at 361-62 (advocating that Congress impose similar cap on damages under Title IX).

ready amended Title IX on two separate occasions,[322] indicating that its decision to exclude Title IX from the scope of the Civil Rights Act of 1991 was not a mere oversight. Specifically, in response to the Court's narrow interpretation of Title IX in *Grove City College v. Bell*,[323] Congress was swift to expand the coverage of Title IX so as to encompass all programs and activities within an educational institution.[324] The lack of similar legislative response in 1991 has been interpreted to indicate that, at that time, "Congress did not view Title IX as the kind of legislation that could generate expansive liability."[325]

In addition, Title IX does not contain a statute of limitations as does Title VII. Under Title VII, a plaintiff has less than one year to file a claim after first exhausting administrative remedies.[326] Since Title IX is a federal statute without an explicit limitation, courts must look to state law regarding the appropriate statute of limitations.[327] Under Texas law, the applicable law in *Gebser*, the student victim could potentially wait until she is in college before filing suit.[328] Such delay not only complicates the prosecution and defense of such a claim, but could leave open the possibility that a significant lapse of time could pass before a school might receive potential notice that an employee is conducting criminal acts.

Title IX also explicitly limits liability to the acts or omissions of the grant recipients, i.e., the school district.[329] As a statute enacted under the Spending Clause, a school can therefore only be held responsible for its own conduct, and not vicariously liable for the acts of third parties. Unlike the broad definition of an "employer" under Title VII, Title IX quite narrowly defines a grant recipient.[330] The recipient is strictly the school district itself and not an individual employee acting in furtherance of self

322. *See* Rehabilitation Act Amendments of 1986, § 1003, Pub. L. No. 99-506, 100 Stat. 1845, (codified in 42 U.S.C. § 2000d-7 (1994)); Civil Rights Restoration Act of 1987, § 3(a), Pub. L. No. 100-259, 102 Stat. 28 (codified at 20 U.S.C. § 1687 (1994)).

323. 465 U.S. 555, 574-75 (1984); *see also supra* note 31.

324. Civil Rights Restoration Act of 1987, § 3(a), Pub. L. No. 100-259, 102 Stat. 28 (codified at 20 U.S.C. § 1687 (1994)).

325. *Rosa H.*, 106 F.3d at 657 n.4.

326. *See* 42 U.S.C. § 2000e-5(e) (1994) (statute of limitations); 42 U.S.C. § 2000e-5(b) (1994) (exhaustion of administrative remedies); *see also* Brief of *Amici Curiae* National School Board Association and New Jersey School Boards Association in Support of Respondent at *14, Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989 (1998) (No. 96-1866).

327. *See* Bougher v. Univ. of Pittsburgh, 882 F.2d 74 (3d Cir. 1989); Wilson v. Garcia, 471 U.S. 261 (1985); Brief of *Amici Curiae* National School Boards Assocation at *14, *Gebser* (No. 96-1866).

328. The statute of limitations for personal injury of minors under Texas law is tolled until age 20. If the case involves sexual abuse, it is tolled until 23. *See* TEX. CIV. PRAC. & REM. CODE §§ 16.001, 16.003, 16.0045 (West 1986 & Supp. 1999); *see also* Brief of *Amici Curiae* National School Boards Association at *14, *Gebser* (No. 96-1866).

329. *See* 20 U.S.C. § 1681 (1994).

330. 34 C.F.R. § 106.2(h) (1998) (defining recipient as any state or local political subdivision).

interest. This difference is significant, since without knowledge of the sexual harassment, a school cannot be held liable for its own failure to act. Similarly, however, once a school does have knowledge, it must take appropriate steps to investigate and eliminate the discrimination. It would seem illogical to hold a district responsible for acts of its employees that are clearly outside their scope of employment and beyond their authority as teachers.[331]

B. *Legislative Action Is the Appropriate Response*

Recognizing that further expansion of Title IX exceeded the scope of judicial authority, this more "pragmatic"[332] Supreme Court clearly articulated that "it will not go where Congress fails to tread."[333] Employing judicial restraint, O'Connor's message was simple: "Until Congress speaks directly on the subject . . . we will not hold a school district liable . . . absent actual notice and deliberate indifference."[334] Congress has shown a willingness to revisit the statutory language of Title IX in the past to clarify judicial decisions and it is appropriate that the legislature be responsible for further modifications and expansions upon the initial intent of Title IX. Since *Gebser* was decided, several groups have already begun lobbying for congressional action.[335] Even Marcia Greenberger, the co-president of the National Women's Law Center, recognized that although the *Gebser* decision was disappointing, "Congress will have to legislate remedies for students."[336] In fact, according to a recent press release, Congresswoman Eleanor Holmes Norton (D-DC) has introduced a bill to amend Title IX to allow damages in cases where a student is sexually assaulted or harassed.[337] Under the proposed Student Protection from Sexual Abuse Act of 1999, Title IX would explicitly provide for compensatory damages

331. *See* Walsh, *supra* note 21 ("It is very hard to rationalize suing a school district for something its officials had no knowledge of." (quoting Anne L. Bryant, the executive director of the National School Boards Association)).

332. David G. Savage, *Changing Rules on the Job: New Sex Harassment Standards Please Bosses and Workers*, ABA J., Aug. 1998, at 42.

333. Zirkel, *supra* note 11.

334. Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989, 2000 (1998) (O'Connor, J.).

335. *See, e.g.*, Savage, *supra* note 332, at 43 ("In response [to *Gebser*], the National Women's Law Center began a letter-writing campaign to urge President Clinton and congressional leaders to amend Title IX . . . [and] to hold districts responsible for harassment by their employees."); *see also* Ann H. Franke, *The Message from the Supreme Court: Clarify Sexual-Harassment Policies*, CHRONICLE OF HIGHER EDUCATION, July 17, 1998, at B7 ("In fact, advocates of women's and children's rights might well press Congress to amend Title IX so that students could file and win lawsuits without having to prove that authorities willfully disregarded their complaints of harassment.").

336. Leonard, *supra* note 12, at A6.

337. *See* Eleanor Holmes Norton, Government Press Release by Federal Document Clearing House, *Norton Introduces Student Protection from Sexual Abuse Act of 1999 to Clarify Title IX* (Jan. 19, 1999), *available in* <http://www.house.gov/norton/>.

for sexual harassment, while imposing a monetary cap similar to Title VII.[338]

C. *Title IX Does Not Provide for the Application of Agency Principles*

One recent commentator has argued that "[b]y refusing to apply established agency principles to determine school liability under Title IX, the Court failed to recognize the importance of protecting school children from the physical and psychological harm of sexual harassment."[339] While advocating the legitimate end of protecting school children, this position fails to give credit to the sensitivity of the Court as well as the general mission of public educational institutions. Not only does the public "demand[] that educational institutions act aggressively to protects students from harm," schools have "a moral responsibility to protect students and employees from sexual harassment."[340]

Furthermore, applying the use of agency principles within the school context is misplaced. Under Section 219 of the Restatement (Second) of Agency, a master is liable for the "torts of his servants committed while acting in the scope of their employment."[341] Clearly the sexual abuse of a student falls outside the scope of a teacher's employment; however, proponents of applying agency theory within this context contend that the school is liable when a teacher uses his or her "apparent authority" to aid him or her in committing a tort.[342] Although Title VII cases have relied upon agency theory to hold an employer liable,[343] Title VII specifically prohibits discrimination by an employer or "any agent."[344] Under Title IX, there is "no comparable reference to an educational institution's 'agents,'" which led the Supreme Court in *Gebser* to disregard the "application of agency principles."[345]

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338. *See id.*

339. *The Supreme Court 1997 Term*, *supra* note 36, at 344.

340. Franke, *supra* note 335, at B7.

341. RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958); *see also* Gebser, 118 S. Ct. 1989, 1995-96, 2003-04 (1998); *see generally The Supreme Court 1997 Term*, *supra* note 36 (criticizing the Court for abandoning agency principles).

342. *See* RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958). "A master is not subject to liability for the torts of his servants acting outside the scope of their employment unless the servant purported to act or speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation." *Id.*

343. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 72 (1986).

344. *Gebser*, 118 S. Ct. at 1996 (citing 42 U.S.C. § 2000e(b) (1994)).

345. *Id.* In interpreting what constitutes "apparent authority," the National School Board Association pointed out that the commentary to Section 219(2)(d) Restatement uses this provision very narrowly. According to the commentary, "from the point of view of the third party [student] the transaction [must] seem[] regular on its face and the agent appears to be acting in the ordinary course of the business confided to him." RESTATEMENT (SECOND) OF AGENCY § 219, cmt. e (1958). The NSBA noted that from the facts presented in *Gebser*, one could conclude that Alida Gebser knew that

In addition, although recent Title VII cases have also applied agency theory,[346] they have done so with some important caveats. In *Faragher v. City of Boca Raton*,[347] for example, the Supreme Court clearly recognized that its earlier decision in *Meritor* held "that an employer is not 'automatically' liable for harassment by a supervisor."[348] To avoid what it referred to as "a mechanical application of indefinite and malleable"[349] agency principles, the *Faragher* Court held that employers may shield themselves from such vicarious liability if they can show that "(a) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[350] As a result, even if the Court had adopted this standard in *Gebser*, it is highly likely that the Lago Vista School District would not have been held responsible for the criminal acts of Frank Waldrop.

D. *Other Avenues Are Available to Combat Sexual Harassment*

In a zeal to eradicate the obvious dangers of such abuse on young children, some commentators have failed to recognize other available avenues towards achieving this goal. Rather than focusing on the potential redress for sexual harassment once it has occurred, the focus of Title IX is properly on the avoidance of harm.[351] Despite the superficially stringent ruling in *Gebser*, schools have not lost an incentive to act proactively to protect students. In fact, the *Gebser* decision "reinforces the importance of preventive action, and in no way lets any school administrator off the hook."[352]

Waldrop's behavior was "not regular on its face" and that "the school district would end the relationship if it was discovered." Brief of *Amici Curiae* National School Boards Association and New Jersey School Boards Association in Support of Respondent at *19-20, Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989 (1998) (No. 96-1866).

346. *See* Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2290 (1998); Burlington Indus. v. Ellerth, 118 S. Ct. 2257, 2266-68 (1998).

347. 118 S. Ct. 2275 (1998).

348. *Id.* at 2291.

349. *Id.* at 2288.

350. *Id.* at 2293.

351. In *Faragher*, the Court aptly noted that the "'primary objective' [of Title VII], like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm." *Faragher*, 118 S. Ct. at 2292 (citation omitted). The Court further emphasized the need to provide incentives to employers to prevent violations by encouraging affirmative, reasonable behavior. *See id.*

352. Leonard, *supra* note 12, at A6 (quoting Anne Bryant, Executive Director of the National Association of School Boards).

1. *OCR Will Continue to Play Pivotal Role in the Prevention of Sexual Harassment*

As Justice O'Connor noted, the Court's decision in *Gebser* does not in any way affect the Department of Education's administrative enforcement of Title IX.[353] In fact, in a statement issued by U.S. Secretary of Education, Richard W. Riley, it appears as though OCR will continue its own vigorous enforcement of sexual harassment under Title IX.[354] Although the dual standards for liability may create some confusion among school districts, Riley has stated that "[w]hile the [*Gebser*] decision limits the situations where litigants can obtain damages from a school district in a private Title IX lawsuit, it does not undermine the fact that sexual harassment discrimination violates Title IX."[355]

The *Gebser* decision, in effect, creates a bifurcated system of enforcement under Title IX. Judicially implied causes of action will be subjected to the actual notice and deliberate indifference standard articulated in *Gebser*, while administrative enforcement by OCR will continue to adhere to constructive notice and strict liability standards.[356] While this may create some initial confusion, the U.S. Department of Education has made it quite clear that sexual harassment will continue to be enforced and monitored. The establishment of two distinct enforcement systems, however, is not entirely new. Even in 1992, in the *Franklin* decision, the Court noted that, pursuant to OCR's investigation, the Gwinnett County School District had come into compliance, despite the fact that the Court had allowed monetary compensation as a result of the plaintiff's private lawsuit.[357] The OCR's reliance on stricter standards for determining Title IX violations is sensible, given that the remedy for a school district's subsequent non-compliance is the less immediate revocation of federal funds. A district, once contacted by OCR, first has an opportunity to come into compliance voluntarily before termination proceedings begin.[358] OCR,

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

354. *See Press Release, Statement by U.S. Secretary of Education Richard W. Riley on the Impact on Title IX of the U.S. Supreme Court's* Gebser v. Lago Vista *Decision* (July 1, 1998) <http://www.ed.gov/PressReleases/07-1998/lago.html> [hereinafter Riley].

355. *Id.*

356. *See* OCR Guidance, *supra* note 25.

357. *See* Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 65 n.3 (1992). OCR had concluded that the school committed a Title IX violation, but because the offending teacher had resigned and the school had implemented a grievance procedure, no further disciplinary action was necessary. *See id.* One commentator has suggested that when a court "shun[s]" OCR policies in favor of its own standard, "OCR is forced to compromise its position." Blais, *supra* note 122, at 1401. While the *Gebser* decision may initially appear to undermine OCR authority, this fear is unfounded as the Court does not purport to dictate new standards for OCR investigations.

358. *See* 20 U.S.C. § 1682 (1994); 34 C.F.R. §§ 100.7(d), 100.8(d) (1998).

through its own enforcement mechanisms, therefore stresses the proactive nature of preventing further violations.

Riley's statement expressly stated that "[a]lthough a plaintiff cannot obtain money damages where there was no notice to appropriate school officials, it is a violation of Title IX. A school district is therefore still responsible for taking reasonable steps to prevent and eliminate that type of misconduct."[359] His mandate unequivocally puts schools on notice that OCR will continue to enforce the requirement that schools "have well publicized policies against discrimination based on sex, including sexual harassment" and "take prompt and effective action to equitably resolve sexual harassment complaints."[360] While the revocation of federal funds is a rare occurrence,[361] the threat of losing such financial assistance provides adequate additional incentives for schools to comply with OCR mandates.[362]

2. *State Action and Federal Tort Law*

The Supreme Court has also stated that its decision in *Gebser* "does not affect any right of recovery that an individual may have against a school district as a matter of state law or against the teacher in his individual capacity under state law or under 42 U.S.C. § 1983."[363] For example, in *Doe v. Taylor Independent School District*,[364] a fifteen-year-old student

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359. Riley, *supra* note 354, para. 2.

360. *Id.*

361. *See* Franke, *supra* note 335, at B7 ("[T]he Department of Education and other agencies still have authority to strip federal funds from [educational institutions] that allow sexual harassment to go unpunished. The government has never taken that drastic step, but it has wielded the threat against hundreds of institutions to pressure them to adopt and enforce non-discrimination policies."); *see also* Maureen O. Nash, *Student on Student Sexual Harassment: If Schools Are Liable, What About the Parents?*, 31 CREIGHTON L. REV. 1131, 1147 (1998) (arguing that although "few school districts could survive without federal funds . . . the threat of loss of federal funds is less serious . . . than the threat of a court case and a large unfavorable verdict"). If revocation of funds is truly seen as a rarity, the *Gebser* standard can be interpreted as even more consistent with how OCR currently operates. Despite the fact that OCR may find a violation based on strict liability or constructive notice, the termination of federal funds is reserved for egregious violations that occur when notice is given and schools subsequently fail to remedy. This higher standard is akin to the actual notice standard of *Gebser*.

362. According to Verna L. Williams, a senior counsel at the National Women's Law Center in Washington, Secretary Riley's statement "sends a strong signal that schools should not misinterpret [*Gebser*] as an invitation to turn their backs to sexual harassment." Walsh, *supra* note 21, at 30.

363. Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989, 2000 (1998). Although some have claimed that students have not been successful in bringing claims under state or federal tort law, this does not by implication indicate that Title IX is the most appropriate avenue for redress. *See also* Jeffrey Thaler, *Sexual Harassment at School: A Legal Primer*, TRIAL, Nov. 1997, at 68 (noting that plaintiffs have had mixed results in pursuing civil rights claims under 42 U.S.C. § 1983 in the context of sexual harassment in schools).

364. 15 F.3d 443 (5th Cir. 1994).

brought a constitutional claim against her school district after she had been sexually molested by a teacher.[365] The claim, filed under 42 U.S.C. § 1983, charged school officials with a deprivation of the student's constitutional rights based upon their failure to supervise adequately the student.[366] Finding that the principal was not protected by qualified immunity, the court held that schoolchildren not only have a right to bodily integrity but that "school officials can be held liable for supervisory failures" that result in sexual abuse if their failures indicate deliberate indifference.[367]

At the state level, some legislatures have adopted statutes specifically proscribing sexual harassment.[368] Minnesota, for example, requires that all schools have specific sexual harassment policies.[369] California has a similar provision, allowing schools to suspend or expel a student who violates its sexual harassment policy.[370] Traditional tort law may also provide a means for redress under claims for "assault, battery, or intentional infliction of emotional distress."[371] In one particular claim, a female student recovered $20,000 in an out-of-court settlement after suing the school district for intentional infliction of emotional distress as a result of its failure to protect her from sexual harassment by other students.[372] Beyond such claims, however, the only other alternative for a victim is to rely upon criminal sanctions, which, while not providing monetary compensation, will offer the possibility of a conviction and assurance of some level of state intervention.[373] Regardless of the means chosen by a plaintiff in addressing incidences of sexual harassment, it is clear that a school district cannot afford to take chances and risk both the potential harm to its stu-

365. *See id.* at 449-50.

366. *See id.* at 451-52, 457-58.

367. *Id.* at 445. *See also* Barbara L. Horwitz, *The Duty of Schools to Protect Students from Sexual Harassment: How Much Recovery Will the Law Allow?*, 62 U. CIN. L. REV. 1165 (1994) (analyzing the impact of *Doe v. Taylor*); Thaler, *supra* note 363, at 68; *see generally* Michael A. Zwibelman, *Why Title IX Does Not Preclude Section 1983 Claims*, 65 U. CHI. L. REV. 1465 (1998) (explaining the contours of Section 1983 claims and arguing that such claims should not be precluded by Title IX).

368. *See* Nash, *supra* note 361, at 1135-36 (listing Minnesota, California, Massachusetts, and Colorado as states that legislatively prohibit sexual harassment); Sherer, *supra* note 53, at 2139-43.

369. *See* MINN. STAT. ANN. § 121A.03 (West Supp. 1999).

370. *See* CAL. EDUC. CODE § 48900 (West 1993 & Supp. 1999); CAL. EDUC. CODE § 212.5 (West 1994 & Supp. 1999) (defining sexual harassment as "unwelcome sexual advances, requests for sexual favors, and other verbal, visual, or physical conduct of a sexual nature, made by someone from or in the work or educational setting"); CAL. EDUC. CODE § 231.5 (West 1994 & Supp. 1999) (requiring schools to adopt and distribute sexual harassment policies).

371. *See* Sherer, *supra* note 53, at 2142.

372. *See id.* at 2143 n.128 (citing Jerry Adler & Debra Rosenberg, *Must Boys Always Be Boys?*, NEWSWEEK, Oct. 19, 1992, at 77).

373. *See* Sherer, *supra* note 53, at 2141-42 n.125. In *Gebser*, for example, the harassing teacher was convicted of statutory rape. *See* Leonard, *supra* note 12, at A6. In a case addressing peer sexual harassment, the student offender was charged with sexual battery. *See* Davis v. Monroe County Bd. of Educ., 120 F.3d 1390, 1394 (11th Cir. 1997), *cert. granted*, 118 S. Ct. 595 (1998).

dents and contentious litigation.

E. *Future Litigation: Courts Begin to Apply the Gebser Standard*

1. *Appropriate School Official*

In the wake of *Gebser*, lower courts are now left with the task of defining what constitutes "an appropriate school official," "deliberate indifference," and "actual notice." Some recent cases decided subsequent to *Gebser* may provide some indication of how literal courts will be in applying the liability standard articulated in *Gebser*.

According to *Gebser*, notice must be given to "an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf."[374] This criteria arose from the statutory language of Title IX, which provided for notice to the "appropriate person" before an agency may initiate enforcement proceedings.[375] If such a person is limited to school administrators, argues Victoria Alzapiedi, executive director of the Title IX Advocacy Project in Boston, "it will have a chilling effect on the reporting and follow-up of sexual harassment incidents in middle schools and high schools."[376] Since sexual harassment inherently involves issues that are sensitive and private in nature, school officials, such as principals and superintendents, will likely be the last to become advised of potential misconduct.

This point is illustrated by *Miller v. Kentosh*,[377] a case decided one week after *Gebser*, in which the District Court for the Eastern District of Pennsylvania held that a mere teacher and band director were not "officials with authority to take corrective action under Title IX."[378] In *Miller*, the plaintiff alleged that her teacher discovered a Valentine's Day card given to her by a teacher with whom she had a sexual relationship.[379] The teacher then discussed her concerns with the student's band director and upon confronting the student about the card, the student denied the existence of any relationship.[380] Neither the teacher nor the band director informed "any other supervisory official" about the incident.[381]

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374. Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989, 1999 (1998).

375. *Id.* at 1999 (citing 20 U.S.C. § 1682 (1994)).

376. Leonard, *supra* note 12, at A6. "If students have to let school administrators, as opposed to teachers or counselors, know about harassment, they will fear the implications for themselves and the stigma among their peers. . . . The backlash—subtle or blatant—will be a major disincentive to report a hostile sexual environment." *Id.*

377. No. Civ. A. 97-6541, 1998 WL 355520 (E.D. Pa. June 29, 1998).

378. *Id.* at *7.

379. *See id.* at *6.

380. *See id.*

381. *Id.*

In contrast, in a case involving peer sexual harassment, the District Court for the Southern District of West Virginia held that an allegation that a teacher witnessed a physical assault on a playground was sufficient to support a claim that there was notice to an appropriate school official.[382] Although the court cautioned that not every incident of a sexual nature between students constitutes sexual harassment, it allowed the claim to proceed for a factual determination.[383] This decision seems to indicate that peer sexual harassment claims may be distinguishable from claims of teacher harassment if the definition of an appropriate official is strictly defined as one with authority *over the harasser*.[384] However, this distinction dangerously narrows and overstates the Court's holding in *Gebser*. Inherent in any teacher's position, as well as those of other school authorities such as a guidance counselor, is the power to remedy potential harassment since such individuals exert control over both classrooms and general school discipline on a daily basis. Rarely do disciplinary acts of students take place directly within sight of the principal or superintendent; instead, school officials rely on the hierarchy of authority to maintain discipline and order within a school. While a principal or superintendent may arguably have ultimate authority to discipline a teacher, fellow teachers are far from helpless in aiding the reporting of suspected or confirmed incidents of harassment.[385]

Furthermore, teachers may very well have an *obligation* to report suspected harassment. In *Miller*, once the principal learned that the offending teacher had been arrested for engaging in sexual activity with the plaintiff, he immediately "filed a report of suspected child abuse with the police

382. *See* Carroll K. v. Fayette County Bd. of Educ., 19 F. Supp. 2d 618, 620-21 (S.D. W. Va. 1998).

383. *See id.* at 621.

384. This was exactly the approach taken by the Fifth Circuit in a pre-*Gebser* decision. *See* Canutillo Indep. Sch. Dist., 101 F.3d 393, 402-03 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 2434 (1997). In *Canutillo*, the Fifth Circuit found that reporting sexual abuse to the child's homeroom teacher was not enough to impute liability to the district since the teacher was not "management-level" and had no authority over the offending teacher. *Id.* at 402. However, while ultimately resting on an actual notice standard, the *Canutillo* court did not follow the Spending Clause rationale of *Gebser*. Instead, it evaluated potential district liability under several models; first rejecting a strict liability standard and then concluding that the plaintiff's claim failed under a Title VI standard as well as a Title VII agency standard. *See id.* at 400, 402. *Gebser*, in contrast, specifically declined to adopt agency principles. *See* Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989, 1996 (1998). As a result, *Canutillo* may not be an ideal model for deciding cases in the wake of the *Gebser* decision.

385. In another post-*Gebser* case of teacher-to-student sexual harassment, the Supreme Court of Alabama determined that a school board had actual notice of harassment once a teacher, who learned of the sexual abuse from the student, reported the behavior to the administration. Such reporting seems to follow the more logical pathway of a student claim against a teacher. *See* H. M. v. Jefferson County Bd. of Educ., 719 So. 2d 793, 797 (Ala. 1998).

department."[386] In all states, there exist mandatory child abuse reporting laws that, in most cases, require certain professionals, such as teachers, to report instances of suspected abuse.[387] Sexual misconduct between a teacher and a student certainly falls within the definitions of such abuse and may inherently require an adult within a lower level educational institution to report suspected sexual abuse of a student. Such mandatory reporting laws may not distinguish between a teacher and an administrator;[388] nor should courts in interpreting this aspect of the *Gebser* standard.

2. *Deliberate Indifference*

Courts will also face the future challenge of interpreting what conduct amounts to deliberate indifference on behalf of a school district. In *Chontos v. Rhea*,[389] the District Court for the Northern District of Indiana undertook this inquiry, noting that *Gebser* "did not apply the term to the facts in that case."[390] *Gebser* described deliberate indifference as a school's "decision . . . not to remedy the violation,"[391] yet the court in *Chontos* looked beyond *Gebser* for clues to defining such indifference. The Seventh Circuit, adopting a standard similar to that in *Gebser*, imposed liability when a school official with "the power to take action that would end such abuse . . . failed to do so."[392] Furthermore, in another case, the same court stressed that schools have a wide range of options when dealing with harassment claims.[393] "As long as the responsive strategy chosen is one plausibly directed toward putting an end to the known harassment, courts should not second-guess the professional judgments of

386. *Miller*, 1998 WL 355520, at *1.

387. *See* Caroline T. Trost, Note, *Chilling Child Abuse Reporting: Rethinking the CAPTA Amendments*, 51 VAND. L. REV. 183, 194 n.63 (1998) (listing the specific mandatory reporting statutes for each state); *see also* David S. Doty & Susan Strauss, *"Prompt and Equitable": The Importance of Student Sexual Harassment Policies in the Public Schools*, 113 ED. LAW REP. 1, 13 (1996) (suggesting that schools identify in their sexual harassment policies what obligations a district may have to report child abuse and any other sexually criminal activity); Sana Loue, *Legal and Epidemiological Aspects of Child Maltreatment*, 19 J. LEGAL MED. 471, 490 (1998) (noting that the District of Columbia's mandatory reporting statute specifies educators among the list of those required to report abuse). *Cf.* Hendrie, *supra* note 3, at 13 (observing that "despite state laws requiring educators to report suspected child abuse, teachers are still reluctant to report colleagues out of fear of being labelled a 'troublemaker'").

388. In Missouri, for example, mandatory reporters specificially include a "teacher, principal, or other school official." MO. REV. STAT. § 210.115 (1986); *see also* Trost, *supra* note 387, at 195 n.66.

389. 29 F. Supp. 2d 931 (N.D. Ind. 1998).

390. *Id.* at 934.

391. Gebser v. Lago Vista Indep. Sch. Dist, 118 S. Ct. 1989, 1999 (1998).

392. Smith v. Metropolitan Sch. Dist. Perry Township, 128 F.3d 1014, 1034 (7th Cir. 1997) (quoting Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648, 660 (5th Cir. 1997)). Although both cases were decided pre-*Gebser*, the *Chontos* court determined that the standard was "as stringent as deliberate indifference." *Chontos*, 29 F. Supp. 2d at 934.

393. *See Chontos*, 29 F. Supp. 2d at 934.

school officials."[394]

The complaint in *Chontos* alleged that a university professor had made unwelcome sexual advances towards the plaintiff, after engaging in similar behavior with other students on prior occasions.[395] In response, the university confronted the professor with the allegations, officially reprimanding him and warning him that another such incident could lead to termination.[396] When the professor proceeded to touch inappropriately another female student later that year, the university recommended that he get counseling, but never followed up on the professor's progress.[397] In addition, another incident took place nearly five years later, and the university official who spoke to the victim declined to inform anyone of the incident.[398] In light of *Gebser*, as well as the guidance of several Seventh Circuit cases,[399] the *Chontos* court concluded that "a reasonable jury could find that the university was deliberately indifferent."[400]

The court's decision appeared to be influenced by the university's failure to follow up on its threats to impose more serious sanctions, as well as the fact that the school did not pursue its own self-imposed requirement of continued monitoring.[401] Given the reasoning in *Chontos*, one may conclude that in future cases the prerequisite criteria that a school must respond with deliberate indifference will likely be a case-by-case factual determination. While schools may be afforded tremendous latitude in their choice of responses, courts will ultimately rely on the cumulative facts and documented responses (or lack thereof) in conducting fact-intensive inquiries.

3. *Actual Notice*

Perhaps the most salient criterion for imposing school liability, however, is *Gebser*'s actual notice standard. Despite the apparent bright line drawn in arriving at this standard, *Gebser* fails to specify the exact circumstances that will constitute actual notice to a school official. According to

394. Doe v. University of Ill., 138 F.3d 653, 667 (7th Cir. 1998), *cited in Chontos*, 29 F. Supp. 2d at 934.

395. *See Chontos*, 29 F. Supp. 2d at 933.

396. *See id.*

397. *See id.* at 935.

398. *See id.* at 936.

399. *See* Smith v. Metropolitan Sch. Dist. Perry Township, 128 F.3d 1014, 1034 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 2367 (1998) (stating that deliberate indifference is when a school official with "the power to take action that would end such abuse . . . failed to do so"); Jones v. City of Chicago, 856 F.2d 985, 992 (7th Cir. 1988) (defining deliberate indifference in the context of Section 1983 claims as "know[ing] about the [wrongful] conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see.").

400. Chontos v. Rhea, 29 F. Supp. 2d 931, 936-37 (N.D. Ind. 1998).

401. *Id.* at 936.

the facts in *Gebser*, the only notice supplied to the Lago Vista School District "consisted of a complaint from parents of other students charging only that Waldrop had made inappropriate comments during class."[402] The Court found that these complaints were "insufficient to alert the principal to the possibility that Waldrop was involved in a sexual relationship with a student."[403] However, this finding simply leaves more questions to be answered by subsequent court decisions. Certainly *Gebser* does not foreclose the possibility that actual notice may be satisfied in instances where an appropriate school official either witnesses harassing conduct first hand or hears about incidents of sexual harassment from an indirect source.

Furthermore, as indicated by the Supreme Court of Alabama, notice need not be in the form of a formal grievance or written complaint. In *H. M. v. Jefferson County Board of Education*,[404] the school board learned that a teacher had been sexually harassing a student when the student reported the harassment to a teacher who, in turn, informed administrators.[405] Upon learning of the misconduct, the district promptly fired the teacher and notified law enforcement about the incident.[406] In its ruling, the court in *H. M. v. Jefferson County Board of Education* excused the fact that the district lacked formal grievance procedures, reiterating the statement in *Gebser* that the district's "failure to comply with the [administrative] regulations . . . does not establish the requisite actual notice and deliberate indifference."[407] Since the school had responded appropriately upon receiving notice, the Alabama Supreme Court concluded that the district could not be held liable, even absent the requisite grievance procedures.[408] Given this decision, as well as the open ended question left by *Gebser*, future litigators will likely be attempting to define the specific factual circumstances that will lead to a determination that a school had actual notice of the alleged harassment.

4. *Same-Sex Sexual Harassment*

Prior to *Gebser*, courts had held that same-sex sexual harassment poses a viable claim under Title IX.[409] Such holdings are consistent with

402. Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989, 2000 (1998).
403. *Id.*
404. 719 So. 2d 793 (Ala. 1998).
405. *See id.* at 794.
406. *See id.*
407. *Id.* at 796 (quoting Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989, 1992 (1998)).
408. *See id.*
409. *See, e.g.*, Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463 (8th Cir. 1996) (involving teacher-student sexual harassment), *rev'd on other grounds*, Nos. 98-1683, 98-2018, 98-2994, 1998 WL 148090, at *2 (8th Cir. Mar. 19, 1999); Seamons v. Snow, 84 F.3d 1226 (10th Cir. 1996) (involving peer sexual harassment).

existing OCR policy indicating that, if the harassment is sexual in nature, regardless of the sex of the student or alleged harasser, it may constitute sex discrimination.[410] Nonetheless, not all courts were initially convinced that Title IX provided for such a cause of action. In two recent post-*Gebser* cases, for example, lower courts had initially barred same-sex claims, claiming that since the plaintiff and the alleged harasser were of the same sex, Title IX did not apply.[411] On appeal, each court was ultimately persuaded to recognize the existence of same-sex claims.[412] Interestingly enough, however, not only did both cases look to *Gebser* for the appropriate school liability standard, but each case cited the Supreme Court's recent decision in *Oncale v. Sundowner Offshore Services*[413] as a controlling influence in establishing same-sex sexual harassment as a form of sex discrimination.[414] *Oncale* is particularly interesting since it is a Title VII, and not a Title IX, sexual harassment case. In citing to *Oncale*, these courts implicitly suggest that, while *Gebser* may have partially rejected the importation of Title VII liability standards into Title IX jurisprudence, the underlying foundation of sexual harassment law may still be found in Title VII case law.

F. *The Impact of* Gebser *on Hostile Racial Environment Cases*

In deciding *Gebser*, the Supreme Court gave great importance to the contractual nature of Title IX. Noting its semantical similarity to Title VI, the Court reasoned that the two statutes "operate in the same manner."[415] Given this functional resemblance, it should not be a surprise that cases involving claims for hostile racial environment under Title VI should begin to adopt standards that mirror those set forth in *Gebser*.

In *Montiero v. Tempe Union High School*,[416] for example, the most recent circuit case to address a Title VI hostile environment claim, the Ninth Circuit relied heavily on the OCR Guidance and Title VII in establishing the criteria necessary to state a legitimate claim of racial discrimination.[417] The ninth grade plaintiff in *Montiero* alleged that other students routinely called her and other African-American students "nigger" and that similar demeaning graffiti was written on school walls.[418] Once establish-

410. *See* OCR Guidance, *supra* note 25, at 12,036.
411. *See* Doe v. Dallas Indep. Sch. Dist., 153 F.3d 211, 219 (5th Cir. 1998); H.M. v. Jefferson Cty. Bd. of Educ., 719 So. 2d 793, 794 (Ala. 1998).
412. *See Doe*, 153 F.3d at 219; *H.M.*, 719 So. 2d at 795.
413. 118 S. Ct. 998 (1998).
414. *See Doe*, 153 F.3d at 219; *H.M.*, 719 So. 2d at 793.
415. Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989, 1997 (1998).
416. 158 F.3d 1022 (9th Cir. 1998).
417. *See id.* at 1032.
418. *See id.*

ing that the allegations were sufficient to support a claim for a Title VI violation, the Ninth Circuit focused on the appropriate standard for imputing liability to the school.[419] In doing so, the court hedged on the exact notice requirement. Instead, it cited to OCR interpretations, stating that they "provide[] that a district may have either actual or constructive notice of racial harassment."[420] Reviewing the facts, the court found that actual notice had taken place, although it did so without conclusively ruling out that constructive notice was inappropriate.[421]

The *Montiero* court next applied the *Gebser* standard in evaluating the district's response. It stated that "the district is liable for its failure to act if the need for intervention was so obvious, or if inaction was so likely to result in discrimination, that 'it can be said to have been deliberately indifferent to the need.'"[422] As an encore to the Court's ruling in *Gebser*, *Montiero* thus seems to extend the application of the *Gebser* standard, applying it not only within the Title VI context, but also to a claim of peer harassment. More immediately, however, this Ninth Circuit decision could help pave the way for the Supreme Court's recognition of peer harassment in the context of Title IX sex discrimination cases.[423]

G. *The Impact of* Gebser *on Peer Sexual Harassment Cases*

Immediately following *Gebser*, the Supreme Court considered whether school districts may also be held liable for peer sexual harassment under the umbrella of Title IX.[424] According to the facts in *Davis v. Monroe County Board of Education*, the fifth grade plaintiff was repeatedly harassed by a boy in her class.[425] For five months, the girl was subjected to vulgar comments and was sexually grabbed and touched by the harasser on several different occasions.[426] Although the boy ultimately pleaded guilty to sexual battery, it took three months before the teacher would allow the

419. *See id.* at 1034.

420. *Id.* (citing 59 Fed. Reg. 11,450-51).

421. *See id.*

422. *Id.* (citation omitted).

423. On September 4, 1998, a Kentucky jury awarded $220,000 to a 17-year old student for a claim of peer-based harassment based on the girl's national origin. According to the suit, the student, Alma McGowan, claimed she had been subjected to four years of "sexual harassments and taunts." U.S. District Judge Thomas B. Russell applied the *Gebser* standard, finding that the school had been deliberately indifferent to the complaints. *See* Mark Walsh, *News In Brief: A National Roundup, Girl Wins Harassment Case*, EDUC. WEEK, Sept. 16, 1998, at 4.

424. 120 F.3d 1390 (11th Cir. 1997), *cert. granted*, 119 S. Ct. 29 (1998); *see also* Linda Greenhouse, *High Court Will Add to Sex Harassment Rulings, Taking Up Case of Offense by Student*, N.Y. TIMES, Sept. 30, 1998, at A13. Oral arguments for *Davis* were heard in January 1999. *See* Official Transcript, Davis v. Monroe County Bd. of Educ., 119 S. Ct. 29 (1998) (No. 97-843); Michael D. Simpson, *The Court Rules on Harassment*, NEA TODAY, Jan. 1999, at 25.

425. *See Davis*, 120 F.3d at 1393-94.

426. *See id.*

plaintiff to move to a seat away from the harasser.[427] Despite "condemn[ing] the harm" that the plaintiff suffered, however, the Eleventh Circuit held that Title IX does not provide a cause of action for student-to-student sexual harassment.[428] However, in a 5-4 decision, the Supreme Court reversed, holding that Title IX supports a claim for student-to-student sexual harassment when a school "responds with deliberate indifference to known acts of harassment in its programs or its activities."[429]

Since *Gebser* explicitly based its holding on the Spending Clause nature of Title IX, which operates so as to create a contract between the grant recipient and the government, the Court made it clear that it would not hold the school liable for the acts of the third party teacher, but rather for the district's *own* failure to respond adequately to allegations of harassment. Applying this rationale to the facts in *Davis*, it made no difference that the source of the harassment is a fellow student rather than a teacher.[430] Although the fact that the alleged harasser is a student means that the only viable claim for peer sexual harassment will be hostile environment rather than quid pro quo claims, this difference did not affect the liability standard imposed upon the school district. Regardless, a plaintiff will still need to establish that the offensive conduct rises to a level that is "severe and pervasive" enough to create a hostile educational environment.[431] Once passing that threshold question, *Gebser* then supplies the appropriate standard of institutional liability.

Even before the Supreme Court's decision in *Davis*, other peer sexual harassment cases that were decided following *Gebser* seemed to be following this exact trend.[432] In *Andusumilli v. Illinois Institute of Technology*,[433] for example, the District Court for the Northern District of Illinois stated that "[alt]hough the facts of Lago Vista involved teacher-student sexual harassment, the court sees no reason to distinguish, and formulate a

427. *See id.* at 1394.

428. *Id.* at 1406. The *Davis* court further added the possibility that Georgia tort law may provide redress for the harm caused to the plaintiff. *See id.*

429. Davis v. Monroe County Bd. of Educ., No. 97-843, 1999 WL 320808, at *3 (U.S. May 24, 1999).

430. "This is not to say that the identity of the harasser is irrelevant. . . . [However,] [d]eliberate indifference makes sense as a theory of direct liability under Title IX only where the funding recipient has some control over the alleged harassment." *Id.* at *10.

431. The *Davis* Court concluded that "such an action will lie only for harassment that is so severe, pervasive, and objectionably offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Id.* at *3.

432. *See* Morse v. Regents of Univ. of Colo., 154 F.3d 1124 (10th Cir. 1998); Carroll K. v. Fayette County Bd. of Educ., 19 F. Supp. 2d 618 (S.D. W. Va. 1998); Adusumilli v. Illinois Inst. of Tech., No. 97 C 8507, 1998 WL 601822 (N.D. Ill. Sept. 9, 1998); Doe v. Sabine Parish Sch. Bd., 24 F. Supp. 2d 655 (W.D. La. 1998).

433. No. 97 C 8507, 1998 WL 601822 (N.D. Ill. Sept. 9, 1998).

different rule for, student-student sexual harassment."[434] Most significantly, the Tenth Circuit has also approved the transfer of the *Gebser* standard to claims of peer sexual harassment.[435] In *Morse v. Regents of the University of Colorado*,[436] a female student claimed that she was subjected to repeated sexual harassment by fellow students in her ROTC program.[437] In her complaint, the plaintiff alleged that she reported the harassment to a university dean, and that the university failed to take appropriate action.[438] Having met the criteria set forth in *Gebser* for establishing a claim, the Tenth Circuit concluded that the pleadings were sufficient to survive the University's motion to dismiss.[439]

V. CONCLUSION

The Supreme Court's recent decision in *Gebser v. Lago Vista Independent School District* properly restricted the use of Title IX in addressing sexual harassment within educational institutions. As written, Title IX simply does not provide for a liability threshold short of actual notice to an appropriate school official. This stringent standard, however, should not be interpreted as an indication of the Court's apathy towards curtailing sexual harassment within our nation's school districts. Rather, Justice O'Connor's opinion was explicit that, while a judicial remedy may be more difficult to obtain, the U.S. Department of Education's Office for Civil Rights will continue to enforce the mandate of Title IX under its own administrative guidelines. Under OCR policy, schools are still required to adopt and publicize anti-harassment policies and grievance procedures, and failure to comply subjects schools to the possibility of losing federal funding. According to one spokesman for OCR, the *Gebser* decision has not changed the fact that schools are still "responsible for providing an environment free from sexual discrimination."[440]

Furthermore, attorneys for educational institutions are not likely to advise its school districts to relax their standards for enforcement.[441] Public policy demands that schools continue to assume an active role in pro-

434. *Adusumilli*, 1998 WL 601822, at *3.

435. *See* Morse v. Regents of Univ. of Colo., 154 F.3d 1124, 1127-28 (10th Cir. 1998).

436. 154 F.3d 1124 (10th Cir. 1998).

437. *See id.* at 1126.

438. *See id.* at 1128.

439. *See id.* at 1129.

440. Caroline Hendrie, *Shifting Legal Ground on Harassment Has Made It Harder for Victims to Win*, EDUC. WEEK, Dec. 9, 1998, at 18 (quoting Arthur L. Coleman, a deputy assistant secretary in the Office for Civil Rights).

441. *See id.* para. 17 (quoting Michael E. Wessley, a representative of the National School Boards Association).

tecting students by providing a safe, educational environment. The impact of sexual harassment can be devastating to a student's self esteem and subsequent opportunities for educational success. It is therefore crucial that schools, along with teachers and parents, work towards the elimination of the discriminatory social conduct and attitudes that facilitate such destructive behavior.

The aftermath of the *Gebser* decision is likely to have far-reaching consequences. Not only will it undoubtedly impact the Court's determination regarding Title IX's applicability to peer sexual harassment claims, but it will also inevitably filter into race-based harassment claims under Title VI. Claims of sexual harassment continue to be on the rise and future litigation will now have to dedicate itself to determining the contours of the standard established in *Gebser*. In interpreting each of the criteria articulated by the *Gebser* court, lower courts will now have to apply the actual notice standard to a wide range of factual contexts. As one commentator had stated prior to *Gebser*, "[s]hort of a thunderbolt of clarification . . . the best insurance against conflicting legal outcomes is for school districts to develop and vigorously enforce effective measures to combat harassment in schools."[442] Well, the thunderbolt has struck, and it appears as if the Supreme Court has finally established a bright-line rule for sexual harassment within schools. The question remains, however, will this really be the final word on school liability for sexual harassment?

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442. Thaler, *supra* note 363, at 68.

* *University of Connecticut, J.D. candidate, 2000.* *I would like to thank my parents and husband, Michael, for their tremendous support and encouragement. It is through their collective dedication to education that I have developed a profound respect for the value and importance of teachers.*