

1999

## *Gebser v. Lago Vista Independent School District: The Supreme Court's Determination That Children Deserve Less Protection Than Adults from Sexual Harassment*

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### Recommended Citation

Amy K. Graham, *Gebser v. Lago Vista Independent School District: The Supreme Court's Determination That Children Deserve Less Protection Than Adults from Sexual Harassment*, 30 Loy. U. Chi. L.J. 551 (1999).

Available at: <http://lawcommons.luc.edu/lucj/vol30/iss3/6>

# Note

## *Gebser v. Lago Vista Independent School District:* The Supreme Court's Determination That Children Deserve Less Protection Than Adults From Sexual Harassment

### I. INTRODUCTION

School children have the right under Title IX of the Education Amendments of 1972<sup>1</sup> to attend school free from sexual discrimination.<sup>2</sup> Sexual harassment and sexual abuse are forms of sexual discrimination.<sup>3</sup> Unfortunately, all too often, children are sexually victimized at school by the adults charged with their care—their teachers.<sup>4</sup> This kind of sexual harassment and abuse may lead to litigation under Title IX.<sup>5</sup>

The United States Supreme Court has held that students subjected to sexual harassment or abuse at the hands of teachers can sue the school district to recover damages.<sup>6</sup> Until recently, however, the Supreme Court left unanswered the question of what standard of liability should be imputed to a school district for its teachers' abusive conduct.<sup>7</sup> In *Gebser v. Lago Vista Independent School District*,<sup>8</sup> the Supreme Court

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1. 20 U.S.C. § 1681(a) (1994). Throughout this Note, the author will refer to 20 U.S.C. §§ 1681-88 as "Title IX."

2. See Neera Rellan Stacy, Note, *Seeking a Superior Institutional Liability Standard Under Title IX for Teacher-Student Sexual Harassment*, 71 N.Y.U. L. REV. 1338, 1343 (1996).

3. See *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 74-76 (1992) (holding that a student who was sexually harassed by her teacher could sue the school district for damages under Title IX).

4. See *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 657 (5th Cir. 1997) (noting that teachers sexually molesting students "may be a widespread phenomenon").

5. See *Franklin*, 503 U.S. at 63-64. In *Franklin*, a student sued a school district for an intentional violation of Title IX after a teacher repeatedly sexually harassed and abused her. See *id.*

6. See *id.* at 74-76 (concluding that a student's recovery is not limited to injunctive relief).

7. See *Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989, 1995 (1998), *aff'g* by an equally divided Court *Doe v. Lago Vista Indep. Sch. Dist.*, 106 F.3d 1223 (5th Cir. 1997). The majority notes that while *Franklin* established a private cause of action for damages under Title IX, the "contours of that liability" were not defined in *Franklin*. *Id.*

8. *Gebser*, 118 S. Ct. 1989 (1998).

defined the standard for school district liability.<sup>9</sup> In a five-four decision, the Court held that unless a school district official, vested with the authority to act on the school district's behalf, actually knew of the harassment and deliberately failed to stop it, the school district is not liable for damages under Title IX.<sup>10</sup> The dissenting justices<sup>11</sup> suggested that the proper standard should hold a school district liable for a teacher's sexual harassment of a student solely on the basis of the agency relationship between the teacher and the school district, regardless of whether a school district official had any knowledge of the harassment.<sup>12</sup> The standard of liability supported by the dissenting opinions is the standard used in the employment context for sexual harassment claims under Title VII of the Civil Rights Act of 1964.<sup>13</sup>

This Note begins by outlining the history and purposes of Title IX,<sup>14</sup> comparing it to similar civil rights statutes<sup>15</sup> and highlighting its prohibition of sexual harassment in schools.<sup>16</sup> Next, this Note details the *Gebser* decision<sup>17</sup> and its dissenting opinions.<sup>18</sup> This Note then criticizes the majority's holding, arguing that the decision is inconsistent with sexual harassment precedent.<sup>19</sup> Finally, this Note explores the possibility of changing the standard of school district

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9. *See id.* at 1999. This Note will discuss the *Gebser* decision in detail below. *See infra* Part III.

10. *See Gebser*, 118 S. Ct. at 1999. Throughout this Note, the author refers to the standard created by the *Gebser* Court as the "actual knowledge standard." Additionally, the school district's deliberate failure to respond to the sexual harassment despite actual knowledge is referred to as "deliberate indifference."

11. Two dissenting opinions were filed in the *Gebser* decision. *See id.* at 2000 (Stevens, J., dissenting); *id.* at 2007 (Ginsburg, J., dissenting). Justice Stevens' dissenting opinion was joined by all three of the dissenting Justices—Souter, Ginsburg and Breyer. *See id.* at 2000 (Stevens, J., dissenting). Justice Ginsburg, who joined in Justice Stevens' dissenting opinion as to the appropriate standard of school district liability, filed a separate dissenting opinion in which she advocated for the creation of an affirmative defense for school districts. *See id.* at 2007 (Ginsburg, J., dissenting).

12. *See id.* at 2004 (Stevens, J., dissenting). Throughout this Note, the author refers to the standard of liability supported by the dissenting opinions as the "vicarious liability standard." This liability standard refers to liability based on the agency relationship between teachers and school districts.

13. 42 U.S.C. § 2000e (1994). Throughout the text of this Note, the author will refer to 42 U.S.C.A. § 2000e to § 2000e-4 as "Title VII."

14. *See infra* Part II.A.

15. *See infra* Parts II.B-C. The two civil rights statutes to which Title IX is compared are Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and Title VII, 42 U.S.C. § 2000e. Throughout the text of this Note, the author will refer to 42 U.S.C. § 2000d to § 2000d-7 as "Title VI."

16. *See infra* Part II.D.

17. *See infra* Parts III.A-C.

18. *See infra* Parts III.D-E.

19. *See infra* Part IV.

liability for teacher-student sexual harassment under Title IX.<sup>20</sup>

## II. BACKGROUND

When a supervisor makes unwelcome sexual advances that are severe or pervasive to a subordinate, the supervisor sexually harasses the subordinate.<sup>21</sup> Similarly, when a teacher makes unwelcome sexual advances that are severe or pervasive to a student, the teacher sexually harasses the student.<sup>22</sup> While the behaviors of the supervisor and the teacher may be the same, they are prohibited by two different statutes because of the contexts in which the sexual harassment occurs. Title VII prohibits an employer's sexual harassment of an employee,<sup>23</sup> and Title IX prohibits a teacher's sexual harassment of a student.<sup>24</sup>

Title IX prohibits an academic institution from discriminating against any person on the basis of sex.<sup>25</sup> While Title IX does not explicitly prohibit sexual harassment and abuse, the Supreme Court has held that sexual harassment and abuse are forms of intentional sexual discrimination and therefore are prohibited by Title IX.<sup>26</sup> The language of Title IX does not specifically prescribe a private cause of action.<sup>27</sup> The Supreme Court, however, has implied a private cause of action<sup>28</sup> as well as the availability of remedial damages<sup>29</sup> for a Title IX violation.<sup>30</sup> In making these decisions, the Supreme Court has relied on the statute's legislative history and underlying purposes reflected in

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20. See *infra* Part V.

21. See *Burlington Indus. Inc., v. Ellerth*, 118 S. Ct. 2257, 2265 (1998); *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2283 (1998).

22. See *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 74-75 (1992).

23. See 42 U.S.C. § 2000e (1994).

24. See 20 U.S.C. § 1681(a) (1994).

25. See *id.* Title IX states in pertinent part: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ." *Id.*

26. See *infra* Part II.D (discussing sexual harassment under Title IX).

27. See 20 U.S.C. § 1681; see also *infra* Part II.D. The only remedy expressly created by Congress for a Title IX violation is the termination of the school district's federal funding. See 20 U.S.C. § 1682 (1994); see also *infra* Part II.A.

28. See *Cannon v. University of Chicago*, 441 U.S. 677, 709 (1979) (holding that even though not expressly provided by Title IX, a student subjected to sexual discrimination by an academic institution has a private cause of action against the institution).

29. See *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 76 (1992) (concluding that a student may recover damages in a private cause of action for sexual harassment under Title IX).

30. See *infra* Part II.D (discussing the Supreme Court's treatment and interpretation of Title IX).

Congressional debates surrounding its enactment.<sup>31</sup> In addition, the Supreme Court has looked to cases involving Title VI<sup>32</sup> and Title VII to aid in its interpretation of Title IX.<sup>33</sup>

### A. *Legislative History and Provisions of Title IX*

Congress enacted Title IX pursuant to its Spending Clause power as part of the Education Amendments of 1972.<sup>34</sup> Floor debates on the bill began in both houses of Congress in 1971.<sup>35</sup> At that time, Congress sought to amend the Civil Rights Act of 1964 to include a prohibition against sexual discrimination in schools.<sup>36</sup> In advocating for the bill, the proponents' main purpose was to end discrimination against women in admissions to institutions of higher education.<sup>37</sup> Title IX was viewed by its sponsors as an important measure needed to provide legal protection to women in pursuit of a college or graduate degree.<sup>38</sup>

Title IX prohibits an educational institution that receives federal funding from discriminating against any person on the basis of sex under any of its programs or activities.<sup>39</sup> Under Title IX, the federal government conditions the granting of federal funds to academic institutions upon the schools' promises not to discriminate on the basis of sex.<sup>40</sup> By accepting the funds, an academic institution agrees to comply with Title IX by expressly promising not to subject anyone to sexual discrimination in its programs or activities.<sup>41</sup> Within Title IX,

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31. See *infra* Part II.A (reporting on Congress' reports and debates surrounding the enactment of Title IX).

32. See *infra* Part II.B (exploring the similarities and differences between Title IX and Title VI).

33. See *infra* Part II.C.1 (outlining the protections afforded employees under Title VII).

34. See H.R. REP. NO. 92-554 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2462, 2462. The Spending Clause declares that "[t]he Congress shall have Power To . . . pay the Debts and provide for the common Defense and general Welfare of the United States . . . ." U.S. CONST. art. I, § 8, cl. 1.

35. See 117 CONG. REC. 30,403 (1971).

36. See *id.* at 30,406. By 1972, the provision was included in the proposed Education Amendments of 1972. See *id.*

37. See *id.* at 30,404. Senator Bayh, one of the sponsors of the bill, stated in the floor debates: "[W]e do hope to wipe aside some of the discrimination that exists today intentionally or unintentionally. This is the thrust of the amendment." *Id.* (statement of Sen. Bayh).

38. See 118 CONG. REC. 5,806-07 (1972) (statement of Sen. Bayh).

39. See 20 U.S.C. § 1681(a) (1994).

40. See *id.*

41. See *Floyd v. Waiters*, 133 F.3d 786, 791 (11th Cir.), *cert. granted, vacated by* *Floyd v. Waiters*, 119 S. Ct. 33 (1998). "[W]hen a school district accepts funds per Title IX, the school district, in effect, makes the Title IX standard part of its own regulations." *Id.*

“program or activity” is defined as including all of the operations of a local school district regardless of which part receives federal funding.<sup>42</sup> By agreeing to the conditions of Title IX, schools relinquish some autonomy in that they no longer may make sexually discriminatory decisions.<sup>43</sup> Furthermore, under Title IX, schools assume a duty not to discriminate on the basis of sex by accepting federal funding.<sup>44</sup> A breach of the school’s duty constitutes an intentional violation of Title IX.<sup>45</sup>

Title IX’s history commands that the courts give it “a sweep as broad as its language”<sup>46</sup> to achieve Congress’ goal of eliminating sexual discrimination in all educational programs receiving federal assistance.<sup>47</sup> The two-fold purpose of Title IX is: (1) to prevent federal funds from supporting schools with sexually discriminatory practices; and (2) to protect students in federally-funded schools from being subjected to sexual discrimination.<sup>48</sup> First, Title IX disallows the use of federal funds to support an institution which discriminates on the basis of sex.<sup>49</sup> This purpose follows from Congress’ assumption that taxpayers do not want their tax dollars to be used to

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42. See 20 U.S.C. § 1687(2)(B) (1994). “For the purposes of this chapter, the term ‘program or activity’ and ‘program’ mean all of the operations of—(2)(B) a local educational agency . . . or other school system . . . any part of which is extended Federal financial assistance. . . .” *Id.*

43. See *Grove City College v. Bell*, 465 U.S. 555, 577 (1983) (Powell, J., concurring). In *Grove City*, the college refused to accept any federal funding, except financial aid given to students, because the school recognized that the acceptance of federal funds required it to comply with certain conditions. See *id.* Nevertheless, the Court held that even this indirect acceptance of federal funding obligated the school to comply with Title IX. See *id.* at 575-76.

44. See Henry Seiji Newman, Note, *The University’s Liability for Professor-Student Sexual Harassment Under Title IX*, 66 FORDHAM L. REV. 2559, 2571 (1998).

45. See *id.*

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

47. See Department of Education Office for Civil Rights: Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,036 (1997) [hereinafter *Guidance*]. Congress bestowed the authority on the Department of Education Office for Civil Rights to interpret and enforce Title IX. See 20 U.S.C. § 1682. In so doing, the Department of Education Office for Civil Rights promulgated a “Guidance” intended to aid in the application of Title IX to incidents of sexual harassment of students by teachers and other students. See *Guidance*, *supra*, at 12,036.

48. See Andrea Giampetro-Meyer et al., *Sexual Harassment in Schools: An Analysis of the “Knew or Should Have Known” Liability Standard in Title IX Peer Sexual Harassment Cases*, 12 WIS. WOMEN’S L.J. 301, 311 (1997).

49. See *Cannon v. University of Chicago*, 441 U.S. 677, 704 (1979) (relying on the purposes of Title IX to interpret the statute).

promote a school's sexually discriminatory practices.<sup>50</sup> The language of Title IX manifests the statute's second purpose, protecting individuals, by focusing on the victim of the discrimination rather than on the perpetrator.<sup>51</sup> In order to achieve these purposes, Congress modeled Title IX after an existing civil rights statute, Title VI, which prohibited programs receiving federal funds from discriminating on the basis of color, race, or national origin.<sup>52</sup>

### B. Title VI

Title VI of the Civil Rights Act of 1964 prohibits discrimination against persons on the basis of race, color, or national origin in any program receiving federal funds.<sup>53</sup> The statutory definition of "program" includes, but is not limited to, local school districts and other academic institutions.<sup>54</sup> The purpose of Title VI is to prevent the use of taxpayers' money to forward and support discriminatory

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50. See Giampetro-Meyer, *supra* note 48, at 311-12 (citing 117 CONG. REC. 39,252 (1971)).

51. See *Cannon*, 441 U.S. at 691-93. Instead of saying, for instance, no academic institution receiving federal funding shall discriminate on the basis of sex, Title IX states "[n]o person . . . shall, on the basis of sex . . . be subjected to discrimination under any educational program or activity receiving Federal financial assistance . . . ." 20 U.S.C. § 1681(a) (1994). This victim-focused language reinforces Congress' intention for Title IX to protect individuals from discrimination on the basis of sex. See *Cannon*, 441 U.S. at 690-92.

52. The language of Title IX is virtually identical to the language of Title VI, except that instead of prohibiting discrimination on the basis of race, color, or national origin, Title IX forbids discrimination on the basis of sex. Compare 20 U.S.C. § 1681(a) (1994), with 42 U.S.C. § 2000d (1994). Also, Title IX only applies to educational programs whereas Title VI applies to all programs receiving federal funding. See 20 U.S.C. § 1681; 42 U.S.C. § 2000d.

53. See 42 U.S.C. § 2000d. "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." *Id.*

54. See *id.* § 2000d-4a(2). The statute states:

For the purposes of this subchapter, the term 'program or activity' and the term 'program' mean all of the operations of—(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or (B) a local educational agency (as defined in section 8801 of Title 20), system of vocational education, or other school system[.]

*Id.*

purposes.<sup>55</sup> Just as in Title IX,<sup>56</sup> programs do not have to accept federal funds, but if they do, the programs agree to comply with the conditions of Title VI.<sup>57</sup> Although Title VI does not expressly provide a private cause of action, an implied private cause of action exists for a victim of intentional racial discrimination under a program accepting federal funds.<sup>58</sup> The Supreme Court has established an actual knowledge standard of liability for a program's violation of Title VI.<sup>59</sup> The Court has held that because only an intentional act of discrimination violates Title VI, the school or program must actually know that the violation occurred in order to be liable.<sup>60</sup>

Because of strong similarities in the language of Title VI and Title IX,<sup>61</sup> the Supreme Court and lower courts have relied on Title VI decisions to aid in interpreting Title IX.<sup>62</sup> The Supreme Court, however, has cautioned that the statutes prohibit different types of conduct.<sup>63</sup> Furthermore, Title IX only applies to educational institutions, whereas Title VI applies to all programs receiving federal

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55. See *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 599 (1983). A class of minority police officers who were laid off pursuant to a department policy sued the New York City Police Department for an alleged violation of Title VI. See *id.* at 585-86. The Supreme Court concluded that Title VI implicitly permits a private action for damages when a program receiving federal funds intentionally discriminates on the basis of race, color, or national origin. See *id.* at 601-03.

56. See *supra* Part II.A (discussing how schools assume a duty not to discriminate on the basis of sex by accepting federal funds).

57. See *Guardians Ass'n*, 463 U.S. at 599. "No recipient is required to accept Federal aid. If he does so voluntarily, he must take it on the conditions on which it is offered." *Id.* (citing 110 CONG. REC. 6546 (1964) (statement of Sen. Humphrey)).

58. See *Guardians Ass'n*, 463 U.S. at 602-03. Damages are not available for unintentional violations of Title VI. See *id.*

59. See *id.* at 597.

60. See *id.* "In cases where intentional discrimination has been shown, there can be no question as to what the recipient's obligation under the program was and no question that the recipient was aware of that obligation." *Id.*

61. Compare 42 U.S.C. § 2000d (1994), with 20 U.S.C. § 1681(a) (1994). Both statutes are phrased the same way and focus on the victim of the discrimination.

62. See, e.g., *Grove City College v. Bell*, 465 U.S. 555, 566 (1984) (relying on Title VI to conclude that only the part of the program receiving federal funds is subject to the conditions of Title IX); *Cannon v. University of Chicago*, 441 U.S. 677, 699 (1979) (relying on Title VI to find an implied cause of action under Title IX).

63. See *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 529-30 (1982).

This focus on the history of Title VI . . . is misplaced. It is Congress' intention in 1972, not in 1964, that is of significance in interpreting Title IX. The meaning and applicability of Title VI are useful guides in construing Title IX, therefore, only to the extent that the language and history of Title IX do not suggest a contrary interpretation."

*Id.* at 529 (citations omitted).



funds.<sup>64</sup> Thus, despite the similarities between Title VI and Title IX, the statutes are different and must not be interpreted identically.<sup>65</sup>

### C. Title VII

Title VII prohibits an employer from discriminating on the basis of race, color, religion, sex, or national origin.<sup>66</sup> Under Title VII, an employer may not refuse to hire, refuse to promote, or choose to fire any employee because of that employee's race, color, religion, sex, or national origin.<sup>67</sup> Congress enacted Title VII pursuant to its Commerce Clause<sup>68</sup> power. Consequently, employers do not voluntarily agree to avoid discrimination, rather they have a statutory duty to refrain from arbitrary discrimination.<sup>69</sup> Under Title VII an employer may not discriminate against an employee on the basis of sex.<sup>70</sup> This prohibition of sexual discrimination also means that an employer may not sexually harass an employee.<sup>71</sup> As both Title VII and Title IX prohibit sexual discrimination and sexual harassment, the Supreme Court has relied on Title VII in interpreting Title IX.<sup>72</sup>

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64. Compare 20 U.S.C. § 1681(a), with 42 U.S.C. § 2000d.

65. See *North Haven*, 456 U.S. at 530. "For although two statutes may be similar in language and objective, we must not fail to give effect to the differences between them." *Id.* (citations omitted).

66. See 42 U.S.C. § 2000e-2(a).

It shall be an unlawful employment practice for an employer—to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

*Id.*

67. See *id.*

68. U.S. CONST. art. 1, § 8, cl. 3. "The Congress shall have Power To . . . regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." *Id.*

69. See *Smith v. Metropolitan Sch. Dist. Perry Township*, 128 F.3d 1014, 1028 (7th Cir.), *reh'g en banc denied*, 1997 U.S. App. LEXIS 35549 (7th Cir. 1997), and *cert. denied*, 118 S. Ct. 2367 (1998). Statutes enacted pursuant to the Commerce Clause apply to any program affecting interstate commerce whereas statutes under the Spending Clause only apply to those programs that accept the federal funds subject to the statute's conditions. See *id.* Title IX was enacted pursuant to Congress' Spending Power. See *id.* Unlike Title VII, educational institutions voluntarily agree to avoid discrimination on the basis of sex when they accept federal funding. For a discussion of the implications of Title IX as a Spending Clause statute, see *supra* Part II.A.

70. See 42 U.S.C. § 2000e-2.

71. See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (concluding that sexual harassment is a form of sexual discrimination, and therefore, prohibited by Title VII).

72. See *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 74-75 (1992) (relying on *Meritor* in deciding that sexual harassment is discrimination on the basis of sex and,

### 1. Sexual Harassment Under Title VII

Sexual discrimination is treating another person differently because of that person's sex.<sup>73</sup> Sexual harassment is a form of sexual discrimination because the unwelcome sexual advances or the threats are made solely because of the victim's sex.<sup>74</sup> Thus, as Title VII prohibits discrimination based on sex, it also prohibits sexual harassment.<sup>75</sup>

Courts and commentators have defined two types of sexual harassment: (1) quid pro quo harassment and (2) hostile environment harassment.<sup>76</sup> Quid pro quo sexual harassment involves a supervisor demanding a sexual act from an employee in exchange for a tangible employment benefit.<sup>77</sup> Whether the employee complies with the request is irrelevant to a claim of quid pro quo harassment.<sup>78</sup> Hostile environment sexual harassment, on the other hand, involves no tangible employment benefit.<sup>79</sup> Instead, the sexual harassment is so severe or pervasive that it creates an abusive environment, adversely affecting the employee.<sup>80</sup> To constitute hostile environment sexual

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therefore, is proscribed by Title IX).

73. See *Meritor*, 477 U.S. at 64. In *Meritor*, the Supreme Court stated that a female employee may recover under Title VII if her supervisor's pervasive sexual harassment of her creates a hostile environment. See *id.* at 73. The Court held that Title VII's prohibition of sexual discrimination in the workplace also forbids sexual harassment. See *id.* at 64.

74. See *id.*

75. See *id.* "Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." *Id.* The Supreme Court in *Franklin* cites this language in concluding that a teacher's sexual harassment of a student constitutes sexual discrimination against the student. See *Franklin*, 503 U.S. at 75. Recently, the Supreme Court held that Title VII protects individuals from same-sex sexual harassment. See *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998, 1002 (1998). For further discussion of Title IX's treatment of sexual harassment, see *infra* Part II.D.

76. See *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2264-65 (1998); *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2283-84 (1998); see also Carrie N. Baker, Comment, *Proposed Title IX Guidelines on Sex-Based Harassment of Students*, 43 EMORY L.J. 271, 276 (1994).

77. See Baker, *supra* note 76, at 276. "Quid pro quo sexual harassment exists when a supervisor . . . demands sexual acts of a subordinate . . . in exchange for tangible benefits, such as a promotion, job training, or job retention . . ." *Id.* These "tangible benefits" are referred to by the Supreme Court in *Burlington Industries* and *Faragher* as "tangible employment actions." See *Burlington Indus.*, 118 S. Ct. at 2268-69; *Faragher*, 118 S. Ct. at 2283.

78. See Baker, *supra* note 76, at 276. The offer or threat constitutes sexual harassment regardless of whether the subordinate complies. See *id.*

79. See *id.* In hostile environment sexual harassment, no threat is made, only unwelcome sexual advances. See *id.*

80. See *id.* "Hostile environment harassment is sex-based conduct that does not

harassment, the sexual advances must be unwelcome.<sup>81</sup> Even if a victim gives in to the advances, the sexual conduct may still be unwelcome.<sup>82</sup> Furthermore, voluntariness of sexual conduct is not a defense to a claim of hostile environment sexual harassment.<sup>83</sup> To understand welcomeness as opposed to "mere acquiescence," the power differential between the people involved must be considered.<sup>84</sup> Also, hostile environment harassment must be severe or pervasive, such that a reasonable person and the victim must find the harassment to be severe or pervasive.<sup>85</sup> Finally, the harassment must adversely affect the victim.<sup>86</sup>

The Supreme Court has recently de-emphasized the necessity of distinguishing between *quid pro quo* and hostile environment sexual harassment for a successful Title VII claim.<sup>87</sup> Both harassment claims constitute intentional discrimination on the basis of sex.<sup>88</sup> Lower courts, however, continue to use the terms *quid pro quo* and hostile environment sexual harassment to distinguish instances where the sexual harassment results in a tangible employment action from

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result in a tangible detriment, but adversely affects the psychological and emotional environment of an employee . . . ." *Id.*

81. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 68 (1986). "[T]he fact that sex-related conduct was 'voluntary,' in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII. The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'" *Id.*

82. *See id.* For example, in *Meritor*, a female bank employee engaged in sexual relations with her supervisor at his request out of fear of losing her job. *See id.* at 60. The Supreme Court held that even though the supervisor did not force her to have sexual intercourse, the employee could nonetheless state a claim for hostile environment sexual harassment. *See id.* at 68.

83. *See id.* "The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary." *Id.*

84. *See id.* at 70. The supervisor's authority aids him or her in creating a sexually hostile environment. *See id.*

85. *See Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2283 (1998). The requirement that the sexual harassment be both objectively and subjectively severe or pervasive allows courts to account for individual differences and consider both the plaintiff's and a reasonable person's sensibilities. *See id.*

86. *See Meritor*, 477 U.S. at 67. For hostile environment sexual harassment to be actionable, "it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Id.* (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971)).

87. *See Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2264-65 (1998). "The principal significance of the distinction is to instruct that Title VII is violated by either explicit or constructive alterations in the terms or conditions of employment . . . ." *Id.* at 2264.

88. *See id.* at 2264-65.

instances involving only unwelcome sexual advances.<sup>89</sup> To establish a claim for damages under Title VII for either quid pro quo or hostile environment sexual harassment, the employee must establish that the employer was liable.<sup>90</sup>

## 2. Employer Liability Under Title VII

Not only is it unlawful for an employer to discriminate on the basis of sex, it is also a violation of Title VII for an employer's agent to sexually discriminate against an employee.<sup>91</sup> The inclusion of the employer's agents in the definition of employer demonstrates Congress' intent that agency principles<sup>92</sup> be applied in Title VII cases.<sup>93</sup> The Supreme Court in *Meritor Savings Bank, FSB v. Vinson*,<sup>94</sup> first used agency principles to impute liability to the employer for a supervisor's sexual discrimination of an employee.<sup>95</sup> Rarely does a discriminatory employment practice result from an official decision of the company directors.<sup>96</sup> Instead, employees are discriminated against in the workplace through the decisions and actions of other employees, such as supervisors.<sup>97</sup> The *Meritor* Court

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89. *See id.* at 2264. "The terms quid pro quo and hostile work environment are helpful, perhaps, in making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether, but beyond this are of limited utility." *Id.*

90. *See id.* at 2270; *Faragher*, 118 S. Ct. at 2292. Unless liability can be imputed to the employer, the harassed employee cannot recover from the employer. *See Burlington Indus.*, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2292.

91. *See* 42 U.S.C. § 2000e(b) (1994). "The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person . . ." *Id.* (emphasis added).

92. The author uses the phrases "agency principles" or "common law agency principles" to refer to imputing liability to an employer because of the relationship between the employer and the employee. The Restatement (Second) of Agency illustrates this vicarious liability by explaining that an employer is liable for the torts of the employee when the authority, given to the employee by the employer, aids the employee in accomplishing the tort. *See* RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1957).

93. *See Burlington Indus.*, 118 S. Ct. at 2265; *Faragher*, 118 S. Ct. at 2285; *see also* EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11 (1998) (stating that agency principles should be applied to determine employer liability for Title VII violations).

94. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

95. *See id.* at 76-77 (Marshall, J., concurring).

96. *See id.* at 75 (Marshall, J., concurring). "An employer can act only through individual supervisors and employees; discrimination is rarely carried out pursuant to a formal vote of a corporation's board of directors." *Id.* (Marshall, J., concurring).

97. *See id.* (Marshall, J., concurring) (recognizing that an employer acts through his or her employees). For the purposes of this Note, a supervisor is an agent of the

recognized that a supervisor is able to sexually discriminate against or harass a subordinate by virtue of the authority vested in him or her by the employer.<sup>98</sup>

The *Meritor* Court, however, did not create an absolute standard of employer liability under Title VII.<sup>99</sup> In June 1998, the Court defined the standard of employer liability.<sup>100</sup> In both *Burlington Industries, Inc. v. Ellerth*<sup>101</sup> and *Faragher v. City of Boca Raton*,<sup>102</sup> the Court officially adopted vicarious liability<sup>103</sup> using common law agency principles as the standard of employer liability for a supervisor's sexual harassment of a subordinate.<sup>104</sup> The Court noted in both cases that a supervisor's relationship with a subordinate employee always aids the supervisor in sexually discriminating against the employee.<sup>105</sup> The authority bestowed upon a supervisor by the employer enhances the supervisor's ability to sexually discriminate and harass employees because the supervisor's conduct often goes unchecked.<sup>106</sup> Moreover,

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employer vested by the employer with the authority to oversee other employees' work, to reprimand employees, and to advise the employer as to the hiring, firing, and promotion of employees. The supervisor may, depending on the employer, also have the authority to make decisions regarding the hiring, firing, and promotion of employees.

98. *See id.* at 76-77 (Marshall, J., concurring). "[I]t is the authority vested in the supervisor by the employer that enables him to commit the wrong: it is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome sexual conduct on subordinates." *Id.* (Marshall, J., concurring).

99. *See id.* at 72. The Court stated: "We therefore decline the parties' invitation to issue a definitive rule on employer liability, but we do agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area." *Id.*

100. *See Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2270 (1998); *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2292-93 (1998). These cases were decided four days after *Gebser v. Lago Vista Independent School District.*, 118 S. Ct. 1989 (1998).

101. *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998). In *Burlington Industries*, a female employee quit her job because her supervisor constantly sexually harassed her during the fifteen months that she worked for Burlington Industries. *See id.* at 2262. Although the sexual harassment did not result in a tangible employment action, the Court held that Burlington Industries could be vicariously liable for the supervisor's actions, which violated Title VII. *See id.* at 2271.

102. *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998). In *Faragher*, a life guard for the City of Boca Raton sued the City for a violation of Title VII after she was repeatedly sexually harassed by her supervisors. *See id.* at 2280. The Supreme Court held the City liable for the supervisor's actions. *See id.* at 2293-94.

103. *See supra* note 12 (discussing the vicarious liability standard).

104. *See Burlington Indus.*, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2292-93.

105. *See Burlington Indus.*, 118 S. Ct. at 2268-69; *Faragher*, 118 S. Ct. at 2290-91. "[M]ost workplace tortfeasors are aided in accomplishing their tortious objective by the existence of the agency relation: Proximity and regular contact may afford a captive pool of potential victims." *Burlington Indus.*, 118 S. Ct. at 2268.

106. *See Faragher*, 118 S. Ct. at 2291. "[A]n employee generally cannot check a

the supervisor may have the authority to fire, demote, and discipline employees.<sup>107</sup> When the supervisor acts in this capacity, his actions are the actions of the employer for Title VII purposes.<sup>108</sup>

By recognizing that imputing liability to an employer based on agency principles enlarges the employer's responsibility for the actions of others, the Court in both *Burlington Industries* and *Faragher* created an affirmative defense for the employer.<sup>109</sup> Affording employers an affirmative defense creates an incentive for them to be proactive in preventing sexual discrimination and harassment in the workplace.<sup>110</sup> This defense has two prongs.<sup>111</sup> First, the employer must demonstrate that he or she has exercised reasonable care in attempting to prevent sexual discrimination and harassment.<sup>112</sup> Second, the court must look to the reasonableness of the harassed employee's actions, specifically looking at whether the employee utilized the safeguards and grievance procedures provided for him or her by the employer.<sup>113</sup> If the

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supervisor's abusive conduct the same way that she might deal with abuse from a co-worker." *Id.*

107. See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 76-77 (1986) (Marshall, J., concurring). Justice Marshall's opinion, however, did note that:

A supervisor's responsibilities do not begin and end with the power to hire, fire, and discipline employees, or with the power to recommend such actions. Rather, a supervisor is charged with the day-to-day supervision of the work environment and with ensuring a safe, productive workplace. There is no reason why abuse of the latter authority should have different consequences than abuse of the former.

*Id.* at 76 (Marshall, J., concurring). The *Burlington Industries* and *Faragher* Courts agreed with Justice Marshall and adopted a vicarious liability standard for the employer regardless if the harassment results in a tangible employment action. See *Burlington Indus.*, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2292. For a discussion and definition of tangible employment action, see *supra* note 77 and accompanying text.

108. See *Burlington Indus.*, 118 S. Ct. at 2269.

109. See *id.* at 2270; *Faragher*, 118 S. Ct. at 2293. The Court recognized that the purpose of Title VII is to prevent sexual discrimination and harassment. See *Burlington Indus.*, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2292. To forward this purpose, the Court determined that creating an affirmative defense would encourage employers to adopt anti-discrimination policies. See *Burlington Indus.*, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2292.

110. See *Faragher*, 118 S. Ct. at 2292.

111. See *Burlington Indus.*, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2293.

112. See *Burlington Indus.*, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2292. The employer demonstrates that it acted with reasonable care by showing that it has an anti-discrimination policy that effectively responds to sexual harassment. See *Burlington Indus.*, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2293.

113. See *Burlington Indus.*, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2293. If, for example, an employee faced with sexual harassment properly used the procedures available, the employee acted reasonably. See *Burlington Indus.*, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2292. Also, if compelling reasons exist as to why the employee could not follow the procedures, the employee may also be deemed to be acting

employer acted with reasonable care and the employee failed to use available safeguards and procedures, the employee may not recover damages.<sup>114</sup> The affirmative defense, however, does not apply if the sexual discrimination or harassment results in a tangible employment action.<sup>115</sup>

In his dissenting opinion in *Burlington Industries*, Justice Thomas noted that the holdings in both *Burlington Industries* and *Faragher* created different standards of employer liability for sexual as opposed to racial discrimination under Title VII.<sup>116</sup> Employers are held vicariously liable for racial discrimination in their programs only when the discrimination results in a tangible employment action.<sup>117</sup> For cases in which no tangible employment action is alleged, but only a hostile environment created by the racial discrimination, the employee must demonstrate that the employer knew or should have known of the racial discrimination and deliberately failed to take any remedial actions.<sup>118</sup>

#### *D. The Supreme Court's Interpretation and Application of Title IX*

Title IX's prohibition of discrimination on the basis of sex also prohibits sexual harassment of any person in an educational institution that receives federal funds.<sup>119</sup> In interpreting and applying Title IX, the Supreme Court has judicially recognized an implied private cause

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reasonably. See *Burlington Indus.*, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2292. If, however, an employee who was able to use the grievance procedures decided to sue the employer instead, that employee did not act reasonably and would be unable to recover. See *Faragher*, 118 S. Ct. at 2292.

114. See *Faragher*, 118 S. Ct. at 2292.

115. See *Burlington Indus.*, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2293. The Court used the term tangible employment action to mean any discriminatory action or incident of sexual harassment that results in "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Indus.*, 118 S. Ct. at 2268; see also *supra* Part II.C.1 (discussing tangible employment actions).

116. See *Burlington Indus.*, 118 S. Ct. at 2271 (Thomas, J., dissenting). Justice Thomas also dissented in *Faragher*. See *Faragher*, 118 S. Ct. at 2294 (Thomas, J., dissenting).

117. See *Burlington Indus.*, 118 S. Ct. at 2272 (Thomas, J., dissenting). When an employee alleges a racially hostile work environment, the employer is not held vicariously liable, but when an employee alleges a hostile work environment because of sexual harassment, the employer is vicariously liable for the supervisor's actions. See *id.* at 2272-73.

118. See *id.* at 2272 (Thomas, J., dissenting). "If . . . the employee alleges a racially hostile work environment, the employer is liable only for negligence . . ." *Id.*

119. See *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 74-75 (1992).

of action.<sup>120</sup> Moreover, the Court has concluded that remedial damages are available to an individual who suffers sexual discrimination or harassment under any educational program subject to Title IX.<sup>121</sup>

### 1. Sexual Harassment Under Title IX

Under Title IX, schools have a duty not to discriminate on the basis of sex.<sup>122</sup> The Supreme Court, by relying on Title VII precedent,<sup>123</sup> concluded that Congress did not intend to allow federal funding to support intentional discrimination.<sup>124</sup> A teacher's sexual harassment of a student constitutes intentional discrimination on the basis of sex and therefore is a violation of Title IX.<sup>125</sup> The Supreme Court in *Franklin* characterized sexual harassment as intentional discrimination not because the school district intended the harassment but because the teacher's abusive conduct was purposeful.<sup>126</sup> Sexual abuse is an extreme form of sexual harassment,<sup>127</sup> because of the severity and adverse affects on the student's educational environment. Therefore, sexual abuse constitutes a violation of Title IX.<sup>128</sup>

By accepting federal funds, a school district voluntarily assumes a

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120. See *Cannon v. University of Chicago*, 441 U.S. 677, 699 (1979).

121. See *Franklin*, 503 U.S. at 76.

122. See 20 U.S.C. § 1681(a) (1994).

123. See *Franklin*, 503 U.S. at 75. The Court stated:

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

*Id.* at 75 (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)) (citation omitted).

124. See *id.*

125. See Newman, *supra* note 44, at 2571 (discussing *Franklin*).

126. See *Smith v. Metropolitan Sch. Dist. Perry Township*, 128 F.3d 1014, 1050 (7th Cir. 1997) (Rovner, J., dissenting) (relying on *Franklin*).

127. See Guidance, *supra* note 47, at 12,034; see also, *Canutillo Indep. Sch. Dist. v. Leija*, 101 F.3d 393, 396 (5th Cir. 1996). In *Canutillo*, after a second grade student was repeatedly molested by her teacher, the child's parents sued the school district for a violation of Title IX. See *id.* at 395-96. Although the Fifth Circuit denied the student's claim because the school district lacked actual knowledge of the conduct, the court did find that the teacher's sexual abuse of the child constituted intentional discrimination on the basis of sex. See *id.* at 396.

128. See Guidance, *supra* note 47, at 12,034. Congress bestowed on the Department of Education Office for Civil Rights the authority to interpret and enforce Title IX. See *id.*



duty to protect students from sexual harassment and sexual abuse.<sup>129</sup> In effecting that duty, school officials should rely both on common sense in judging and responding to sexual harassment and consider the age and maturity of the student.<sup>130</sup> For example, the age and maturity levels of the students are particularly relevant when deciding how to explain sexual harassment and how to teach students to protect themselves.<sup>131</sup> Moreover, the age of a student claiming to be harassed is pertinent to determining an appropriate response to the allegation as well as to determining the welcomeness of the advances.<sup>132</sup>

Additionally, Title IX requires all schools to inform students and their parents of their anti-discrimination policy and grievance procedures.<sup>133</sup> Although a school need not create a policy that specifically addresses sexual harassment, the school's general anti-discrimination policy must effectively protect students from sexual harassment at school.<sup>134</sup>

## 2. Private Cause of Action Under Title IX

The express statutory remedy for an academic institution's violation of Title IX is the termination of its federal funding.<sup>135</sup> The Supreme Court, however, in *Cannon v. University of Chicago*<sup>136</sup> found an implied private cause of action for Title IX violations.<sup>137</sup> The Court relied on its interpretation of Title VI in holding that Title IX created an implied cause of action.<sup>138</sup> The Supreme Court also concluded that the

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129. See *Floyd v. Waiters*, 133 F.3d 786, 791 (11th Cir.), cert. granted vacated by, *Floyd v. Waiters*, 119 S. Ct. 33 (1998).

130. See Guidance, *supra* note 47, at 12,034.

131. See *id.* The Department of Education Office for Civil Rights specifically advises schools to educate and train students about sexual harassment in an effort to prevent sexual harassment from occurring in schools. See *id.* The age of the students should guide school personnel in shaping their lessons about sexual harassment. See *id.*

132. See *id.* "[A]ge is relevant in determining whether sexual harassment occurred in the first instance, as well as in determining the appropriate response by the school. For example, age is relevant in determining whether a student welcomed the conduct and in determining whether the conduct was severe, persistent, or pervasive." *Id.*

133. See 34 C.F.R. § 106.8 (1998); Guidance, *supra* note 47, at 12,038.

134. See 34 C.F.R. § 106.9; Guidance, *supra* note 47.

135. See 20 U.S.C. § 1682 (1994).

136. *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979).

137. See *Cannon*, 441 U.S. at 717. The plaintiff, a female applicant, sued two universities after neither school granted her admission to medical school. See *id.* at 680. The plaintiff alleged that the medical school denied her admission because she was a woman, thereby discriminating against her on the basis of sex in violation of Title IX. See *id.* The Supreme Court held that the plaintiff could maintain a private cause of action against the academic institutions under Title IX even though the statute does not expressly create this remedy. See *id.* at 717.

138. See *id.* at 703. After recognizing the similarities in the language of Title IX and

legislative history of Title IX shows Congress' intention to create a private cause of action.<sup>139</sup> Additionally, the *Cannon* Court, in implying a private cause of action for violations of Title IX, looked to Title IX's purpose of protecting individuals from sexual discrimination.<sup>140</sup>

Congress responded on two separate occasions to Supreme Court decisions that interfere with the protection afforded under Title IX.<sup>141</sup> In *North Haven Board of Education v. Bell*<sup>142</sup> and in *Grove City College v. Bell*,<sup>143</sup> the Supreme Court determined that only the part of an educational institution receiving federal funds was subjected to Title IX's conditions.<sup>144</sup> Congress responded to these decisions by passing the Civil Rights Restoration Act of 1987,<sup>145</sup> which statutorily

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Title VI, the Court concluded that undoubtedly "Congress intended to create Title IX remedies comparable to those available under Title VI and that [Congress] understood Title VI as authorizing an implied private cause of action for victims of the prohibited discrimination." *Id.* For further discussion of Title VI, see *infra* Part II.B.

139. *See id.* at 694. As *Cannon* dealt with discriminatory admissions practices by a medical school, the legislative history of Title IX was especially illuminative; as noted above, in Part II.A., Title IX initially intended to eradicate sexual discrimination in admissions to institutions of higher learning. *See* 117 CONG. REC. 30,403; 30,406 (1971).

140. *See Cannon*, 441 U.S. at 709. "Not only the words and history of Title IX, but also its subject matter and underlying purposes, counsel implication of a cause of action in favor of private victims of discrimination." *Id.*

141. *See* 20 U.S.C.A. § 1687 (West 1990 & Supp. 1998) (expanding coverage of Title IX to the entire educational program and not only the program that accepts federal funding); 42 U.S.C. § 2000d-7 (1994) (abrogating the States' Eleventh Amendment immunity for suits under Title IX).

142. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982). *North Haven Board of Education* sued the U.S. Department of Education alleging that the regulations promulgated by the Department of Education concerning Title IX were invalid. *See id.* at 514. Specifically, *North Haven* objected to the regulations' inclusion of school employees in the protected class of Title IX. *See id.* at 518. After considering the authority of the Department of Education, the Court concluded that employees are protected by Title IX, but that Title IX coverage is limited to the program accepting federal funds. *See id.* at 538.

143. *Grove City College v. Bell*, 465 U.S. 555 (1984). *Grove City College* sued the Department of Education after the federal funds it received for student financial aid were terminated for failure to comply with Title IX. *See id.* at 561. *Grove City* alleged that because the institution's programs did not accept federal funds and only some students received federal financial assistance, Title IX did not apply to *Grove City College*. *See id.* at 563. The Supreme Court held that while *Grove City's* financial aid programs were subjected to Title IX conditions, the entire school was not because Title IX applies only to the program accepting federal funds. *See id.* at 572.

144. *See id.* at 574; *North Haven*, 456 U.S. at 538.

145. 20 U.S.C.A. § 1687. "For the purposes of this chapter, the term[s] 'program or activity' and 'program' mean *all* of the operations of—(2)(B) a local education agency . . . ." *Id.* (emphasis added).

superseded *North Haven* and *Grove City*.<sup>146</sup> Congress defined the program or activity subjected to Title IX conditions as including the entire educational institution regardless of which program within the institution receives the funding.<sup>147</sup> As Title IX was promulgated to end sexual discrimination in the entire educational institution and not only in a specific program that receives federal funding,<sup>148</sup> subjecting the entire educational institution to the statute's conditions comports with the purposes of Title IX.<sup>149</sup>

In *Atascadero State Hospital v. Scanlon*,<sup>150</sup> the Supreme Court held that even though a state institution accepts federal funds, it does not waive its Eleventh Amendment<sup>151</sup> immunity.<sup>152</sup> Congress again legislatively overruled the Court when it passed the Civil Rights Remedies Equalization Amendment of 1986<sup>153</sup> in which it expressly abrogated the states' Eleventh Amendment immunity from suits under Title IX.<sup>154</sup>

In 1992, the Supreme Court revisited the implied cause of action under Title IX in *Franklin v. Gwinnett County Public Schools*.<sup>155</sup> The Court held that damages are an available remedy for a private cause of action under Title IX.<sup>156</sup> The *Franklin* Court concluded that all

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146. See Baker, *supra* note 76, at 280.

147. See 20 U.S.C.A. § 1687.

148. See 34 C.F.R. § 106.1 (1998).

149. See Guidance, *supra*, note 47 at 12,038 (1997). "The 'education program or activity' of a school includes all of the school's operations." *Id.* (citing 20 U.S.C.A. § 1687).

150. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985).

151. U.S. CONST. amend. XI. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." *Id.*

152. See *Atascadero State Hosp.*, 473 U.S. at 247. In response to a suit under the Rehabilitation Act of 1973, 29 U.S.C.A. § 794, a California state hospital invoked the Eleventh Amendment as proscribing any suit against the state. See *id.* at 236. The Supreme Court agreed and held that the suit was barred by the Eleventh Amendment. See *id.* at 246. Although *Atascadero* concerned the Rehabilitation Act of 1973, Congress' response to the decision, the Civil Rights Remedies Equalization Amendment of 1986, specifically includes Title IX. See 42 U.S.C. § 2000d-7(a)(1) (1994).

153. 42 U.S.C. § 2000d-7(a)(1). "A State shall not be immune under the Eleventh Amendment . . . from suit in Federal court for a violation of . . . Title IX of the Education Amendments of 1972 . . ." *Id.*

154. See Baker, *supra* note 76, at 281.

155. See *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992).

156. See *id.* at 76. In *Franklin*, a high school student sued the school district for violating Title IX after she was repeatedly sexually harassed by a teacher. See *id.* at 63. The school not only was aware of the harassment but also deliberately failed to stop it and discouraged the student from pressing charges against the teacher. See *id.* at 63-64. The Court held that the student could maintain a private cause of action for damages for

appropriate remedies are available unless Congress expressly says they are not.<sup>157</sup> After noting that a student has a right not to be subjected to sexual discrimination, the Court wrote: "Our Government 'has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.'"<sup>158</sup> Damages are an appropriate remedy for a violation of Title IX.<sup>159</sup> While Congress responded when the Court limited Title IX to a specific program and applied the Eleventh Amendment to bar a Title IX claim, Congress did not respond to the Court's decisions in either *Cannon* or *Franklin*.<sup>160</sup> Congress' silence on the judicially implied private cause of action, despite amending Title IX, implicitly authorizes the private cause of action for damages under Title IX.<sup>161</sup>

In order to state a claim upon which relief can be granted under Title IX, the student must establish that the school district is liable for the teacher's conduct.<sup>162</sup> Although the Supreme Court in the *Franklin* decision established that a teacher's sexual harassment or abuse of a student violates Title IX, the Court left open the question of the proper standard of liability for a school district.<sup>163</sup> The Federal Courts of Appeals have applied inconsistent standards of school district liability, including actual knowledge,<sup>164</sup> constructive knowledge,<sup>165</sup> and agency

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the school district's violation of Title IX. *See id.* at 76.

157. *See id.* at 66.

158. *Id.* at 66 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)).

159. *See id.* at 76. "[A] damages remedy is available for an action brought to enforce Title IX." *Id.*

160. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989, 2002-03 (1998) (Stevens, J., dissenting), *aff'g by an equally divided Court Doe v. Lago Vista Indep. Sch. Dist.*, 106 F.3d 1223 (5th Cir. 1997). Congress' amendments to Title IX "must be read 'not only as a validation of Cannon's holding but also as an implicit acknowledgment that damages are available.'" *Id.* at 2002 (citing *Franklin*, 503 U.S. at 78 (Scalia, J., concurring)) (citations omitted).

161. *See id.* (Stevens, J., dissenting). "Because these constructions of the statute have been accepted by Congress and are unchallenged here, they have the same legal effect as if the private cause of action seeking damages had been explicitly, rather than implicitly, authorized by Congress." *Id.* (Stevens, J., dissenting).

162. *See Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463, 468 (8th Cir. 1996). Just as an employee must establish the employer's liability for the sexual harassment, *see supra* Part II.C.2, a student seeking to recover damages from the school district must establish that the school district is liable for the harassing teacher's acts. *See Kinman*, 94 F.3d at 468.

163. *See Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 75-76 (1992).

164. *See, e.g., Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 660 (5th Cir. 1997) (holding that a school district can only be liable for teacher-student sexual harassment if the school district had actual knowledge of the abuse and deliberately failed to take any action to correct it); *Smith v. Metropolitan Sch. Dist. Perry*

principles.<sup>166</sup> The Supreme Court finally determined the standard of school district liability in *Gebser v. Lago Vista Independent School District*.<sup>167</sup>

### III. DISCUSSION

#### A. *The Facts of Gebser v. Lago Vista Independent School District*

Alida Star Gebser joined a high school book discussion group as an eighth grader during the spring of 1991.<sup>168</sup> Frank Waldrop, a teacher and employee of Lago Vista Independent School District ("Lago Vista"), led the discussion group.<sup>169</sup> During the group discussions, Waldrop made sexually inappropriate comments in front of the students, including Gebser.<sup>170</sup> When Gebser began high school, Waldrop became her freshman social studies teacher.<sup>171</sup> During her freshman year, Waldrop increasingly directed his sexually suggestive comments toward Gebser, often when the two were alone together.<sup>172</sup> In the spring of Gebser's freshman year, Waldrop initiated sexual contact when he visited Gebser's house under the pretense of dropping

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Township, 128 F.3d 1014, 1034 (7th Cir. 1997) (relying on *Rosa H.* and reaching the same conclusion).

165. See, e.g., *Kracunas v. Iona College*, 119 F.3d 80, 87-88 (2d Cir. 1997); *Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463, 469 (8th Cir. 1996). Both courts held that schools are liable for teacher-student hostile environment sexual harassment if they knew or should have known of the harassment. See *Kracunas*, 119 F.3d at 87-88; *Kinman*, 94 F.3d at 469.

166. See, e.g., *Kracunas*, 119 F.3d at 87-88; *Kinman*, 94 F.3d at 469. Both courts suggested using agency principles in cases of teacher-student quid pro quo harassment. See *Kracunas*, 119 F.3d at 87-88; *Kinman*, 94 F.3d at 469.

167. See *Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989 (1998), *aff'g by an equally divided Court Doe v. Lago Vista Indep. Sch. Dist.*, 106 F.3d 1223 (5th Cir. 1997).

168. See *id.* at 1993.

169. See *id.* Gebser's eighth grade teacher, who recommended the group, was Waldrop's wife. See *Doe v. Lago Vista Indep. Sch. Dist.*, 106 F.3d 1223, 1224 (5th Cir. 1997), *aff'd sub nom. Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989 (1998).

170. See *Gebser*, 118 S. Ct. at 1993. While both the Supreme Court in *Gebser* and the Fifth Circuit in its opinion in this case state that Waldrop made "sexually suggestive comments" to students and increasingly to Gebser, neither court defines "sexually suggestive" nor gives any examples of the comments. See *id.*; *Lago Vista*, 106 F.3d at 1224-25. Furthermore, neither the Supreme Court nor the Fifth Circuit include any details as to Waldrop's sexual conduct with Gebser aside from the facts outlined in this Note. See *Gebser*, 118 S. Ct. at 1993; *Lago Vista*, 106 F.3d at 1224-25.

171. See *Lago Vista*, 106 F.3d at 1224. Gebser was assigned by the school district to Waldrop's class. See *Gebser*, 118 S. Ct. at 1993.

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

off a book.<sup>173</sup> Subsequently, Waldrop had sexual intercourse with Gebser on numerous occasions during her freshman year, throughout the summer, and into the beginning of her sophomore year.<sup>174</sup> Waldrop often engaged in sexual intercourse with Gebser during school time but never on school grounds.<sup>175</sup> In October 1992, during Gebser's sophomore year, parents of two students complained to the principal that Waldrop made sexually inappropriate comments to the students during class.<sup>176</sup> Although the principal investigated the complaints<sup>177</sup> and cautioned Waldrop about his comments, the incident was not reported to Lago Vista.<sup>178</sup> Waldrop and Gebser continued their sexual relationship until January 1993 when a police officer discovered them engaged in sexual intercourse.<sup>179</sup>

Upon learning of the relationship, Lago Vista fired Waldrop, and the state of Texas revoked his teaching certificate.<sup>180</sup> Gebser told no one of Waldrop's actions until January 1993, after the relationship was uncovered by the police.<sup>181</sup> Gebser testified that she knew Waldrop's conduct was inappropriate, but she did not know how to react.<sup>182</sup> She liked the special attention from Waldrop<sup>183</sup> and wanted to continue having him as her teacher.<sup>184</sup> Lago Vista had neither a formal policy against sexual harassment of students by teachers nor a grievance procedure for sexual harassment complaints.<sup>185</sup>

### B. *The Lower Courts' Opinions*

Gebser and her mother, Alida Jean Gebser, sued Lago Vista and Waldrop in Texas state court alleging violations of Title IX and Section

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173. *See id.* Waldrop planned his visit at a time when he knew Gebser would be home alone. *See Lago Vista*, 106 F.3d at 1224. On this first occasion of sexual contact, Waldrop kissed Gebser, fondled her breasts, and unzipped her pants. *See id.*

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

175. *See id.* "[T]hey often had intercourse during class time, although never on school property." *Id.*

176. *See id.*

177. *See Lago Vista*, 106 F.3d at 1225.

178. *See Gebser*, 118 S. Ct. at 1993. The principal did not report the complaints to Lago Vista's Title IX coordinator. *See id.*

179. *See id.* Waldrop was arrested as a result of his sexual relationship with Gebser. *See id.*

180. *See id.*

181. *See id.*

182. *See id.*

183. *See Doe v. Lago Vista Indep. Sch. Dist.*, 106 F.3d 1223, 1224 (5th Cir.), *aff'd sub nom. Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989 (1998).

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

185. *See id.* Lago Vista did have a Title IX coordinator. *See id.* At all times Lago Vista received federal funds. *See id.*

1983 of the Civil Rights Act of 1964,<sup>186</sup> as well as negligence.<sup>187</sup> After Lago Vista removed the case to federal court, the district court granted Lago Vista summary judgment on all claims.<sup>188</sup> The district court concluded that a student may not recover damages under Title IX unless the school district had notice of the violation and purposefully failed to remedy the discrimination.<sup>189</sup> The district court held that Gebser made no showing that the school district had notice of the harassment. Therefore, Lago Vista was not liable for damages under Title IX.<sup>190</sup>

On appeal, the Fifth Circuit affirmed the district court decision. As to the Title IX claim, the Fifth Circuit declined to apply strict liability to teacher-student harassment claims.<sup>191</sup> Furthermore, the Fifth Circuit rejected using a constructive knowledge or negligence standard<sup>192</sup> of school district liability because Gebser failed to demonstrate that Lago Vista should have known of Waldrop's sexual abuse of Gebser.<sup>193</sup> The principal's knowledge of Waldrop's inappropriate remarks in class did not translate into constructive knowledge of sexual intercourse between Waldrop and Gebser.<sup>194</sup> On appeal to the Fifth Circuit, Gebser premised her recovery on imposing a vicarious liability standard on the school district.<sup>195</sup> Gebser contended that Waldrop's position of authority, bestowed upon him by the school district, aided him in sexually harassing and abusing Gebser.<sup>196</sup> The Fifth Circuit

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186. 42 U.S.C. § 1983 (1994). The statute states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

*Id.*

187. *See Gebser*, 118 S. Ct. at 1993. Gebser sought compensatory and punitive damages. *See id.*

188. *See id.* Gebser only appealed the Title IX claim. *See id.* at 1994.

189. *See id.*

190. *See id.*

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

192. When the author refers to "constructive knowledge" or "negligence standard" of liability, either phrase means that the school district is liable when it knew or should have known of the harassment.

193. *See Lago Vista*, 106 F.3d at 1225. The Fifth Circuit wrote: "[Gebser] does not pursue the constructive-notice theory because . . . there is not enough evidence for a jury to conclude that a Lago Vista school officials should have known about the abuse." *Id.*

194. *See id.*

195. *See id.* For a definition of vicarious liability, see *supra* note 12.

196. *See id.* Gebser argued to the Fifth Circuit that "Waldrop's status as a Lago Vista instructor made his abuse possible: he used his authoritative position to take advantage

held that Lago Vista's employment of Waldrop did not lead automatically to Lago Vista's liability for Waldrop's tortious conduct.<sup>197</sup> The court reasoned that applying agency principles, as Gebser urged, was tantamount to adopting a standard of strict liability, which the court refused to do.<sup>198</sup>

### C. *The Supreme Court's Majority Opinion*

In *Gebser*, Justice O'Connor, writing for the majority of the Supreme Court,<sup>199</sup> defined the standard of school district liability under Title IX for a teacher's sexual harassment of a student.<sup>200</sup> The majority held that a school district is liable in damages only when a school district official actually knew of the harassment and deliberately failed to take actions to end it.<sup>201</sup> Justice O'Connor reasoned that to violate the conditions of the funding imposed by Title IX, the school district must itself sexually discriminate or harass a student or employee through deliberate inaction.<sup>202</sup> Therefore, the school district official who has actual knowledge of the sexual harassment must be an official vested with the authority to make decisions on behalf of the school district.<sup>203</sup> The majority concluded that only the school district's deliberate indifference to a teacher's sexual harassment of a student constitutes an official action by the school district in violation of Title IX.<sup>204</sup>

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of an adolescent student who wanted to please her teachers and fit in socially." *Id.*

197. *See id.* at 1226.

198. *See id.*

199. Justice O'Connor wrote the majority opinion, joined by Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas.

200. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989, 1993 (1998), *aff'g* by an *equally divided Court* *Doe v. Lago Vista Indep. Sch. Dist.*, 106 F.3d 1223 (5th Cir. 1997).

201. *See id.* "We conclude that damages may not be recovered in those circumstances [a teacher's sexual harassment of a student] unless an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct." *Id.*

202. *See id.* at 1999. Justice O'Connor focuses on the express remedy of a Title IX violation provided for in the statutory language. *See id.* Considering that the express remedy requires notice and a refusal to comply with the statute, Justice O'Connor concluded that any enforcement scheme for Title IX must require notice to the school district. *See id.*

203. *See id.*

204. *See id.*

The administrative enforcement scheme presupposes that an official who is advised of a Title IX violation refuses to take action to bring the recipient into compliance. The premise, in other words, is an official decision by the recipient not to remedy the violation. That framework finds a rough parallel in the standard of deliberate indifference. Under a lower standard, there would



In reaching this decision, the majority considered its past decisions regarding Title IX,<sup>205</sup> the differences between Titles IX and VII,<sup>206</sup> the contractual nature of Spending Clause legislation like Title IX,<sup>207</sup> and the language and purposes of Title IX.<sup>208</sup> The majority reaffirmed the Court's holding in *Cannon*, which created a private cause of action under Title IX for individuals subjected to sexual discrimination by academic institutions receiving federal funds.<sup>209</sup> Additionally, the majority affirmed the Court's decision in *Franklin* granting a student a private cause of action for damages under Title IX.<sup>210</sup>

Although the *Franklin* Court cited *Meritor Savings Bank, FSB v. Vinson*<sup>211</sup> in reaching its holding, Justice O'Connor cautioned that Title VII principles, including vicarious liability, should not be applied automatically in Title IX cases.<sup>212</sup> Justice O'Connor cited differences within the language of the statutes.<sup>213</sup> For instance, in Title VII, an employer is defined as including "any agent"<sup>214</sup> whereas Title IX contains no such inclusion.<sup>215</sup> Title VII created an express cause of action while the Court judicially implied a private cause of action under Title IX.<sup>216</sup> Additionally, Congress amended Title VII to expressly include a statutory cap on damages while Title IX contains no cap on

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be a risk that the recipient would be liable in damages not for its own official decision but instead for its employees' independent actions.

*Id.*

205. *See id.* at 1994-95. The Supreme Court's past decisions regarding the private cause of action under Title IX are *Cannon v. University of Chicago*, 441 U.S. 677 (1979), and *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992). *See supra* Part II.D.2 (analyzing the case law of the private cause of action under Title IX).

206. *See Gebser*, 118 S. Ct. at 1995-96.

207. *See id.* at 1997-98.

208. *See id.* at 1996-97.

209. *See id.* at 1994 (citing *Cannon*, 441 U.S. at 717); *see also supra* Part II.D.2 (discussing the implied cause of action judicially acknowledged by the Supreme Court in *Cannon*).

210. *See Gebser* 118 S.Ct. at 1994-95 (citing *Franklin*, 503 U.S. at 74-75); *see also supra* 155-61 (examining the *Franklin* court's decision that damages are available in the implied cause of action under Title IX).

211. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986). *Meritor* was a sexual harassment case under Title VII which held that 'hostile environment' sexual harassment is actionable against an employer and suggested the application of agency principles to determine an employer's liability when a supervisor sexually harasses a subordinate. *See id.* at 73.

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

213. *See id.* at 1996.

214. *See* 42 U.S.C. § 2000e(b) (1994).

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

216. *See id.* The Supreme Court judicially implied a private cause of action under Title IX in *Cannon v. University of Chicago*, 441 U.S. 677, 699 (1979).

damages.<sup>217</sup> Justice O'Connor reasoned that absent a cap, damages for Title IX violations feasibly could exceed the amount of federal funding received by the school district.<sup>218</sup> Justice O'Connor also emphasized that the purposes of Title IX and Title VII differ.<sup>219</sup> While Title VII is designed to make the victim of discrimination whole,<sup>220</sup> Title IX is intended to protect individuals from a school's discrimination on the basis of sex.<sup>221</sup> Considering that Congress has not expressly bestowed the cause of action or damages under Title IX, the majority posited that Congress probably did not contemplate unlimited recovery under Title IX.<sup>222</sup> Because an implied private cause of action for damages does exist, limited recovery must be imposed by a strictly defined standard for school district liability.<sup>223</sup>

The majority also noted that Congress crafted Title IX after Title VI.<sup>224</sup> Both Title IX and Title VI were enacted pursuant to Congress' spending power and are consequently contractual.<sup>225</sup> Under Title IX and Title VI, the program or institution promises not to discriminate on the basis of sex or race, respectively, in consideration for federal funds.<sup>226</sup> The majority recognized that the contractual nature of Title IX has ramifications on the available remedies.<sup>227</sup> In order to violate

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217. *See Gebser*, 118 S. Ct. at 1997. Justice O'Connor cited 42 U.S.C. § 1981a(b)(3) (1994) as evidence of Congress' intent to carefully limit recovery. *See id.* Justice O'Connor reasoned that employing Title VII's vicarious liability standard in Title IX actions "would amount, then, to allowing unlimited recovery of damages under Title IX where Congress has not spoken on the subject of either the right or the remedy, and in the face of evidence that when Congress expressly considered both in Title VII it restricted the amount of damages available." *Id.*

218. *See id.*

219. *See id.*

220. *See id.* (relying on *Landgraf v. USI Film Prods.*, 511 U.S. 244, 254 (1994)). The purpose of Title VII is to compensate victims of discrimination in employment. *See id.*

221. *See id.* "Congress enacted Title IX in 1972 with two principal objectives in mind: 'to avoid the use of federal resources to support discriminatory practices' and 'to provide individual citizens effective protection against those practices.'" *Id.* (quoting *Cannon*, 441 U.S. at 704).

222. *See id.*

223. *See id.*

224. *See id.* (noting the parallel language between Title VI and Title IX). Title VI of the Civil Rights Act of 1964 prohibits the discrimination on the basis of race, color and national origin in programs receiving federal funds. *See* 42 U.S.C. § 2000d (1994). For a discussion of Title VI, see *supra* Part II.B.

225. *See Gebser*, 118 S. Ct. at 1997.

226. *See id.*

227. *See id.* at 1998. "When Congress attaches conditions to the award of federal funds under its spending power . . . we examine closely the propriety of private actions holding the recipient liable in monetary damages for noncompliance with the condition." *Id.* (citations omitted).

Title IX, Justice O'Connor contended that the school district must have notice of what actions constitute a breach of the contract.<sup>228</sup> The majority reasoned that Congress, by framing Title IX's prohibition on sexual discrimination as a contract, indicated that a school district must have notice of discrimination for it to constitute an intentional breach.<sup>229</sup> Therefore, the majority concluded that a school district cannot be liable for a violation of Title IX through either vicarious liability or constructive knowledge because in both cases the school district lacks the requisite knowledge for an intentional breach.<sup>230</sup>

Justice O'Connor continued her analysis by stating that the only means of enforcement expressly prescribed by the statute is the termination of federal funding.<sup>231</sup> To begin proceedings to terminate funding, the government must first notify the school district of the alleged violations and then determine that the school district intentionally failed to comply with Title IX regulations.<sup>232</sup> Therefore, Justice O'Connor determined that if the school district discriminated on the basis of sex, it may voluntarily correct the violation, in compliance with Title IX, to maintain its federal funding.<sup>233</sup> If a school district had no notice of the sexual harassment, it had no opportunity to correct the violation.<sup>234</sup>

Considering that the statute's express means of enforcement requires notice to the school district and a chance to remedy the violation, the majority concluded that holding the school district liable for damages for sexual harassment of which it has no notice would be unreasonable.<sup>235</sup> Moreover, Justice O'Connor continued, if the damages exceed the federal funding, the penalty for violating Title IX

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228. *See id.*

229. *See id.*

If a school district's liability for a teacher's sexual harassment rests on principles of constructive notice or *respondeat superior*, it will . . . be the case that the recipient of funds was unaware of the discrimination. It is sensible to assume that Congress did not envision a recipient's liability in damages in that situation.

*Id.*

230. *See id.*

231. *See id.* "The statute entitles agencies who disburse education funding to enforce their rules implementing the non-discrimination mandate through proceedings to suspend or terminate funding . . ." *Id.*

232. *See id.* "Title IX's express means of enforcement—by administrative agencies—operates on an assumption of actual notice to officials of the funding recipient." *Id.*

233. *See id.* Before enforcement proceedings can begin, the school district must have been notified of the discrimination and despite such notice, deliberately failed to remedy the situation. *See id.*

234. *See id.*

235. *See id.* at 1999.

would be far greater than the school district could have anticipated when accepting the federal funds.<sup>236</sup> Thus, the Court concluded that because the implied remedy of damages may impose more liability on a school district than the express remedy, the standards of liability for both remedies must be comparable.<sup>237</sup>

In affirming the Fifth Circuit's decision,<sup>238</sup> the majority defined actual knowledge and deliberate indifference as the standard for school district liability in private causes of action for damages under Title IX.<sup>239</sup> The majority held that a school official with the authority to end the harassment must actually know of the teacher's sexual harassment of a student and must deliberately fail to end it.<sup>240</sup> Justice O'Connor further explained that a school district's failure to institute an anti-discrimination policy or grievance procedure does not rise to the level of a Title IX violation.<sup>241</sup> Therefore, the majority concluded that until Congress specifically addresses the issue,<sup>242</sup> a school district is liable in damages under Title IX only if the school district has actual knowledge of and responds with deliberate indifference to a teacher's sexual harassment of a student.<sup>243</sup>

#### *D. Justice Stevens' Dissenting Opinion*

In his dissent, Justice Stevens asserted that the majority's holding "thwarts the purposes of Title IX."<sup>244</sup> The appropriate conclusion in

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236. *See id.* "Where a statute's express enforcement scheme hinges its most severe sanction on notice and unsuccessful efforts to obtain compliance, we cannot attribute to Congress the intention to have implied an enforcement scheme that allows imposition of greater liability without comparable conditions." *Id.*

237. *See id.*

238. *See Doe v. Lago Vista Indep. Sch. Dist.*, 106 F.3d 1223, 1226 (5th Cir. 1997), *aff'd sub nom. Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989 (1998).

239. *See Gebser*, 118 S. Ct. at 1999.

240. *See id.* "[A] damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond." *Id.*

241. *See id.* at 2000. The school district's failure to institute an anti-discrimination policy does not translate to the school district's actual knowledge of and deliberate indifference to a teacher's sexual harassment of a student. *See id.*

242. *See id.* The majority recognized that Congress can amend Title IX to change this decision. *See id.* As noted above, Congress responded legislatively in the past when the Supreme Court misinterpreted Title IX. *See supra* notes 141-154 and accompanying text (noting that Congress passed the Civil Rights Remedies Equalization Amendment of 1986 and the Civil Rights Restoration Act of 1987 as responses to Supreme Court interpretations of Title IX).

243. *See Gebser*, 118 S. Ct. at 2000.

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

this case, according to the dissenting justices,<sup>245</sup> is to hold a school district liable when a teacher uses the authority vested in him or her by the school district to sexually harass a student, whether or not a school official actually knew of the teacher's abusive conduct.<sup>246</sup> To reach this conclusion, the dissenting justices focused on the Court's past decisions regarding Title IX,<sup>247</sup> the language and purposes of Title IX,<sup>248</sup> and the duty voluntarily assumed by the school district in accepting federal funds.<sup>249</sup>

In rejecting the majority's assertion that because the cause of action is judicially implied Congress did not intend for a school district's extensive liability in damages,<sup>250</sup> Justice Stevens noted that Congress has amended Title IX twice since the Court judicially implied a cause of action in *Cannon v. University of Chicago*.<sup>251</sup> Justice Stevens contended that this demonstrated Congress' support for a private cause of action and gave the implied right of action the same legal effect as if it were expressly included in the language of Title IX.<sup>252</sup> Justice Stevens emphasized the Court's position in *Franklin v. Gwinnett County Public Schools*: merely because the private cause of action under Title IX is judicially implied rather than expressly granted by the statute does not mean that all appropriate remedies are not available.<sup>253</sup>

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245. Justice Stevens wrote the dissenting opinion, joined by Justices Souter, Ginsburg, and Breyer.

246. See *Gebser*, 118 S. Ct. at 2003-04 (Stevens, J., dissenting). The dissenting justices suggested applying the Title VII vicarious liability standard in Title IX actions. See *id.* (Stevens, J., dissenting).

247. See *id.* at 2002-03 (Stevens, J., dissenting). Justice Stevens noted that the Supreme Court, in previous Title IX decisions, used Title VII principles to interpret Title IX. See *id.* (Stevens, J., dissenting). For example, when faced with a teacher's sexual harassment of a student in *Franklin v. Gwinnett County Pub. Sch.*, the Court specifically relied on *Meritor Savings Bank, FSB v. Vinson*, a Title VII sexual harassment case. See *id.* (Stevens, J., dissenting) (discussing *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986)).

248. See *id.* at 2002-04 (Stevens, J., dissenting).

249. See *id.* at 2004-06 (Stevens, J., dissenting).

250. See *id.* at 1996.

251. See *id.* at 2001-02 (Stevens, J., dissenting) (citing 42 U.S.C. § 2000d-7 (1994)) (abolishing the states' Eleventh Amendment immunity to Title IX); 20 U.S.C.A. § 1687 (West 1990 & Supp. 1998) (determining that the entire institution is included in "program or activity" when any part of the academic institution receives federal funding)); see also *supra* Part II.D.2 (discussing the Supreme Court's interpretation of Title IX and Congress' response).

252. See *Gebser*, 118 S. Ct. at 2002 (Stevens, J., dissenting).

253. See *id.* at 2001-02 (Stevens, J., dissenting). In *Franklin*, the Court stated that unless Congress expressly notes otherwise, Congress intends to authorize "all appropriate remedies." See *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 66 (1992).

Justice Stevens further emphasized that the Court's decision in *Franklin* relied on *Meritor Savings Bank, FSB v. Vinson*, a Title VII case.<sup>254</sup> Under *Franklin*, the Court held that a teacher's sexual harassment or abuse of a student violates the school district's Title IX duty not to sexually discriminate against any person under its programs.<sup>255</sup> Justice Stevens recognized that Congress did not intend for federal funds to support a school district's intentional discrimination of a student.<sup>256</sup> Justice Stevens concluded that a student should be able to recover for damages when the school district violates its Title IX duty.<sup>257</sup>

Justice Stevens further noted that *Franklin* and its reliance on *Meritor* supports using agency principles to determine a school district's liability for the intentional acts of its agents.<sup>258</sup> When a teacher's harassment and abuse of a student is aided by the teacher's authority, bestowed upon him or her by the school district, agency principles impute liability to the school district for the teacher's tortious actions.<sup>259</sup> Justice Stevens, noting that agency principles have been used in cases of an employer's sexual harassment of an employee, recognized that as compared to an employer's authority over an employee, teachers exercise greater control and power over students—control and power that is vested in them by the school district.<sup>260</sup>

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254. See *Gebser*, 118 S. Ct. at 2002-03 (Stevens, J., dissenting).

255. See *Franklin*, 503 U.S. at 75 (noting that sexual harassment is a form of intentional discrimination on the basis of sex).

256. See *Gebser*, 118 S. Ct. at 2002 (Stevens, J., dissenting). When Lago Vista "assumed the statutory duty set out in Title IX as part of its consideration for the receipt of federal funds, that duty constitutes an affirmative undertaking that is more significant than a mere promise to obey the law." *Id.* (Stevens, J., dissenting).

257. See *id.* at 2003 (Stevens, J., dissenting). After reviewing the Supreme Court's decision in *Franklin*, Justice Stevens concluded that:

*Franklin* therefore stands for the proposition that sexual harassment of a student by her teacher violates the duty – assumed by the school district in exchange for federal funds – not to discriminate on the basis of sex, and that a student may recover damages from a school district for such a violation.

*Id.* (Stevens, J., dissenting).

258. See *id.* at 2003-04 (Stevens, J., dissenting).

259. See *id.* (Stevens, J., dissenting) (relying on RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958)). Section 219(2)(d) states "[a] master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless: . . . the [servant] was aided in accomplishing the tort by the existence of the agency relation." RESTATEMENT (SECOND) OF AGENCY § 219(2)(d).

260. See *Gebser*, 118 S. Ct. at 2004 (Stevens, J., dissenting). Justice Stevens wrote:

This case presents a paradigmatic example of a tort that was made possible, that was effected, and that was repeated over a prolonged period because of the powerful influence that Waldrop had over Gebser by reason of the authority that his employer, the school district, had delegated to him. As a secondary

Furthermore, the Department of Education Office for Civil Rights, which is in charge of administering and enforcing Title IX, instituted a policy that imputes vicarious liability to a school district based on agency principles.<sup>261</sup> While acknowledging that the Court is not bound by the policy, Justice Stevens maintained that the regulations should be afforded appropriate deference.<sup>262</sup>

In support of his recommendation of vicarious liability in Title IX actions, Justice Stevens also relied on the language and purpose of Title IX.<sup>263</sup> Courts have held that "Title IX should be accorded 'a sweep as broad as its language.'"<sup>264</sup> To give Title IX its broad sweep, Justice Stevens emphasized that Title IX's use of passive verbs focuses not on the perpetrator of sexual discrimination but on the victim of that discrimination.<sup>265</sup> This focus on the victim indicates Congress' intent to protect students from sexual discrimination.<sup>266</sup> Justice Stevens also noted that the omission of the perpetrator from the statutory language explains why the word "agents" is not included in the statute.<sup>267</sup> Furthermore, the purposes of Title IX are to prohibit the use of federal funds to support sexual discrimination and to protect individuals under educational programs from sexual discrimination.<sup>268</sup>

Justice Stevens asserted that a vicarious liability standard would further these purposes because holding school districts accountable for a failure to protect students would force them to create and implement anti-discrimination policies.<sup>269</sup> The actual knowledge standard defined

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school teacher, Waldrop exercised even greater authority and control over his students than employers and supervisors exercise over their employees. His gross misuse of that authority allowed him to abuse his young student's trust.

*Id.* at 2003-04 (Stevens, J., dissenting).

261. *See id.* (Stevens, J., dissenting) (examining Guidance, *supra* note 47, at 12,039).

262. *See id.* (Stevens, J., dissenting).

263. *See id.* at 2002-04 (Stevens, J., dissenting).

264. *Id.* at 2002 (Stevens, J., dissenting) (quoting *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982) (quoting *United States v. Price*, 383 U.S. 787, 801 (1966))).

265. *See id.* (Stevens, J., dissenting). "[T]he use of passive verbs in Title IX, focusing on the victim of discrimination rather than the particular wrongdoer, gives this statute broader coverage than Title VII." *Id.* (citing *Smith v. Metropolitan Sch. Dist. Perry Township*, 128 F.3d 1014, 1047 (7th Cir. 1997) (Rovner, J., dissenting)).

266. *See id.* (Stevens, J., dissenting).

267. *See id.* at 2002 n.5 (Stevens, J., dissenting). As Title IX's language does not contain a specific perpetrator of discrimination but rather only focuses on the victim, Congress had no reason to define the perpetrator, much less specifically to include any "agents." *See id.* (Stevens, J., dissenting). As noted above, in Part II.C.1, Title VII's definition of employer specifically includes "any agent." *See* 42 U.S.C. § 2000e(b) (1994).

268. *See Gebser*, 118 S. Ct. at 2004-05 (Stevens, J., dissenting).

269. *See id.* at 2004 (Stevens, J., dissenting). By implementing anti-discrimination

by the majority, however, would frustrate the protective purpose of Title IX because it encourages school districts to remain ignorant of harassment in an effort to avoid liability.<sup>270</sup> Justice Stevens additionally criticized the majority's standard for failing to protect even a student who tells another teacher of the abuse because, under the majority's standard, a teacher is not a school official who can act on the school district's behalf.<sup>271</sup> Justice Stevens concluded that the majority's actual knowledge standard will allow few victims of teachers' sexual harassment and abuse to recover, rendering useless the cause of action defined in *Franklin*.<sup>272</sup>

As observed by the majority, Title IX acts as the government's contract with the school districts to not discriminate on the basis of sex.<sup>273</sup> Justice Stevens further asserted that by accepting federal funds, a school district promises to protect students from sexual discrimination, including sexual harassment and abuse.<sup>274</sup> Additionally, in accepting the federal funds, a school district reasonably should know the conditions imposed by Title IX.<sup>275</sup> Justice Stevens suggested that knowledge of the Title IX conditions provides school districts with notice that a teacher's sexual harassment of a student violates Title IX.<sup>276</sup> According to Justice Stevens, this notice is sufficient for school district liability under Title IX.<sup>277</sup>

The dissenters acknowledged the majority's point that by allowing recovery when the school district lacks notice, the school district could

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policies, school districts seek to prevent sexual harassment before it occurs. *See id.* (Stevens, J., dissenting).

270. *See id.* (Stevens, J., dissenting). Under the actual knowledge standard, schools have no incentive to create anti-discrimination policies or to prevent sexual harassment. *See id.* (Stevens, J., dissenting). The only incentive created by the actual knowledge standard is for school district officials to purposefully remain ignorant of sexual harassment in schools. *See id.* (Stevens, J., dissenting).

271. *See id.* (Stevens, J., dissenting).

272. *See id.* at 2006 (Stevens, J., dissenting). "The Court fails to recognize that its holding will virtually 'render inutile causes of action authorized by Congress through a decision that no remedy is available.'" *Id.* (Stevens, J., dissenting) (quoting *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 74 (1992)).

273. *See id.* at 1997.

274. *See id.* at 2002 (Stevens, J., dissenting).

275. *See id.* at 2005 (Stevens, J., dissenting). School districts know that Title IX prohibits sexual discrimination and sexual harassment. *See id.* (Stevens, J., dissenting).

276. *See id.* (Stevens, J., dissenting). "The Court cannot mean, however, that respondent [Lago Vista] was not on notice that sexual harassment of a student by a teacher constitutes an 'intentional' violation of Title IX for which damages are available, because we so held shortly before Waldrop began abusing Gebser." *Id.* (Stevens, J., dissenting) (referring to the Court's decision in *Franklin*).

277. *See id.* (Stevens, J., dissenting).



be subject to increased liability because damages may exceed the amount of federal funding.<sup>278</sup> Justice Stevens, however, stressed that Title IX's lack of a damages cap should not affect the standard of school district liability.<sup>279</sup> Justice Stevens further argued that district courts can guard against excessive verdicts by giving proper jury instructions and by using their power of remittitur.<sup>280</sup> Justice Stevens asserted that protecting the school district's budget should not be more important than protecting children.<sup>281</sup> The dissenting justices concluded that liability properly rests with the school district because the school district can insure against the risk of sexual harassment and abuse.<sup>282</sup>

### *E. Justice Ginsburg's Dissenting Opinion*

Although Justice Ginsburg joined in Justice Stevens' dissenting opinion as to the appropriate standard of school district liability when a teacher sexually harasses a student, Justice Ginsburg wrote a separate dissenting opinion that addressed the issue of an affirmative defense that the school district could use to eliminate or mitigate its liability under the vicarious liability standard.<sup>283</sup> Justice Ginsburg

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278. *See id.* at 2006-07 (Stevens, J., dissenting).

279. *See id.* (Stevens, J., dissenting). In responding to the majority's "creative argument" that the lack of a damages ceiling under Title IX is relevant to the analysis of the standard for school district liability for a teacher's intentional sexual harassment of a student, Justice Stevens responded, "the Title VII ceiling does not have any bearing on when damages may be recovered from a defendant in a Title IX case. Moreover, this case [*Gebser*] does not present any issue concerning the amount of any possible damages award." *Id.* at 2005 (Stevens, J., dissenting).

280. *See id.* at 2005 n.12 (Stevens, J., dissenting). Remittitur is the procedural device used by the trial court to reduce a jury's award of damages that the trial court deems excessive. *See, e.g., Northern Pac. R. Co. v. Herbert*, 116 U.S. 642 (1886).

281. *See id.* at 2007 (Stevens, J., dissenting).

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

*Id.* (Stevens, J., dissenting).

282. *See id.* (Stevens, J., dissenting).

283. *See id.* (Ginsburg, J., dissenting). Justice Ginsburg wrote a dissenting opinion, joined by Justices Souter and Breyer. *See id.* (Ginsburg, J., dissenting). Justice Stevens, in his dissenting opinion, concluded that the issue of affirmative defenses to eliminate or mitigate school district liability was not properly before the Court. *See id.* at 2006 (Stevens, J., dissenting). Justice Ginsburg, on the other hand, advocated such an affirmative defense because the plaintiff's allegations as well as the available defenses define the claim, and also because the lower courts and school districts need the Supreme Court's guidance in implementing Title IX. *See id.* (Ginsburg, J., dissenting).

recommended creating an affirmative defense under Title IX for school districts who have “an effective policy for reporting and redressing” sexual harassment and abuse of students by their teachers.<sup>284</sup> Justice Ginsburg suggested that under such a defense, the school district would bear the burden of demonstrating that its policy was properly publicized and likely to be effective in addressing the victim’s injury.<sup>285</sup> Additionally, Justice Ginsburg stated that the school district would have to show that its reporting procedure does not expose the victim of harassment and abuse to unnecessary risk or further injury.<sup>286</sup> Under Justice Ginsburg’s recommendation, if a victim unreasonably decided not to use the policy, the school district would not be liable under Title IX.<sup>287</sup>

#### IV. ANALYSIS

A majority of the Supreme Court in *Gebser* concluded that the appropriate standard of liability for actions under Title IX is actual knowledge of the harassment and deliberate indifference.<sup>288</sup> The actual knowledge standard encourages school districts to purposefully remain ignorant of sexual harassment in their schools.<sup>289</sup> Moreover, the majority’s decision results in less protection from sexual harassment for school children than the protection afforded to adult employees by Title VII.<sup>290</sup>

##### A. *The Majority’s Actual Knowledge Standard*

The majority in *Gebser* determined that in order for a school district to be liable for damages from a teacher’s sexual harassment of a student, a high level school district official must have actual knowledge of the conduct and deliberately fail to stop such conduct.<sup>291</sup>

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284. *Id.* at 2007 (Ginsburg, J., dissenting). This affirmative defense is similar to the one created by the Supreme Court in *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998), and *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998). See *supra* Part II.C.2 (discussing the affirmative defense for cases of sexual harassment under Title VII).

285. See *Gebser*, 118 S. Ct. at 2007 (Ginsburg, J., dissenting). Justice Ginsburg recognized that the Department of Education has directed school districts to adopt grievance procedures. See *id.* (Ginsburg, J., dissenting) (relying on 34 C.F.R. § 106.8(b) (1997); Guidance, *supra* note 47, at 12,044-45).

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

287. See *id.* (Ginsburg, J., dissenting).

288. See *id.* at 1993; *infra* Part IV.A.1 (analyzing the *Gebser* majority’s reasoning).

289. See *infra* Part IV.A.2 (explaining the effect of the actual knowledge standard).

290. See *infra* Part IV.B (discussing the inconsistency between *Gebser* and other recent Supreme Court decisions concerning sexual harassment).

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

This standard is based on the idea that a school district cannot properly respond to allegations of sexual harassment or abuse unless an appropriate official first receives notice.<sup>292</sup>

### 1. The Majority's Reasoning in *Gebser*

The *Gebser* majority concluded that actual knowledge is the appropriate standard of liability for Title IX actions because Congress enacted Title IX pursuant to its spending power.<sup>293</sup> Under Spending Clause legislation, recipients of federal funds should only be liable if they, at the time they accepted the funds, understood the conditions attached to the funds and intentionally violated those conditions.<sup>294</sup> The Supreme Court in *Franklin v. Gwinnett County Public Schools*<sup>295</sup> held that sexual harassment is intentional sexual discrimination.<sup>296</sup> Therefore, a school district knows upon accepting its yearly funding that it may not subject any person under its programs to sexual harassment.<sup>297</sup> Assuming such knowledge, liability under Title IX exists when the school district intentionally allows the sexual harassment or abuse of its students.<sup>298</sup> The *Gebser* Court reasoned

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292. See *Canutillo Indep. Sch. Dist. v. Leija*, 101 F.3d 393, 401 (5th Cir. 1996). In *Canutillo*, the Fifth Circuit denied recovery to a seven-year-old student who had been repeatedly molested by her teacher because the child failed to demonstrate that the school district had actual knowledge of the abuse. See *id.* at 402. Even though the student proved that she reported the abuse to another teacher in the school, the Fifth Circuit held that a teacher's knowledge of the abuse does not constitute actual knowledge on the part of the school district. See *id.* at 401-02. The Fifth Circuit determined that the teacher was not an appropriate school official because she did not have the authority to end the abuse. See *id.* at 402.

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

294. See *id.* "As a statute enacted under the Spending Clause, Title IX should not generate liability unless the recipient of federal funds agreed to assume the liability." *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 654 (5th Cir. 1997). Because the school district in *Rosa H.* did not have actual knowledge of the teacher's sexual harassment of the student, the Fifth Circuit held that the school district did not assume liability for the teacher's actions and therefore was not liable for the Title IX violation. See *id.* at 660.

295. *Franklin v. Gwinnett County Public Sch.*, 503 U.S. 60 (1992).

296. See *id.* at 75.

297. See *id.* at 75. The condition attached to Title IX funds is that no person will be subjected to sexual discrimination of any kind under the educational program. See 20 U.S.C. § 1681(a) (1994). Educational institutions know that they cannot subject students to sexual discrimination or sexual harassment when they accept the federal funds under Title IX. See *Franklin*, 503 U.S. at 74-75; see also *Canutillo*, 101 F.3d at 400.

298. See *Rosa H.*, 106 F.3d at 654. Actual knowledge and deliberate indifference are required of the school district because the school board has accepted the Title IX funding and, therefore, the school district is the only party that may breach the terms of the funding. See *Floyd v. Waiters*, 133 F.3d 786, 792 (11th Cir. 1998), *vacated*, 119 S. Ct. 33 (1998).

that an intentional allowance of sexual harassment or abuse by the school district requires actual knowledge of the harassment or abuse.<sup>299</sup>

Although the Supreme Court previously concluded in *Franklin* that sexual harassment is always intentional discrimination on the basis of sex and therefore constitutes an intentional violation of Title IX,<sup>300</sup> the *Gebser* Court held that even a teacher's intentional discrimination of a student cannot be imputed to the school district if the school district lacks the requisite knowledge.<sup>301</sup> Under the actual knowledge standard, unless the school district official has knowledge of a teacher's sexual abuse of a student, liability cannot be imputed to the school district.<sup>302</sup> If, however, a school district official sexually abused a student, the school district would be liable because that official acted on behalf of the school district.<sup>303</sup> Liability, therefore, under the majority's actual knowledge standard depends not on the conduct alleged but on the identity of the perpetrator.<sup>304</sup> Title IX, however, does not specify the perpetrator.<sup>305</sup> Rather, Title IX focuses on the victim and the prohibited conduct, thereby proscribing sexual discrimination in educational institutions by all perpetrators.<sup>306</sup> The actual knowledge standard, therefore, does not comport with the language of Title IX.<sup>307</sup>

Additionally, the majority in *Gebser* feared that a school district's increased liability could result in judgments that exceed the school's

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299. See *Gebser*, 118 S. Ct. at 1998-99.

300. See *Franklin*, 503 U.S. at 74. In *Franklin*, the Supreme Court concluded that sexual harassment is "intentional" discrimination on the basis of sex, and therefore, constitutes an intentional violation of Title IX. See *id.*

301. See *Gebser*, 118 S. Ct. at 1999.

302. See *Floyd*, 133 F.3d at 792-93.

303. See *id.* at 792. Liability would exist in the case of the school district official because the official has the authority to act on behalf of the school district whereas a teacher does not. See *id.*

304. See *id.* at 792-93.

305. See 20 U.S.C. § 1681(a) (1994). As noted above, the language of Title IX focuses on the victim of the harassment and not on the actor of the harassment. See *supra* note 51 and accompanying text (discussing the victim-focused language of Title IX).

306. See 20 U.S.C. § 1681(a).

307. See *id.* Under the actual knowledge standard, liability depends on the identity of the perpetrator. See *Floyd*, 133 F.3d at 792-93. The language of Title IX, however, focuses on the victim of the harassment, and therefore, this result is inconsistent with Title IX's language. See 20 U.S.C. § 1681(a). The Supreme Court recognized that Congress drafted "Title IX with an unmistakable focus on the benefited class" rather than "simply as a ban on discriminatory conduct by recipients of federal funds. . . ." *Cannon v. University of Chicago*, 441 U.S. 677, 691-92 (1979) (emphasis added).

federal funding.<sup>308</sup> If, however, a school district determines that accepting funds under such conditions would open it to unmanageable liability, the school district can decline the funding.<sup>309</sup> Also, as Justice Stevens' dissenting opinion recognized, district courts have the power to control jury verdicts through appropriate jury instructions and the use of remittitur.<sup>310</sup> Finally, while a large judgment could be detrimental to a school district, failing to afford students protection against sexual abuse at school is detrimental to the students.<sup>311</sup>

## 2. The Effect of the Actual Knowledge Standard

The actual knowledge standard of liability imposed by the *Gebser* Court greatly reduces the protection afforded to students by Title IX.<sup>312</sup> Under the *Gebser* standard, a school district will seldom face liability for teacher-student sexual harassment or abuse.<sup>313</sup> Consequently, a student who has been sexually molested by a teacher rarely can recover from the school district.<sup>314</sup> In this way, the actual knowledge standard fails to protect children and results in injustice, rendering Title IX ineffective.<sup>315</sup>

Requiring a school district to have actual knowledge of a teacher's sexual harassment of a student "creates incentives for school boards to

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308. See *Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989, 1999 (1998), *aff'g* by an *equally divided Court* *Doe v. Lago Vista Indep. Sch. Dist.*, 106 F.3d 1223 (5th Cir. 1997).

309. See *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 657 (5th Cir. 1997). "[I]f the acts that create liability [under Title IX] are likely to occur and are out of the control of the school district, the grant recipients might prefer to decline the federal money." *Id.*

310. See *Gebser*, 118 S. Ct. at 2005 n.12 (Stevens, J., dissenting).

311. See Stacy, *supra* note 2, at 1382. Even if increased liability could expose school districts to potentially large monetary liability, a school district can avoid such liability by working to prevent sexual harassment in its schools. See *id.* A school district does not face any liability under Title IX if its students are not subjected to sexual harassment. See *id.*

312. See *id.* at 1339.

313. See *Rosa H.*, 106 F.3d at 659. In *Rosa H.*, the Fifth Circuit refused to allow a high school student who had been repeatedly abused by a teacher to recover damages under Title IX because the school district lacked actual knowledge of the teacher's misconduct. See *id.* at 660. In using the actual knowledge standard, the Fifth Circuit recognized that "a school district would virtually never face penalties for sexual abuse of students unless school board members themselves intended the harm." *Id.* at 659.

314. See James C. Harrington, *Fifth Circuit Survey June 1996-May 1997: Civil Rights*, 29 TEX. TECH. L. REV. 433, 442 (1998). "No matter how egregious, perverted, or disgusting the sexual conduct may be, seldom, if ever, it seems, will a school district be responsible or held accountable" for a teacher's sexual harassment or abuse of a student. *Id.* at 442-43.

315. See Stacy, *supra* note 2, at 1369. Since school districts will rarely have actual knowledge of sexual harassment, school districts will rarely face liability. See *id.*

stick their heads in the sand.”<sup>316</sup> Thus, schools can escape liability by refusing to acknowledge obvious signs of sexual abuse.<sup>317</sup> Under the actual knowledge standard, school districts are rewarded for remaining ignorant of any harassment taking place in their schools.<sup>318</sup> The incentive created for school districts to purposefully remain ignorant abrogates Title IX’s purpose of preventing sexual discrimination in schools.<sup>319</sup>

Under the actual knowledge standard, the victimized student essentially has an affirmative duty to report the harassment to a responsible school official.<sup>320</sup> Expecting all victims of sexual harassment or abuse to report the incident to a school official, whom they may not know or have never seen,<sup>321</sup> is unreasonable.<sup>322</sup> Many children lack the sophistication and maturity necessary to seek help effectively.<sup>323</sup> Moreover, the victim is likely afraid and embarrassed

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316. *Rosa H.*, 106 F.3d at 657.

317. See Stacy, *supra* note 2, at 1359. For instance, in his concurring opinion in *Smith v. Metropolitan School District Perry Township*, Judge Coffey notes that although school officials may have “seen” the teacher and student together on many occasions, the school officials probably did not appreciate the inappropriate relationship that was taking place. See *Smith v. Metropolitan Sch. Dist. Perry Township*, 128 F.3d 1014, 1036 (7th Cir. 1997) (Coffey, J., concurring). Requiring actual knowledge will encourage school officials to fail to really “see” the signs of sexual harassment and abuse in order to escape liability. See Stacy, *supra* note 2, at 1359.

318. See Harrington, *supra* note 314, at 449.

319. See Stacy, *supra* note 2, at 1377. Under Title IX, school districts are supposed to ensure that no person is subjected to sexual discrimination or harassment under their programs. See 20 U.S.C. § 1681(a) (1994). The actual knowledge standard will encourage school districts to remain ignorant of sexual harassment in an effort to avoid liability under Title IX. See Stacy, *supra* note 2, at 1377. This result directly conflicts with the purposes of Title IX. See *id.*

320. See *Doe v. University of Ill.*, 138 F.3d 653, 668 (7th Cir. 1998). In its conclusion, the Seventh Circuit noted that requiring actual knowledge “does not place too severe a burden on potential plaintiffs. All that is required is that they report the alleged harassment to responsible school officials . . .” *Id.*

321. Cf. *Floyd v. Waiters*, 133 F.3d 786, 792 (11th Cir. 1998) (maintaining that school district officials are easily reached by phone or letter). Although a school official’s phone number may be listed, students and parents may not know they must notify the school official. See Stacy, *supra* note 2, at 1359. When problems arise at school, students and parents often tell the child’s teacher or principal. See *Canutillo Indep. Sch. Dist. v. Leija*, 101 F.3d 393, 395 (5th Cir. 1996). Consequently, expecting students to notify school district officials does “place too severe a burden on potential plaintiffs.” *University of Ill.*, 138 F.3d at 668.

322. See Stacy, *supra* note 2, at 1358-59.

323. See *University of Ill.*, 138 F.3d at 674-75 (Coffey, J., concurring in part and dissenting in part); *Baker*, *supra* note 76, at 292. For example in *Gebser*, although the student knew that her teacher’s harassment of her was wrong, she reported that she did not know how to react. See *Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989, 1993 (1998), *aff’d by an equally divided Court Doe v. Lago Vista Indep. Sch. Dist.*, 106

about the conduct.<sup>324</sup>

The actual knowledge standard encourages school districts not only to remain ignorant but also to avoid instituting anti-discrimination policies and effective grievance procedures to prevent and address the problem of sexual harassment in schools.<sup>325</sup> Moreover, even schools with reporting procedures have no incentive under the actual knowledge standard to thoroughly investigate possible instances of sexual harassment or abuse.<sup>326</sup> Holding school districts to a less stringent standard increases the likelihood that school districts will promulgate and enforce anti-discrimination policies and grievance procedures.<sup>327</sup>

### *B. The Gebser Decision's Inconsistency With Recent Sexual Harassment Cases*

During the same session in which the Supreme Court adopted the actual knowledge standard for Title IX sexual harassment actions, the Court determined that the standard for employer liability for Title VII

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F.3d 1223 (5th Cir. 1997). Gebser was fourteen and fifteen-years-old during the time her teacher sexually harassed and abused her. *See id.* Considering she had difficulty coming forward, younger student-victims may have an even harder time revealing the abuse. *See Baker, supra* note 76, at 292. Moreover, when a child does not receive help from the adult that she tells, the child may give up. *See Canutillo*, 101 F.3d at 395. For instance, in *Canutillo*, the seven-year-old victim told her homeroom teacher that the physical education teacher had molested her during school. *See id.* Instead of helping the child, the teacher told the student to stay away from the abusive teacher. *See id.* After the child told her mother, her mother spoke with the homeroom teacher. *See id.* The homeroom teacher then threatened the child "with 'trouble' if she was lying about her accusation." *Id.* The abused child did not speak about the sexual abuse until three years later when she began counseling. *See id.*

324. *See Stacy, supra* note 2, at 1359. In *Smith v. Metropolitan School District Perry Township*, the harassing teacher was a friend of the student-victim's family. *See Smith v. Metropolitan Sch. Dist. Perry Township*, 128 F.3d 1014, 1016 (7th Cir. 1997). The student was not only afraid to tell the teacher to stop but also was embarrassed and worried that her parents would find out. *See id.* at 1017. The student reported that:

She was afraid to tell Rager [the teacher] "no" and worried that if she told her parents they would be disappointed. She also worried that she might get in trouble if she told school officials. She decided that while she would rather not engage in sex, in order to maintain the relationship and keep Rager happy, she would have to continue to do so.

*Id.*

325. *See Harrington, supra* note 314, at 448. If schools do not investigate, schools will avoid acquiring actual knowledge of sexual harassment. *See id.*

326. *See Stacy, supra* note 2, at 1359.

327. *See id.* at 1380. "[I]f the school district . . . may be held liable, it is more likely that schools will create and enforce effective policies against sexual harassment and that a student who has indeed been sexually harassed will be able to recover from the school under Title IX." *Id.*

sexual harassment claims should be based on common law agency principles.<sup>328</sup> Within four days, the Supreme Court provided more protection against sexual harassment to adult employees than to school children.<sup>329</sup> Title IX's liability standard now differs from Title VII's standard for the same conduct.<sup>330</sup> A teacher's agency relationship to the school district aids the commission of the harassment, just as a supervisor's agency relationship to the employer does, and therefore Title VII's vicarious liability standard should also have been adopted for sexual harassment actions under Title IX.<sup>331</sup> Children are more vulnerable than adults and deserve more, not less, protection than adult employees from sexual harassment.<sup>332</sup> Finally, the affirmative defense created for employers who promulgate effective anti-discrimination policies should have been created by the Court to enable school districts to mitigate the increased liability that would have resulted if the *Gebser* Court had adopted vicarious liability for Title IX claims.<sup>333</sup>

#### 1. Advocating the Use of Title VII's Vicarious Liability Standard in Title IX Cases

Justice Stevens, in his dissenting opinion in *Gebser*, examined both the Supreme Court's reliance on Title VII in previous cases<sup>334</sup> and the Department of Education Office for Civil Rights' regulations

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328. See *Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989 (1998), *aff'g by an equally divided Court* *Doe v. Lago Vista Indep. Sch. Dist.*, 106 F.3d 1223 (5th Cir. 1997). The Supreme Court rendered its decision in *Gebser* on June 22, 1998. See *id.* The Court decided the two Title VII cases four days later on June 26, 1998. See *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257 (1998); *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998).

329. Compare *Gebser*, 118 S. Ct. at 1999, with *Burlington Indus.*, 118 S. Ct. at 2270-71, and *Faragher*, 118 S. Ct. at 2292-93.

330. Compare *Gebser*, 118 S. Ct. at 1999, with *Burlington Indus.*, 118 S. Ct. at 2270-71, and *Faragher*, 118 S. Ct. at 2292-93. Consider, for example, a school district with no anti-discrimination policy. Teacher A in that school district sexually abuses a first-grade student during school. In that same school district, a principal makes unwelcome sexual advances to Teacher B. Under Title IX, the student cannot recover damages from the school district for Teacher A's sexual abuse. Under Title VII, however, Teacher B may recover damages from the school district for the principal's unwelcome advances.

331. See *infra* Part IV.B.1 (suggesting the adoption of vicarious liability in Title IX actions).

332. See *infra* Part IV.B.2 (discussing children's need for protection from sexual harassment); Part IV.B.3 (noting the differences between the school environment and the workplace).

333. See *infra* Part IV.B.4 (advocating the adoption of an affirmative defense for Title IX sexual harassment actions).

334. See *Gebser* at 2002-03 (Stevens, J., dissenting) (discussing the Court's reliance on Title VII in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 74 (1992)).



interpreting Title IX.<sup>335</sup> The Supreme Court's reliance on *Meritor Savings Bank, FSB v. Vinson* in *Franklin v. Gwinnett County Public Schools* suggests the use of common law agency principles in Title IX actions.<sup>336</sup> Also, the Department of Education Office for Civil Rights' regulations recommend the standard of vicarious liability when a teacher's sexual harassment of a student results from the teacher's authority.<sup>337</sup> While these regulations are not binding on the Court, they should be given some deference because Congress bestowed the authority to create these regulations on the Department of Education.<sup>338</sup>

When a teacher is "aided in accomplishing" the harassment of the student "by the existence of the agency relation[.]" liability should be imputed to the school district.<sup>339</sup> A school district vests its teachers with authority over students.<sup>340</sup> When this authority enables a teacher to sexually harass a student, the school district should be held liable for damages.<sup>341</sup> Part of the teacher's authority is to control the educational environment and facilitate learning.<sup>342</sup> A child has a right to a safe environment that is conducive to education.<sup>343</sup> When a teacher sexually harasses a student, the teacher deprives the student of this right.<sup>344</sup> The environment is no longer safe nor does it foster

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335. See *id.* at 2004 (Stevens, J., dissenting) (noting that the Office of Civil Rights applies agency principles to teacher-student sexual harassment and abuse under Title IX).

336. See Stacy, *supra* note 2, at 1370.

337. See Guidance, *supra* note 47, at 12,039.

338. See *id.* at 12,034.

339. RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958). "A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless . . . he was aided in accomplishing the tort by the existence of the agency relation." *Id.*

340. See Stacy, *supra* note 2, at 1367-68.

341. See *id.* at 1368. For example, in his dissenting opinion in *Gebser v. Lago Vista Independent School District*, Justice Stevens recognized that Waldrop's "powerful influence" over Gebser was given to him by the school district. See *Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989, 2004 (1998) (Stevens, J., dissenting) *aff'g by an equally divided Court Doe v. Lago Vista Indep. Sch. Dist.*, 106 F.3d 1223 (5th Cir. 1997). Because Waldrop's authority aided him in sexually harassing Gebser, the school district should have been held liable under Title IX. See *id.* (Stevens, J., dissenting).

342. See Baker, *supra* note 76, at 305. "In the educational context, the job of teachers is to aid their students in self-development through academic training." *Id.* at 295.

343. See *id.* at 295. The opportunity of an education is every child's right, and it must be "available to all on equal terms." *Id.* at 318 (quoting *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954)).

344. See *id.* at 295-96. The teacher is able to sexually harass students, thereby depriving them of their right to a safe educational environment, because of the power the school district gives them. See *id.* at 305. Therefore, the teacher's abuse of his or her authority should be imputed to the school district. See *id.*

learning.<sup>345</sup> Teacher-student sexual harassment completely undermines the purpose of the educational environment by interfering with the student's education.<sup>346</sup>

By accepting custody of the child each day, the school district assumes a duty to protect, supervise, and care for the child.<sup>347</sup> To determine the correct standard of liability under Title IX, the Supreme Court should have considered the unique educational environment and the relationship between teachers and students.<sup>348</sup> When a teacher takes advantage of the school environment and his relationship with a student, liability should be assigned to the school district regardless of the school district's knowledge of the abuse.<sup>349</sup>

Vicarious liability would ensure greater protection under Title IX for students who are sexually abused and harassed.<sup>350</sup> Furthermore, vicarious liability would afford a victimized student a greater chance to receive compensation for his or her injury.<sup>351</sup> Vicarious liability also encourages school districts to adopt measures to prevent future harassment and abuse.<sup>352</sup> A school district's potential liability under

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345. *See id.* at 295-96. "[I]n the educational environment, the moment a teacher makes sexual demands of a student, the student is denied the benefit of an educational environment free from sexual coercion, a benefit which all students should be able to expect." *Id.*

346. *See id.* at 290. When a teacher sexually harasses a student, the school environment is no longer a safe environment conducive to education. *See id.* at 295-96. In this way, "[s]exual harassment fundamentally defeats the purpose of the educational environment." *Id.* at 290.

347. *See id.* at 291-92. School districts act *in loco parentis* to children in schools. *See id.* at 291. This means that schools have an authority and responsibility similar to that of parents while children are in school. *See id.*

348. *See Stacy, supra* note 2, at 1358-59. School is different from work. *See Baker, supra* note 76, at 290-92. Children do not choose to go to school. *See id.* at 292. Moreover, the teacher-student relationship differs from the employer-employee relationship with respect to more pronounced differences in power, maturity, and sophistication. *See id.* at 290-92.

349. *See Stacy, supra* note 2, at 1373. Furthermore, commentators contend that a student's job is to attend school. *See id.* at 1358; Giampetro-Meyer, *supra* note 48, at 316-17. Also, when the school district promptly and appropriately responds to sexual harassment, the school district instills within the student the principle that sexual harassment is not tolerated at school and will not be later tolerated in the workplace. *See id.* at 302.

350. *See Stacy, supra* note 2, at 1339. As school districts would face liability whenever their teachers sexually harass children, vicarious liability would encourage schools to be proactive and deter sexual harassment. *See id.*

351. *See id.* at 1370. School district officials rarely will know of a teacher's sexual harassment of a student. *See id.* at 1358-59. Therefore, under the actual knowledge theory of liability, a victimized student will virtually never recover damages for the Title IX violation. *See id.*

352. *See id.* at 1339. The goal of Title IX is to prevent sexual harassment. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989, 1997 (1998), *aff'g by an*

Title IX for a teacher's sexual harassment of a student provides an incentive for school districts to prevent sexual harassment and to respond appropriately and quickly when it does occur.<sup>353</sup> Applying vicarious liability will force school districts to prevent harassment of students at school by monitoring their hiring practices and guiding school employees in their duties.<sup>354</sup>

## 2. Children's Vulnerability and Their Need For More Protection Than Adults

The sexual abuse of children is usually secret.<sup>355</sup> Because of the covert nature of sexual abuse, school districts will actually know of sexual abuse only when the victim reports it.<sup>356</sup> A student is unlikely to reveal the occurrence of sexual abuse because the student may be embarrassed, feel that he or she deserved the abuse, or fear the stigma associated with being a victim of sexual abuse.<sup>357</sup> Therefore, expecting a school district official to have actual knowledge of the abuse is unreasonable.<sup>358</sup>

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*equally divided Court* Doe v. Lago Vista Indep. Sch. Dist., 106 F.3d 1223 (5th Cir. 1997). The threat of liability for their teachers' actions would likely encourage school districts to adopt appropriate grievance procedures and thoroughly investigate allegations, thereby comporting with the goal of Title IX. See Stacy, *supra* note 2, at 1339.

353. See Newman, *supra* note 44, at 2560. Creating an affirmative defense, like the one suggested in Justice Ginsburg's dissenting opinion in *Gebser*, would give school districts further incentive to respond appropriately to incidents of sexual harassment. See *Gebser*, 118 S. Ct. at 2007 (Ginsburg, J., dissenting); see also *infra* Part IV.B.4 (advocating the adoption of an affirmative defense to mitigate the increased liability schools would face under a vicarious liability standard).

354. See Baker, *supra* note 76, at 305. "Strict liability of educational institutions will encourage schools to educate and to monitor employees in order to prevent harassment from occurring." *Id.*

355. See Stacy, *supra* note 2, at 1358-59. Moreover, if a student is younger than a certain age, sexual activity is criminal. See, e.g., 720 ILL. COMP. STAT. § 5/12-14.1 (a)(1) (West 1998) (defining an adult's commission of an act of sexual penetration with a child under 13 as predatory criminal sexual assault of a child); 720 ILL. COMP. STAT. § 5/12-13(a)(4) (determining that a person who holds a position of trust or authority and commits an act of sexual penetration with a victim between the ages of 13 and 18 has committed a Class 1 felony).

356. See *Canutillo Indep. Sch. Dist. v. Leija*, 101 F.3d 393, 399 (5th Cir. 1996).

357. See Stacy, *supra* note 2, at 1359. Moreover, when a student has reported the harassment or abuse to a teacher he or she trusts and that teacher has failed to help, the child will likely not try to get help from another teacher. See, e.g., *Canutillo*, 101 F.3d at 395.

358. See Stacy, *supra* note 2, at 1358-59. "[T]eacher-student sexual abuse is conducted in secret making it difficult, if not impossible, to detect without being told about it." *Canutillo*, 101 F.3d at 399.

Children are not mature decision makers.<sup>359</sup> Children also have less power than adults and are vulnerable to the acts of adults, especially teachers.<sup>360</sup> When faced with sexual harassment and abuse, a child may not know how to respond appropriately or seek help.<sup>361</sup> Furthermore, sexual harassment adversely affects students' daily lives as well as their school performances.<sup>362</sup> Sexual harassment and abuse have powerful and long-lasting effects on children.<sup>363</sup> Students may experience a variety of physical,<sup>364</sup> psychological<sup>365</sup> and social problems.<sup>366</sup> As sexual harassment affects a significant number of students,<sup>367</sup> school districts must work to create safe environments free from sexual harassment.<sup>368</sup>

Under Title IX, schools must ensure that no one is subjected to

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359. *See Doe v. University of Ill.*, 138 F.3d 653, 675 (7th Cir. 1998) (Coffey, J., concurring in part and dissenting in part). Because children lack maturity, their rights to make certain adult decisions are limited by law. *See id.* (Coffey, J., concurring in part and dissenting in part).

360. *See Baker, supra* note 76, at 295-96.

361. *See id.* at 296 (noting that "[s]tudents are keenly aware of their vulnerability to the broad discretionary power of faculty members"). For example, a seventeen-year-old student who became sexually involved with a male teacher was afraid to say "no" to her teacher. *See Smith v. Metropolitan Sch. Dist. Perry Township*, 128 F.3d 1014, 1017 (7th Cir. 1997). She was also worried that she would get in trouble at school and disappoint her parents. *See id.*

362. *See Giampetro-Meyer, supra* note 48, at 302. "Students who are victims of sexual harassment by peers experience a wide range of problems which affect the students' education and may persist beyond the school environment." *Id.* at 304.

363. *See id.* at 320.

364. *See id.* at 304-05. "Physical problems may include: insomnia, headaches, ulcers, dermatological reactions, weight fluctuations, genitourinary distress, and respiratory problems." *Id.*

365. *See id.* at 305. "Psychological problems may include: lethargy, hypervigilance, nightmares, phobias, panic reactions, substance abuse, depression, helplessness, embarrassment [sic], anger, self-consciousness, distress, and lack of motivation." *Id.*

366. *See id.*

[S]ocial problems may include: feeling less popular with peers, changing behavior to avoid further harassment, fear of new people or situations, lack of trust, changes in social network patterns, negative attitudes and behavior in sexual relationships, changes in dress or physical appearance, changing seats in the classroom, changing friends and avoiding certain people or locations.

*Id.*

367. *See id.* at 302. "The occurrence of sexual harassment in schools is prevalent and harmful." *Id.*; *see also Baker, supra* note 76, at 318. "Sex-based harassment is a serious problem in schools." *Id.*

368. *See Guidance, supra* note 47, at 12,034. "[P]reventing and remedying sexual harassment in schools is essential to ensure nondiscriminatory, safe environments in which students can learn." *Id.*

sexual discrimination.<sup>369</sup> As schools act *in loco parentis*, they have a heightened duty to protect students.<sup>370</sup> Primary and secondary schools undertake an increased responsibility to ensure students' safety while at school because the students are children.<sup>371</sup> Furthermore, state laws mandate that teachers report any suspicions of abuse occurring either at home or school.<sup>372</sup>

Compulsory attendance laws require students to attend school.<sup>373</sup> These laws require that children leave their parents for several hours every day.<sup>374</sup> Some victimized students, knowing they must go to school, may feel that they have no choice but to endure the sexual abuse.<sup>375</sup> Consequently, students too often cannot avoid the sexual harassment or abuse that they face at school.<sup>376</sup>

### 3. Differences Between School and Work Environments

Although Title IX and Title VII prohibit the same conduct, they operate in different settings.<sup>377</sup> Title IX generally affects a younger population than does Title VII in that the majority of students are children while the majority of people in the workforce are adults.<sup>378</sup>

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

370. See Giampetro-Meyer, *supra* note 48, at 319 (discussing reasons why school officials have more control over students than employers have over employees in the work environment).

371. See Newman, *supra* note 44, at 2566 (comparing primary and secondary school environments with university environments).

372. See *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 661 (5th Cir. 1997). Teachers must, under state law, report any suspicions of child abuse. See *id.* In *Canutillo Independent School District v. Leija*, a teacher knew that another teacher was sexually molesting a seven-year-old student but did not report the abuse in violation of the reporting laws. See *Canutillo Indep. Sch. Dist. v. Leija*, 101 F.3d 393, 395-96 (5th Cir. 1996). Despite the teacher's violation of the law, the Fifth Circuit refused to allow the seven-year-old to recover under Title IX because the school district did not have actual knowledge of the abuse. See *id.* at 402.

373. See Stacy, *supra* note 2, at 1357.

374. See *id.*

375. See Baker, *supra* note 76, at 292. School children, because of compulsory education laws, must attend school. See *id.* Unlike employees, students do not have the option of quitting. See *id.* Moreover, students who attend public schools do not have the option of changing schools. See Stacy, *supra* note 2, at 1357-58.

376. See Baker, *supra* note 76, at 292.

377. Compare 20 U.S.C. § 1681(a) (1994), with 42 U.S.C. § 2000e-2(a)(1) (1994). Both Title IX and Title VII prohibit sexual harassment, but Title IX operates in academic institutions while Title VII applies in the workplace. See 20 U.S.C. § 1681(a); 42 U.S.C. § 2000e-2(a)(1).

378. See 20 U.S.C.A. § 1681(a); Baker, *supra* note 76, at 290-91. Although college

The differences between the scopes of the statutes suggest affording more protection, in the form of stricter standards, in the school context rather than the workplace.<sup>379</sup> Ironically, however, the Supreme Court has defined a vicarious liability standard for sexual harassment claims in the workplace,<sup>380</sup> but a more stringent actual knowledge standard for the same claims occurring in schools.<sup>381</sup> The Title IX actual knowledge standard serves to hold schools liable less often for sexual harassment than employers.<sup>382</sup> Because of the special relationship between students and their teachers,<sup>383</sup> students should receive at least the same protection as adult workers protected by Title VII.<sup>384</sup>

Teachers can exploit their authority as easily as supervisors.<sup>385</sup> Just as a supervisor's duties include more than simply hiring and firing,<sup>386</sup> a teacher does more than give grades.<sup>387</sup> Teachers are charged with the

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and graduate students may be in their twenties, the majority of students are minors.

379. *See Baker, supra* note 76, at 290-91. "[S]tudents should not receive less protection from conduct that is shown to be harassment (as opposed to teaching) than do employees in the workplace." *Kracunas v. Iona College*, 119 F.3d 80, 88 (2d Cir. 1997).

380. *See Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2270 (1998); *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2292-93 (1998); *see also supra* Part II.C.1 (outlining the protections against sexual harassment afforded employees under Title VII).

381. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989, 1999 (1998), *aff'g by an equally divided Court Doe v. Lago Vista Indep. Sch. Dist.*, 106 F.3d 1223 (5th Cir. 1997); *see also supra* Part III.C (discussing the Supreme Court's majority opinion in *Gebser*).

382. *See Giampetro-Meyer, supra* note 48, at 301. Employers are held to a vicarious liability standard for the sexual harassment of their employees whereas school districts have an actual knowledge standard of liability for the sexual harassment of their students. *Compare Burlington Indus.*, 118 S. Ct. at 2270, and *Faragher*, 118 S. Ct. at 2292-93, with *Gebser*, 118 S. Ct. at 1999.

383. *See supra* notes 355-76 and accompanying text (discussing children's vulnerability and need for more protection than adults).

384. *See Doe v. University of Ill.*, 138 F.3d 653, 665 (7th Cir. 1998). "Broadly speaking, there is no reason why students . . . should be afforded a lesser degree of protection against such 'hostile environment' discrimination than adult workers in the employment setting regulated by Title VII." *Id.*

385. *See Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 655 (5th Cir. 1997). In *Rosa H.*, for example, a teacher initiated sexual activity with his fifteen-year-old student. *See id.* at 650. The teacher repeatedly had sexual intercourse with the student during school hours. *See id.* The teacher told the student, who worried that she was missing school, that she would not be in trouble because she was with him. *See id.* The teacher used his power to keep the student out of class, to encourage her to stay with him, and to have sexual intercourse with the fifteen-year-old. *See id.* at 650-51.

386. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 76 (1986) (Marshall, J., concurring). A supervisor's sexual harassment of a subordinate, even when not resulting in a tangible employment action, carries the threat of such an action. *See Burlington Indus.*, 118 S. Ct. at 2269.

387. *See Stacy, supra* note 2, at 1375.

supervision of children and are directed to create a safe environment conducive to education.<sup>388</sup> Schools have a higher duty to students, especially minor students,<sup>389</sup> as compared with the employers' duties to their employees.<sup>390</sup> The goal of school is to teach students, whereas employers aim to create a lucrative and successful business.<sup>391</sup> Although employees need to work to earn a living, the law does not mandate that they work.<sup>392</sup> Children, however, are bound by compulsory education laws which require them to attend school.<sup>393</sup> Finally, the power differential between harasser and victim is increased in the teacher-student context as a result of differences in age, experience, and maturity.<sup>394</sup>

#### 4. Creating an Affirmative Defense For Schools With Effective Anti-Discrimination Policies

In her dissenting opinion in *Gebser*, Justice Ginsburg recommended creating an affirmative defense for schools who promulgate effective anti-discrimination policies and grievance procedures to mitigate the increased liability school districts would face under a vicarious liability standard.<sup>395</sup> This defense would be similar to the one created by the Supreme Court for employers facing liability under Title VII.<sup>396</sup> That defense considers both the effectiveness of the policies and procedures as well as the plaintiff-employee's use of corrective opportunities provided by the employer.<sup>397</sup> Creating such an affirmative defense under Title IX would encourage schools to institute policies and

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388. *See id.*

389. *See Baker, supra* note 76, at 291.

390. *See id.*

391. *See id.* at 290-91. The difference in goals highlights the heightened duty teachers have to their students when compared with that of employers to their employees. *See id.*

392. *See id.* at 292. Employees may quit or change jobs to avoid sexual harassment. *See id.* Students do not have this option. *See id.*

393. *See id.*

394. *See id.* "[D]ifferences in age and experience are generally more significant between students and their teachers than between employers and employees. This unequal balance of power places students in a more vulnerable position than employees, and justifies applying a more stringent standard to faculty conduct." *Id.*

395. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989, 2007 (1998) (Ginsburg, J., dissenting), *aff'g by an equally divided Court Doe v. Lago Vista Indep. Sch. Dist.*, 106 F.3d 1223 (5th Cir. 1997).

396. *See Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2270 (1998); *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2293 (1998).

397. *See Burlington Indus.*, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2293; *supra* Part II.C.2 (discussing the two-pronged affirmative defense under Title VII).

thoroughly investigate claims of sexual harassment.<sup>398</sup> Also, because Title IX affects people of varying levels of maturity and sophistication (pre-schoolers through graduate students), assessing the reasonableness of the student's response would allow courts to consider the individual differences between students depending on their differing abilities to respond to sexual harassment.<sup>399</sup> Affording school districts this affirmative defense would allow schools to mitigate the increased burden of vicarious liability while also encouraging schools to be proactive and work to prevent sexual harassment and abuse in schools.<sup>400</sup> This result would forward the goal of Title IX—to ensure that no student in any academic institution is subjected to sexual discrimination.<sup>401</sup>

## V. IMPACT

Requiring actual knowledge and deliberate indifference on the part of the school board in order to render a school district liable for a Title IX violation provides no incentive for school districts to work to prevent sexual harassment.<sup>402</sup> In fact, the actual knowledge standard could result in school officials purposefully turning a blind eye to the abuse in an effort to avoid Title IX liability.<sup>403</sup> Although the Supreme Court did not eliminate a student's private cause of action under Title IX, the Court's establishment of the actual knowledge standard greatly limits the availability of remedial damages such that students will rarely recover.<sup>404</sup> In the wake of *Gebser*, the Department of Education urges schools to see the decision as a challenge to institute effective policies and properly respond to allegations of sexual harassment.<sup>405</sup> Schools

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398. See Baker, *supra* note 76, at 306-07. "Limiting damages when schools act immediately and appropriately upon discovering prohibited conduct should insulate schools from burdensome liability." *Id.* at 312.

399. See *Gebser*, 118 S. Ct. at 2007 (Ginsburg, J., dissenting). A child's age, maturity, and experience will impact the child's ability to respond to sexual harassment. See Baker, *supra* note 76, at 292.

400. See Baker, *supra* note 76, at 312.

401. See *Cannon v. University of Chicago*, 441 U.S. 677, 704 (1979).

402. See *supra* Part IV.A.2 (discussing the effect of the actual knowledge standard created by the Supreme Court in *Gebser*).

403. See *supra* Part IV.A.2 (recognizing the possibility that a school district could purposely avoid learning of an act of sexual harassment by failing to acknowledge the existence of inappropriate behavior).

404. See *supra* Part IV.A.2 (noting that school districts can escape liability by refusing to notice signs of sexual harassment and abuse).

405. See *Press Release*, *supra* note 369. Every school system is encouraged "to view the Supreme Court's recent decision in [*Gebser*] as a challenge to work with parents and communities to ensure that they have effective policies and procedures in place to prevent sexual harassment, consistent with their continuing Title IX legal obligations."



are reminded that even though the school district cannot be held liable for damages without actual knowledge, a teacher's sexual harassment of a student nonetheless constitutes a Title IX violation.<sup>406</sup>

Since *Gebser*, adult employees have more protection against sexual harassment in the workplace under Title VII than do students at school under Title IX.<sup>407</sup> Employees state a cause of action by alleging that a supervisor sexually harassed them and by defining the agency relationship between the employer and the supervisor.<sup>408</sup> The Supreme Court should have used these principles to define the standard of school district liability because students are primarily children who deserve more protection than adults.<sup>409</sup> Moreover, the Court could have created an affirmative defense, similar to the one created for Title VII actions, for school districts that institute effective anti-discrimination policies.<sup>410</sup> Unfortunately, the Court did not apply Title VII's vicarious liability standard.<sup>411</sup> Now, to establish a vicarious liability standard for Title IX violations, Congress must amend Title IX.<sup>412</sup> In an effort to prevent any person from being subjected to sexual discrimination in schools, Congress should create a standard of school district liability based on agency principles.<sup>413</sup>

## VI. CONCLUSION

School children deserve protection from all sexual predators, including their teachers. Considering that adult employees are provided adequate protection from sexual harassment under Title VII, the Supreme Court's failure to similarly protect children is

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*Id.*

406. *See id.* "Although a plaintiff cannot obtain money damages where there was no notice to appropriate school officials, it is a violation of Title IX." *Id.*

407. *See supra* Part IV.B.1 (explaining the inconsistency between *Gebser* and other sexual harassment decisions).

408. *See supra* Part IV.B.1 (explaining how the actual knowledge standard affords children less protection from sexual harassment than adults).

409. *See supra* Parts IV.B.1 (advocating for the application of the Title VII vicarious liability standard in Title IX actions), IV.B.2 (noting that children are more vulnerable than adults).

410. *See supra* Part IV.B.4 (suggesting the adoption of an affirmative defense for Title IX actions).

411. *See supra* Part III.C (discussing the majority's adoption of the actual knowledge standard).

412. *See supra* notes 141-54 and accompanying text (noting the two occasions when Congress responded legislatively after the Supreme Court misinterpreted Title IX). In the past, Congress has responded when the Supreme Court misinterpreted Title IX. *See supra* notes 141-54 and accompanying text.

413. *See supra* Part IV.B (arguing for the vicarious liability standard in sexual harassment claims under Title IX).

unreasonable. The decision in *Gebser* abrogates a student's Title IX protection from sexual harassment by greatly limiting the student's likelihood of recovery. In the wake of *Gebser*, school districts have no incentive to end existing sexual harassment in schools or to institute policies to prevent future harassment. Without such incentive, children likely will face increased victimization as school officials stick their heads in the sand to avoid liability. A vicarious liability standard would encourage school districts to take affirmative steps to prevent sexual harassment in schools. Also, the formulation of an affirmative defense, similar to the one created under Title VII, would mitigate the school district's liability. The Supreme Court, however, has defined the standard for liability as actual knowledge and deliberate indifference. Therefore, unless Congress amends Title IX to include a different standard, school districts who "see no evil" can escape liability.

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