Students, Beware: Gebser v. Lago Vista Independent School District

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I. INTRODUCTION

As the number of sexual harassment claims in the workplace continues to increase, awareness of harassment in an educational setting has parallely risen. Both primary and secondary students are filing more complaints than ever before. Nearly every circuit has addressed the issue of sexual harassment in schools, and various tests ranging from actual knowledge to strict liability have developed to determine the liability of a school district. The United States Supreme Court resolved this conflict in the circuits in *Gebser v. Lago Vista Independent School District*. In a 5-4 decision, the Court held that actual knowledge and deliberate indifference were required to impose liability on a school district for sexual harassment of a student by an employee.

This paper analyzes the *Gebser* decision. It presents a brief history of the relevant discrimination laws, especially Title IX, the statute prohibiting discrimination in federally funded educational programs. It describes the different theories of liability that the appellate courts have developed. It analyzes the Supreme Court decision, its rationale, and its policy implications. Finally, this paper proposes an alternative standard of agency liability.

II. THE *GEBSER* CASE

A. Factual and Procedural Background

The plaintiff, Alida Star Gebser, a student in the Lago Vista Independent School District of Texas, brought suit against the district and a teacher for violations of Title IX and state negligence law. While thirteen years old and in the eighth grade, the plaintiff was placed in a high school book discussion class led by

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5. *Id.* at 1998.
Frank Waldrop, a Lago Vista high school teacher. During the course of these discussions, Waldrop made sexually suggestive remarks to students. In the fall of 1991, the plaintiff entered the Lago Vista High School, and Waldrop taught her both semesters, continuing to make inappropriate remarks that became increasingly directed toward the plaintiff. The relationship between the plaintiff and Waldrop soon became sexual in the spring of 1992. Rebuffing questions from teachers, the plaintiff did not report the incident, and she and Waldrop had sexual intercourse repeatedly, during secret off-campus sexual encounters. During the summer, the plaintiff was a student in Waldrop’s Advanced Placement class, and she had regular sexual relations with him.

The plaintiff did not report the relationship although she realized it was improper. She was unsure about to whom to complain, and she still desired to have Waldrop as a teacher and to participate in his advanced classes. At this time, the school district had not distributed an official grievance procedure for filing sexual harassment complaints, nor had it issued an anti-harassment policy. There was no appointed person to receive harassment claims, and there was no attempt to educate the faculty or students about sexual harassment. Instead, during a portion of the time period of the relationship, the district only had in effect two written policies, one that prohibited employees from sexual harassment of students, and one that prohibited employees from any sexual harassment of a student or employee.

In October of 1992, on the basis of two other students’ complaints about inappropriate remarks made by Waldrop in class, a meeting was arranged with the parents, principal, and Waldrop, at which Waldrop apologized and was warned about his conduct. The principal did not investigate the matter any further, nor

11. Under the pretense of delivering a book to the plaintiff, who was home alone, Waldrop complimented plaintiff on her maturity, embraced her, kissed her, and fondled her breasts and genitalia. Gebser, 118 S. Ct. at 1993.
did he report the incident to the superintendent.\textsuperscript{20} However, in January of 1993, a police officer discovered the plaintiff and Waldrop having sexual intercourse.\textsuperscript{21} Waldrop was fired, and his teaching license was revoked.\textsuperscript{22}

The plaintiff and her mother originally filed suit in state court against Waldrop for violation of state tort law, then amended the suit to join Lago Vista for violations of the Civil Rights Act of 1866 and Title IX of the Educational Amendments of 1972.\textsuperscript{23} The case was removed to the United States District Court for the Western District of Texas, which granted summary judgment for Lago Vista and remanded the claims against Waldrop to state court.\textsuperscript{24} The district court reasoned that before liability can be imposed upon them, the school administrators must have some kind of notice, and they must fail to respond in good faith.\textsuperscript{25}

The plaintiff appealed the Title IX claim to the Fifth Circuit Court of Appeals, which affirmed the district court's decision.\textsuperscript{26} In a brief opinion, the Fifth Circuit rejected strict liability for school districts in Title IX sexual harassment cases.\textsuperscript{27} Next, the court rejected a constructive notice standard because there was not enough evidence to indicate that a school official knew or should have known about the abuse.\textsuperscript{28} Finally, the court rejected an agency theory, whereby the employer is vicariously liable for the tort of an employee accompanied by the "existence of the agency relationship."\textsuperscript{29} The Fifth Circuit held that a school district is not liable unless an official with supervisory power actually knew of the abuse and failed to end it.\textsuperscript{30}

The Supreme Court affirmed.\textsuperscript{31} Acknowledging that a school district may be liable for a teacher's sexual harassment of a student,\textsuperscript{32} the Court held that in order for a plaintiff to recover under Title IX, "an official who at a minimum had authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf" must have actual knowledge of discrimination and must be deliberately indifferent.\textsuperscript{33} The Court's analysis focused primarily on the text of Title IX, comparing it with Title VII, which prohibits discrimination and sexual harassment (among other things) in an employment setting, and with Title VI, which prohibits racial discrimination. Noting that the private right of action under

\begin{itemize}
\item \textsuperscript{21} Gebser, 118 S. Ct. at 1993.
\item \textsuperscript{22} Id.
\item \textsuperscript{24} Gebser, 118 S. Ct. at 1993.
\item \textsuperscript{25} Id.
\item \textsuperscript{26} Doe v. Lago Vista Indep. Sch. Dist., 106 F.3d 1223 (5th Cir. 1997).
\item \textsuperscript{27} Id. at 1225.
\item \textsuperscript{28} Id.
\item \textsuperscript{29} Id.
\item \textsuperscript{30} Id. at 1226. See Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648 (5th Cir. 1997).
\item \textsuperscript{31} Gebser, 118 S. Ct. at 1993.
\item \textsuperscript{33} Gebser, 118 S. Ct. at 1999.
\end{itemize}
Title IX is judicially implied, the Court sought to shape the remedy to conform with the purpose of the statute. The Court discovered a two-fold purpose: "to avoid the use of federal resources to support discriminatory practices" and "to provide individual citizens effective protection against those practices." In order to fulfill this two-fold purpose, the Court mandated that the recipient of federal funding have actual notice of the discrimination through the awareness of an official with authority to correct it.

B. Relevant Law

The Supreme Court in *Gebser* undertook a textual analysis and comparison of Title IX with Titles VI and VII. All three statutes concern forms of discrimination: Title IX prohibits discrimination based on sex, Title VI prohibits discrimination based on race, and Title VII prohibits discrimination based on sex or race in employment. All three must be understood in order to understand the rationale and critiques of *Gebser*.

1. Sexual Harassment in an Employment Context: Title VII

Title VII of the Civil Rights Act of 1964 states: "It shall be an unlawful employment practice for the employer—(1) to fail or refuse to hire or 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." This Title provides employees a right to be free from unlawful discrimination by their employers. Originally, claims were lodged as class actions, but they gradually transformed into tort remedies. As a result of the Civil Rights Act of 1991, plaintiffs with a Title VII claim may now recover up to $300,000 for discrimination because of race, color, religion, sex, or national origin.

Title VII provides a cause of action for sexual harassment. Defined as unwelcome sexual conduct, sexual harassment may occur in two forms: "quid pro quo" and "hostile environment." "Quid pro quo" discrimination involves
advances or requests for sexual favors in return for advancements or other employment decisions, and "hostile environment" involves an environment that interferes with performance. Both types of claims are readily actionable under Title VII.

Hostile work environment claims, however, have developed more slowly. The theory was first recognized in the context of race discrimination. As claims developed for sexual harassment under Title IX, Henson v. City of Dundee defined the five elements of a hostile environment claim: (1) the employee is part of a protected group; (2) the employee was subjected to sexual harassment; (3) the harassment was based on sex; (4) the harassment was so pervasive as to alter the conditions of employment and create an abusive working environment; and (5) there is a basis for the employer's liability. In Meritor Savings Bank v. Vinson, the first Supreme Court ruling on a sexual harassment claim, the Court held that a hostile environment was actionable under Title VII. Later, in Harris v. Forklift Systems, Inc., the Court established an objective/subjective test for an abusive work environment. Finally, in Faragher City of Boca Raton and Burlington Industries v. Ellerth, the Court has recently held employers vicariously liable for sexual harassment by employees, subject to an affirmative defense. In those two decisions, the Court specifically relied on agency principles, reasoning that "most workplace tortfeasors are aided in accomplishing their tortious objectives by the existence of an agency relationship." However, this theory of liability was limited by the affirmative defense: (1) if the employer exercised reasonable care to prevent harassment, and (2) the plaintiff failed to take advantage of the preventive opportunities.

44. 29 C.F.R. § 1604.11(a)(1) and (a)(2) (1985) define sexual harassment as occurring when "submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment" or "submission to or rejection of such conduct by an individual is used as the basis for employment decision affecting such individual" (equivalent to quid pro quo). 29 C.F.R. § 1604.11(a)(3) defines sexual harassment as conduct which "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment" (hostile environment).
47. 682 F.2d 897, 903 (11th Cir. 1982).
52. Id. at 753, 118 S. Ct. at 2268.
53. Id. at 754, 118 S. Ct. at 2270.
2. Discrimination in Federally Funded Programs: Title VI

Title VI of the Civil Rights Act of 1964 prohibits any person, "on the ground of race, color, or national origin, [to] be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." It was enacted to terminate federal funding to entities that engaged in racial discrimination. Since then, a variety of claims have been brought under the auspices of Title VI. For example, in Regents v. Bakke, a white male challenged a medical school’s admission program as discriminatory because it assured admission of a certain number of minority students.

Although Title VI does not provide a private cause of action, courts have nevertheless implied one. In Lau v. Nichols, the Supreme Court gave the plaintiffs, students challenging a school district's language program, relief under Title VI. The availability of a private cause of action was affirmed in Guardians Association v. Civil Service Commission of the City of New York, which also limited the right to apply to only intentional discrimination.

3. Sexual Harassment in Education: Title IX

Title IX provides 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. . . .” Recipients of federal funds must comply with rules and regulations issued to accomplish the objectives of Title IX. Compliance with the requirements may be attained by the termination of funds or assistance (after an opportunity for a hearing and an express finding of a failure to comply) or by any other authorized means. Finally, the statute provides that no action may be taken until an appropriate person has been advised of the failure and still refuses to comply voluntarily.

Two seminal cases established the procedural requirements for Title IX sexual harassment actions. In Cannon v. University of Chicago, the Supreme Court held that, although Title IX did not contain an express, private cause of action for damages, nevertheless it provided an implied private cause of action. Title IX

56. Id. at 269-70, 98 S. Ct. at 2737.
61. Id.
confers a benefit on a particular class discriminated against because of sex.\textsuperscript{64} Because of its similarity to Title VI, which also has an implied right of action, the Court reasoned Title IX was to have the same right.\textsuperscript{65} Also, it seemed more sensible to give a claimant individual relief rather than placing the burden of proof of termination of federal funding on them.\textsuperscript{66} In \textit{Franklin v. Gwinnett County Public Schools},\textsuperscript{67} the Supreme Court went beyond \textit{Cannon} to explicitly hold that Title IX provides a damages remedy. Expanding the \textit{Cannon} decision, the Court decided that Congress did not intend to limit the remedies of Title IX.\textsuperscript{68}

4. Legislative History of Title IX

The legislative history of Title IX is often cited as support for theories concerning the Title's legislative predecessor, i.e., whether it was modeled after Title VI or Title VII. In \textit{Cannon}, the Court stated that Title IX was enacted "to avoid the use of federal resources to support discriminatory practices" and "to provide individual citizens effective protection against those practices."\textsuperscript{69}

At the time it enacted Title IX, Congress had already enacted Title VI and Title VII, which were intended to halt racial and gender discrimination; however, gender discrimination still remained in educational programs.\textsuperscript{70} In June and July of 1970, Representative Edith Green chaired the House Subcommittee on Education and Labor, which held hearings on gender discrimination in federally funded education systems.\textsuperscript{71} In those hearings, debates focused on equality in education.\textsuperscript{72} Senator Green argued that women should have more access to higher education, but there was no discussion about discrimination in the form of sexual harassment.\textsuperscript{73} The subcommittee considered proposing an amendment that would have added the word "sex" to the list of discriminations in Title VI and applied the nondiscrimination requirements of Title VII.\textsuperscript{74} One court described this amendment as a way to "bridge the gap" between Title VII and Title VI,\textsuperscript{75} but the House never passed the resolution.\textsuperscript{76}

\textsuperscript{64} \textit{Id.} at 694-96, 99 S. Ct. at 1956-57.
\textsuperscript{65} \textit{Id.} at 699-700, 99 S. Ct. at 1958-59.
\textsuperscript{66} \textit{Id.} at 705, 99 S. Ct. at 1962.
\textsuperscript{68} \textit{Id.} at 72, 112 S. Ct. at 1036.
\textsuperscript{69} \textit{Cannon}, 441 U.S. at 704, 99 S. Ct. at 1961.
\textsuperscript{70} Paul C. Sweeney, \textit{Abuse, Misuse, and Abrogation of the Use of Legislative History: Title IX and Peer Sexual Harassment}, 66 UMKC L. Rev. 41 (1997).
\textsuperscript{71} \textit{Davis v. Monroe County Bd. of Educ.}, 120 F.3d 1390, 1395 (11th Cir. 1997), rev'd on other grounds, 526 U.S. 629, 119 S. Ct. 1661 (1999).
\textsuperscript{72} Sweeney, supra note 70, at 66.
\textsuperscript{73} \textit{Id.} at 66 nn.129 & 130.
\textsuperscript{74} \textit{Cannon}, 441 U.S. at 694-95 n.16, 99 S. Ct. at 1956-57 n.16.
\textsuperscript{75} \textit{Davis v. Monroe County}, 120 F.3d 1390, 1396 (11th Cir. 1997), rev'd on other grounds, 526 U.S. 629, 119 S. Ct. 1661 (1999).
\textsuperscript{76} \textit{Cannon}, 441 U.S. at 695 n.16, 99 S. Ct. at 1957 n.16.
The present Title IX was passed by joint contributions of the House and Senate. In 1971, the House introduced a new bill prohibiting gender discrimination in any federally funded educational program. Meanwhile, the Senate had passed an education bill, which was intended to improve access to higher education by low-income students and increase the quality of teaching, but did not include an anti-discrimination amendment. The House adopted an anti-discrimination amendment to the Senate bill, but the Senate committee to which the bill was referred restored it to its original form. However, the Senate did finally accept an antidiscrimination provision, which its sponsor said would close a loophole in existing legislation. As in the House, debates in the Senate focused on discrimination against women in educational programs, in other words, admission procedures, scholarship, and employment, but not sexual harassment. Finally, a joint bill was formed by the Senate Conference Committee, which passed and became Title IX. The House Report states that Title VII excludes educational institutions and that Title IX brings those in education under the equal employment protection.

III. INTERPRETATIONS OF TITLE IX

Prior to the decision in Gebser, courts were divided as to which standard of liability should be used in Title IX claims. The only guidance the Supreme Court provided was that Title IX should be given "a sweep as broad as its language." Four different standards of school district liability arose in the circuits: (1) actual knowledge; (2) constructive knowledge; (3) agency principles; and (4) strict liability.

A. Actual Knowledge

The most defendant friendly, the actual knowledge standard is synonymous with intentional discrimination, a knowing failure to act on allegations of

77. Sweeney, supra note 70, at 63.
78. Id. at 57.
79. Davis v. Monroe County, 120 F.3d 1390, 1396 (11th Cir. 1997), rev'd on other grounds, 526 U.S. 629, 119 S. Ct. 1661 (1999). Senator Bayh introduced the amendment to provide women with access to and employment in higher education. Sweeney, supra note 70, at 57-58.
80. Sweeney, supra note 70, at 67.
81. Id.
82. Id. at 61.
83. Davis, 120 F.3d at 1397.
84. Doe v. Claiborne County Tennessee, 103 F.3d 495, 514 (6th Cir. 1996).
discrimination.\textsuperscript{88} The person with actual knowledge must be in some position of authority and must fail to respond adequately.\textsuperscript{89}

The Fifth Circuit has developed this theory quite thoroughly,\textsuperscript{90} rejecting strict liability and agency theories in favor of actual knowledge.\textsuperscript{91} The court determined that Title IX was enacted pursuant to the Spending Clause of the Constitution, and as such, required clear and unambiguous conditions attached to the funding, which precludes strict liability.\textsuperscript{92} The recipient of federal funds must be on notice of potential liability.\textsuperscript{93}

The Fifth Circuit has found several bases for its theory. First, the text of Title IX has the "identical language" of Title VI, which has been interpreted as Spending Clause legislation.\textsuperscript{94} Unlike Title VII, which specifically refers to agents, Title IX only refers to recipients.\textsuperscript{95} Furthermore, a school district cannot "spread the loss" of enormous verdicts so the children in the district would ultimately pay the price.\textsuperscript{96} Lastly, requiring actual knowledge results in swifter action as the district can immediately react and better protect the harassed individual and any other potential victim.\textsuperscript{97}

Additionally, the Fifth Circuit analyzed the question of who should be the appropriate party to have actual knowledge,\textsuperscript{98} devising a spectrum of potential candidates.\textsuperscript{99} At one end, most friendly to defendants, were members of the school board. This interpretation would impose practically no liability on districts since it would be highly unlikely that such a person would have actual knowledge. At the other end, most friendly to plaintiffs, were any school employees (other than the perpetrator), which would defeat the entire analysis of the Spending Clause of no strict liability.\textsuperscript{100} The court instead chose a middle ground, requiring an official vested with the power of supervision and remedial action to have actual knowledge of the harassment.\textsuperscript{101}

\textsuperscript{89.} \textit{Canutillo Indep. Sch. Dist. v. Leija}, 101 F.3d 393 (5th Cir. 1996).
\textsuperscript{91.} \textit{Canutillo}, 101 F.3d at 398-400.
\textsuperscript{92.} Id. at 398-99.
\textsuperscript{94.} \textit{Canutillo}, 101 F.3d at 398.
\textsuperscript{95.} \textit{Rosa H.}, 106 F.3d at 654.
\textsuperscript{96.} \textit{Canutillo}, 101 F.3d at 399.
\textsuperscript{97.} Id. at 399-400.
\textsuperscript{98.} In \textit{Canutillo}, the court declined to address the question, only providing that the person must have some authority over the employee. Interestingly, the court mused that person may have to be a member of the school board. 101 F.3d at 401.
\textsuperscript{99.} \textit{Rosa H.}, 106 F.3d at 659.
\textsuperscript{100.} Id.
\textsuperscript{101.} Id. at 660.
The Seventh Circuit found the Fifth Circuit’s logic persuasive, and also held that a school district is liable only if an official with authority has actual knowledge and fails to end the harassment. This circuit found a Title VII comparison to be useful in determining the severity of the harassment, but not useful in determining the standard of liability. It agreed with the Fifth Circuit that Title IX lacked any statutory basis for agency principles.

B. Constructive Knowledge

The constructive knowledge standard would require that a school district “knew or should have known” of the harassment and failed to take proper action. This theory of liability derives from Meritor, in which the Supreme Court held that employers are not always strictly liable for harassment by employees under Title VII; however, the Court specifically declined to define a rule on employer liability. When addressing Title IX claims under this standard, some courts have applied Title VII rationale and interpreted Meritor to mean a constructive knowledge standard should be applied in hostile environment situations.

Both the First and Eighth Circuits have employed this standard. For example, in Lipsett v. University of Puerto Rico, the First Circuit relied heavily on the Meritor decision. Citing Meritor, the court held that an educational institution is liable for a hostile environment if an official “knew, or in the exercise of reasonable care, should have known” of the harassment unless the official can show preventative steps were taken. The Eighth Circuit used the same reasoning in Kinman v. Omaha Public School District, holding that Title VII standards apply to Title IX claims of sexual harassment. Also, relying on Meritor, the court stated that constructive knowledge and reasonable attempts to alleviate the harassment were the appropriate standards.

102. Smith v. Metropolitan Sch. Dist., Perry Township, 128 F.3d 1014 (7th Cir. 1997).
103. Id.
104. Id. at 1024. See also Oona By Kate S. v. McCaffrey, 143 F.3d 473 (9th Cir. 1997) (holding that a school is liable for a failure to address a known hostile environment) and Floyd v. Waiters, 133 F.3d 786 (11th Cir. 1998) (holding that a grant recipient must have actual notice of sexual harassment and fail to act).
108. 864 F.2d 881 (1st Cir. 1988).
109. Id. at 901. Note, Lipsett addressed a claim by an employee of an educational institution; however, presumably the rationale would apply to students.
110. 94 F.3d 463, 469 (8th Cir. 1996).
111. Id. at 468.
C. Agency

The agency theory finds its roots in the Restatement of Agency. An agent acts on behalf of a principal and with the principal's consent. He or she may act with authority granted by the principal. Additionally, he or she may act with apparent authority, which arises from a third party's perception of the agent-principal relationship. In the context of Title IX, a school district would be liable for the actions of a teacher, even if outside of the scope of employment, if the school discriminated intentionally, negligently, or recklessly or if the teacher was aided in performing a tort by virtue of his or her agency relationship with the school.

The Office for Civil Rights (OCR), the agency responsible for enforcing Title IX, stated that a school's liability for sexual harassment by its employees should be determined by agency principles. OCR chose to apply what it interpreted as the Supreme Court's determination that agency principles govern Title VII and Title IX claims. For "quid pro quo" harassment, a school in effect will always be liable, whether or not it had constructive or actual knowledge, because the "quid pro quo" harasser always uses authority that has been granted by the school. For hostile environment claims, a school will be liable if the employee acted with apparent authority or was aided in harassing by the employee's position of authority. OCR defined authority as dependent on factors such as actual authority and the age of the student.

To explain this theory of vicarious liability, courts cite the Restatement of Agency. In Kracunas v. Iona College, the Second Circuit relied on agency

112. See generally Restatement Second of Agency (1958) [hereinafter Restatement].
113. Restatement § 1(1) states, "Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act."
114. Restatement § 7 states, "Authority is the power of the agent to affect the legal relations of the principal by acts done in accordance with the principal's manifestations of consent to him."
115. Restatement § 8 states, "Apparent authority is the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons."
118. Id.
119. Id.
120. Id. Younger students have a greater tendency to view more people as authority figures.
121. See Doe v. Lago Vista Indep. Sch. Dist., 106 F.3d 1223, 1225 (5th Cir. 1997). Cited by the Lago Vista court, Section 219 of the Restatement Second of Agency states: "(1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment. (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless: (a) the master intended the consequences, or (b) the master was negligent or reckless, or (c) the conduct violated a non-delegable duty of the master, or (d) the servant purported to act or speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation."
122. 119 F.3d 80 (2d Cir. 1997).
principles to reverse summary judgment on the defendant’s liability. The court found that the teacher acted as the school’s agent and had authority over the students, the abuse of which was sufficient to impute liability to the school.\textsuperscript{123} There was no reason, the court believed, that students should receive less protection than employees.\textsuperscript{124} The Second Circuit also developed a second test: If an employee does not rely on authority, the school is liable if it provided “no reasonable avenue for complaint” or if it had constructive knowledge of the harassment and failed to act.\textsuperscript{125}

In \textit{Doe v. Claiborne County Tennessee},\textsuperscript{126} the Sixth Circuit also concluded that Title VII agency principles apply to Title IX claims. The court cited two main reasons for applying the standard.\textsuperscript{127} First, the House Report on Title IX stated that Title IX removes the exception that Title VII contains for educational institutions.\textsuperscript{128} Secondly, OCR stated that Title VII agency principles should apply in sexual harassment claims.\textsuperscript{129} Despite the emphasis on Title VII and agency principles, the court nevertheless formulated its final inquiry in a somewhat different form: whether the school took appropriate action after knowing of the harassment, a standard that undermines the pure agency theory that the court initially embraced.\textsuperscript{130}

\textbf{D. Strict Liability}

Although never formally adopted by a court as a basis for liability, the theory of strict liability is liability without fault.\textsuperscript{131} This theory also derives from Title VII cases, especially \textit{Meritor}, which stated that “quid pro quo” actions by employees are imputed to supervisors regardless of fault or knowledge.\textsuperscript{132} In relying on that reasoning, courts have determined that under Title VII, quid pro quo harassment makes the employer strictly liable.\textsuperscript{133}

The Seventh Circuit classified the agency theory as a strict liability theory.\textsuperscript{134} Using the Restatement for determining liability creates strict liability because in every case of harassment, the argument could be made that the teacher’s status enabled accomplishing the tort.\textsuperscript{135} The liability is

\begin{itemize}
  \item \textsuperscript{123} \textit{Id.} at 87-88.
  \item \textsuperscript{124} \textit{Id.} at 88.
  \item \textsuperscript{125} \textit{Id.}
  \item \textsuperscript{126} 103 F.3d 495, 514 (6th Cir. 1996).
  \item \textsuperscript{127} \textit{Id.}
  \item \textsuperscript{128} \textit{Id.}
  \item \textsuperscript{129} \textit{Id.}
  \item \textsuperscript{130} \textit{Id.}
  \item \textsuperscript{131} Smith v. Metropolitan Sch. Dist., Perry Township, 128 F.3d 1014, 1030 (7th Cir. 1997).
  \item \textsuperscript{132} 477 U.S. at 70, 106 S. Ct. at 2407.
  \item \textsuperscript{133} Canutillo Indep. Sch. Dist. v. Leija, 101 F.3d 393, 397 (5th Cir. 1996).
  \item \textsuperscript{134} \textit{Smith}, 128 F.3d at 1014.
  \item \textsuperscript{135} \textit{See supra} note 79; \textit{id.} at 1030.
\end{itemize}
strict because the district is liable even if it had no knowledge and even if it acted reasonably.\textsuperscript{136} The Seventh Circuit then rejected this standard as inconsistent with the Spending Clause interpretation of Title IX.\textsuperscript{137}

IV. ANALYSIS

A. The Gebser Standard

The standard set out in Gebser involves two requirements: (1) an official with authority to address and correct the problem must have actual knowledge of the harassment and (2) the official must fail to respond adequately.\textsuperscript{138} The official, in essence, serves as a representative of the school district. Additionally, the Court describes the inadequate response as “deliberate indifference” because there must be an official decision not to correct the violation.\textsuperscript{139} The Court then finds that the plaintiff’s cause of action failed because no official had actual knowledge; the principal had only complaints from other parents about inappropriate comments.\textsuperscript{140}

Although the Supreme Court chooses the strictest standard for imposing liability on schools, ambiguities still abound. The Fifth Circuit has previously addressed the first problem: the status of the official who must have such knowledge.\textsuperscript{141} The Supreme Court succinctly defines the appropriate official as one with the authority to take corrective action;\textsuperscript{142} however, the definition may not be so clear. The Fifth Circuit debated the status of the official, whether it should be a school board member or another employee, and finally concluded the official must have the duty to supervise and the power to end the abuse.\textsuperscript{143} The Supreme Court noticeably omits a reference to supervision, perhaps to dispel totally the association with agency principles. However, the court leaves many questions as to what constitutes “authority.” Could a tenured teacher be considered an official with authority over a nontenured one? For example, if a teacher observes inappropriate gestures, conversations, or touching between a student and a teaching assistant, would the teacher be in a position of authority? If the teacher is not such an official, does that teacher have a duty to report the incident to someone with the proper authority? How should teacher aids, student teachers, and volunteers be treated? Certainly, a teacher would have authority over aids and volunteers, but not if a fellow teacher is the harasser. This standard may produce inconsistent results in some circumstances, and may not even impose liability in a situation where some official has actual knowledge but not the specific official designated by the Supreme Court.

\begin{itemize}
  \item \textsuperscript{136} Smith, 128 F.3d at 1030.
  \item \textsuperscript{137} Id. at 1029.
  \item \textsuperscript{139} Id.
  \item \textsuperscript{140} Id.
  \item \textsuperscript{141} See Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648, 659-60 (5th Cir. 1997).
  \item \textsuperscript{142} Gebser, 118 S. Ct. at 1989.
  \item \textsuperscript{143} Rosa H., 106 F.3d at 660.
\end{itemize}
Furthermore, the Court surmises the status of the official from the enforcement provision of Title IX.\textsuperscript{144} "Because the express remedial scheme under Title IX is predicated upon notice to an 'appropriate person' and an opportunity to rectify any violation, . . . we conclude, in the absence of further direction from Congress, that the implied damages remedy should be fashioned along the same lines."\textsuperscript{145} This inference seems logical as it draws on cues from Congress; however, the enforcement provision specifically addresses only the termination of funding, not a private right of action. Therefore, the enforcement provision need not control determining the status of the official for purposes of a private cause of action.

Beyond the textual problems, the actual notice standard also produces policy concerns. As Justice Stevens writes in his dissent, school districts will have an incentive to "insulate themselves from knowledge."\textsuperscript{146} The most extreme example he cites is one in which every teacher at a school knows of harassment, but no one has the power to address it.\textsuperscript{147} School districts, in an effort to avoid liability, can refuse to grant power to all employees, except perhaps principals or even school board members. It is extremely unlikely that a child will report harassment to such a person or that the correct information will make its way up the chain of command. Schools, conscious of potential liability, will develop a "see-no-evil" attitude to maintain a defense of ignorance, which undermines the purpose of Title IX.\textsuperscript{148}

Another problem is the noticeable gap in the Court's standard in its cursory dismissal of the fact that Lago Vista School District did not promulgate a grievance procedure.\textsuperscript{149} That failure, the Court writes, did not constitute discrimination.\textsuperscript{150} This reasoning is logically inconsistent because, had a proper grievance procedure been in place, the "appropriate official" would at least have been identified, and thus could have been notified. Even though the plaintiff did not notify her principal, she could not have known the proper procedure or even how the school should have responded to the initial contact. Moreover, the Department of Education regulations required district recipients to designate one employee to handle grievances, to adopt and publish grievance procedures, and to notify students.\textsuperscript{151} The Office of Civil Rights has argued that in the absence of such a policy, the school should be liable, even if it is unaware of harassment, because the

\begin{thebibliography}{99}
\bibitem{f} Gebser, 118 S. Ct. at 1999.
\bibitem{1} Id.
\bibitem{2} Id. at 2004. One commentator suggests, however, that "forward-looking and fiscally prudent" schools will continue to implement harassment procedure, as they are still liable under Title VII. Deborah Volberg, Sexual Harassment Under Title IX: The Same But Different, N.Y.L.J. I (1998).
\bibitem{3} Gebser, 118 S. Ct. at 2004.
\bibitem{5} Id. at 2000.
\bibitem{6} Id.
\bibitem{7} 34 C.F.R. §§ 106.8 and 106.9 (1998).
\end{thebibliography}
student does not know how to report the harassment. OCR also considers the existence of grievance procedures when investigating claims.

The existence of such procedures should be a necessary and key factor in determining liability. Without a policy against harassment, the danger is that these actions will be condoned or ignored. Besides avoiding liability by ending harassment before it has begun or effecting remedial action, a well-stated policy will fulfill Title IX's ultimate purpose of protecting students. Students will have an "accessible and fair forum," and they will be aware of their schools' standard on harassment. Demonstrating "zero tolerance," the policy should apply to both students and teachers, and the school should implement grievance procedures that encourage reporting and that are widely disseminated. Such strong policies may change behavior in school and prevent future instances of sexual harassment.

B. Analysis of the Gebser Rationale

Gebser is the final case in the "trilogy" of cases in which the Supreme Court has defined the right of action under Title IX. Giving it life in Cannon through an implied right, then giving it substance in Franklin through monetary damages, the Supreme Court has finally given form to the right: actual notice and deliberate indifference. However, is this final step a judicial creation or an accurate interpretation of congressional intent?

1. Text of Title IX

The Court's most basic analysis begins with the text of Title IX. Of the three cases in the trilogy, Gebser most closely examines the text of Title IX, but only to distinguish it from Title VII. It is ironic that part of the rationale for

153. Id.
154. Canutillo, 101 F.3d at 409 (Dennis, J., dissenting).
159. Id. at 19.
162. Id. at 1996.
163. The Cannon court cited only Title IX's focus on a particular class, focusing instead on its legislative history and similarity to Title VI. 441 U.S. at 677, 99 S. Ct. at 1946. The Franklin court rejected pure statutory construction for an evaluation of the state of the law at Title IX's passage.
Gebser, which represents the furthest step the Supreme Court has taken in its judicial implications, is a step back to the actual text. The Court professes to have a "measure of latitude to shape" a remedy and confesses to "a degree of speculation," but then claims to "generally examine" the statute to avoid conflict with its purpose.

The method of the Court's interpretation of Title IX in Gebser is a retreat from Franklin, a "switching of music," as Justice Scalia might say. In Franklin, the emphasis was on the settled rule that if rights have been violated and a federal statute provides a right to sue, courts may award appropriate remedies. In Gebser, the Court concludes that the rule yielded to the intent of Congress to avoid frustrating the statute's purposes. Although the Court's approach may be classified as an exercise of the judicial power to interpret legislation, the Court still appears to be retracting from its previous position. In Franklin, the Court was like a skilled artisan, handcrafting a remedy from the blueprint Congress provided. In Gebser, the court seems relegated to an assembly line worker, undeviating from the explicit demands of Congress.

In order to avoid frustrating Congress' supposed purposes, the Court concludes there could be no liability based on respondeat superior or constructive notice. Title IX has no text that "shed[s] light" on Congress' intent; therefore, the Court is left to interpreting "clues." Citing Title IX's means of enforcement, the Court determines that the district should have actual knowledge in order to end and prevent harassment. This logic fails, however, because the

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U.S. at 71, 112 S. Ct. at 1036.
164. See United States Supreme Court Official Transcript, 1998 WL 146703. During oral argument, Justice Scalia stated, "[W]e're sort of switching the music if, having created the cause of action in the face of its nonexpression, despite the fact that this is a spending thing, ... we get very picky ... about what the context of that cause of action is." Note that Justice Scalia concurred with the majority.
165. Gebser, 118 S. Ct. at 1996.
166. United States Supreme Court Official Transcript, supra note 164.
167. 503 U.S. at 66, 112 S. Ct. at 1033.
168. 118 S. Ct. at 1996.
169. Id. at 1997.
170. Id. 1997-98.
171. 20 U.S.C. § 1682 (Supp. 1999) provides:
   compliance ... may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement ... or (2) by any other means authorized by law: Provided, however, that not such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.
   (emphasis added).
173. Id.
referenced portion of Title IX refers to the consequences to the education program’s funding, not the right of action an individual has. Those are two distinct consequences.

The Court argues that unlike Title VII, which specifically defines an employer to include agent, Title IX contains no reference to agents, and thus an agency theory is inappropriate. The Seventh Circuit agreed, stating that the program or activity in Title IX applies only to those with administrative control. However, Title IX prohibits discrimination under a program or activity, which implies that some part of the program or activity has resulted in discrimination. Programs and activities “act” through their individuals; therefore, there need not be any specific references to agents.

Furthermore, Title IX is written in the passive voice from the perspective of the person who is the object of discrimination, which, Justice Stevens argues, gives it broader coverage. The focus is on requiring the recipients to provide a nondiscriminatory environment. Title IX names no actors, uses passive verbs, and focuses on the setting of discrimination. Therefore, the statute only asks, “whether an individual was subjected to discrimination under a covered program or activity.” There is no actor defined in Title IX, so the statute need not reference agents.

2. Comparisons to Title VII

The Court addresses one “issue squarely”: Title IX’s relationship to Title VII. The effect of Title VII on Title IX has been debated in the Circuits and commentary. The Supreme Court very carefully distinguishes Title VII, and in doing so, rejects agency principles. The most obvious difference between the two statutes is the texts. Title VII defines “employer” as including any agent of that employer whereas Title IX has

174. Id. at 1996; 20 U.S.C. § 1681(c) (Supp. 1999) defines an educational institution as “any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education.”

175. Smith v. Metropolitan Sch. Dist., Perry Township, 128 F.3d 1014, 1024 (7th Cir. 1997).


180. Smith v. Metropolitan Sch. Dist., Perry Township, 128 F.3d 1014, 1047 (7th Cir. 1997).

181. Id.

182. Smith, 128 F.3d at 1047 (Rovner, J., dissenting).


184. See, e.g., Murray v. New York Univ. College of Dentistry, 57 F.3d 243 (2d Cir. 1995); Bodnar, supra note 2, at 549.


no comparable reference. Some commentators have surmised that under Title VII, culpable parties are the employer and its agents, so courts may use agency principles. Title IX defines program or activity as the "local educational agency," the entity with legal control of administering school services. Therefore, the Court argues that the focus of Title IX is on the discriminating effect of programs within the school district. However, there is an alternative analysis for Title IX not referencing agency. The entire statute is drafted in the passive voice, and the definition of program is broad, so there is no need to reference any agent. Title IX imposes an affirmative duty on recipients to stop discrimination, which may even provide a broader protection than Title VII, which only refers to employers. Title IX also requires the establishment of a grievance procedure and a person to handle complaints. Therefore, the focus of the statute is to protect the individual from a system that discriminates through its agents.

The Court in Gebser distinguishes Title IX as a contract and Title VII as an "outright prohibition." Title VII seeks to compensate victims, whereas Title IX seeks to protect them. That distinction may be accurate, but does not preclude the analogy between Title VII and Title IX. Both statutes proscribe sexual harassment and confront similar issues. The employment environment is similar to the educational one as both have hierarchical power schemes. Despite the fact that Title IX addresses a problem before it has begun and Title VII addresses the consequences of the problem, both try to resolve the same fundamental issue: sexual harassment. To be sure, schools and workplaces do not have identical environments; however, these differences enhance, rather than reduce, the need for a more lenient standard of liability. Students are transient and less likely to seek remedial action than employees are. Their benefits include intellectual growth, which is less objectively measurable than are employee benefits. Finally, a court is likely to show more deference to schools. These distinctions

193. Schneider, supra note 155, at 545 (citing 34 C.F.R. § 106.8(a-b) (1986)).
195. Id.
196. Quesada, supra note 156, at 1047.
198. However, one commentator found the hostile environment in education different from one in an employment setting. Newman, supra note 157, at 2579.
199. Id.
200. Id.
201. Id.
only indicate a need for greater protection of students, as students are in a more vulnerable position.

Title VII may be distinguished from Title IX because it contains limits on liability. For example, the Fifth Circuit decided that employers have detailed regulations, which "state forthrightly" an employer's responsibility for sexual harassment. In contrast, Title IX does not regulate claims, nor does it even mention sexual harassment. This reasoning, however, represents a cursory look at Title IX and its jurisprudence. Instead of setting out regulations for claims, Title IX requires recipients to do so. Sexual harassment has been regarded as discrimination since Meritor so it need not be specifically mentioned in the statute.

Despite the Court's narrowly drawn distinctions, it nevertheless uses Title VII to support an argument about Title IX. Once monetary damages were available under Title VII, Congress limited recovery. Accepting the principles of agency would allow unlimited recovery under Title IX "in the face of evidence that when Congress expressly considered . . . Title VII[,] it restricted the amount of damages available." This argument seems to undermine the Court's aim of rejecting Title VII-Title IX comparisons. On the one hand, the Court asserts the statutes are very different, and yet, on the other, it uses Title VII damages to draw conclusions about Title IX.

The Court has perhaps made an unnecessary argument. Even courts that refuse to apply agency standards, nevertheless, acknowledge that it is useful to look to Title VII as precedents to establish the requirements of a hostile environment because Title VII and its jurisprudence provide the basis for sexual harassment claims. An analysis of hostile environment, the less clear cut of the two harassment claims under Title VII, is useful for the claim under Title IX. The same definitions of sexual harassment are used for both as well as the same requirements for a claim. Presumably, courts will not completely abandon their reliance on Title VII principles; however, the danger remains that the present Title IX jurisprudence will be inadequate to guide future decisions. Was this distinction even necessary? Some courts have arrived at agency theories for Title IX somewhat independently of Title VII. The Court could have rejected agency solely on the text of Title IX and policy concerns.

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203. Id. One wonders why if the regulations were so forthright, the Supreme Court felt the need this past term to twice address employer liability for sexual harassment.
204. Id.
207. Id.
208. See Smith v. Metropolitan Sch. Dist., Perry Township, 128 F.3d 1014, 1023 (7th Cir. 1997).
209. Bodnar, supra note 2, at 565.
210. Schneider, supra note 155, at 543 (describing the "paucity" of Title IX decisions).
211. See, e.g., Doe v. Claiborne County Tennessee, 103 F.3d 495, 514 (6th Cir. 1996) (citing OCR and the text of Title IX).
212. Perhaps, the Court was internally distinguishing the seemingly similar fact scenarios but different conclusions in Faragher and Burlington.
3. Comparisons to Title VI

Having rejected Title VII comparisons, the Court instead determines that a comparison of Title IX to Title VI was more appropriate. Title IX was modeled after Title VI in wording, and both operate as Spending Clause legislation. The two statutes are worded nearly identically, except Title IX substitutes “sex” for “race, color, or national origin” and adds “education” to program. The comparison between Title IX and Title VI is compelling and accords with many lower circuit opinions that adopted the actual knowledge principle.

Liability under Title VI rests on intentional violations. For unintentional violations, a plaintiff is entitled only to an injunction and other noncompensatory relief. As Title IX was interpreted in Gebser, Title VI is interpreted as a contract whereby the recipients are offered an option of money with conditions attached, but they are free to decline. In order to prevail on a Title VI claim, a plaintiff must show a discriminatory intent and effect.

Apparently the Court assumes Title VI standards can fill the voids in Title IX legislation; however, there are still difficulties. Using Title VI standards, the Fifth Circuit noted that a sexual harassment claim would fail absent direct involvement by a school district. One commentator explained that even notice would not impute liability. There is also great difficulty in proving discriminatory intent. For example, in Guardians v. New York, the Supreme Court found that the plaintiffs failed to prove a discriminatory intent for an entrance exam on which white officers continually received higher scores and, as a result, got more promotions. The factors of proving discriminatory intent include the impact of an action bearing more heavily on one race, the historical background of the decision, the sequence of events leading to the decision, and departures from normal procedures. Moreover, Title VI addresses entirely unique problems and is not a suitable analogy for Title IX.

214. Id.
218. Id. at 607, 103 S. Ct. at 3235.
219. Id. at 599, 103 S. Ct. at 3231.
223. Id.
226. Specifically, Title VI addresses problems of racial discrimination.
4. **Overruling Franklin?**

In *Franklin*, the Supreme Court held that a damages remedy was available under Title IX, relying on an early theory of the court's power to award appropriate relief for a violated right. Simply put, the theory concluded that an individual is entitled to an adequate remedy for a wrong. Historically, the Court has implied private causes of action from statutes that do not expressly provide for such causes. Later, the Court recognized a presumption that all appropriate remedies are available in an implied cause. However, it has also limited the presumption by requiring legislative intent for that remedy or using intent to show the nonexistence of a remedy. Yet, one commentator suggested that courts should not limit themselves to analysis of legislative intent because Congress can always amend the statute if it disagrees with an interpretation. Determining intent is difficult because “Congress quite often enacts legislation without considering such questions as whether private individuals have a cause of action.”

With *Franklin*, academics cheered the return of the presumption of remedies. The *Franklin* Court wrote, “Congress did not intend to limit the remedies available in a suit brought under Title IX.” That statement was interpreted to mean only clear congressional intent can limit remedies. Justice Scalia, in a separate concurrence, critiqued the Court’s reasoning, and explained that unless Congress expressly restricts a right, it does not know it is creating, it intends the full range of remedies. He warned that judicial limitations should apply in judicially implied rights.

Although the language in *Franklin* is particularly broad in awarding remedies, the Court in *Gebser* retracts from that theory, imposing Justice Scalia’s judicial limitations. The Court finds legislative intent to provide for an actual knowledge standard; however, legislative intent as to a judicially implied right could compel a different result. In determining intent, the context of the law when it was passed

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230. *Id.*
231. *Id.*
232. *Stabile, supra* note 228, at 901.
233. *Id.*
237. 503 U.S. at 77, 112 S. Ct. at 1038.
238. *Id.*
is important.\textsuperscript{239} With the passage of Title IX, both Titles VI and VII were in place; however, the development of sexual harassment law was still fourteen years away in \textit{Meritor}.\textsuperscript{240} Therefore, the more important context of Title IX is the context of Title VII and its applicable sexual harassment principles. Legislative history usually provides some insight into intent; however, Title IX’s legislative history could arguably be read to invoke either Title VI or Title VII.\textsuperscript{241}

5. \textit{Spending Power}

The crux of the Supreme Court’s argument in \textit{Gebser} is that Title IX was enacted under the Spending Clause\textsuperscript{242} and therefore requires that the recipient should have clear notice of potential liability that it may incur when it chooses to accept the funds.\textsuperscript{243} The Court finds it unlikely that state education recipients of federal funds knowingly agreed to be liable whenever an employee was guilty of discrimination.\textsuperscript{244} Therefore, liability is imposed when there is actual knowledge of harassment. This argument certainly is not novel; Title IX has traditionally been interpreted as Spending Clause legislation\textsuperscript{245} because it is conditional federal funding.\textsuperscript{246}

In \textit{South Dakota v. Dole},\textsuperscript{247} the Supreme Court described the spending power as the power to condition funds upon the recipient’s agreement to follow federal directives and policies. The power, though broad, is subject to the following limitations: exercise must be in pursuit of the general welfare, conditions must be unambiguous to allow states to make a knowing decision, and grants must be related to the federal interest.\textsuperscript{248} If states view federal polices as contrary to local ones, they may decline to accept the grants.\textsuperscript{249} The understanding is that the Spending Clause forms a contract whereby states accept funds and agree to comply with conditions.\textsuperscript{250} Conditions must be unambiguous\textsuperscript{251} so states can knowingly accept the terms of the contract.\textsuperscript{252} There are no conditions in the statute implying

\begin{itemize}
\item \textsuperscript{239} Stabile, \textit{supra} note 228, at 888.
\item \textsuperscript{240} 477 U.S. 57, 106 S. Ct. 2399 (1986).
\item \textsuperscript{241} Stabile, \textit{supra} note 228, at 893.
\item \textsuperscript{242} U.S. Const. art. I, § 8, cl. 1.
\item \textsuperscript{244} \textit{id.}
\item \textsuperscript{245} \textit{See Lieberman v. University of Chicago}, 660 F.2d 185, 1185 (7th Cir. 1981); \textit{Rosa H. v. San Elizario Indep. Sch. Dist.}, 106 F.3d 648, 654 (5th Cir. 1997); \textit{Smith v. Metropolitan Sch. Dist.}, Perry Township, 128 F.3d 1014, 1028 (7th Cir. 1997); \textit{Floyd v. Waiters}, 133 F.3d 786, 702 (11th Cir.), \textit{rev’d in part (on other grounds)}, 119 S. Ct. 33 (1998).
\item \textsuperscript{246} \textit{See 20 U.S.C. § 1681 (Supp. 1999)}.
\item \textsuperscript{247} 483 U.S. 203, 206, 107 S. Ct. 2793, 2795 (1987).
\item \textsuperscript{248} \textit{id. at 207, 107 S. Ct. at 2796}.
\end{itemize}
strict liability, so no state could have made a "knowing" choice without being informed of the consequences of strict liability.253 However, this interpretation assumes states live in ignorance of the law. As Justice Stevens points out, schools did have notice that damages were available for intentional discrimination by teachers because of Franklin.254 At the very least, the decision that sexual harassment is a prohibited form of discrimination is clear.255 Even in Pennhurst, the Supreme Court decision often cited for its contract theory of the Spending Clause, the Court stated there "is no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it."256 Schools had more than adequate notice of potential liability.257 A private cause for monetary relief had been awarded, agency theory had been well litigated regarding sexual harassment, and OCR promulgated standards for liability. The language of Franklin was more than adequate notice:

This notice problem does not arise in a case such as this, in which intentional discrimination is alleged. Unquestionably Title IX placed on the Gwinnett . . . [s]chools the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminates' on the basis of sex." We believe the same rule should apply when a teacher sexually harasses and abuses a student. Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe.258

The Spending Clause argument hinges on the issue of "intentional" discrimination. The majority defines intentional from the viewpoint of the district.259 When a teacher harasses a student, unbeknownst to any school official, the discrimination is unintentional from the district's perspective.260 It follows that the district cannot possibly know that it is violating a condition, so it cannot be held liable in order to preserve the contractual nature of Title IX.261 Franklin has been interpreted in the same way. One commentator wrote that Franklin only addressed intentional discrimination (i.e., actual knowledge of the district) and that the intent requirement gave districts notice of their liability.262 Both Gebser and Franklin have subtly

256. Pennhurst, 451 U.S. at 17 (emphasis added).
258. 503 U.S. at 75, 112 S. Ct. at 1037.
260. Id.
261. Id.
shifted the meaning of notice from the federal/state contract to actual violations. Under the Spending Clause, the only requirement is that conditions be unambiguous, not that states easily be on notice of violations. The federal government unambiguously informed states that they could be liable for sexual harassment in any form. It is the states’ responsibility to monitor for such violations.

Justice Stevens recognizes that the state had fair notice and defined intentional from the perspective of the student. As Meritor stated, sexual harassment is discrimination on the basis of sex, i.e., “intentional discrimination.” The intent, therefore, is in the teacher’s actions. This argument comports with the wording of the statute, which is written from the perspective of the student. The student is entitled to be free from discrimination under any program; certainly teachers are classified as part of the program. Furthermore, in Landgraf v. USI Film Products, the Supreme Court concluded that a hostile work environment based on co-worker harassment constituted intentional discrimination under Title VII with no reference to whether the employer was aware or not. By analogy, hostile environment sexual harassment in an educational setting should also be classified as intentional discrimination.

V. A BETTER SOLUTION

A more appropriate theory of liability is an agency standard with an affirmative defense of an effective grievance policy. The district should be liable for a teacher’s harassment because in fact the teacher is always aided in the harassment by the existence of the agency relationship. The teacher in Gebser used his authority over the plaintiff to engage in discriminatory behavior. As one amicus brief explained, “[D]elegated authority cannot be defined so narrowly that the employing entity is insulated from responsibility whenever its employees fail to live up to the entity’s rules of conduct.”

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265. Brady, supra note 88, at 436.
268. See Gebser, 118 S. Ct. at 2007 (Ginsburg, J., dissenting). Constructive knowledge is an appealing standard; however, it is potentially problem ridden. For example, would the same standard make a school district liable for peer sexual harassment? Also, many victims of harassment which occur in private would remain uncompensated and not vindicated under the auspices of the reasonable person test. Even in Gebser, the plaintiff may have no recovery under a constructive knowledge standard because the harassment occurred in private. Because of the dynamics of the relationship of a school employee sexually harassing a student, the authority of the harasser is key. Therefore, an agency standard is more appropriate.

270. Id. at 2004. The two often had sexual intercourse during school time. Waldrop also was the only teacher of advanced classes, in which the plaintiff had an interest.
271. Brief for National Education Association at 9, Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989 (1998) (No. 96-1866). The respondent suggested agency principles should be modified to include a third party’s reasonable belief that the principal authorizes the agent. Students who are
This standard does not impose strict liability, but absence of notice is not a shield for the employer. Using solely agency principles would essentially result in a form of strict liability because conceivably every school employee is vested with some authority, or a child may believe so. “For example, a security employee may reasonably be perceived by very young students as acting with the authority of the educational institution although the actual delegation of authority to him may be very limited.” Incorporating an affirmative defense into the standard of liability removes the possibility of strict liability. Justice Ginsburg explains the nature of the defense:

The burden would be the school district’s to show that its internal remedies were adequately publicized and likely would have provided redress without exposing the complainant to undue risk, effort, or expense. Under such a regime, to the extent that a plaintiff unreasonably failed to avail herself of the school district’s preventive and remedial measures, and consequently suffered avoidable harm, she would not qualify for Title IX relief.

This theory would align Title IX liability with Title VII, both of which address sexual harassment. Within a Title IX cause of action is a basic sexual harassment claim, the elements of which have been fully developed under Title VII. Courts even unknowingly draw upon Title VII case law to analyze quid pro quo and hostile environment. Although the statutes have dissimilar wording and have been classified under different constitutional powers, both have identical aims of prohibiting sexual discrimination. Title VII and Title IX now have similar remedies, injunctions and compensatory relief. Furthermore, analogies between Title VII and Title IX have been valid in other contexts besides sexual harassment. In El-Marazku v. University of Wisconsin, the plaintiff filed a Title IX suit, alleging discrimination based on her gender when she was denied advancement and continued employment. The court declared it was “reasonable to apply Title VII caselaw” to the Title IX claim. In North Haven Board of Education v. Bell, the Supreme Court, analyzing a Title IX claim, focused on maternity leave, and emphasized the differences of Title VI and the similarities of Title VII. In Ivan v.

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272. Id. at 12.
275. Elizabeth J. Gant, Applying Title VII “HWE” Analysis to Title IX of the Education Amendment of 1972—An Avenue of Relief for Victims of Student-to-Student Sexual Harassment in Schools, 98 Dick. L. Rev. 489 (1994).
276. 134 F.3d 374 (7th Cir. 1998).
277. Id.
Kent State University, the Sixth Circuit considered Title IX and Title VII claims on identical facts.279

Not adopting an agency standard leads to absurd conclusions. In an employment context, a school district would be liable for sexual harassment by its employees even in the absence of actual knowledge by its supervisors.281 In both Burlington and Faragher, the Supreme Court held that an employer is vicariously liable for a hostile work environment posed by a supervisor with authority over an employee, subject to an affirmative defense that the employer exercises reasonable care and the employee failed to take advantage of opportunities.284 If an employee and student were both harassed unbeknownst to the employers and school districts, the employee would have a claim but the student would not under the Gebser rationale.

This result is logically inconsistent considering the similarities between education and employment settings. In both contexts, the victim is required to attend, complete jobs, meet deadlines, and respond to authority. The social atmospheres are similar because both include the same groups of people.282 In both school and employment settings, the victims are unable to stop the abuse, "leaving them unnerved and potentially inhibited in their growth." Sexual harassment in a school environment arguably may be even more damaging. Children and teenagers often have not developed "firm self concepts," so abuse can cause even greater harm.287 Also, children cannot simply switch schools or enter a private school if finances are limited.288 A nondiscriminatory environment is essential for intellectual growth.289

An agency theory would support other particulars of Title IX. OCR declared that agency principles should be used.290 OCR is the agency responsible for enforcing Title IX, and under the Chevron doctrine, it should be entitled to deference. Under Chevron, if Congress has spoken directly on the issue, Congress' intent prevails.292 There is no such clear intent, so Chevron's second test is whether the agency’s interpretation is reasonable.293 An agency standard of liability is quite

279. 92 F.3d 1185 (6th Cir. 1996).
280. Id.
286. Clark, supra note 39, at 373.
287. Id. at 374.
288. Bredthauer, supra note 85, at 1147.
289. Clark, supra note 39, at 374.
293. Id. at 844, 104 S. Ct. at 2782.
reasonable considering the type of claim and Congress' intent to prohibit sexual discrimination. Yet, the Supreme Court does not even mention OCR, let alone give it deference. That noticeable absence is in contradiction to other cases where courts have given deference to OCR. Only Justice Stevens' dissent recognizes that OCR, under the Department of Education, has a special interest in Title IX, and its decision is significant. Furthermore, an agency theory is consistent with the text of Title IX; agents' actions can be classified as part of a program under which a student faces discrimination.

Damages do not necessarily have to be extreme under an agency theory. The majority argues that educational funds should not be diverted from useful programs and that recovery may exceed the level of funding. Certainly, high verdicts would harm children; however, courts may control awards. The majority even cites the fact that Title VII damages have been limited. Why could the same not be done for Title IX? One commentator suggests damages could be limited to rehabilitation costs, which would not significantly impair a school district. A school district is in the best position to bear this risk. It may institute strict policies and grievance procedures, which would discourage harassment while ensuring a defense to liability, and it may more carefully monitor the hiring of teachers and observe teacher/student relationships.

VI. CONCLUSION

Sexual harassment in a school environment is a danger that threatens the goals of Title IX. As one court wrote, "[A] schoolchild's right to personal security and to bodily integrity manifestly embraces the right to be free from sexual abuse at the hands of a public school employee." Unfortunately, the Gebser decision does not provide adequate protection for students. Not only is it based on illogical reasoning, but the actual knowledge standard also discourages school districts from instituting grievance procedures in order to shield themselves from liability. A vicious cycle may begin in which a school district does not promulgate procedures, leaving the student with no knowledge of the proper means of recourse. Accordingly, the student never reports the sexual harassment to a proper official.

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297. Id. at 2004 (Stevens, J., dissenting).
298. Id. at 1997.
300. Quesada, supra note 156, at 1065.
Without a proper official ever having actual knowledge, the student becomes a victim again and has no claim for recovery from the very institution that is responsible for his or her injury.

The impact of Gebser will be tremendous. Plaintiffs must now prove what the school knew and who in the school knew it. These cases are much more difficult to prove, but not impossible if students give actual notice to an appropriate person. However, knowing the appropriate person assumes the school has notified its students of who that person is and adopted an efficient grievance procedure. In the final paragraph of Gebser, the Court offhandedly mentions Section 1983 actions as a student’s remedy, but one wonders how effective those actions would really be. The Court does conclude that it will use an actual notice standard until Congress speaks on the matter. Hopefully, Congress will resolve the problems of the Gebser decision by adopting the proposed agency theory.

Kelly Titus

302. Volberg, supra note 146.
303. Id.
305. In Kinman v. Omaha Public Sch. Dist., 94 F.3d 463 (8th Cir. 1996), rev’d on other grounds, 171 F.3d 607 (1999), the Eighth Circuit addressed a 1983 action in a sexual harassment claim. The elements of proof are 1) district had notice of pattern of unconstitutional acts; 2) deliberate indifference or tacit authorization; 3) failure to take adequate remedial action; and 4) proximate cause of injury. Certainly, these elements represent an even stronger burden of proof.