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## ***Gebser v. Lago Vista Independent School District.* School District Remains Afloat in Title IX Litigation Floodwater**

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# Casenotes

## ***Gebser v. Lago Vista Independent School District: School District Remains Afloat in Title IX Litigation Floodwater***

In *Gebser v. Lago Vista Independent School District*,<sup>1</sup> the United States Supreme Court held that a school district could not be held liable under Title IX for a teacher's sexual harassment of a student without actual notice and deliberate indifference.<sup>2</sup> In a five to four decision, the Court affirmed summary judgment in favor of the school district.<sup>3</sup>

### I. FACTUAL BACKGROUND

In *Gebser* the Court considered the circumstances that warrant imposing liability on a school district for sexual harassment in violation of Title IX of the Education Amendments of 1972 ("Title IX").<sup>4</sup> Frank Waldrop, a teacher at Lago Vista's high school, was involved in a sexual relationship with one of his students, Alida Gebser. Waldrop first met Gebser when she was a thirteen-year-old student in an eighth-grade

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1. 118 S. Ct. 1989 (1998).

2. *Id.* at 2000.

3. *Id.* The majority consisted of Justices O'Connor, Scalia, Kennedy, Thomas, and Chief Justice Rehnquist; Justices Stevens, Souter, Ginsburg, and Breyer dissented. *Id.* at 1992.

4. *Id.* at 1993.

class that his wife taught. Ironically, it was Waldrop's wife who referred Gebser to Waldrop's high school discussion group. A relationship ensued, and by the time Gebser was fifteen years old, what started out as sexually suggestive and flattering comments progressed into frequent consensual sexual relations.<sup>5</sup> Eventually, a police officer arrested Waldrop after discovering the couple engaging in sexual intercourse. Although school officials had received complaints that Waldrop had often made sexually suggestive comments to students, they were unaware of the sexual relationship until Waldrop's arrest. Subsequently, the high school terminated his employment, and the Texas Education Agency revoked his teaching license.<sup>6</sup>

Gebser and her mother filed a sexual harassment suit against the school district under Title IX, seeking compensatory and punitive damages.<sup>7</sup> The district court granted summary judgment in favor of the school district, and Gebser appealed, arguing that school districts can be liable on agency principles when teachers use their authority to abuse students ("teacher-student harassment").<sup>8</sup> The circuit court affirmed, citing prior case law that rejected theories of strict liability and constructive notice.<sup>9</sup> The court also expressed its concern that common-law agency theories would impute vicarious liability to school boards for all teacher-student harassment.<sup>10</sup> For these reasons, the circuit court refused to recognize strict or vicarious liability for a Title IX sexual harassment violation absent a school board's actual knowledge.<sup>11</sup>

The Supreme Court granted certiorari to address when a school district could be held liable for damages under Title IX for sexual harassment of a student by a teacher. In a five to four decision, the Court affirmed.<sup>12</sup> The Court held that Title IX does not authorize damages against a district unless a school official, having the authority to address unlawful discrimination and the power to take corrective measures, has actual knowledge of the discrimination and fails to take adequate action to end it.<sup>13</sup>

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5. *Doe v. Lago Vista Indep. Sch. Dist.*, 106 F.3d 1223, 1224-25 (5th Cir. 1997).

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

7. *Id.*

8. *Doe*, 106 F.3d at 1225.

9. *Id.* (referring to *Canutillo Indep. Sch. Dist. v. Leija*, 101 F.3d 393, 402 (5th Cir. 1996)).

10. *Id.* at 1226.

11. *Id.*

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

13. *Id.* at 1999.

## II. LEGAL BACKGROUND

Title IX provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>14</sup> The statute is administratively enforced by the Office of Civil Rights (“OCR”), a division of the federal Department of Education.<sup>15</sup> Originally, Title IX deterred discrimination only administratively through the threat of withdrawal of federal funds,<sup>16</sup> but judicial construction has since transformed it into a limited, yet powerful, weapon for obtaining private damages as well.

The Supreme Court launched this trend in *Cannon v. University of Chicago*.<sup>17</sup> Cannon, a female student, was denied admission to two universities because of her sex. The lower courts determined that Title IX contained no express private right of action and declined to infer one.<sup>18</sup> However, the Supreme Court, examining legislative intent underlying Title VII of the Civil Rights Act of 1964 (“Title VII”) and Title IX,<sup>19</sup> determined that Congress expected Title IX to contain private remedies for intentional discrimination because Congress had not objected to court interpretations of Title VI of the Civil Rights Act of 1964 (“Title VI”) that found an implied private remedy.<sup>20</sup> The Court stated that Congress patterned Title IX after Title VI by inserting the word “sex” in the place of Title VI’s language protecting classes based on race, color, and national origin.<sup>21</sup> When Title IX was enacted, the language in Title VI concerning the protected classes had already been interpreted to provide a private remedy.<sup>22</sup>

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14. 20 U.S.C. § 1681(a) (1994).

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

16. *Id.* at 1108.

17. 441 U.S. 677 (1979).

18. *Id.* at 683.

19. *Id.* at 694-704. Title VII provides that it is unlawful for employers to “fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a) (1994).

20. *Id.* at 696-98. Title VI provides that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participating 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).

21. *Cannon*, 441 U.S. at 694-95.

22. *Id.* at 696.

The expansion of remedies continued in *Franklin v. Gwinnett County Public Schools*,<sup>23</sup> when the Court, without construing the standard for a funded entity's liability, addressed the issue of the appropriateness of monetary damages in an implied private right of action under Title IX.<sup>24</sup> Christine Franklin, a student, was subjected to sexually oriented conversations and coercive sexual intercourse by one of her teachers. When school administrators became aware of this teacher-student harassment, they failed to take action sufficient to stop the harassment and also discouraged Franklin from pressing charges. The teacher resigned, and the school closed its investigation.<sup>25</sup> The district court determined that Title IX did not provide for monetary damages and subsequently dismissed the complaint.<sup>26</sup> On appeal, the Supreme Court reviewed only the damages issue. It relied upon a presumption that all appropriate remedies are available unless Congress expressly precluded them.<sup>27</sup> The Court also examined the legislative history of Title IX and determined that Congress did not intend to limit the types of remedies available.<sup>28</sup> The Court held that monetary damages, including recovery for emotional distress, are available, at least for intentional violations of Title IX.<sup>29</sup> Although *Franklin* established a damages remedy, it provided no guidance concerning the standards governing a school district's liability for actionable harassment by an employee. Before *Gebser*, the lower courts had devised several standards including strict liability, constructive notice, and actual notice.

In *Bolon v. Rolla Public Schools*,<sup>30</sup> the district court adopted a strict liability approach.<sup>31</sup> Relying on a portion of the *Franklin* opinion that equated supervisor-employee sexual harassment (of the type prohibited by Title VII) to the teacher-student sexual harassment at issue, the court imputed liability to the school district for intentional sexual discrimination by a teacher regardless of whether the school district was aware of the discrimination.<sup>32</sup> The court determined that strict liability was necessary if Title IX was to have any effect.<sup>33</sup> It characterized the constructive notice standard as unworkable because teacher-student

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23. 503 U.S. 60 (1992).

24. *Id.* at 62-63.

25. *Id.* at 63-64.

26. *Id.* at 64.

27. *Id.* at 66.

28. *Id.* at 72.

29. *Id.* at 76.

30. 917 F. Supp. 1423 (E.D. Mo. 1996).

31. *Id.* at 1429.

32. *Id.* at 1428.

33. *Id.* at 1429.

harassment is inherently clandestine, making the harassment difficult to detect, yet easy to ignore.<sup>34</sup>

Taking a different view of the standard for entity liability under Title IX, the Eighth Circuit applied a constructive notice standard in *Kinman v. Omaha Public School District*.<sup>35</sup> In *Kinman* a teacher initiated a sexual relationship with one of her students. During an investigation into the relationship, the teacher voluntarily took lie detector tests that indicated deception. Despite this evidence and additional allegations that the relationship had continued, the school took no further action.<sup>36</sup> The court of appeals looked to *Meritor Savings Bank v. Vinson*<sup>37</sup> and other Title VII cases for guidance in its quest for an appropriate Title IX school liability standard, because it had only recently held that Title VII standards were applicable to Title IX actions.<sup>38</sup> The court held the constructive notice standard was appropriate for intentional teacher-student sexual harassment cases because the *Meritor* opinion imputed liability to the employer, under agency principles, for the discriminatory acts of its employees.<sup>39</sup> The case was remanded to determine if the school had constructive knowledge of the relationship at any point during the investigation.<sup>40</sup>

The actual knowledge standard was articulated by the Fifth Circuit Court of Appeals in *Rosa H. v. San Elizario Independent School District*.<sup>41</sup> In *Rosa H.* a school's karate teacher initiated a sexual relationship with one of his students. The court of appeals was not persuaded that *Franklin* implied a vicarious liability standard whenever intentional sexual harassment is established.<sup>42</sup> In addition, the plain language of Title IX did not suggest that school districts assumed liability according to agency theories.<sup>43</sup> Whereas Title VII makes an explicit reference to agents of employers, the court observed that Title IX imposes liability only for the conduct of the actual recipient of federal

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34. *Id.*

35. 94 F.3d 463 (8th Cir. 1996).

36. *Id.* at 465-66.

37. 477 U.S. 57 (1986). *Meritor* was significant because it established that sexual harassment claims are not limited to cases when employment advancement is dependent on the granting of sexual favors. *Id.* at 65. The creation of a "hostile environment" by conduct that either interferes with job performance or results in an intimidating or offensive atmosphere is sufficient to establish a Title VII claim. *Id.*

38. *Kinman*, 94 F.3d at 469 (referring to *Brine v. University of Iowa*, 90 F.3d 271, 275-76 (8th Cir. 1996)).

39. *Id.*

40. *Id.*

41. 106 F.3d 648 (5th Cir. 1997).

42. *Id.* at 654.

43. *Id.*

funds.<sup>44</sup> The court concluded that Title IX was not enacted to impose unlimited liability on federally-funded schools.<sup>45</sup> After rejecting the agency and constructive notice theories, the court held that school district liability hinges on whether high-level officials had actual notice and, despite that notice, failed to correct the problem.<sup>46</sup>

### III. RATIONALE OF THE COURT

In a five to four decision, the Supreme Court held that a school district could not be liable for damages under Title IX for teacher-student sexual harassment without actual notice and deliberate indifference.<sup>47</sup> In doing so, the Court rejected the strict liability and constructive notice standards applied by the lower courts.<sup>48</sup>

Justice O'Connor, writing for the majority, examined Gebser's contention that Lago Vista was liable for Waldrop's conduct under strict liability or constructive notice standards.<sup>49</sup> Gebser relied on a Sexual Harassment Policy Guidance ("Guidance") issued by the OCR which recommended school district liability for teacher-student sexual harassment "irrespective of whether school district officials had any knowledge of the harassment and irrespective of their response upon becoming aware."<sup>50</sup> The Court rejected the Guidance, offering two reasons why *Franklin's* citation of *Meritor*, the Title VII decision directing the application of agency principles, did not determine that respondeat superior or constructive notice liability is permissible under Title IX.<sup>51</sup> First, the school district's liability in *Franklin* was based on evidence of actual knowledge, not strict liability or constructive knowledge.<sup>52</sup> Second, the rationale of *Meritor* could not apply to Title IX because Title IX lacked the "agency" language of Title VII.<sup>53</sup>

Because Congress had not spoken on strict liability, the Court had some flexibility to determine appropriate standards.<sup>54</sup> The Court observed that while the purpose of Title VII is to remedy past discrimination by making victims whole, the purpose of Title IX is to protect

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44. *Id.*

45. *Id.* at 656.

46. *Id.* at 658.

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

48. *Id.* at 1997.

49. *Id.* at 1993-99.

50. *Id.* at 1995.

51. *Id.* at 1995-96.

52. *Id.*

53. *Id.* at 1996.

54. *Id.*

individuals from discrimination by recipients of federal funds.<sup>55</sup> Originally, the only remedy Title IX offered was injunctive and equitable relief.<sup>56</sup> The Court concluded that imposing liability without actual notice would frustrate Title IX's purpose.<sup>57</sup> Allowing damages in all cases of teacher-student sexual harassment would, as a practical matter, require school boards to acquiesce in unlimited liability as the price of federal funding simply by agreeing not to discriminate based on sex.<sup>58</sup> The majority believed that Congress could not have desired this result.<sup>59</sup>

The Court also treated the administrative agency's method of enforcement as suggesting a notice requirement.<sup>60</sup> When a sexual harassment situation occurs under Title IX, the OCR may impose sanctions (suspending or terminating fund disbursement) only after it determines that the fund recipient will not voluntarily comply with Title IX following notification of its potential violation.<sup>61</sup> The central purpose of such notice, the Court believed, is to provide the recipient with an opportunity to take appropriate action to rectify the violation before enforcement proceedings begin.<sup>62</sup> If liability is imputed to a school district before it has actual knowledge of teacher-student harassment, the school has no opportunity to take corrective measures to end the harassment and to comply with the statute.<sup>63</sup> A judicially-implied enforcement system that contradicts the express legislative enforcement system would be "unsound."<sup>64</sup>

The Court then considered who the appropriate person to receive notice on behalf of the district is and what constitutes deliberate indifference by the district after receiving such notice.<sup>65</sup> According to the Court, an appropriate person is an official with authority to initiate corrective measures to end the discrimination.<sup>66</sup> The Court determined that an inappropriate response that amounts to deliberate indifference must be an official decision by the district to take no action to end the

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55. *Id.* at 1997.

56. *Id.*

57. *Id.*

58. *Id.* at 1998.

59. *Id.*

60. *Id.* at 1998-99.

61. *Id.* at 1998.

62. *Id.* at 1999.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*



discrimination.<sup>67</sup> A lower standard would impute liability to the district for independent actions of employees, instead of intentional official actions plainly attributable to fund recipients.<sup>68</sup>

Although the Court recognized that sexual harassment of students is a frequent and unfortunate reality in our society, Gebser had no recourse under Title IX.<sup>69</sup> However, the Court pointed out that its affirmation of the judgment in favor of the school district did not prevent victims of teacher-student sexual harassment from seeking damages from the school or teacher under relevant state law.<sup>70</sup> The Court concluded that, until Congress specifically addresses this issue, it was unwilling to impose strict liability or constructive notice standards as a matter of federal law.<sup>71</sup>

Justice Stevens, in a dissent joined by Justices Souter, Ginsburg, and Breyer, stated that the majority's conclusion actually contradicts the purposes of Title IX.<sup>72</sup> Justice Stevens observed that *Franklin* held, at least implicitly, that teacher-student sexual harassment was a violation of a school district's duty to not discriminate, a duty the district assumes in exchange for federal funds, and that recovery of damages was appropriate.<sup>73</sup> Because Waldrop's conduct was intentional and occurred while exercising authority over Gebser, the school district should be liable.<sup>74</sup> To hold otherwise would contradict agency principles as well as the OCR's Guidance imposing liability when a teacher abuses authority by sexually harassing a student.<sup>75</sup>

Justice Stevens argued the purpose of Title IX liability is to induce school boards to promulgate and enforce programs that will minimize sexual harassment in schools receiving federal funds.<sup>76</sup> Imposition of liability in this case would further, not frustrate, the purposes behind Title IX's enactment.<sup>77</sup> Justice Stevens was concerned that the majority's rule would give school boards the incentive to "insulate themselves from knowledge" about teacher-student sexual harassment to avoid damages.<sup>78</sup>

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67. *Id.*

68. *Id.*

69. *Id.* at 2000.

70. *Id.*

71. *Id.*

72. *Id.* at 2001 (Stevens, J., dissenting).

73. *Id.* at 2001-02.

74. *Id.* at 2003.

75. *Id.*

76. *Id.* at 2004.

77. *Id.* at 2005.

78. *Id.* at 2004.

Justice Ginsburg, joined by Justices Souter and Breyer, also dissented, offering another approach derived from "the tort law doctrine of avoidable consequences."<sup>79</sup> Justice Ginsburg argued that if a school board had an effective policy for handling sexual harassment, it could use such a policy as an affirmative defense to a Title IX liability claim.<sup>80</sup> In order to avoid liability, a school board would have the burden of proving the plaintiff failed to utilize the school's preventive and remedial programs, resulting in avoidable harm.<sup>81</sup>

#### IV. IMPLICATIONS

The Supreme Court's decision in *Gebser* is significant in several respects. First, the decision specifically resolves the split of authority in the lower courts by defining the standard of institutional liability for teacher-student sexual harassment.<sup>82</sup> While *Franklin* has been credited with opening "the floodgates for sexual harassment litigation under Title IX,"<sup>83</sup> *Gebser* clearly rejects strict entity liability and constructive knowledge standards and imposes the requirements of actual knowledge and deliberate indifference.<sup>84</sup> Lower courts will no longer have to struggle with extrapolating policies from Title VII, a substantive liability model the Court rejected. Congress must take action in order to modify the Title IX liability standard the Court adopted.<sup>85</sup>

Second, the decision will also ultimately affect the children in school systems. Proponents of strict liability believe the agency theory is the only way to require school districts to be as aggressive as possible in preventing and discovering sexual harassment.<sup>86</sup>

In contrast, a school cannot effectively serve a child in any capacity if it is rendered financially bankrupt from unlimited damage awards.<sup>87</sup> The grim reality is that schools will always attract people who become

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79. *Id.* at 2007 (Ginsburg, J., dissenting).

80. *Id.* A similar affirmative defense was accepted by the Court in Title VII cases alleging employer liability for a supervisor's creation of a hostile environment due to sexual harassment. See *Burlington Indus. v. Ellerth*, 118 S. Ct. 2257, 2270 (1998); *Faragher v. Boca Raton*, 118 S. Ct. 2275, 2293 (1998).

81. *Gebser*, 118 S. Ct. at 2007.

82. *Id.* at 2000.

83. Kaija Clark, *School Liability and Compensation for Title IX Sexual Harassment Violations by Teachers and Peers*, 66 GEO. WASH. L. REV. 353, 358 (1998).

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

85. *Id.*

86. Richard Fossey & Todd A. Demitchell, "Let the Master Answer": *Holding Schools Vicariously Liable When Employees Sexually Abuse Children*, 25 J.L. & EDUC. 575, 593-96 (1996).

87. *Id.* at 596.

teachers in order to sexually abuse children. Because, after *Franklin*, there are no fixed limits on damages, easily-met entity liability standards could mean that the criminal conduct of a single individual could devastate the ability of a school district to provide services for an entire community.<sup>88</sup>

Finally, *Gebser* may also have implications for other issues arising out of Title IX. For example, the Court will soon decide a case concerning student-on-student sexual harassment.<sup>89</sup> Because the standard of "actual knowledge with deliberate indifference" is so hard to establish in teacher-student sexual harassment cases, it will likewise be extremely difficult for victims of student-on-student harassment to establish a Title IX violation and seek compensation. There would then be no federal damages remedy at all for such harassment because most courts have held that individual officials, as opposed to institutions, are not subject to Title IX liability.<sup>90</sup> However, because the decision in *Gebser* did not receive an overwhelming majority, the Court could establish that the elements of the standard for district liability could more easily be met in other Title IX liability situations.

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88. *Id.*

89. *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390 (11th Cir. 1997), *cert. granted*, 1998 WL 663332 (U.S. Sept. 29, 1998) (No. 97-843).

90. 1 HAROLD S. LEWIS, JR., *LITIGATING CIVIL RIGHTS AND EMPLOYMENT DISCRIMINATION CASES* § 11.19 (Supp. 1997).