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School Law - School District Liability under Title IX: Actual Notice Is the Requisite Standard for Teacher-Student Sexual Harassment - Gebser v. Lago Vista Independent School District

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SCHOOL LAW—School District Liability Under Title IX: Actual Notice is the Requisite Standard for Teacher-Student Sexual Harassment. *Gebser v. Lago Vista Independent School District*, 118 S. Ct. 1989 (1998).

INTRODUCTION

During the 1990-91 school year, Alida Star Gebser was thirteen and an eighth grade student at a middle school in Lago Vista Independent School District.[1] For several weeks, Gebser participated in a book discussion group led by Frank Waldrop, a teacher at Lago Vista's high school.[2] During the book discussion sessions, Waldrop often made sexually suggestive comments to the students.[3] When Gebser entered high school, she was assigned to Waldrop's classes.[4] He continued to make inappropriate remarks to the students and directed more of his suggestive comments toward Gebser.[5] Waldrop and Gebser's relationship grew close as the two spent a substantial amount of time with each other, alone in the classroom throughout the academic year.[6]

Waldrop initiated sexual contact with Gebser in the spring of 1992.[7] Knowing she would be alone, he visited her home under the pretext of returning a book and proceeded to kiss her and fondle her breasts and genitals.[8] During the remainder of the spring semester and into the following fall semester, the two had sexual intercourse on a regular basis.[9] They often had intercourse during class time, although never on school property.[10] In January of 1993, the relationship ended when a police officer discovered Waldrop and Gebser having sex; the officer subsequently arrested Waldrop.[11]

Gebser had always concealed the relationship from school officials, but in October of 1992, the parents of two other students complained to the high

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1. Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989, 1993 (1998).
2. *Id.*
3. *Id.*
4. Doe v. Lago Vista Indep. Sch. Dist., 106 F.3d 1223, 1224 (5th Cir. 1997).
5. Gebser, 118 S. Ct. at 1993.
6. *Id.*
7. *Doe*, 106 F.3d at 1224.
8. Brief for Respondent at 3, Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989 (1998) (No. 96-1866) [hereinafter Brief for Respondent]. This incident occurred just prior to spring break of Gebser's freshman year. *Id.* Waldrop left the country immediately on a two-week long school field trip, but the relationship progressed rapidly after he returned from Europe. *Id.*
9. *Gebser*, 118 S. Ct. at 1993.
10. *Id.*
11. *Id.* Lago Vista terminated Waldrop's employment and the Texas Education Agency revoked his teaching license. *Id.*

school principal about Waldrop's inappropriate comments in class.[12] The principal organized a meeting, at which Waldrop indicated that he did not feel he had made offensive remarks but apologized to the parents and said it would not happen again.[13] The principal told the school guidance counselor about the meeting, but he did not report the parents' complaint to Lago Vista's superintendent, who was the district's Title IX[14] coordinator.[15]

Subsequent to Waldrop's arrest, Gebser and her parents sued the school district in state court seeking monetary damages under Title IX for the teacher's sexual harassment. After the case was removed to federal court, the United States District Court for the Western District of Texas granted the school district's motion for summary judgment.[16] The case was reviewed by the United States Court of Appeals for the Fifth Circuit.[17] The court of appeals affirmed and held that school districts are not liable under Title IX for teacher-student sexual harassment unless an employee with supervisory power over the offending employee actually knew of the abuse, had the power to end it, and failed to do so.[18]

The United States Supreme Court granted certiorari in order to clarify the standard to be used in determining whether a school district is liable for the sexual harassment of a student by a teacher under Title IX.[19] The Court,

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12. *Id.* Those remarks included Waldrop's observation that some of the girls had "filled out" over the summer and an obscure reference to the size of some of the boys' belt buckles. Brief for Respondent, *supra* note 8, at 4. In addition, one of the girls told her mother "that whenever Mr. Waldrop looked at her, she felt like he was looking at her up and down." Brief for Petitioner at 7, Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989 (1998) (No. 96-1866) [hereinafter Brief for Petitioner]. Another girl said that, in a Gifted and Talented class, Waldrop's conversation was strange and uncomfortable to the point of having sexual connotations as well as telling off-colored jokes. *Id.*

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

14. 20 U.S.C. § 1681(a) (1994). Title IX of the Education Amendments of 1972 provides in pertinent part that, "[n]o 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." *Id.* Lago Vista received federal funds at all pertinent times and therefore was subject to Title IX. *Gebser*, 118 S. Ct. at 1993. Title IX operates by conditioning an offer of federal funding on a promise by the recipient not to discriminate on the basis of sex against any person under any educational program or activity. 20 U.S.C. § 1681(a) (1994). Title IX amounts essentially to a contract between the government and a recipient of funds. *Id.*; *see also infra* notes 25-28 and accompanying text.

15. *Gebser*, 118 S. Ct. at 1993. Federal regulations for Title IX mandate that each school district designate a Title IX coordinator. Specifically, the regulation requires that:

> [e]ach [school district] shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities . . . including any investigation of any complaint communicated to such [school district] alleging its noncompliance . . . [and] [t]he [school district] shall notify all its students and employees of the name, office address and telephone number of the employee or employees appointed . . . .

34 C.F.R. § 106.8(a) (1998).

16. Doe v. Lago Vista Indep. Sch. Dist., 106 F.3d 1223, 1225 (5th Cir. 1997).

17. *Id.*

18. *Id.* at 1226.

19. *Gebser*, 118 S. Ct. at 1989; *see* Sulloway & Hollis, P.L.L.C., *U.S. Supreme Court Limits School*

in a five to four decision, established a three-part test which must be met before a student can recover against a school district.[20] First, a school district official with authority to correct the misconduct must have had notice of the sexual harassment.[21] Second, an official must have had actual notice of the particular misconduct.[22] Finally, the Court held that in order for a district to be held liable, a district must act with deliberate indifference to a teacher's misconduct.[23]

This case note focuses on whether the Supreme Court properly interpreted Congress' intended scope of available remedies under Title IX. The note then reviews the development and current status of Title IX as it pertains to school district liability, including an examination of the most recent court decisions and the practical implications for school districts. Finally, this note concludes that the Court properly ascertained the legislative intent of Title IX and issued a decision which afforded an equitable result for students and school districts.

BACKGROUND

Title IX has been expanded both in scope and in potential liability during the last twenty-five years.[24] Title IX of the Educational Amendments of 1972 provides in pertinent part that "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."[25] Thus, Title IX applies to virtually every school district in the United States.[26] Most courts agree that lawsuits under Title IX can only be brought against public entities.[27] Therefore, in a Title

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District Liability Under Title IX, 3 No. 7 NEW HAMPSHIRE EMPL. L. LETTER 2, at 2 (Sept. 1998).

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

21. *Id.* An official of the school district is defined as an official of the recipient entity with the authority to institute corrective action to end the alleged discrimination. 20 U.S.C. § 1682 (1994); *see infra* notes 107-08 and accompanying text. The Court did not identify the persons who must have knowledge by reference to any particular job title, but by reference to their ability to act for the district to prevent or remedy the threat of sexual harassment. *Gebser*, 118 S. Ct. at 1999. Where a school district's liability rests on actual notice principles, the knowledge of the wrongdoer himself is not sufficient. *Id.* at 2000.

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

23. *Id.*; *see infra* notes 109-11 and accompanying text.

24. Trudy Saunders Bredthauer, *Twenty-Five Years Under Title IX: Have We Made Progress?*, 31 CREIGHTON L. REV. 1107, 1108 (1998).

25. 20 U.S.C. § 1681(a) (1994); *see also supra* note 14. The "education program or activity" under Title IX includes all of the academic, educational, extra-curricular, athletic, and other programs of a school, whether they take place in the facilities of a school or another location. Department of Education, Office of Civil Rights, *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12,034 (1997) [hereinafter OCR Guidance].

26. Richard Fossey et al., *Title IX Liability For School Districts When Employees Sexually Assault Children: A Law and Policy Analysis*, 124 WEST'S EDUC. L. REP. 485, 486 (1998).

27. *Id*; *see also* Lipsett v. University of Puerto Rico, 864 F.2d 881, 901 (1st Cir. 1998); Bougher v.

IX claim the educational facility is the only defendant.[28]

Congress enacted Title IX in response to recognition of widespread discrimination against women with respect to educational opportunities.[29] Title IX was designed to prohibit sex discrimination in education by eliminating the use of federal resources to support discriminatory practices and to provide individual citizens effective protection against those practices.[30] Students and parents gradually came to conclude that Title IX should afford broad protections for students against sexual harassment and, accordingly, they began to utilize the courts to enforce those protections.[31] Like other civil rights statutes, however, Title IX does not provide guidelines on how a private individual may bring a suit for a violation of the statute.[32]

United States Supreme Court Decisions

Prior to *Gebser*, the Court had not specifically defined the contours of damages against a school district held liable for teacher-student sexual harassment under Title IX.[33] Twenty years before *Gebser*, the Court, in *Cannon v. University of Chicago,* considered whether Congress intended to make a remedy available to those protected under Title IX.[34] The Court concluded in *Cannon* that the text and history, as well as the underlying purposes of Title IX, counseled implication of a private cause of action for victims of discrimination.[35]

According to *Cannon*, the Court has long recognized that the failure of Congress to specify a cause of action is not inconsistent with intent on its part to make such a remedy available to the persons benefited by its legislation.[36] The Court based its conclusion primarily on a careful analysis of the

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University of Pittsburgh, 882 F.2d 74, 77 n.3 (3rd Cir. 1989); Smith v. Metropolitan Sch. Dist. Perry Township, 128 F.3d 1014, 1019 (7th Cir. 1997). *But see* Mennone v. Gordon, 889 F. Supp. 53, 56 (D. Conn. 1995) (holding that an individual can be sued, but only if the individual exercised a sufficient level of control over the program or activity), Mann v. University of Cincinnati, 864 F. Supp. 44, 47 (S.D. Ohio 1994) (concluding that a Title IX claim could be brought against both an educational institution and one of its officials).

28. Fossey et al., *supra* note 26, at 486.

29. Sulloway & Hollis, *supra* note 19, at 1.

30. Cannon v. University of Chicago, 441 U.S. 677, 703 (1979). Title IX is enforced by the Office of Civil Rights ("OCR"), a division of the federal Department of Education. Bredthauer, *supra* note 24, at 1108.

31. Michael Meliti, Note, *Civil Rights—Title IX of the Education Amendments of 1972*, 9 SETON HALL CONST. L. J. 213, 214 (1998).

32. *Id.* at 223; *see, e.g., infra* note 95.

33. Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989, 1995 (1998).

34. *Cannon*, 441 U.S. at 688. In *Cannon*, a female denied admission to medical schools at two private universities charged the schools with discrimination against her on the basis of her sex. *Id.*

35. *Id.* at 688-89.

36. *Id.* at 716.

four factors set forth in *Cort v. Ash*.[37] The first factor asks whether the statute was enacted for the benefit of a special class of which the plaintiff is a member.[38] The second factor asks whether there is any indication of legislative intent to create a private remedy.[39] The third factor asks whether implication of such a remedy is consistent with the underlying purposes of the legislative scheme.[40] The final factor asks whether implying a federal remedy is inappropriate because the subject matter involves an area basically of concern to the states.[41] The *Cannon* Court examined the four factors and determined that Congress, even without including an express provision, intended to make a remedy available to a special class of litigants under Title IX.[42]

Once the Court held that Title IX was enforceable through an implied private right of action, it considered available remedies.[43] In 1992, the Supreme Court clearly stated that plaintiffs could obtain monetary awards from school districts that intentionally violated Title IX.[44] The seminal case is *Franklin v. Gwinnett County Public Schools*, in which a female student sued a school district under Title IX based on her accusation that her teacher had sexually harassed her.[45] The student claimed the teacher had:

> Engaged her in sexually-oriented conversations . . . forcibly kissed her on the mouth in the school parking lot . . . telephoned her at home and asked if she would meet him socially . . . and . . . on three occasions . . . interrupted a class, requested that the teacher excuse [her] and took her to a private office where he subjected her to coercive intercourse.[46]

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37. *Id.* at 688-89 (citing Cort v. Ash, 422 U.S. 66 (1975)).

38. Cort v. Ash, 422 U.S. 66, 78 (1975). The Court in *Cannon* decided that Title IX satisfies the first factor because it explicitly confers a benefit to persons discriminated against on the basis of sex. *Cannon*, 441 U.S. at 689.

39. *Cort*, 422 U.S. at 78. The Court in *Cannon* held the legislative intent of Title IX satisfied the second factor and indicated that Congress intended to create a private cause of action. *Cannon*, 441 U.S. at 694. Additionally, the Court held that Title IX was patterned after Title VI and the draftors of Title IX explicitly assumed that it would be interpreted and enforced in the same manner as Title VI, which had already been construed as creating a private remedy. *Cannon*, 441 U.S. at 694-96.

40. *Cort*, 422 U.S. at 78. The Court in *Cannon* found the third factor to have been complied with since implication of a private remedy would not frustrate, but would rather assist, the statutory purpose of providing individual citizens effective protection against discriminatory practices. *Cannon*, 441 U.S. at 703-08.

41. *Cort*, 422 U.S. at 78. The final factor was also met, according to the Court in *Cannon*, because implying a federal remedy was appropriate and this was not an area of concern left basically to the states—the federal government and courts had been powerful forces in protecting citizens against discrimination of any sort. *Cannon*, 441 U.S. at 708-09.

42. *Cannon*, 441 U.S. at 709.

43. Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 64 (1992).

44. *Id.*

45. *Id.* at 63.

46. *Id.*

While the *Franklin* Court permitted plaintiffs to recover monetary damages, the Court did not announce a legal standard for holding educational institutions liable under Title IX.[47]

The *Franklin* Court adhered to the longstanding traditional presumption, articulated in *Bell v. Hood,* 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.[48] The traditional presumption originated in the English common law, and Blackstone described it as "a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded."[49]

Standards of Liability in the Federal Courts

The circuit courts have reached various conclusions regarding the circumstances in which the educational institution, as the recipient of federal funds, would be liable for discriminatory conduct by its employees.[50] Courts have applied three different standards of liability which vary in strictness, knowledge, and evidentiary requirements.[51] Some courts have utilized a respondeat superior liability standard, holding school districts liable without fault every time a school employee molests a child. Other courts have applied Title VII's "knew or should have known about the abuse and failed to take action" standard. Still other courts have used an intentional discrimination standard, in which a school district would only be liable if school authorities had actual knowledge of the sexual molestation and did nothing to stop it.

1. Respondeat Superior

Under the standard of respondeat superior, courts hold a school district liable where a teacher is aided in carrying out the sexual harassment of a student by virtue of his or her position of authority within the institution.[52] A

47. *Id.* at 76.; *see also* Raymond Gregory, *Rowinsky, Leija, and Rosa H.: The Fifth Circuit Does the Texas Three Step and Limits a Student's Right to Recover for Sexual Harassment,* 121 WEST'S EDUC. L. REP. 881 (1997).

48. *Franklin*, 503 U.S. at 66 (citing Bell v. Hood, 327 U.S. 678, 684 (1946)).

49. 3 WILLIAM BLACKSTONE, COMMENTARIES 23 (1783).

50. Sulloway & Hollis, *supra* note 19, at 1. *Compare, e.g.*, Doe v. Claiborne County, Tennessee, 103 F.3d 495, 514 (6th Cir. 1996) (applying agency principles to determine Title IX sexual harassment liability), *and* Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463, 469 (8th Cir. 1996) (same), *with* Smith v. Metropolitan Sch. Dist. Perry Township, 128 F.3d 1014, 1034 (7th Cir. 1997) (adopting an actual notice standard of liability for Title IX sexual harassment claims), *and* Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648, 650 (5th Cir. 1997) (same).

51. Henry Seiji Newman, Note, *The University's Liability for Professor-Student Sexual Harassment Under Title IX,* 66 FORDHAM L. REV. 2559, 2598 (1998).

52. *See generally* RESTATEMENT (SECOND) OF AGENCY §219(2)(d) (1958).

school district must answer in damages regardless of whether school district officials had any knowledge of the harassment and regardless of their response upon becoming aware of the harassment,[53] resulting in essentially a strict liability standard.

Franklin v. Gwinnett County Public Schools has been relied upon as authority for utilizing the respondeat superior theory of liability. In *Doe v. Petaluma City School District*, the federal district court noted that it appeared the Supreme Court, after *Franklin*, would impose liability on a school district under agency principles for the intentional discrimination by its agent, a school teacher, not for the school district's failure to stop the harassment.[54] One commentator suggested that it seemed apparent that the *Franklin* Court simply imputed to the school district the teacher's acts of intentional discrimination.[55] Moreover, in *Hastings v. Hancock* a federal court held that an educational institution could be vicariously liable for a supervisor's sexual harassment of students, even without the educational institution's knowledge of the harassment.[56]

2. Constructive Notice

The second theory of liability is Title VII's "knew or should have known about the abuse and failed to take action" standard, commonly referred to as the constructive notice theory.[57] The Department of Education's Office of Civil Rights (OCR) states that a school "should have known" of the sexual harassment if a "reasonably diligent inquiry" would have revealed it.[58] An example of this would be if the pervasiveness of the harassment were such that it should have prompted the school to act.[59] In utilizing the constructive notice standard, courts have reasoned that it imposes an obligation for school districts to investigate potential acts of discrimination, but does not hold school districts strictly or vicariously liable for conduct the district could not have reasonably discovered.[60]

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53. Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989, 1995 (1998).

54. Doe v. Petaluma City Sch. Dist., 830 F. Supp. 1560, 1575 (N.D. Cal. 1993).

55. Jay Heubert, *Sexual Harassment and Racial Harassment of Public School Students: Federal Protections and What State Law May Add to Them.* Paper delivered at the American Educational Research Association's annual meeting, New Orleans (May 7, 1994) (on file with *Land and Water Law Review*).

56. Hastings v. Hancock, 842 F. Supp. 1315 (D. Kan. 1993).

57. Title VII makes it unlawful "for an employer . . . to discriminate against any individual with respect to his . . . conditions of employment, because of such individual's . . . sex . . . ." 42 U.S.C. § 2000e-2(a)(1) (1994).

58. OCR Guidance, *supra* note 25, at 12,042.

59. *Id.*

60. *See* Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648, 655-56 (5th Cir. 1997) (rejecting a constructive notice standard, although the court acknowledged that this standard would not be based on agency principles).

The Eighth Circuit is an example of a circuit court which has applied Title VII's agency principles to situations of teacher-student sexual harassment.[61] The court in *Kinman* v. *Omaha Public School District* noted that a number of courts that have addressed the appropriate standard for school district liability under Title IX have looked to Title VII for guidance.[62] In *Kinman,* a teacher initiated a same-sex relationship with a student.[63] The court relied on *Franklin,* which it interpreted as using Title VII principles, as authority in holding that Title IX authorizes an award of compensatory damages.[64]

The Sixth Circuit also held that Title VII's agency principles were applicable to sexual harassment claims under Title IX.[65] In *Doe v. Claiborne County, Tennessee,* the court noted that Title VII sexual harassment cases and principles have been well litigated, while Title IX cases have a short historical background.[66] Thus, courts have resorted to Title VII standards to resolve sexual harassment claims brought under Title IX.[67]

3. Actual Notice

The third theory of liability is the actual notice standard. Several federal courts have attempted to limit the situations where a plaintiff can recover under Title IX by adopting this standard. For example, the Fifth Circuit refused to apply agency principles in teacher-student sexual harassment cases in *Canutillo Independent School District v. Leija.*[68] While the court held that a school district cannot be liable for its employee's sexual misconduct under Title IX unless it had notice that abuse occurred, the court stopped short of articulating the sufficiency of that notice.[69]

In *Canutillo,* a health teacher showed movies to his students in a darkened classroom while sexually molesting Leija, a second grade student.[70] Leija told her home room teacher, but the teacher did not advise the superintendent or principal.[71] Initially, the trial court found that a teacher's sexual abuse must be fully and strictly imputed to the district, regardless of

61. Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463, 469 (8th Cir. 1996).
62. *Id*; *see, e.g.*, Murray v. New York Univ. College of Dentistry, 57 F.3d 243 (2d Cir. 1995); Bosley v. Kearney R-1 Sch. Dist., 904 F. Supp 1006, 1022 (W.D. Mo. 1995).
63. *Kinman*, 94 F.3d at 465.
64. *Id.* at 469.
65. Doe v. Claiborne County, Tennessee, 103 F.3d 495, 514 (6th Cir. 1996).
66. *Id.*
67. *Id.*
68. Canutillo Indep. Sch. Dist. v. Leija, 101 F.3d 393 (5th Cir. 1996).
69. Fossey et al., *supra* note 26, at 492.
70. *Canutillo*, 101 F.3d at 393.
71. *Id.*

authorization or knowledge.[72] The judge commented that holding school districts strictly liable for their employees' sexual misconduct would encourage school employees at every level to be vigilant.[73]

The Fifth Circuit reversed the trial court's decision.[74] The court stated that it would be difficult to conclude that Title IX, which contains no hint of strict liability, created such an enforceable obligation.[75] The Fifth Circuit also rejected the trial court's strict liability ruling on public policy grounds. The court stated that a strict liability standard would lead to financial ruin and reasoned that "strict liability converts the school district from being the educator of children into their insurer as well."[76]

In his dissent, Circuit Judge Dennis found error in placing limits on damages recoverable under Title IX.[77] The dissent argued that according to the *Franklin* decision, all appropriate remedies are presumed available unless Congress has expressly indicated otherwise.[78] The dissent argued that the majority failed to offer any compelling legal reason for its failure to follow and recognize the other circuits which have applied the standards developed under Title VII in the adjudication and review of a student's claim of sexual discrimination by a school employee under Title IX.[79]

The Fifth Circuit most recently addressed this issue in *Rosa H. v. San Elizario Independent School District.*[80] In *Rosa H.*, a high school student alleged sexual abuse by the teacher of an after-school karate class when the teacher initiated a sexual relationship with the student.[81] The facts were questionable as to whether school officials knew about the sexual relations.[82] The court held that a student who has been sexually abused by a teacher cannot recover under Title IX unless an employee with supervisory power over the offending employee actually knew of the abuse, had the power to

72. Leija v. Canutillo Indep. Sch. Dist., 887 F. Supp. 947, 953 (W.D. Tex. 1995), *rev'd*, 101 F.3d 393 (5th Cir. 1996).

73. *Id.*

74. *Canutillo*, 101 F.3d at 393.

75. *Id.* at 399.

76. *Id.* at 400.

77. *Id.* at 413.

78. *Id.; see supra* note 48 and accompanying text.

79. *Canutillo*, 101 F.3d at 410; *see* Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463 (8th Cir. 1996); Seamons v. Snow, 84 F.3d 1226 (10th Cir. 1996); Murray v. New York Univ. College of Dentistry, 57 F.3d 243 (2d Cir. 1995).

80. Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648 (5th Cir. 1997).

81. *Id.*

82. *Id.* at 651. Deborah H., the student, testified that she visited the high school counselor, and confided that she had been having sex with Conteras, the school's karate teacher. *Id.* The high school counselor admitted before the jury that he had counseled Deborah roughly once a week, but denied that Deborah told him anything confidentially about her relations with Conteras. *Id.*

end the abuse, and failed to do so.[83]

PRINCIPLE CASE

In *Gebser*, a high school teacher initiated a one-year sexual relationship with a ninth grade student after they met during a book discussion group.[84] No one at the school knew of the relationship until a police officer caught the teacher and student engaged in sexual intercourse.[85] Although Gebser never reported the relationship to school officials, parents of two other students had previously complained to the school principal about inappropriate remarks Waldrop had made in class.[86] The principal instructed Waldrop to apologize to the parents and warned him to be careful.[87] The complaints were never reported to Lago Vista's superintendent, who was the school district's Title IX coordinator.[88]

Justice O'Connor, writing for the Court in *Gebser*,[89] acknowledged that the Court had never defined the contours of liability for a school district in cases involving a teacher's sexual harassment of a student.[90] The Court, citing *Cannon v. University of Chicago*, judicially implied a private right of action under Title IX and stated its objective was to infer how Congress would have addressed the issue of a remedy had it been included as an express provision in the statute.[91] According to the Court, the essential task of judicial review is to carry out the intent of Congress or at least to avoid frustrating the statute's purposes.[92]

The Supreme Court rejected the principles of constructive notice and agency law as a basis for liability. Instead, the Court discerned Congress' intent from the history and language of Title IX and held that a person who has the authority to take corrective measures must receive actual notice of the misconduct before a school district can be liable for a teacher's sexual discrimination of a student. [93]

As support for the Court's holding, the majority sought to compare Ti-

83. *Id.* at 648.
84. Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989, 1993 (1998).
85. *Id.*
86. *Id.*; *see supra* note 12 and accompanying text.
87. *Gebser*, 118 S. Ct. at 1993.
88. *Id.*; *see supra* note 15 and accompanying text.
89. Justice O'Connor was joined by Chief Justice Rehnquist, Justices Scalia, Kennedy and Thomas. *Gebser*, 118 S. Ct. at 1992.
90. *Id.* at 1995.
91. *Id.* at 1997; *see supra* note 36 and accompanying text.
92. *Gebser*, 118 S. Ct. at 1996.
93. Steptoe & Johnson, *Courts Offer Assistance to County Boards of Education*, 4 No. 2 WEST VIRGINIA EMPL. L. LETTER, at 1 (Aug. 1998).

tle IX with other civil rights statutes.[94] Justice O'Connor reviewed Title VI and Title IX in a similar light, stressing that both statutes expressly conditioned federal funding upon an agreement not to discriminate.[95] Thus, Justice O'Connor concluded that this condition made the statutes contractual in nature, compelling a different interpretation than Title VII.[96] The majority contrasted Title IX with Title VII, which is not framed in terms of a condition but of an outright prohibition.[97]

The Court asserted that Title IX's contractual nature has implications for the Court's construction of available remedies.[98] The Court explained that when Congress attaches conditions to federal funding under its spending power, courts must examine closely the propriety of private actions holding the recipient liable for noncompliance.[99] Justice O'Connor stated that the Court's central concern is to ensure that an entity which receives federal funds has notice of the conditions in which it will be held liable for a monetary award.[100] O'Connor further reasoned that if a school district's liability were to rest on principles of constructive notice or respondeat superior, a recipient of the funds would be held responsible for the acts of employees, despite a lack of awareness that the program was being administered in violation of the condition.[101] The Court held that when a school district accepted federal funds, it agreed not to discriminate on the basis of sex.[102] The Court found it unlikely that a school district further agreed to suffer liability whenever its employees discriminate on the basis of sex.[103]

The Court further supported its position by relying on Title IX's express means of enforcement, which requires notice to the recipient and an opportunity to come into voluntary compliance before funding is suspended

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

95. *Id.* For the language of Title IX, see *supra* note 14. Similarly, 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).

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

97. *Id.* Title VII, unlike either Title VI or Title IX, states in pertinent part:

> It shall be 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).

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

99. *Id.* at 1998. Title IX was enacted pursuant to Congress' Spending Clause power. *See generally* U.S. CONST. art. 1, §8, cl. 1. Under the Spending Clause a recipient of federal funds must be given clear notice of the consequences of accepting those funds, including clear notice of the circumstances in which it may be exposed to monetary liability. Bredthauer, *supra* note 24, at 1122.

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

101. *Id.*

102. *Id.*

103. *Id.*

or terminated.[104] The Court refused to establish a lower standard for the damage remedy, which would permit substantial liability without regard to the recipient's knowledge that a violation has occurred or its corrective actions upon receiving knowledge.[105] The Court explained that "where a statute's express enforcement scheme hinges its most severe sanction on notice and unsuccessful efforts to obtain compliance, we cannot attribute to Congress the intention to have implied a judicial enforcement scheme that allows imposition of greater liability without comparable conditions."[106]

The Court subsequently reasoned that since the express means of enforcement for Title IX requires notice to an appropriate person, the remedy should require the same.[107] According to the Court, the appropriate person is, at a minimum, an official of the recipient entity with the authority to take corrective action to end the discrimination.[108] Next, the Court held that a school district's response must amount to deliberate indifference to discrimination.[109] The Court defined deliberate indifference as an official decision by the recipient to not remedy the violation.[110] The Court reasoned that, under a lower standard, there would be a risk that the recipient would be liable in damages for its employees' independent actions, not for its own official decision.[111]

The Court applied its new standard to the facts in *Gebser*. Justice O'Connor found the application to be straightforward, stating that the complaints of inappropriate comments were plainly insufficient to alert the principal to the possibility that Waldrop was involved in a sexual relationship with a student.[112] Justice O'Connor also noted that Lago Vista terminated Waldrop's employment upon learning of his relationship with Gebser and, therefore, was not deliberately indifferent.[113]

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104. 20 U.S.C. § 1682 (1994). The statute entitles administrative agencies that disburse educational funding to enforce their rules implementing the non-discrimination mandate through proceedings to suspend or terminate funding or through "other means authorized by law." *Id.* A central purpose of requiring notice of the violation to the funding recipient and an opportunity for voluntary compliance before administrative proceedings can commence is to avoid diverting educational funding from beneficial uses where the recipient was unaware of the discrimination and willing to institute prompt corrective measures. *Gebser*, 118 S. Ct. at 1999.

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

106. *Id.*

107. *Id.*

108. *Id.*; *see* 20 U.S.C. § 1682 (1994).

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

110. *Id.*

111. *Id.*

112. *Id.* at 2000. The only official alleged to have had information about Waldrop's misconduct was the high school principal. That information, however, consisted of a complaint from parents of other students charging only that Waldrop had made inappropriate comments during class. *Id.*

113. *Id.*

In his dissent,[114] Justice Stevens challenged the majority's holding as being at odds with settled principles of agency law, under which the district would be responsible for Waldrop's misconduct because "he was aided in accomplishing the tort by the existence of the agency relation."[115] Stevens asserted that "this case is an example of a tort that was made possible, that was effected, and that was repeated over a prolonged period because of the powerful influence that Waldrop had over Gebser by reason of the authority that the school district had delegated to him."[116]

Additionally, Justice Stevens argued that the language, "[n]o person . . . shall . . . be subjected to discrimination," focused upon the victim of discrimination and not the wrongdoer, and therefore, Title IX provided broader coverage than the language in Title VII.[117] Moreover, Justice Stevens noted that because Lago Vista had assumed its Title IX duty as part of its consideration for the receipt of federal funds, that duty constituted an affirmative undertaking that is more significant than a mere promise to obey the law.[118]

Justice Stevens further found it significant that the Department of Education, through its Office for Civil Rights, had recently issued a policy guidance stating that a school district is liable under Title IX if one of its teachers "was aided in carrying out the sexual harassment of students by his or her position of authority within the institution."[119] According to Stevens, the Department's interpretation supported the conclusion that the school district should have been held liable in damages for Waldrop's sexual abuse of his student, made possible only by Waldrop's affirmative misuse of his authority as a teacher.[120]

Stevens pointed out that the rule the Court crafted created an incentive for school boards to insulate themselves from knowledge and claim immunity from damage liability.[121] Stevens continued to state that the rule the Court adopted would preclude a damage remedy even if every teacher at the school knew about the harassment but did not have the "authority to insti-

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114. Justice Stevens was joined in his dissenting opinion by Justices Souter, Ginsburg, and Breyer. *Id.*

115. *Id.* at 2003 (Stevens, J., dissenting); *see* RESTATEMENT (SECOND) OF AGENCY, § 219(2)(d) (1957).

116. *Gebser*, 118 S. Ct. at 2004 (Stevens, J., dissenting).

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

118. *Id.*

119. OCR Guidance, *supra* note 25, at 12,039; *see also supra* note 30.

120. *Gebser*, 118 S. Ct. at 2004 (Stevens, J., dissenting). Lago Vista argued, however, that the Guidance was issued four years after the events at issue and cannot be given retroactive effect. Brief for Respondent, *supra* note 8, at 32-33. Retroactive effect would constitute surprising school districts with postacceptance conditions that would not be faithful to the Spending Clause legislation, which requires unambiguous notice of consequences at the time funds are accepted. *Id.*

121. *Gebser*, 118 S. Ct. at 2004 (Stevens, J., dissenting). As long as school districts can insulate themselves from knowledge about this sort of conduct, they can claim immunity from damage liability. *Id.*

tute corrective measures on the district's behalf."[122] Stevens concluded by stating:

> As a matter of policy, the Court ranks protection of the school district's purse above the protection of immature high school students. Because those students are members of the class for whose special benefit Congress enacted Title IX, that policy choice is not faithful to the intent of the policymaking branch of our Government.[123]

ANALYSIS

The Court, through its interpretation of the scope of remedies under Title IX, gives school districts faced with the sexual misconduct of their teachers long overdue guidance on how to comply with and avoid violating Title IX. The number of sexual harassment cases originating in schools reveals that sexual harassment is not an uncommon occurrence in our educational system.[124] It is indisputable that a student suffers considerably when sexually harassed or abused by a teacher, and that the teacher's misconduct undermines the basic purpose of formal education.[125] However, *Gebser* is a welcome development for school districts and other educational institutions that receive federal funding.[126] Educational institutions no longer face the threat of liability if an employee engages in discriminatory conduct without the employer's knowledge.[127]

Gebser significantly reduces school boards' exposure for teacher-student sexual harassment under federal law.[128] However, the decision 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.[129] In fact, state laws may provide for a stricter standard than that announced in *Gebser*.[130] In addition, the Department of Education has clearly stated that school districts' obligations to take reasonable steps to prevent and eliminate sexual harassment are unchanged by the *Gebser* decision.[131]

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122. *Id.*
123. *Id.* at 2006 (Stevens, J., dissenting).
124. *Gebser*, 118 S. Ct. at 2000. During the fiscal year of 1997, the Department of Education's Office of Civil Rights received 209 new complaints alleging sexual harassment in schools. Department of Education, Office of Civil Rights, Annual Report to Congress, Fiscal Year 1997. However, this only reflects the incidents of sexual harassment that were actually reported to the Office of Civil Rights. *Id.*
125. *Gebser*, 118 S. Ct. at 2000.
126. Sulloway & Hollis, *supra* note 19, at 2.
127. *Id.*
128. *Gebser*, 118 S. Ct. at 2000.
129. *Id.*
130. John Borkowski & Alexander Dreier, *The 1997-98 Term of the United States Supreme Court and its Impact on Public Schools*, 129 WEST'S EDUC. L. REP. 887, 891 (1998).
131. *Id.*

The decision in *Gebser* only determines that the independent misconduct of a teacher is not attributable to the school district that employs him, under Title IX, unless the district has actual notice and is deliberately indifferent.[132] This appears to be the correct determination.

According to the legislative history of Title IX, Congress intended the statute to be interpreted in the same manner as Title VI.[133] Title IX and Title VI were enacted pursuant to the Spending Clause of the United States Constitution.[134] Both statutes allow entities to enter into a contract with the government to receive federal funding upon accepting specific conditions.[135] The nature of such a contractual obligation requires actual notice of the circumstances in which a recipient may violate the agreement.

In *Guardians Ass'n v. Civil Service Commission of New York City*, the Court concluded that the relief in an action under Title VI alleging unintentional discrimination should be prospective only, because where discrimination is unintentional, "it is surely not obvious that the grantee was aware that it was administering the program in violation of the [condition]."[136] Applying a parallel analysis to Title IX, it would be logical to assume Congress did not intend for recipients to be liable for the unintentional discrimination by a school district.[137] If a school district is held liable without actual notice, then the district is being held liable without regard to whether it knew anything about the violation, in contravention to the contractual conditions expressed in Title IX.

In contrast to Title IX, Title VII was enacted pursuant to the Commerce Clause, which permits monetary recovery for mere negligence.[138] Title VII's "knew or should have known" constructive notice standard is essentially a negligence standard and thus may not be imported to cases

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

133. Brief for Respondent, *supra* note 8, at 10. The Court recognized that Congress modeled Title IX after Title VI, not Title VII. *See* Grove City College v. Bell, 465 U.S. 555, 566 (1984); North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 514 (1982); Cannon v. University of Chicago, 441 U.S. 677, 694 (1979). The Court found the parallel between Title IX and Title VI significant because it can be distinguished from Title VII, which applies to all employers without regard to federal funding and focuses on compensating victims of discrimination rather than protecting individuals from discrimination by a recipient of federal funds. *Gebser*, 118 S. Ct. at 1997. *See also supra* note 39.

134. Bredthauer, *supra* note 24, at 1122; *see* Davis v. Monroe County Bd. of Educ., 120 F.3d 1390, 1397 (11th Cir. 1197) (holding that Title IX, like Title VI, was enacted under Congress' power to spend for the general welfare of the United States); *see also supra* note 99.

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

136. 463 U.S. 582, 597 (1983). A Title VI plaintiff must prove discriminatory intent to receive compensatory damages. *Id.* at 607 n.27.

137. Brief for Respondent, *supra* note 8, at 24-25. As a result, Title IX must be interpreted and enforced in the same manner as Title VI. *Id.*

138. Smith v. Metropolitan Sch. Dist. Perry Township, 128 F.3d 1014, 1028 (7th Cir. 1997).

arising under Title IX.[139] The Seventh Circuit discussed the distinction in *Smith v. Metropolitan School District Perry Township*:

> While a school district or school board that [actually] "knew" and failed to respond to sex discrimination would act with the intent required to suffer a monetary judgment under the Spending Clause, the "should have known" prong of Title VII's standard is a standard based on negligence, not intent. Negligence cannot support a monetary award for a claim brought under Spending Clause legislation, thus a "should have known" standard cannot create institutional liability under Title IX.[140]

Several courts have looked to the Supreme Court's decision in *Franklin* as authority for the proposition that Title VII's standard of constructive notice should be applied in Title IX cases.[141] The Court in *Franklin* utilized its analysis of Title VII in *Meritor Savings Bank, FSB v. Vinson* to define discrimination in a Title IX case.[142] In *Meritor,* the Court announced that "[w]hen a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminates' on the basis of sex."[143] The Court in *Franklin* explained that "the same rule should apply when a teacher sexually harasses and abuses a student.[144] "Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe."[145] The Supreme Court's decision in *Franklin,* however, was limited by its facts in that it dealt with intentional discrimination.[146] The Franklin school administration had actual knowledge of the abuse and intentionally ignored the problem.[147] As the Fifth Circuit stated in *Rosa H.*:

> *Franklin's* single citation to *Meritor Savings* to support the Court's conclusion that sexual harassment is sex discrimination does not by itself justify the importation of other aspects of Title VII law into the Title IX context. We can find nothing in *Franklin* to support the

139. *Id.* at 1028-29.
140. *Id.* at 1029.
141. *Id.* at 1120-21; *see* Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463, 469 (8th Cir. 1996) (holding that "Title VII standards of institutional liability [apply] to hostile environment sexual harassment cases" under Title IX); Bolon v. Rolla Pub. Sch., 917 F. Supp. 1423, 1428 (E.D. Mo. 1996) (adopting Title VII's "knew or should have known standard" when a student brings a Title IX claim against a teacher); Murray v. New York Univ. College of Dentistry, 57 F.3d 243, 250 (2d Cir. 1995) (holding that the "complaint failed to allege that [the school's] agents knew or should have known of the continued harassment in the present case.").
142. Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 75 (1992).
143. Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986).
144. *Franklin*, 503 U.S. at 75.
145. *Id.*
146. *Id.* at 73.
147. *Id.*

> . . . theory that Title IX can make school districts liable for monetary damages when the district itself engages in no intentional discrimination.[148]

The fact that the Court utilized *Meritor* to define discrimination in a Title IX case does not mean that principles of notice under Title VII should be used in all Title IX cases.[149]

In refusing to adopt agency theories of liability under Title VII, circuit courts have also found support in the language of Title IX.[150] Title VII governs employers, who are defined in the text of the statute as including "any agent of such a person."[151] In contrast, Title IX definitions do not contain similar language broadening liability to violations committed by school teachers.[152] As the court in *Rosa H.* stated: "While Title VII makes explicit reference to the agents of employers, Title IX does not instruct courts to impose liability based on anything other than the acts of the recipients of federal funds."[153]

Congress has also demonstrated its intent by expressly requiring actual notice of discriminating conduct to the recipient in Title IX's enforcement provisions.[154] The administrative regulations prohibit the funding agency from initiating enforcement proceedings until the agency provides actual notice of the violation and an opportunity for the recipient to voluntarily comply.[155] The conclusion that the notice requirement should be something less in a suit for damages frustrates the intent expressed by Congress in the enforcement provision of Title IX. Therefore, actual notice should be the applicable standard for both enforcement proceedings and judicial liability.

Public policy also supports the notion that courts should impose liability upon a finding of actual notice and not upon principles of agency law. It is practically impossible for a school district to thoroughly investigate and discover potential employee flaws which may lead to a violation of Title IX.[156] School districts are limited by state and federal laws in the extent to which they can examine, inquire about, or investigate their employees' backgrounds or characteristics.[157] Hence, school districts could be held liable

148. Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648, 656 (5th Cir. 1997).
149. Bredthauer, *supra* note 24, at 1121.
150. Smith v. Metropolitan Sch. Dist. Perry Township, 128 F.3d 1014, 1029 (7th Cir. 1997).
151. *Id.* at 1023 (quoting 42 U.S.C. § 2000c(B) (1994)).
152. 20 U.S.C. § 1681(c) (1994).
153. *Rosa H.*, 106 F.3d at 654.
154. Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989, 1998 (1998); *see supra* notes 104-06 and accompanying text.
155. 34 C.F.R. § 100.8(d) (1998).
156. Canutillo Indep. Sch. Dist. v. Leija, 101 F.3d 393, 399 (5th Cir. 1996).
157. *Id.* Wyoming allows school districts to obtain fingerprints of any employee who may have access

for incidents that were not in a district's power to stop.[158] As the Seventh Circuit noted, liability without knowledge "would create liability for the school even if it acted without notice of the alleged harassment; even if it had no reason to know of the harassment; and even if it acted entirely reasonably."[159]

Furthermore, the financial implications of the rejected standards could cripple a district, making it difficult to provide quality education for its students.[160] The trial court judge in *Canutillo* wrote: "Just as child abuse should not occur, school districts should not be subjected to potential insolvency when it does occur."[161] Concerns about exposing school districts to large damage awards seem justified, particularly in light of the fact that school districts are finding it increasingly difficult to obtain insurance against such awards.[162] Some insurance policies explicitly exclude sexual abuse from insurable risks, and several courts have ruled that sexual abuse by a school employee is outside the scope of insurance coverage.[163]

Prospective recipients may decline federal funding and current recipients may withdraw from federal programs if the risk of legislative conditions exceeds the amount of assistance.[164] School authorities must balance the benefit of a small amount of funding against the threat of substantial liability and the cost of litigation.[165] Additionally, if school districts were to be held liable regardless of knowledge or fault, they would be required to protect themselves by ordering teachers to keep their distance from students, contrary to the necessary contact between teachers and students that is so essential to the educational experience.[166] Actual notice is the standard that provides the most equitable solution.

The bottom line of the Court's decision in *Gebser* is that employers in

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to minors. WYO. STAT. ANN. § 21-7-401 (Michie 1997). Such information will provide state or national criminal history. *Id.*

158. Leija v. Canutillo Indep. Sch. Dist., 887 F. Supp. 947, 955 (W.D. Tex. 1995), *rev'd*, 101 F.3d 393 (5th Cir. 1996).

159. Smith v. Metropolitan Sch. Dist., 128 F.3d 1014, 1030 (7th Cir. 1997) (rejecting strict liability and agency principles as bases for institutional liability in a Title IX case).

160. Fossey et al., *supra* note 26, at 493. This problem is well illustrated in *Canutillo*, in which a child received a $1.4 million jury award against a small, poorly-funded school district in compensation for sexual molestation by a teacher. *Canutillo*, 887 F. Supp at 955. The trial judge dramatically reduced the damage award to out-of-pocket expenses. *Id.*

161. *Canutillo*, 887 F. Supp. at 955.

162. *See generally*, Chrys A. Martin, *Is Sexual Abuse Covered by School Insurance Policies?*, *in* CHILD ABUSE: LEGAL ISSUES FOR SCHOOLS 101 (National School Board Association Council of School Attorneys, 1994).

163. *Id. See also* Horace Mann Ins. Co. v. D.A.C., 710 So. 2d 1274 (Ala. Civ. App. 1998); New World Frontier, Inc. v. Mount Vernon Fire Ins. Co., 676 N.Y.S.2d 648 (1998).

164. Brief for Respondent, *supra* note 8, at 46.

165. *Id.* at 47.

166. *Id.* at 48.

educational institutions should take additional precautionary steps to minimize their liability in teacher-student sexual harassment situations. In addition to continuing to maintain strict policies and procedures regarding sexual discrimination, to include advising students on how to report cases of sexual discrimination, it is recommended that a school district's Title IX coordinator conduct a thorough investigation when a discrimination complaint is received.[167] This is an essential step in establishing the response and corrective measure element required by the decision in *Gebser*.[168] Additionally, employers should train supervisors and teachers to promptly respond to any indication of sexual harassment, not just formal complaints, and to take each complaint seriously.[169] Finally, educational institutions should take great care in selecting and supervising their employees, as their actions may result in liability under state law.[170]

CONCLUSION

Sexual discrimination deserves very serious attention under Title IX. The core objective of the federal statute is to protect students who are the subject of sexual discrimination by their teachers.[171] Both Congress and the public should have zero tolerance for sexual discrimination and Title IX should reach such discrimination with the full weight of its purpose.[172] The Supreme Court in *Gebser* has offered an approach that recognizes the right of students to be free from sexual discrimination under Title IX, without subjecting school districts to immense awards that could hinder the performance of their educational mission.

The primary effect of *Gebser* is that, in the absence of actual notice or deliberate indifference by a school district, we cannot attribute the independent misconduct of a teacher to a school district under Title IX. While states may choose to offer additional protections to students under state law, the Supreme Court in *Gebser* seized the opportunity to define the requirements of recovery under Title IX and provided an equitable result. School districts and students will benefit from the guidance of the well-defined rule established in *Gebser*.

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167. Steptoe & Johnson, *supra* note 93, at 2. *See also supra* note 15.
168. Steptoe & Johnson, *supra* note 93, at 2.
169. Perkins Coie, *Supreme Court Speaks on Sexual Harassment*, WASHINGTON EMPL. L. LETTER, August 1998, p.7.
170. *Id.*
171. Leija v. Canutillo Indep. Sch. Dist., 887 F. Supp. 947, 952 (W.D. Tex. 1995), *rev'd*, 101 F.3d 393 (5th Cir. 1996).
172. *Id.*