Education Law - The United States Supreme Court Determines the Standard of Liability under Title IX - Gebser v. Lago Vista Independent School District

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I. INTRODUCTION

In *Gebser v. Lago Vista Independent School District*, the United States Supreme Court held that a school district can be liable for monetary damages under Title IX for the sexual harassment of a student by a teacher only if an employee of the school district who has authority to end the harassment has actual knowledge of the harassment, and acts with deliberate indifference to it. Before *Gebser*, the Circuits disagreed concerning the standard a court should apply in determining when a school district would be held liable for monetary damages under Title IX. Several Courts of Appeals applied a standard of strict liability, while others found that a district would be held liable under Title IX if it "knew or should have known" of the harassment and failed to remedy the problem. The "actual knowledge and deliberate indifference" standard, which the Supreme Court adopted in *Gebser*, had previously been adopted only by the Fifth, Seventh, and Eleventh Circuits. Thus, the *Gebser* decision has resulted in a substantial change in the law in the Tenth Circuit and seven others. This note will examine the nature of this change, and its implications for future plaintiffs and defendant school districts.

II. STATEMENT OF THE CASE

In the spring of 1991, petitioner Alida Gebser was an eighth grade student in the Lago Vista Independent School District in Texas. That year, she joined a book discussion group led by teacher Frank Waldrop. During the group's discussions, Waldrop often made sexually suggestive comments to the students. Gebser subsequently entered high school, and was placed in classes taught by Waldrop. Waldrop continued to make inappropriate comments to the students, and he began to direct more of his comments at Gebser. Waldrop eventually initiated sexual contact with Gebser when he visited her home, allegedly to give her a book. At that time he fondled and kissed Gebser. Following the first occasion, Gebser and Waldrop had sexual intercourse throughout the remainder of the school year, over the summer, and during the following school year. Although the pair never had intercourse on school property, they did have intercourse during class time.

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2. See id. at 1993.
4. See Oona v. McCaffrey, 143 F.3d 473, 476 (9th Cir. 1998); Kracunas v. Iona College, 119 F.3d 80, 87 (2nd Cir. 1997); Doe v. Claiborne County, 103 F.3d 495, 513 (6th Cir. 1996).
5. See Brzonkala v. Virginia Polytechnic Inst. and State Univ., 132 F.3d 949, 960 (4th Cir. 1997); Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463, 469 (8th Cir. 1996); Lipsett v. Univ. of Puerto Rico, 864 F.2d 881, 901 (1st Cir. 1988); Mabry v. State Bd. of Community Colleges and Occupational Educ., 813 F.2d 311, 316 n.6 (10th Cir. 1987).
6. See Floyd v. Waiters, 133 F.3d 786,789 (11th Cir. 1998); Smith v. Metropolitan Sch. Dist. Perry Township, 128 F.3d 1014, 1026 (7th Cir. 1997); Canutillo Independent Sch. Dist. v. Leiha, 101 F.3d 393, 401 (5th Cir. 1996).
7. All information contained in this section is from *Gebser* unless otherwise cited.
Gebser testified that she did not report her relationship with Waldrop to anyone within the school district because she did not know how to react, and she wanted to continue to have Waldrop as a teacher. In October 1992, the parents of two other female students complained to the school principal that Waldrop made inappropriate comments during class. The principal instructed Waldrop to stop making such comments, but did not report the complaint to the superintendent, who was the Title IX coordinator for the district. In January 1993, a police officer found Gebser and Waldrop having intercourse. Waldrop was arrested, and his teaching license was revoked. Throughout the time that the relationship between Gebser and Waldrop went on, the Lago Vista School District may have been in violation of federal regulations because it had not established or promulgated a grievance procedure for the reporting of sexual harassment complaints.

In 1993, Gebser and her mother filed suit against Waldrop and Lago Vista in a Texas state court, alleging violations of Title IX, 42 U.S.C. § 1983, and state negligence laws. The case was removed to the United States District Court for the Western District of Texas, and the court granted summary judgment for the Lago Vista School District on all claims. The claims against Waldrop were remanded to state court. The district court found that Lago Vista could not be held liable for monetary damages under Title IX unless the school district had actual knowledge of the discrimination and acted with deliberate indifference to it. The court determined that the complaint by the parents of other students regarding Waldrop's comments in class was insufficient to notify the district of the relationship between Waldrop and Gebser, and therefore Lago Vista could not be held liable for Waldrop's conduct.

Gebser appealed only the Title IX claim, and the Court of Appeals for the Fifth Circuit affirmed the ruling of the district court, holding that a school district should only be held liable for sexual harassment under Title IX when an employee of the district who has authority to end the discrimination has actual knowledge of the discrimination and fails to act. The Supreme Court granted certiorari to determine what standard of liability should be applied when holding a school district liable in monetary damages for sexual harassment under Title IX.

III. BACKGROUND

Title IX was enacted as part of the Education Amendments of 1972 in an effort to eradicate sex discrimination in educational institutions that receive federal funding. The two purposes of Title IX are to avoid using federal funds to support discriminatory practices, and to provide individual citizens with protection from those practices. Title IX has helped limit sex discrimination in educational institutions.

8. See Trudy Saunders Brodthauer, Twenty-five Years Under Title IX: Have We Made Progress?, 31 CREIGHTON L. REV. 1107 (1998)(discussing the impact that Title IX has had in promoting equal treatment for women).
10. See Brodthauer, supra note 8, at 1107. When Title IX was passed in 1972, women received only nine percent of medical degrees and seven percent of law degrees. Today, women receive 38% of medical degrees and 43% of law degrees, and over 50% of college students are women. Similar increases have occurred in collegiate
Title IX provides that "No 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 educational program or activity receiving Federal financial assistance." Previous rulings make sexual harassment a form of sex discrimination, and sexual abuse is a type of sexual harassment. A plaintiff can state a Title IX claim by showing that: 1) he or she was subject to discrimination in an educational program; 2) the program receives federal funds; 3) the discrimination was based on sex; 4) the harassment was sufficiently severe to create an abusive educational environment; and 5) there is some basis for institutional liability.

Title IX states that an educational institution's federal funds can be revoked in the instance of a violation after a school district official with authority to stop the harassment has been notified of the harassment and has refused to remedy the situation. The Office of Civil Rights, a division of the U.S. Department of Education, is charged with enforcing Title IX. The statute does not expressly provide for a private cause of action.

When Title IX was passed, courts were not sure whether the statute prohibited sex discrimination in an entire educational institution or only within the specific program that received federal funding. In Grove City College v. Bell, the Supreme Court construed Title IX narrowly, finding that it did not apply to an entire educational institution when only one of its departments received federal funds. Congress then superseded the Grove City decision by passing the Civil Rights Restoration Act of 1987, which expressly states that Title IX applies to all operations of an educational institution regardless of how many departments receive federal funds. Thus, Congress indicated that it favored a broad interpretation of Title IX.

While Congress implied that it favored a broad reading of Title IX, the statute expressly included only an administrative remedy that could result in the revocation of federal funds in the instance of sex discrimination. In Cannon v. University of Chicago, the Supreme Court held for the first time that Title IX also included an implied private cause of action for injunctive relief. The Court found that the statute's language, legislative history and underlying purpose all supported a private cause of action for injunctory relief.
It was not until 1992, in *Franklin v. Gwinnet County Public Schools*,\(^{25}\) that the Supreme Court held that Title IX also included a private cause of action for monetary damages. In *Franklin* the Court discussed the common law presumption that once a cause of action is determined to exist, "all appropriate remedies" are available under a statute unless Congress indicates otherwise.\(^{26}\) The Court considered the fact that Congress amended Title IX twice after *Cannon* was decided and left the decision intact, and concluded that Congress did not intend to limit the remedies available under Title IX.\(^{27}\)

Unfortunately, *Franklin* did not clearly indicate what standard of liability a court should apply to determine whether a school district would be held liable for sex discrimination under Title IX.\(^{28}\) In *Franklin*, the Court cited its decision in *Meritor Savings Bank, FSB v. Vinson*,\(^ {29}\) a sexual harassment case brought under Title VII, stating that "when a supervisor sexually harasses a subordinate because of the subordinate's sex, the supervisor 'discriminates' on the basis of sex."\(^ {30}\) The *Franklin* Court went on to state that "the same rule should apply when a teacher sexually harasses a student."\(^ {31}\) Because *Meritor* determined that agency principles should be used to determine whether an employer is liable for sexual harassment under Title VII,\(^ {32}\) several courts of appeals applied agency principles in determining whether a school district should be held liable under Title IX.\(^ {33}\) The matter was confused even further because *Franklin* involved intentional discrimination on the part of the school district.\(^ {34}\)

Following *Franklin*, federal courts applied at least three standards of liability to cases brought under Title IX. Several courts adopted a strict liability standard that held school districts liable for sexual harassment on traditional agency principles. Others adopted a "knew or should have known" standard that was derived from Title VII agency principles. Still others applied an "actual knowledge" standard that would only hold school districts liable when they had actual knowledge of sexual harassment and failed to act.

The Second, Sixth, and Ninth Circuit Courts of Appeals adopted the strict liability standard.\(^ {35}\) These courts reasoned that the Supreme Court's reference to *Meritor* in *Franklin*\(^ {36}\) indicated that Title VII standards of liability should be applied

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25. 503 U.S. 60 (1992). *Franklin* involved a suit against a school district for the sexual abuse of a student by an athletic coach. In *Franklin*, the school district was aware of the abuse and failed to stop it. See id. at 64.

26. See id. at 66.

27. See id. at 72-73.


31. See *Franklin*, 503 U.S. at 75.

32. See *Meritor*, 477 U.S. at 71.

33. See, e.g., *Oona v. McCaffrey*, 143 F.3d 473, 476 (9th Cir. 1998); *Kracunas v. Iona College*, 119 F.3d 80, 87 (2nd Cir. 1997); *Doe v. Claiborne County*, 103 F.3d 495, 513 (6th Cir. 1996).

34. In *Franklin*, school administrators and teachers knew about the harassment that was occurring and they failed to act. See id. at 64.

35. See *Oona*, 143 F.3d at 473, 476; *Kracunas*, 119 F.3d at 87; *Doe*, 103 F.3d at 513.

36. *Franklin* quoted *Meritor*, stating that "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminates' on the basis of sex." Id. *Franklin* then went on to state that "the same rule should apply when a teacher sexually harasses and abuses a student." *Franklin*, 503 U.S. at 75.
to cases brought under Title IX. Title VII holds employers liable for the conduct of their employees when the employees act as agents of the employer. The courts that adopted this standard in Title IX cases generally held school districts liable for sexual harassment of a student by a teacher when the teacher acted with purported authority of the district, or when the teacher was aided by his or her position in carrying out the harassment.

The First, Fourth, Eighth, and Tenth Circuit Courts of Appeals applied a “knew or should have known” standard of liability to cases brought under Title IX. These courts generally interpreted Meritor to mean that agency principles should serve as guidance in Title VII cases, but that an employer should not always be held strictly liable for a supervisor’s harassment of an employee. They found that an employer would be held liable under Title VII if it knew or should have known of harassment, and that a school district should be held to the same standard under Title IX.

Thus, these courts applied a “constructive notice” standard of liability to Title IX cases.

While the majority of circuits applied some form of Title VII liability principles to Title IX cases, the Fifth, Seventh, and Eleventh Circuits found that a school district would be held liable for sexual harassment only when it had actual knowledge of the harassment and failed to act. These courts reasoned that Title IX was spending clause legislation, and that it could not impose a condition on a state’s receipt of funds unless the condition was clear. They found that Title IX did not clearly impose agency liability on school districts, and that as a policy matter, holding school districts strictly liable under Title IX would not benefit students.

Adding to the confusion over what standard of liability should apply to sexual harassment cases brought under Title IX, the Office of Civil Rights (OCR), the agency department charged with enforcing Title IX, determined that school districts should be held strictly liable for the sexual abuse of students. The OCR argued for absolute strict liability, without regard to a district’s fault. In Gebser, the Supreme

37. See Meritor, 477 U.S. at 71. In Meritor, the Supreme Court implied that traditional agency principles should be used to determine whether an employer is liable under Title VII for harassment of an employee by a supervisor. See id. However, the court also declined to issue a definitive rule on employer liability and stated that common-law agency principles may not be “transferable in all their particulars to Title VII.” See id. The court recently issued a clear rule on Title VII employer liability for sexual harassment by a supervisor in Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2278 (1998), holding that employers should be held vicariously liable for harassment of an employee by a supervisor.

38. See, e.g., Brzonkala v. Virginia Polytechnic Inst. and State Univ., 132 F.3d 949, 960 (4th Cir. 1997); Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463, 469 (8th Cir. 1996); Lipsett v. Univ. of Puerto Rico, 864 F.2d 881, 901 (1st Cir. 1988); Mabry v. State Bd. of Community Colleges and Occupational Educ., 813 F.2d 311, 316 n.6 (10th Cir. 1987).

39. See, e.g., Lipsett, 864 F.2d at 901.

40. See id.


42. See Floyd v. Waiters, 133 F.3d 786, 789 (11th Cir. 1998); Smith v. Metropolitan Sch. Dist. Perry Township, 128 F.3d 1014, 1026 (7th Cir. 1997); Canutillo Independent Sch. Dist. v. Leija, 101 F.3d 393, 401 (5th Cir. 1996).

43. See, e.g., Canutillo, 101 F.3d at 398.

44. See, e.g., id. at 398-399.


46. See id.
Court finally resolved the conflict over what standard of liability should apply, adopting the actual knowledge and deliberate indifference standard applied by the Fifth, Seventh, and Eleventh Circuits.

IV. RATIONALE

In determining that school districts cannot be held vicariously liable for sexual harassment under Title IX, the Supreme Court found that Title VII standards of agency liability do not apply to cases brought under Title IX. The court reasoned that Title VII and Title IX are completely different statutes, and that they should not be governed by similar principles.

When the Court determined that Title VII agency principles do not apply to Title IX, it relied on the fact that Title VII expressly includes the right to a private cause of action and provides for relief in the form of monetary damages, while Title IX only provides for administrative enforcement. The right to a private cause of action under Title IX is judicially implied, and therefore, Congress has expressed no intention as to the scope of available remedies. Because the cause of action is judicially implied, the court found that it had latitude to establish a “sensible remedial scheme” that would best fit within the statute. Applying these principles, the court determined that it would frustrate the purposes of Title IX to permit recovery for damages against a school district on principles of constructive notice or respondeat superior.

When making this determination, the Court considered the fact that Title VII prohibits private employers from discriminating on the basis of race or sex, and it specifically defines “employer” as including “any agent” of an employer. Title IX does not contain a reference to an educational institution’s “agents,” and the Court found that this was an indication that agency principles should not apply. The Court also relied on the fact that Title VII includes damages caps, while Title IX does not. The Court used this difference between the statutes to infer that Congress probably did not contemplate that unlimited monetary damages could be recovered under Title IX, and therefore, that strict liability should not apply to Title IX cases.

The Court also reasoned that Title IX was modeled after Title VI of the Civil Rights Act of 1964, not Title VII. Title VI parallels Title IX, except that it

49. See id. at 1996.
50. See id.
51. See id.
52. Id. The court cited Musick, Peeler & Garrett v. Employers Ins. of Wausau, 508 U.S. 286 (1993) and Virginia Bankshares Inc. v. Sandberg, 501 U.S. 1083 (1991) for this proposition. See id. Both of these cases dealt with judicially implied causes of action, and both stated that the court has latitude to fashion an appropriate remedy when a cause of action is judicially implied.
55. See Gebser, 118 S. Ct. at 1996.
56. See id. at 1997.
57. See id.
58. See id. (citing Cannon v. University of Chicago, 441 U.S. 677 (1979) and Grove City College v. Bell, 465 U.S. 555 (1984)).
prohibits race discrimination in any federally funded program rather than only prohibiting sex discrimination in education programs. Both statutes condition the receipt of federal funds on a promise by the recipient not to discriminate, creating a "contract" between the federal government and the funding recipient. In contrast, Title VII is an outright prohibition on private employers. It does not operate as a contract, and it applies regardless of whether or not the employer receives federal funds. Title VII’s primary goal is to offer a remedy to victims of past discrimination, while Titles VI and IX are more focused on preventing discrimination by recipients of federal funds.

Because Title IX and Title VI act as conditions on the receipt of federal funds, they were enacted pursuant to Congress’ spending clause power. Spending clause legislation must be interpreted very carefully because the fund recipient must have notice, when it accepts the federal funds, that it can be held liable for violating one of the statute’s conditions. In order to meet the notice requirement, an entity can only be held liable under spending clause legislation when it has intentionally violated the statute. The Court found that the language of Title IX does not clearly indicate that a school district could be held liable for discrimination by one of its employees when the district was unaware of the discrimination. The Court determined that because the language of Title IX is unclear, holding school districts vicariously liable, or to a “knew or should have known” constructive notice standard, would violate the requirement that spending clause conditions be expressed unambiguously by the statute. It would also violate the requirement that an entity could only be held liable under spending clause legislation for an intentional statutory violation.

When the Court determined that school districts should not be held vicariously liable for harassment of a student by an employee, it also placed a great deal of reliance on Title IX’s express means of administrative enforcement. Title IX allows its implementing agencies to commence enforcement proceedings against a fund recipient when the recipient does not comply with the statute’s conditions. Enforcement proceedings can be used to terminate a recipient’s funds, but only after

59. See id.
60. See id.
61. See id. The Court cited Landgraf v. USI Film Products, 511 U.S. 244, 254 (1994), which stated that Title VII aims broadly to “eradicate discrimination throughout the economy,” and that it seeks to “make persons whole for injuries suffered through past discrimination.” See id.
62. See id.
63. See id.
64. See id at 1998. Before the Court’s decision in Gebser, it was not clear whether Congress enacted Title IX under its enforcement power conferred by Section 5 of the Fourteenth Amendment, or under the spending clause. Franklin, 503 U.S. 60 (1992), did not address this issue, and other cases implied that Title IX was Section 5 legislation. See Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 732 (1982).
66. See Franklin, 503 U.S. at 74.
67. See id.
68. See id.
69. See id. at 1998 (“If a school district’s liability for a teacher’s sexual harassment rests on principles of constructive notice or respondeat superior, it will likewise be the case that the recipient of funds was unaware of the discrimination.”).
70. See id.
71. See id.
“an appropriate person” employed by the recipient has received notice that it is in violation of the statute, and voluntary compliance with the statute cannot be attained.\textsuperscript{72} The court believed that the purpose of these requirements was to prevent education funds from being taken from a district when the district would have taken prompt corrective measures had it known about a harassment problem.\textsuperscript{73}

In light of the fact that the statute’s express means of enforcement requires that an “appropriate person” within the district have actual notice of discrimination and an opportunity for compliance before funds can be terminated, the Court found that the judicially implied private cause of action must also include these requirements.\textsuperscript{74} The Court considered that a fund recipient could potentially be held liable for a much larger amount than it received in federal funds, and therefore, that it must at least have actual knowledge of a violation before it could be held liable in a private cause of action.\textsuperscript{75} The Court also found that an “appropriate person” under the statute’s administrative enforcement procedure is a district official with authority to take corrective action to end the discrimination, and that this requirement should also be met before a district can be held liable for monetary damages in a private cause of action.\textsuperscript{76} In addition, in order for a district to be held liable, the “appropriate person” must respond with deliberate indifference to the discrimination.\textsuperscript{77}

Applying the requirements of “actual notice and deliberate indifference” to Gebser’s case, it was clear that Lago Vista could not be held liable for Waldrop’s harassment of Gebser.\textsuperscript{78} No employee of the district, other than Waldrop himself, had actual knowledge of the relationship between Gebser and Waldrop. While Lago Vista may have been in violation of federal regulations by failing to promulgate a sexual harassment policy, the court ruled that this failure did not establish the required actual knowledge and deliberate indifference, and it did not in itself amount to discrimination.\textsuperscript{79}

V. ANALYSIS

The court’s decision in Gebser was a 5-4 decision, with Justice Stevens writing for the dissent, which included Justices Souter, Ginsburg and Breyer. Justice Ginsburg joined in Justice Steven’s dissent, but she also wrote an additional dissent that was joined by Justices Souter and Breyer. The dissenting opinions are very persuasive, and they point out numerous flaws in the majority’s decision. For several reasons, the majority’s decision thwarts the purpose of Title IX.

First, the Court departed from precedent when it found that it had latitude to fashion an appropriate remedy under Title IX because the cause of action is

\textsuperscript{72} See 34 C.F.R. §§ 100.7(d), 100.8(d) (1997).
\textsuperscript{73} See Gebser, 118 S. Ct. at 1999.
\textsuperscript{74} See id.
\textsuperscript{75} See id.
\textsuperscript{76} See id.
\textsuperscript{77} See id.
\textsuperscript{78} See id.
\textsuperscript{79} See id. at 2000.
judicially implied. The Court relied on *Musick, Peeler & Garrett v. Employers Insurance Of Wausau* and *Virginia Bankshares Inc. v. Sandberg* to support the proposition that the Court has latitude to fashion an appropriate remedy when a cause of action is judicially implied. However, in both of these cases the Court was concerned with determining the parameters of a judicially implied cause of action rather than with determining what standard of liability should be applied to a cause of action that was already clearly established. *Musick* dealt with whether an implied cause of action included a specific type of recovery, and *Virginia Bankshares* considered whether an implied cause of action extended to certain plaintiffs.

The issues presented in *Gebser* were very different from those involved in *Musick* and *Virginia Bankshares*, which involved determining the parameters of a cause of action. As Justice Stevens' dissent points out, the court already determined that a private cause of action was implied by Title IX in *Cannon v. University of Chicago*. Once the Court determines that a cause of action exists under a statute, there is a presumption in favor of all appropriate remedies unless Congress indicates otherwise. This is exactly the presumption the Court relied on when it found that Title IX included a private cause of action for monetary damages in *Franklin*. In *Franklin* the Court also discussed the fact that Congress amended Title IX after *Cannon* was decided, and that it did not change the statute to prohibit a private cause of action. The Court even stated that “Congress did not intend to limit the remedies available in a suit brought under Title IX.” It is difficult to reconcile this language and precedent with the Court's decision in *Gebser* to “fashion an appropriate remedy” that actually affects a plaintiff’s ability to recover under the statute. The Court appears to confuse the right with the remedy. As Justice Stevens reasoned, once the court determines that a cause of action exists, it “should seek guidance from the text of the statute and settled legal principles rather than from [its] views about sound policy.”

When the Court decided to “fashion an appropriate remedy” under Title IX, it failed to accurately consider the language of the statute. Unlike Title VII, Title IX

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80. It is arguable whether the Court was truly fashioning a remedy in *Gebser*, because its decision really seemed to be based on the right under the statute rather than the remedy. However, the Court based its decision partially on the idea that it had latitude to shape an appropriate remedy for a judicially implied cause of action. See *Gebser*, 118 S. Ct. at 1989 (stating that the court has “latitude to shape a sensible remedial scheme that best comports with the statute” when a cause of action is judicially implied).
84. See *Musick*, 508 U.S. at 297 and *Virginia Bankshares*, 501 U.S. at 1104.
87. See id. at 60 (stating that Congress is aware of the presumption in favor of all appropriate remedies, and that it enacted Title IX with this presumption in mind).
focuses on the protected class rather than on the prohibited action. Title IX broadly states that "No person . . . shall, on the basis of sex, . . . be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." Title VII, on the other hand, explicitly prohibits employers or their agents from discriminating. The majority only considered the fact that Title IX differs from Title VII in that Title VII specifically applies to agents of employers. The Court failed to consider the fact that Title IX may not include a specific reference to "agents" of school districts because Congress felt that such a reference was unnecessary in light of Title IX's focus on the protected class. The use of the term "agent" is unnecessary when the statute only mentions the prohibited conduct rather than the actor who may engage in the conduct. Title IX's language indicates that it provides broader protection from discrimination than Title VII, and that the only issue in a Title IX case should be whether a person was discriminated against on the basis of sex. Under the statute's broad prohibition and settled principles of agency law, a district should be held liable for sexual discrimination when one of its agents was aided by his position in accomplishing the tort. There is no doubt that Waldrop was able to abuse Gebser because he was a teacher in a position of authority over her, and therefore, that he was aided by his position in accomplishing the tort.

The majority's determination that Title IX is spending clause legislation should not have precluded the court from reaching the conclusion that school districts should be held liable under agency principles for intentional harassment of a student by a teacher. The Court could have found that Title IX clearly indicates that school districts will be held liable for intentional harassment of a student. Under the broad language of Title IX, counsel for school districts could reasonably foresee that the districts would be held liable under Title IX for sexual abuse of a student by a teacher whether or not the district had knowledge of the abuse. Although an institution can only be held liable under spending clause legislation for intentional violations of a statute, sexual abuse of a student such as Waldrop's is undoubtedly intentional, and the Court could have made the determination that Waldrop acted as an agent of the school district. Because Waldrop's acts were intentional, and the Court could have found that he acted as an agent of the district, it would make sense for the district to be liable under Title IX. Given the broad language of Title IX, the Court could have found that the statute does impose a clear condition upon

93. See Gebser, 118 S. Ct. at 1996.
94. See id. at 2002, n.5 (Stevens, J., dissenting) (discussing the fact that Title IX uses passive verbs and names no actor).
95. See id. at 2002 (Stevens, J., dissenting) (stating that Title IX's focus on the victim rather than on the wrongdoer indicates that the statute provides more protection from discrimination than is provided by Title VII).
96. See id. at 2002 (Stevens, J., dissenting).
97. See id. at 2005 (Stevens, J., dissenting).
98. See Franklin, 503 U.S. at 74 (stating that liability under spending clause legislation can only be found when a statute has been intentionally violated). This requirement exists because an entity must have knowledge that it has violated a spending clause statute before it can be held liable under the statute. See id.
99. See Gebser, 118 S. Ct. at 2004 (Stevens, J., dissenting).
school districts when they accept federal funds and that they should be held liable when they violate that condition.

The majority also departed from precedent when it failed to give deference to the Office of Civil Rights' interpretation of Title IX. The Office of Civil Rights (OCR) is the division of the Department of Education that is charged with enforcing Title IX. The OCR determined that a school district should be liable for sexual harassment of a student when a teacher "was aided in carrying out the sexual harassment of students by his or her position of authority with the institution." While the OCR's interpretation of Title IX was "policy guidance" rather than an actual regulation, it should still be entitled to deference because the Department of Education has a special interest in making sure that Title IX is enforced properly since it is the agency charged with enforcement of the statute. The majority gave no deference to the OCR's interpretation of Title IX, and it only referenced the policy guidance once in its entire opinion. In addition, the Court gave no explanation for its failure to consider the OCR interpretation. Even if the "policy guidance" was not an official agency regulation that was entitled to deference, it seems that the court should have at least explained why it chose to give the "policy guidance" absolutely no consideration when it was promulgated by the agency charged with enforcing Title IX.

It is also unclear why the majority relied heavily on the fact that Title VII imposed a damages cap on recovery to find that Congress could not have intended to allow unlimited recovery against school districts for violations of Title IX. As Justice Stevens points out, recovery under Title VII is irrelevant to recovery under Title IX. In addition, it is unclear why the majority considered it relevant that when Title IX was passed, other civil rights statutes did not include an express cause of action for monetary damages. This is irrelevant because the court already determined that a private cause of action for injunctory relief was available under Title IX in Cannon v. University of Chicago. Following Cannon, the Court found that Title IX could also support a cause of action for monetary relief because there was no reason to abandon the usual presumption in favor of all available remedies. Once the court determines that a private cause of action exists, the presumption is in favor of all available remedies regardless of the remedies that were available under other civil rights statutes at the time Congress enacted Title IX.

100. See id.
102. See Gebser, 118 S. Ct. at 2004 (Stevens, J., dissenting).
103. See id. at 1995. The majority only mentions the OCR interpretation in the context of Gebser's argument for agency liability.
105. See Gebser, 118 S. Ct. at 2004 (Stevens, J., dissenting).
106. See id. at 1997 (stating that in 1972, the principal civil rights statutes did not include a private cause of action for recovery of monetary damages).
The majority also relied on Title IX's administrative enforcement scheme to support its decision that "actual notice and deliberate indifference" was required before a school district could be held liable under Title IX. The majority stated that the statute's express administrative enforcement scheme provided important clues as to how Congress intended for the statute to be applied. As Justice Stevens points out, Title IX's express means of administrative enforcement is irrelevant to determining when a school district should be held liable under a judicially implied private cause of action for monetary damages. Lago Vista's brief, and the amicus briefs in support of Lago Vista, do not even mention the statute's administrative remedy in support of their arguments.

The cases that the majority cites to support the proposition that the administrative remedy is relevant do not necessarily lead to this conclusion. The majority cites Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A. which states that the Court will not expand a defendant class for an implied cause of action beyond that provided for expressly in a comparable cause of action. However, expanding a defendant class beyond that provided for by statute in a comparable cause of action is different from relying on an express administrative remedy to define a private cause of action that has been judicially implied. In Cannon the court even stated that "the fact that other provisions of a complex statutory scheme create express remedies has not been accepted as a sufficient reason for refusing to imply an otherwise appropriate remedy under a separate section." Thus, in Gebser the court ignored its own language in Cannon and failed to offer an explanation for its choice to do so.

While Justice Stevens did not address whether a school district that complied with Federal regulations by issuing a sexual harassment policy would be held vicariously liable under Title IX for sexual abuse, Justice Ginsburg did address this issue in her dissent. Justice Ginsburg, joined by Justices Souter and Breyer, determined that a school district should have an affirmative defense to Title IX vicarious liability if it is in compliance with Federal regulations. Justice Ginsburg stated that the affirmative defense would apply if a school district had an effective policy for reporting and redressing sexual harassment grievances, and that the burden would be on the school district to show that its policy was adequately effective and publicized.

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109. See Gebser, 118 S. Ct. at 1998 (stating that "[m]ost significantly, Title IX contains important clues that Congress did not intend to allow recovery in damages where liability rests solely on principles of constructive notice.").
110. See id. at 2005 (Stevens, J., dissenting).
111. See Respondent's Brief, Gebser; Amicus Brief of the American Insurance Association, Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989 (No. 96-1866); Amicus Brief of the Texas Association of School Boards, Gebser; Amicus Brief of the Kentucky School Boards Association, Gebser; Amicus Brief of the National School Boards Association and New Jersey School Boards Association, Gebser.
113. See id. In Central Bank of Denver, the Court was dealing with an implied cause of action under one section of a statute that was very similar to those allowed expressly by other sections of the statute.
115. See Gebser, 118 S. Ct. at 2007 (Ginsburg, J., dissenting).
116. See id.
Of the three opinions, Justice Ginsburg's approach best comports with the purpose of Title IX. Her approach would prevent sexual discrimination by holding districts vicariously liable for it, but it would also protect districts from liability if they had attempted to stop harassment by complying with Federal regulations. Justice Stevens is correct that this issue was not clearly presented in this case because Lago Vista was not in compliance with Federal regulations. However, if the majority had found that districts could be held liable for sexual harassment under agency principles, it could have construed its holding very narrowly to apply only when a district was not in compliance with Federal regulations.

It appears that the majority's decision came out of a concern for the financial situation of non-profit school districts. Justice Stevens clearly felt that this was the case, when he stated that "the Court ranks protection of the school district's purse above the protection of immature high school students." While the Court's concern for the financial well being of school districts is legitimate, it does not seem that its decision to impose an extremely high threshold of liability was necessary. By failing to follow an approach that would hold school districts vicariously liable for sexual abuse when they failed to comply with Federal regulations, the majority thwarted the purpose of Title IX. Congress enacted Title IX to prevent sex discrimination in schools, and the Court's holding that a school district will not be held liable for sexual abuse of a student by a teacher unless a district official has actual knowledge of the abuse, and then acts with deliberate indifference to it, does not seem to further the purpose of Title IX. There is no doubt that this holding thwarts the purpose of Title IX when it serves to protect a district from liability even though the district violated Federal regulations by failing to promulgate a sexual harassment policy. Justice Ginsburg's compromise approach would have furthered the purpose of Title IX by offering more protection to students while also protecting school districts that complied with Federal regulations.

VI. IMPLICATIONS

The Court's decision in Gebser has major implications for both future plaintiffs and defendant school districts. The decision will be extremely beneficial to school districts. While school districts in most circuits, including the Tenth, were previously held to a liability standard derived from agency theory, they will now be held liable only if a district official who has authority to end the discrimination has actual knowledge of the discrimination and acts deliberately indifferent to it. School districts are less likely to be financially crippled by large jury verdicts in

117. See id. at 2005 (Stevens, J., dissenting) (stating that "We are not presented with any question concerning the affirmative defenses that might eliminate or mitigate the recovery of damages for a Title IX violation.").
118. See id. at 1997 (stating that when Congress expressly permitted recovery of monetary damages under Title VII, it imposed damages caps). The court implies that Congress could not have intended to limit damages recoverable against private employers while allowing unlimited recovery against non-profit school districts.
119. Id. at 2006 (Stevens, J., dissenting).
121. Before Gebser, only the Fifth, Seventh, and Eleventh Circuits applied a liability standard of actual knowledge and deliberate indifference. See supra text accompanying notes 4-6.
sexual abuse cases. This is important in light of the fact that it has become increasingly difficult for school districts to insure against such awards. It is also important because educational funds will not be diverted from their intended purpose, which is to educate students.

The Court’s decision will have an extremely negative impact on students who are sexually harassed by a school district employee. As Justice Stevens points out in his dissent, the Court’s holding basically makes it impossible for students to recover damages from a school district for sexual abuse by a teacher. It will now be very difficult for any student to state a sexual harassment claim under Title IX. A student will have to allege sufficient facts to show that 1) an “appropriate official” had knowledge of the harassment; 2) the official had authority to end the harassment; and 3) that the official acted with “deliberate indifference” to the harassment. This will be especially difficult for students when their school district, like Lago Vista, has failed to promulgate a sexual harassment policy that tells them who is the appropriate official.

Because many students will not be able to meet the high liability threshold established by Gebser, they will have to pursue other options to obtain a remedy. These options include filing suit under state tort law or under 42 U.S.C. § 1983. There are difficulties with both options. In many instances sovereign immunity may prohibit recovery for negligence actions against school districts, barring recovery for sexual abuse.

Sexual abuse is actionable under section 1983 as a deprivation of substantive due process. However, the requirements for stating a claim under Section 1983 are in many ways even more difficult to meet than Gebser’s standard of “actual knowledge and deliberate indifference.” Under Section 1983, school boards that are considered “arms of the state” are immune from suit in federal court under the Eleventh Amendment. Even if the Eleventh Amendment does not bar a suit, in order for a school district to be held liable under Section 1983 the abuser must have acted under color of law, which is equivalent to state action under the Fourteenth Amendment.

122. In Leija v. Canutillo Independent School District, 101 F.3d 393 (5th Cir. 1996), a jury found a small school district that received a limited amount of federal funds liable for sexual abuse in the amount of $1.4 million.
123. See Fossey et al., supra note 28, at 26.
125. See Gebser, 118 S. Ct. at 2005 (Stevens, J., dissenting) (citing Franklin, 503 U.S. 60, 74 (1992)) (stating that the Court’s holding “will virtually render inutile causes of action authorized by Congress through a decision that no remedy is available.”).
126. See Fossey et al., supra note 28, at 25, which states that in many states school districts are immune from negligence suits under state law.
127. See, e.g., Doe v. Claiborne County, 103 F.3d 495, 505-506 (6th Cir. 1996) (stating that the substantive due process right to bodily integrity protects students from sexual abuse by teachers).
128. This is not the case in New Mexico, as the Tenth Circuit recently found that school boards in New Mexico are not arms of the state, and therefore that the Eleventh Amendment does not protect them from suit. See Duke v. Grady Municipal Schools, 127 F.3d 972 (1997). Factors that the courts consider in determining whether a school district is an “arm of the state” for purposes of Eleventh Amendment immunity include the school board’s degree of autonomy under state law, the extent of the state’s guidance and control over the local school board, the amount of state funds that the school board receives, and the local school boards ability to issue bonds and levy taxes on its own behalf. See Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977).
Amendment.\textsuperscript{129} It may be difficult to prove that a sexual abuser acted under color of law because generally there must be a "real nexus" between the abuser's misuse of his or her authority as a public employee and the alleged violation.\textsuperscript{130} It is conceivable that courts could find that sexual abuse is so far removed from a teacher's position that it is rarely accomplished under color of law. It is also difficult to state a claim under Section 1983 because it must be predicated on a deliberate deprivation of constitutional rights.\textsuperscript{131} Therefore, in order to hold a school district liable, plaintiffs would have to show that school district officials acted to deprive them of their Constitutional rights.\textsuperscript{132} This requirement can be met by showing that the district officials engaged in a pattern of behavior that violated the student's rights.\textsuperscript{133} All of these obstacles may make it more difficult for a student to recover under section 1983 than under the new Title IX standard. The difficulty of recovering under section 1983 also makes it unlikely that school districts will vigorously prohibit sexual abuse to avoid liability under that statute.

Lago Vista argued in its brief that imposing an actual knowledge and deliberate indifference standard on school districts would not provide less incentive for school districts to prevent sexual harassment.\textsuperscript{134} However, this argument appears to be incorrect in many cases.\textsuperscript{135} A 1993 study of New York City Public Schools found that school officials often mishandled complaints of sexual abuse in ways that harmed the victims and allowed the abusers to continue to work in schools.\textsuperscript{136} The study indicated that school principals often conduct their own investigations before complying with child abuse laws, and that principals were less likely to report incidents of abuse after conducting these preliminary investigations.\textsuperscript{137} Another investigation found that a teacher on an Indian Reservation sexually abused children and avoided detection for eighteen years.\textsuperscript{138} There is also evidence that school officials sometimes allow a teacher accused of sexual abuse to resign and offer a letter of reference in order to avoid the cost of dismissal proceedings.\textsuperscript{139} While some of these examples may involve actual knowledge, it is not clear whether a fact finder would also find deliberate indifference by an appropriate official. It is not clear that children hurt by actions like these would be able to recover under the Gebser standard. Holding school districts strictly liable would have encouraged district officials to vigorously enforce anti-harassment policies in order to avoid being held liable.

\textsuperscript{129} See, e.g., Jojola v. Chavez, 55 F.3d 488, 492 n.5 (10th Cir. 1995). In Jojola, the court found that a school janitor who sexually abused a student was not acting under color of law.
\textsuperscript{130} See id. at 493.
\textsuperscript{131} See id. at 490.
\textsuperscript{132} See id. at 490 (stating that liability under section 1983 can only be found when there is an intentional violation of constitutional rights).
\textsuperscript{133} See id. The court states that a pattern of violation would include acquiescence in the abuser's behavior.
\textsuperscript{135} See Fossey et al., supra note 28, at 24.
\textsuperscript{137} See id.
\textsuperscript{138} See Fossey et al., supra note 28, at 24 (citing John R. Schafer and Blaine D. McIlwaine, \textit{Investigating Child Sexual Abuse in the American Indian Community}, 16 \textit{Amer. Indian Q.} 157 (1992)).
\textsuperscript{139} See id.
The Court's decision to require actual knowledge and deliberate indifference has set an extremely high liability threshold that will prohibit many victims of sexual abuse from recovering under Title IX. Due to the difficulty for plaintiffs of recovering under state tort law or section 1983, it appears likely that many plaintiffs simply will not be able to recover damages for sexual abuse, even when their school district violated Federal regulations by failing to institute and promulgate a sexual harassment policy. While the decision will have a negative impact for future plaintiffs, it will benefit school districts by insulating them from liability in many cases.

VII. CONCLUSION

In Gebser the Supreme Court held for the first time that a school district will not be held liable for sexual harassment under Title IX unless a district official who has authority to end the harassment has actual knowledge of the harassment and acts with deliberate indifference to it. In deciding that the "actual knowledge and indifference" standard of liability should apply, the court rejected agency theory liability, which was previously followed in some form by the majority of the Courts of Appeals. The Court's decision is likely to make it extremely difficult for plaintiffs to recover monetary damages for sexual harassment under Title IX, and it may not provide an incentive for school districts to vigorously fight sexual harassment. The decision will benefit school districts financially because it will be difficult for them to be held liable, even when they violate Federal regulations by failing to establish a clear sexual harassment grievance policy.

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