Journal of College and University Law
Summer 1999

***1** ACTUAL KNOWLEDGE UNDER GEBSER V. LAGO VISTA: EVIDENCE OF THE COURT'S DELIBERATE INDIFFERENCE OR AN APPROPRIATE RESPONSE FOR FINDING INSTITUTIONAL LIABILITY?

Jan Alan Neiger [FNa1]

I. INTRODUCTION

There is little debate that sexual harassment in our schools poses an issue of national importance because of the real and demonstrable harm it has to students' social and educational development. Sociological and anecdotal evidence unquestionably demonstrates the damaging effects of student sexual harassment on the college campus. [FN1] To combat the destructive effects of sexual harassment, students recently have turned to Title IX of the Education Amendments of 1972 (Title IX) [FN2] and federal courts for assistance in fighting the oppressive nature of teacher-to-student and student-to-student sexual harassment.

Yet, while Title IX was enacted more than a quarter century ago, a bewildering array of confusing and unclear messages has been delivered to colleges and universities by courts regarding the law of sexual harassment. [FN3] For ***2** college officials, nothing has been more erratic and confusing than the various edicts originating from the federal courts and the U.S. Department of Education as to the appropriate standard of liability that should govern educational institutions. The hazy picture of sexual harassment law under Title IX did not come into focus until last year when the Supreme Court--for just the second time--entered the controversy with its decision in Gebser v. Lago Vista Independent School District [FN4] and at last set forth a standard of liability for teacher-to-student sexual harassment. [FN5]

Thus, while the need for zealous protection of students against sexually harassing behavior at our nation's colleges requires no discussion, the evolution of decisional law recognizing and confronting the issue of student sexual harassment is a relatively new phenomenon. [FN6] A billowing of cases filtered their way into the courts after the Supreme Court's landmark 1992 decision in Franklin v. Gwinnett County Public Schools, [FN7] which held that schools could be monetarily liable for the sexual harassment of students. The Court, though, did not address the standard of liability that was to govern Title IX sexual harassment. Thus, until Gebser the question of whether students should have the same, or even more, protection in the educational setting under Title IX as workers have in the employment setting under Title VII of the Civil Rights Act of 1964 (Title VII) [FN8] puzzled both courts and college administrators.

Part of the reason for this confusion is the deceptively simple language of Title IX. At its heart, Title IX prohibits sexual discrimination at our educational institutions. The pertinent part of the statute provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance." [FN9] But the statute and its implementing regulations say nothing about sexual harassment or the liability that schools face should they allow harassing conduct to go unpunished in

their classrooms and hallways. Nevertheless, most courts and the Department of Education, after reviewing complaints filed by students, have reached the conclusion that schools can be held liable for damages in cases involving both teacher-to-student and student- to-student sexual harassment. [FN10] Yet, they were unable to come together to advance ***3** a single and uniform standard under which to hold educational institutions liable.

Despite the growing prevalence of Title IX sexual harassment claims in the federal courts after Franklin, the Supreme Court failed to rule on the appropriate institutional liability standard for student sexual harassment. The failure of both the Supreme Court and Congress to specifically address the issue of institutional liability for teacher-to-student, as well as student-to- student, sexual harassment led to great confusion in the lower courts. This confusion culminated in the failure of courts to find common ground and resulted in no less than four different standards of liability for teacher-to- student sexual harassment [FN11] and three liability standards for student- to-student sexual harassment. [FN12]

Given the lack of uniformity at the lower court level it was critical for either the Supreme Court or Congress to establish specific guidance and rules. In Gebser, the Supreme Court finally provided specific rules for courts and educational institutions to follow when inquiring about teacher-to-student sexual harassment. [FN13] Yet, while Gebser, like the Franklin decision before it, answered several essential questions as to sexual harassment in the classroom, the Court still left many issues unresolved.

The purpose of this article is to flush out the issues that inevitably led to Gebser, analyze the Supreme Court's opinion, and examine the issues that have yet to be addressed by the Court and Congress. To achieve this end, the first half of this article offers the reader an in-depth history and analysis of sexual harassment law. Particular attention is focused on sexual harassment of students at the college level, and where pertinent, at the primary and secondary school level. Part II looks at Title VI of the Civil Rights Act of 1964 [FN14] and Title VII, while Part III focuses on Title IX case law, Office of Civil Rights (OCR) memoranda, the legislative history of the statute, and the various standards of institutional liability issued by courts for teacher-to-student sexual harassment. The latter half of the article--Part IV-- addresses the Supreme Court's recent decision in Gebser, examines the Court's analysis, ***4** explains whether the decision was appropriate and legally sound, and explores the issues that the Court left unresolved.

While sexual harassment can result from either teachers or fellow students, and various opinions have been rendered for both teacher-to-student and student-to-student sexual harassment, this article focuses on the harassing conduct of teachers. Nevertheless, references to student-to-student sexual harassment will inevitably find their way into this article when appropriate.

II. ANTIDISCRIMINATION IN HIGHER EDUCATION

The prohibition of sexual harassment in the higher education setting has its origin in a series of antidiscrimination statutes first enacted in the 1960s. In order to deal with the pervasive problem of employment discrimination, Congress enacted several statutes to remedy the real and perceived aspects of discrimination in the workplace and to highlight the importance of equality in the employment setting. [FN15] These laws included the Equal Pay Act of 1963, [FN16] Title VII [FN17] in 1964, the Age Discrimination in Employment Act of 1967 (ADEA), [FN18] and the Rehabilitation Act of 1973. [FN19] To curb race, color, and national origin discrimination in those educational programs or activities receiving federal financial assistance, Congress passed Title VI [FN20] in 1964. Finally, Congress enacted Title IX [FN21] in 1972 in order to eliminate sex discrimination in education and open all fields of study to women.

Four of these federal statutes prohibit discrimination in educational programs receiving assistance under federal aid programs. Title VI prohibits educational institutions from discriminating on the basis of race, color, or national origin.

Title IX prohibits sex discrimination. The ADEA prohibits discrimination on the basis of age. Finally, Section 504 of the Rehabilitation Act prohibits discrimination on the basis of disability.

Congress' major function regarding higher education is to establish priorities and objectives for federal spending on education. When implementing these objectives and priorities, "the federal government attaches a wide and varied range of conditions to the funds it makes available" and enforces these conditions against the educational institutions accepting the federal aid. [FN22] By placing conditions on spending, the three civil rights statutes that have the greatest impact on students--Title VI, Title IX, and Section 504--represent an exercise of Congress' spending power under **5Article I, Section 8 of the Constitution, achieved through the delegation of authority by Congress to the various federal departments and agencies. [FN23]

Certain spending power legislation provides the federal government with the express authority to terminate or withhold funds from those institutions failing to prohibit discrimination in their educational programs. [FN24] Courts have also held that Title IX supports an implied private right of action [FN25] and that monetary damages are available in a private action-- at least in cases where intentional discrimination is alleged. [FN26]

Title VII, on the other hand, which was enacted under the federal government's commerce power to directly regulate employment discrimination and generally applies to all employers without regard to federal funding, expressly contains a cause of action [FN27] and also provides for relief in the form of monetary damages. [FN28]

Of the federal statutes noted, Title VII is the most litigated and receives the most extensive treatment of the anti-discrimination laws. As such, it provides Congress and state legislatures, courts, and federal and state agencies with perhaps the best guidance as how best to deal with the other anti-discrimination statutes. [FN29] Title VII was created as part of the Civil Rights Act of 1964. [FN30] The Act, which has been called the most successful and important civil rights legislation ever enacted, [FN31] bars discrimination in voting rights, employment, education,public accommodations, and the use of federal funds. For purposes of this article, Title VII's importance is found in its specific prohibition of discrimination in employment on the basis of sex, race, color, religion, or national origin.

Because most sexual harassment principles have developed under Title VII, courts and the Department of Education have drawn upon Title VII case law and the Equal Employment Opportunity Commission's (EEOC) policy guidelines to (1) help define sexual harassment in the academic setting, and (2) consider whether the prohibition of discrimination under Title IX extends to quid pro quo and hostile environment sexual harassment directed at students. Thus, prior to analyzing Title IX in Part III, this section will first review **6 the law surrounding sex discrimination in the form of sexual harassment in the workplace. Specifically, Title VII will be examined in terms of how courts and the EEOC have defined and developed sexual harassment law in the employment setting and the imposed a standard of liability that has been imposed upon employers. To a lesser extent, Title VI will also be considered given that Title IX was patterned after Title VI and the statutes contain almost identical language. [FN32] Thus, both Title VI and VII are instructive resources in understanding the current case law and administrative findings and guidelines under Title IX as to student sexual harassment.

A. Title VII of the Civil Rights Act of 1964

The Commerce Clause found under Article I, Section 8 of the Constitution provides Congress with the authority to directly govern and regulate employment practices and working conditions. Congress has done so through the enactment of Title VII. [FN33] The purpose of Title VII is to eliminate discrimination in employment by prohibiting certain discriminatory practices and regulating specific employment conditions. [FN34] Specifically, the statute provides most employees [FN35] with relief from

unlawful discriminatory employment practices based on sex, race, color, religion, or national origin. [FN36] Should a court find that an employer has engaged in an unlawful employment practice, the EEOC or a private plaintiff may ask the court to either enjoin the employer from engaging in the unlawful conduct or order such equitable relief as may be appropriate under the circumstances, such as reinstatement, hiring of certain employees, or backpay. [FN37]

***7** The legal standards for harassment, whether sexual or non-sexual, have been developed and defined primarily under Title VII. [FN38] Two basic forms of sexual harassment have been recognized and established in policy making and by courts. Harassment may be found under Title VII for "quid pro quo" sexual harassment if it can be shown that as a result of unwelcome sexual advances, requests for sexual favors, or other verbal or physical sexual conduct, the alleged victim was required to submit to the conduct as a term or condition of his or her employment, [FN39] and for "hostile environment" harassment if conduct is sufficiently severe or pervasive so as to create an intimidating, hostile, or offensive working environment. [FN40] The latter type of harassment has been most difficult to define, as the "standard includes an assessment of the 'totality of circumstances' in each case." [FN41]

1. Genesis of Sexual Harassment

Courts began to recognize quid pro quo sexual harassment as a form of discrimination in the late 1970s. The first decision to find this conduct to be a cognizable injury remediable under Title VII was Barnes v. Costle, [FN42] wherein a female employee claimed that her job was abolished because she rejected her supervisor's sexual demands. The court agreed that a violation of Title VII may have occurred because there was an exacting of a condition (i.e., repeated solicitations to join her supervisors after work and suggestions of enhancement of employment status if she cooperated in a sexual affair), which, but for her sex, she would not have faced. [FN43] Other courts soon reached similar findings. [FN44]

As for hostile workplace environment harassment, the Fifth Circuit was the first appellate court to recognize that such discrimination was prohibited under Title VII, albeit in the context of non-sexual harassment. In Rogers v. ***8** EEOC, [FN45] a Hispanic employee complained that her employer created a hostile work environment for employees by giving discriminatory service to its Hispanic clientele. [FN46] The court, in holding that a violation of Title VII could be established under such a scenario, noted that the employee's protection under Title VII extended beyond the economic aspects of her employment. The court stated, "[o]ne can readily envision working environments so heavily polluted with discrimination," so "as to destroy the emotional and psychological stability of minority group workers ...." [FN47]

Subsequent courts in the 1970s followed the Fifth Circuit's reasoning and applied the above principle to racial harassment, [FN48] religious harassment, [FN49] and national origin harassment. [FN50] While there is nothing in Title VII to suggest that a hostile environment sexual harassment claim could not be brought under the statute, such a cause of action either had not been raised by a plaintiff-employee or recognized by a court prior to 1980. This, however, was soon to change.

In 1980, the EEOC issued its final Guidelines on sexual discrimination. [FN51] In particular, the Guidelines specified that workplace sexual harassment is a form of sex discrimination prohibited by Title VII, and established criteria for determining what type of conduct constitutes unwelcome sexual harassment and defined circumstances for employer liability. [FN52]

Like courts before it, the EEOC found that quid pro quo harassment is a form of discrimination. [FN53] Additionally, the EEOC determined that hostile ***9** environment sexual harassment is prohibited under Title VII. The Commission stated that "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" constitute hostile environment sexual harassment when "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." [FN54]

Shortly after the release of the Guidelines, a federal court for the first time applied the hostile environment principle--that previously had been found in the non-sexual context--to harassment based on sex. In Bundy v. Jackson, [FN55] a female employee alleged that she was subjected to sexual questioning and sexual propositions from two supervisors and a co-worker. The court held that the sexual insults and demeaning propositions to which Bundy was subjected affected the conditions of her employment and illegally poisoned the work environment. [FN56] To not find a discriminatory work environment under these conditions would subject a woman to the following cruel trilemma:

> She can endure the harassment. She can attempt to oppose it, with little hope of success, either legal or practical, but with every prospect of making the job even less tolerable for her. Or she can leave her job, with little hope of legal relief and the likely prospect of another job where she will face harassment anew. [FN57]

Workplace sexual harassment did not reach the Supreme Court until 1986. But once heard, the landmark case of Meritor Savings Bank v. Vinson [FN58] fundamentally changed the employer/employee relationship by greatly expanding the universe of liability for employment-related harassment. The Court, in recognizing the theory of hostile environment sexual harassment, first noted that the language in Title VII does not limit its bar of discrimination solely to economic or tangible discrimination. [FN59] The Court, citing to the 1980 EEOC Guidelines, held that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment." [FN60] Quoting the Eleventh Circuit, the Court agreed that "[s]urely, a requirement that a man or woman run the gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets." [FN61]

***10** The Court, however, declined to issue a definitive rule on the appropriate standard for employer liability. It did agree with the EEOC, though, that Congress wanted the judiciary to look to traditional agency principles for guidance when reviewing workplace sexual harassment. [FN62]

It was these Title VII decisions and EEOC Guidelines that courts, as well as the Department of Education, looked to and relied upon when addressing teacher- to-student sexual harassment complaints under Title IX [FN63] and that formed the basis for the plaintiff's argument in Gebser. [FN64] However, shortly before the Gebser decision, two pivotal decisions in the 1997 term of the Supreme Court drastically changed the methodology for analyzing claims of workplace sexual harassment. In Faragher v. City of Boca Raton [FN65] and Burlington Industries, Inc. v. Ellerth, [FN66] the Court greatly expanded the circumstances in which an employer could be held responsible for the inappropriate behavior of its supervisors. [FN67]

Under these two decisions, the Supreme Court adopted the standard of vicarious liability. Thus, an employee may recover damages against the employer without showing that the employer is negligent or otherwise at fault for the supervisor's actions, even where the employee suffers no adverse employment ***11** action, such as demotion, termination, or the denial of promotion. The employer can escape liability, however, if it can show that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and ... that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." [FN68] An employer, though, is automatically liable fora supervisor's sexual harassment should the harassment culminate in a cognizable job injury, such as a discharge, demotion, or reassignment. [FN69]

The Court did not address the question of employer liability for co-worker harassment in either Faragher or Ellerth, [FN70] as this issue was not before it. Lower courts, though, have held that an employer, through its agents or supervisory personnel, is liable for co-worker harassment under a constructive notice standard. That is, employer liability will result only if it knew, or in the exercise of reasonably diligent inquiry, should have known of the harassing conduct of its employees and failed to take appropriate remedial action. [FN71] The EEOC has taken

a similar approach. [FN72] According to the EEOC, such an approach is appropriate because co-workers do not generally have the plenary authority over the victim's employment status, as do supervisors. [FN73] Prior to Davis v. Monroe County Board of Education, [FN74] several courts had adopted these same liability standards for co-worker harassment when addressing student-to-student sexual harassment under Title IX. [FN75]

B. Title VI

Although many higher education institutions understand the increasing liability for sexual harassment under both Title VII and Title IX, the concept ***12** of non-sexual harassment has been given little attention by these same schools. An understanding of Title VI, however, is critically important because of its impact on the drafting of Title IX. While Title IX was enacted to discourage discrimination on the basis of sex at educational institutions, the purpose of Title VI was to prohibit discrimination on the basis of race, color, or national origin in any activity or program receiving federal funds. [FN76]

Given that Title IX is notoriously vague, it has been suggested that courts and the OCR should analyze standards of liability and the types of harassment prohibited by it under Title VI. [FN77] While Title VI is not restricted to the educational context and does not refer to gender discrimination, it may be Title IX's most appropriate gap filler. [FN78]

This is so for two critical reasons. First, Title IX is patterned after Title VI and contains almost identical language. [FN79] In its review of the two statutes, the Supreme Court found, among other things, an implied private right of action under Title IX based on this same right already having been recognized under Title VI, and legislative history showing that the two statutes should be interpreted and applied similarly. [FN80] The Court noted that "[t]he package of statutes of which Title IX is one part ... also contains a provision whose language and history demonstrate that Congress itself understood Title VI, and thus its companion, Title IX, as creating a private remedy." [FN81] And second, Title IX's regulations themselves purport that Title VI's procedural provisions are to be adopted and incorporated by reference within Title IX's regulations. [FN82] Thus, it is instructive to compare and contrast Title IX to that of Title VI, as well as to Title VII. [FN83]

***13** 1. Title VI and the Supreme Court

The leading case under Title VI for determining an employer's standard of liability is Guardians Association v. Civil Service Commission of the City of New York. [FN84] Guardians is undoubtedly an ambiguous case as the six separate opinions demonstrate--none of which garnered support for a majority. The justices were so badly splintered in their views that it led Justice Powell to explain that the Court's unclear opinion "will further confuse rather than guide." [FN85]

While the opinion is fragmented, a pooling of the justices' views does shed some light. A majority of the justices concluded, albeit in qualifying language, that Title VI requires intentional discrimination in order to show a finding of liability. [FN86] Moreover, a different majority concluded that although intent is a necessary component of Title VI, the agency "charged with enforcing Title VI had sufficient discretion to enforce the statute by forbidding unintentional as well as intentional discrimination." [FN87] Yet, the Supreme Court provided little guidance as to what it meant by intentional discrimination, creating further confusion as lower courts attempted to find uniformity in the various decisions being rendered.

2. Title VI and the U.S. Department of Education

Although the Supreme Court has been less than clear in reaching a consensus for liability and intent under Title VI, the Department of Education has not been so

reticent in expressing an opinion on these issues. The Department's Office for Civil Rights (OCR) and its ten regional offices are responsible for investigating institutions whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with Title VI. [FN88] The OCR may promulgate guidelines for its staff to follow when investigating possible Title VI violations. These guidelines, referred to as "notice of investigative guidance," are made available to the public to apprise recipients and students of the investigative approach and analysis of the OCR staff. [FN89]

In 1994, the OCR issued an investigative guidance, wherein it set forth the procedures and analysis that its staff is to follow when investigating racial ***14** incidents and harassment against students. [FN90] The OCR's position as to Title VI hostile environment harassment is that a college will generally be liable for racial harassment of students by other students or parties, so long as it knew or should have known of the harassing conduct and failed to take immediate and appropriate corrective action. If the harasser is an agent or employee of the institution, such as a teacher, the OCR will apply agency principles and hold the school liable regardless of whether the school itself had knowledge of the harassment. [FN91]

The OCR's position was advanced, however, without any explanation as to the opinion of the Supreme Court in Guardians. That is, the OCR did not comment on the view that intentional discrimination requires a showing of direct involvement on the part of the school or the intentional failure to take appropriate remedial action.

C. Conclusion

Case law and agency regulations offered courts much to work with as they attempted to address the issue of institutional liability under Title IX. But the differing standards of liability established under the EEOC, the Supreme Court in the employment context, and the OCR and courts under Title VI, simply confused rather than guided. While judges reviewed and analyzed the persuasive and precedential authority found under Title VI and Title VII, chaos and confusion were the principal themes resonating from their decisions.

III. STUDENT SEXUAL HARASSMENT UNDER TITLE IX

Despite a significant body of case law that had developed exploring the boundaries of sexual harassment within the employment setting in the 1970s and 1980s, there was a paucity of cases addressing sexual harassment claims within the educational environment during this same period. While the case law grew extensively after Franklin v. Gwinett County, these decisions simply added to the existing confusion and controversy in the student sexual harassment confines. It was only after Gebser v. Lago Vista--twenty-five years after the enactment of Title IX and almost two decades after the first sexual harassment claim filed by a student--that specific rules as to institutional liability were finally given to courts and colleges.

An examination of Title IX's evolution is critical in understanding the Supreme Court's decision in Gebser. Thus, to better appreciate the confusion and debate that blanketed the educational environment, the following analysis of Title IX offers an insight into (1) how and why Title IX sexual harassment developed at the statutory level, (2) the U.S. Department of Education's increasing involvement to curb sexual harassment on college campuses, and (3) the many varying liability standards that were established ***15** by the federal courts before the Supreme Court once again entered the fray in 1998.

A. The Legislative History of Title IX

Before 1970, Congress had not seriously considered the problem of sex discrimination at the higher education level. [FN92] While Congress had enacted Title VI to prohibit discrimination on the basis of race, color, or national origin in those programs receiving federal funds, it apparently did not believe that sex

discrimination warranted the same treatment. Congress could have rectified the disparity when it allocated funds to colleges through the Higher Education Act of 1965. However, it refused to do so in part because of the differing opinions as to the severity of sex discrimination on college campuses, a belief that Title VI would eliminate most forms of discrimination on campus, the fear that quotas would be required for admitting a certain percentage of women, and a view that colleges would lose some autonomy if such legislation was passed. [FN93]

To fill the gap of sex discrimination in education that was left barren by the existing federal statues, Congress began to look seriously into the issue of gender discrimination at federally funded educational programs in the early 1970s. During the national debate over the Equal Rights Amendment (ERA), the issue of sex discrimination received widespread national attention. [FN94] While the ERA was never ratified, the debate was one of the factors that forced Congress to reconsider its earlier decision not to enact legislation prohibiting sex discrimination on the college campus. [FN95] Title IX's enactment was a lengthy process. [FN96] It emerged from a myriad of bills regarding funding of education beginning in 1969, [FN97] and ***16** finally culminated with President Richard Nixon's signature on June 23, 1972. [FN98]

Title IX is notoriously vague. The statute and its implementing regulations say nothing about whether behavior resulting in hostile environment or quid pro quo sexual harassment can be deemed the denial of a "benefit." [FN99] One scholar suggested that the silence found in Title IX may be "indicative of a purposeful intent to maintain a broad scope for the statute, so that it may encompass a wide variety of post-access discrimination, like environmental sexual harassment, that cannot be reached by the other regulatory provisions." [FN100]

What is more, the debate surrounding Title IX and its enactment offers little assistance as the sponsors, drafters, and critics of Title IX never addressed the issue of sexual harassment. Instead, the focus of Title IX rested on withholding federal funds from those educational institutions allowing sexually discriminatory practices and protecting individuals from discrimination based on sex. Specifically, Title IX's sponsors intended its scope to "reach into all facets of education and admissions, scholarship programs, faculty hiring and promotion, professional staffing, and pay scales," [FN101] and that it was to prohibit such persistent and pernicious discrimination as "teachers who favor their male students, and guidance counselors who discourage [females] from many careers that have limited numbers of women in higher levels of administration." [FN102] The central focus of Title IX is illustrated best by Senator Birch Bayh, who said that Title IX "is a strong and comprehensive measure which I believe is needed if we are to provide women with solid legal protection as they seek education and training for later careers." [FN103]

Thus, little legislative history exists addressing the types of sex discrimination that was to be prohibited after a student enrolls in college. Indeed, neither the legislative history nor the statute itself specifically discussed sexual harassment as a form of prohibited sex discrimination. Nevertheless, simply because sexual harassment was not mentioned within any of Title IX's prohibitions does not suggest that Congress intended for this harmful conduct to thrive without interruption on the college campus. [FN104] In fact, at the ***17** time of the enactment of Title IX, sexual harassment was not yet acknowledged as a form of sex discrimination under Title VII. [FN105] The EEOC itself did not issue sexual harassment guidelines until 1980. [FN106] And it was not until five years after Title IX was adopted and thirteen years after the passage of Title VII that sexual harassment was specifically recognized as a form of sex discrimination in the workplace by a federal court. [FN107]

Since the statute and its history provided only little help, colleges and courts had to look elsewhere for guidance. Their search led them to the Department of Education.

B. Department of Education Weighs In

Once civil rights legislation is enacted into law, Congress delegates authority to implement the laws to the various federal departments and agencies. Enforcement responsibilities of Title IX have been delegated to the Department of Education. [FN108] The Department is required to issue regulations to implement the statute for all programs and activities under which it provides federal financial assistance. [FN109]

Like Title VI, the Department of Education provides that its own OCR will be responsible for investigating institutions whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with Title IX. [FN110] A victim of sex discrimination can either bring a ***18** complaint to his or her institution's own internal grievance procedure [FN111] or complain directly to the OCR. [FN112]

And also like Title VI, the OCR may promulgate policy guidelines for its staff to follow when investigating a possible civil rights violation. [FN113] Recently, the OCR issued a policy guidance regarding both student- to-student sexual harassment and teacher-to-student sexual harassment entitled "Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties." [FN114] The Guidance is based on legal principles set ***19** forth in case law and letter findings, and applies to both student-to-student and teacher-to-student sexual harassment. [FN115]

Once the OCR has concluded its investigation of a sexual harassment complaint, it will typically issue a letter finding to the educational institution that it has investigated. [FN116] Prior to the Sexual Harassment Guidance, the OCR essentially created guidelines through its letter findings.

Should there be a finding of a violation and negotiations do not result in voluntary compliance, the OCR may initiate enforcement action. Under this scenario, the OCR can either take the case to an administrative law judge and institute proceedings to suspend, terminate, or refuse to grant or continue to provide federal assistance to an institution; or direct the case to the Department of Justice for additional prosecution to enforce the rights provided for under Title IX. Enforcement proceedings may be initiated only after it has been determined that compliance cannot be secured by voluntary means. [FN117]

***20** C. Private Rights of Action under Title IX

Victims of sexual harassment are not precluded from filing a lawsuit as a result of the alleged harassment if they file an internal grievance within the University or a complaint with the OCR. [FN118] In 1979, the Supreme Court held that individuals could pursue a private remedy against educational institutions for violations of Title IX and that they did not have to exhaust their institutional remedies before bringing suit. [FN119] That is, an individual could bring his or her own suit in federal court in an attempt to remedy an alleged discrimination. Moreover, unlike Title VII actions, the complainant is not required to receive a right-to-sue letter from the enforcing agency before initiating litigation. However, should a lawsuit be initiated, the OCR will discontinue its investigation. [FN120]

By providing an individual with an implied private right of action under Title IX, the Supreme Court attempted to ensure that an appropriate remedy would be provided to the victim of the discrimination. If a public remedy only was available to the victim, such as the termination of federal financial assistance to the university, then the remedy likely would not be fully adequate to protect the rights of the individual who was the victim of the discrimination. Moreover, to even bring about such a severe punishment as terminating federal funding, there must be a showing that the institution's practices are so pervasively discriminatory that a complete cutoff of federal assistance is warranted--a drastic and unlikely measure. [FN121]

While students could bring suit under Title IX, they were unwilling or uninterested to take advantage of their rights. Several reasons explain student's

reluctance: the transient nature of students, [FN122] the belief that colleges are more concerned with protecting faculty members' rights and reputations than students, [FN123] a sense of powerlessness, [FN124] anduntil Franklin, the ambiguity as ***21** to the scope and nature of relief available under Title IX. [FN125] Consequently, very few sexual harassment claims found their way to the courthouse during the early years of the statute.

D. Case Law Under Title IX

1. Quid Pro Quo

The first case to deal specifically with Title IX sexual harassment was heard in 1977. Alexander v. Yale University [FN126] involved a claim by a female student who alleged that she received a poor grade, not because of a fair evaluation of her academic work, but because of her failure to comply with the professor's sexual demands. Four other students brought suit as well, claiming that they too were harmed by the sexually hostile and intimidating atmosphere on campus, such as repeated sexual advances and coerced intercourse and exposure to an educational environment rife with sexual harassment. [FN127]

The court, though, ruled that only one student, Pamela Price, sufficiently alleged an actionable claim under Title IX. [FN128] The court held that while Price's claim did rise to a personal exclusion from a federally funded education activity or a denial of participation in the university's programs or activities in a measurable sense, it did not find the same for the other four students. [FN129]

Price alleged that a professor had offered to give her an "A" in a course in exchange for sexual favors. She submitted that the professor gave her a "C" in the course after she rebuked his demands and that the grade did not reflect her academic performance in the course. [FN130] The district court determined that Price had presented allegations sufficient to state a valid quid pro quo claim under Title IX, opining:

> [I]t is perfectly reasonable to maintain that academic advancement conditioned upon submission to sexual demands constitutes sex discrimination in education, just as questions of job retention or promotion tied to sexual demands from supervisors have become increasingly recognized as potential violations of Title VII's ban against sex discrimination in employment. [FN131]

The court below nevertheless dismissed her claim because she failed to prove her allegations. [FN132] Although the court of appeals affirmed the trial court's findings--because graduation rendered the students' claims moot--it ***22** made clear that Price's claim of a high grade in exchange for her compliance with the professor's sexual demands was a justifiable claim for relief under Title IX. [FN133]

2. Hostile Environment Sexual Harassment

Eight years after Alexander, a Pennsylvania district court became the first federal court to enter the discussion with respect to teacher-to-student hostile environment sexual harassment. In Moire v. Temple University School of Medicine, [FN134] a female medical student brought a Title IX action against the University's medical school and her supervisor. The student claimed that she was sexually harassed by the supervisor of the psychiatric clerkship program because of the supervisor's inappropriate sexual remarks. [FN135] She also claimed that the school illegally conspired against her and sought to protect her supervisor by failing to provide an adequate sexual harassment grievance procedure. [FN136] The supervisor did not necessarily deny that he made the inappropriate sexual comments, but did state that he was simply attempting to be supportive of the student and explain to her how others might view her in the clinical psychiatric profession. [FN137]

The court first found that the sexual harassment doctrine developed under Title

VII is equally applicable to Title IX claims. In a footnote, the court commented:

> The Equal Employment Opportunity Commission's 1980 Guidelines on sexual harassment explicitly recognize these two types of harassment [quid pro quo and hostile environment sexual harassment].... Though ***23** the sexual harassment 'doctrine' has generally developed in the context of Title VII, these guidelines seem equally applicable to Title IX. [FN138]

Thus, for the first time, a federal court found that Title VII regulations were applicable to claims under Title IX for sexual harassment.

The court consequently applied a hostile environment analysis to the facts finding that there was no allegation of quid pro quo harassment. [FN139] Then after reviewing the facts, it determined that there was insufficient evidence to demonstrate that the student was a victim of hostile environment sexual harassment. [FN140] As noted by the court:

> Undeniably, plaintiff was a special subject of Dr. Crabtree's attention during her clerkship. But this attention was the result of his displeasure with her clinical conduct rather than sexual attraction to her. Dr. Crabtree's overall behavior lends credence to his contention that his initial use of the word "attractive" was due only to his desire to lessen the impact of his criticism and make plaintiff aware of the clinical importance of a doctor's appearance in regard to patients' perceptions....
>
> Telling a subordinate she was "attractive" certainly might be unprofessional, offensive or illegal in other circumstances but here Dr. Crabtree was entitled to explain that plaintiff's appearance was a factor of which she should be aware in a clinical setting. [FN141]

Alexander and Moire were two of only a handful of cases relating to student sexual harassment that were heard in the 1970s and 1980s. These few decisions did little to resolve the doubt that remained as to Title IX's applicability to sexual harassment on the college campus. Title IX's role in combating sexual harassment, however, was forever changed in 1992 when the Supreme Court joined the debate with its landmark decision in Franklin v. Gwinnett County Public Schools. [FN142] The Court declared not only that Title IX prohibits sexual harassment as a form of sex discrimination in educational institutions receiving federal assistance, but also that students could seek monetary damages from academic institutions for intentional discrimination under Title IX. [FN143] Until Franklin, courts and commentators were of the opinion that the only remedies available under Title IX were limited to injunctive relief or termination of federal funding to the institutional program receiving the funding. [FN144] Thus, as a result of Franklin, the Court created an attractive ***24** tool for students to seek monetary compensation for harm they have suffered as a result of sex discrimination.

3. Franklin v. Gwinnett County: Clarification or Confusion?

The facts before the Supreme Court in Franklin were quite simple. Christine Franklin, a tenth grader in high school, claimed that she was subjected to a pattern of sexual harassment by one of her teachers, Andrew Hill. [FN145] While a student at Gwinnett County Public Schools, Franklin informed the school that Hill forcibly kissed heron the mouth, subjected her to coercive intercourse, and asked about her sexual experiences with her boyfriends. [FN146] In April 1988, Hill resigned on the condition that all matters pending against him be dropped. The school thereupon closed its investigation. [FN147]

Following what Franklin believed was an unsatisfactory investigation by the school district and pressure from school officials not to file charges against Hill, she filed a Title IX complaint against the district. The OCR found, among other things, that the district was in violation of the statute for subjecting her to physical and verbal sexual harassment. [FN148] Franklin then filed suit in federal court seeking monetary damages under Title IX.

The district court dismissed the complaint, finding that Title IX did not authorize an award for damages. [FN149] The Eleventh Circuit Court of Appeals

affirmed the lower court's ruling. [FN150]

In reversing, the Supreme Court first noted the longstanding rule that absent clear direction to the contrary by Congress, courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute. [FN151] The Court found as well that Title IX does not specifically authorize an award for damages. Yet, it determined, based on the state of the law when Title IX was passed and the subsequent amendments to Title IX, that Congress did not intend to limit the remedies available in a suit brought under Title IX when intentional discrimination is alleged. [FN152]

The Court declined to determine the constitutional basis of Congress' enactment of Title IX. [FN153] Previously, though, it had held that Title IX is analogous to Title VI [FN154] and that Title VI is spending power legislation. [FN155] Thus, reading its earlier Title VI and Title IX decisions, the Court apparently was of the opinion that Title IX was passed pursuant to Congress' powers under ***25** the Spending Clause, and not the Commerce Clause--as urged by some. [FN156] This, of course, is critical because of the differing remedies available to victims and the liability standards that apply to legislation enacted under the two constitutional clauses. [FN157]

Unlike Title VII, which specifically provides for the scope of available remedies, [FN158] Title IX does not contain a legislative expression for relief--including when it is appropriate to award monetary damages. Instead, remedies under the Spending Clause are limited when the alleged violation is "unintentional." This is so because "[t]he point of not permitting monetary damages for an unintentional violation is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award." [FN159] The lack of notice, though, is not a concern for intentional discrimination. As best explained in Franklin:

> [U]nquestionably, Title IX placed on the Gwinnett County 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' [citation omitted]. We believe the same rule should apply when a teacher sexually harasses and abuses a student. Congress surely did not intend for federal monies to be expended to support the intentional actions it sought by statute to proscribe. [FN160]

Thus, according to the Court, a money damage remedy is available for an action brought to enforce Title IX only when there is a showing of intentional discrimination. Although the Court drew on an earlier Title VII decision to hold that when a teacher sexually harasses and abuses a student, that teacher discriminates on the basis of sex, [FN161] it refused to address the question of whether Title IX's prohibitions are co-extensive with those of Title VII. [FN162]

Finally, the Court acknowledged that equitable remedies, such as backpay and reinstatement, were not adequate in matters such as this. That is, even if Franklin could had proven her Title IX claim, equitable remedies would not have been adequate since (1) Franklin was a student when the alleged discrimination occurred, (2) the teacher no longer taught at the school, and (3) Franklin no longer attended a school in the county system. [FN163] The Court's ***26** decision, finding both monetary and equitable relief for sexual harassment under Title IX, provided students with a powerful tool to combat discrimination in the academic setting.

While Franklin is a landmark case--as it made available the remedy of money damages for an intentional violation of sexual harassment under Title IX--it raised some vexing questions. The Court did not elaborate on what it meant by "intentional discrimination" nor did it express an opinion as to what standard of liability should be applied to hostile sexual harassment under Title IX. The Supreme Court's lack of guidance on this latter point is best shown in the opinion itself. The Court expressly set forth in a footnote that it was refusing to address the issue of what standards and remedies under Title VII should be applied to Title IX, but subsequently cited to Meritor--a Title VII sexual harassment case--for the proposition that the same "intentional discrimination" rule set forth in Meritor should apply as well to Title IX matters. [FN164]

The Court did not consider the proper standard for imposing liability for teacher-to-student sexual harassment because the decision did not require it. The facts show that the school itself actually knew of the teacher's sexual misconduct and then took steps to dissuade the student from bringing any charges. Thus, it was the school's own conduct, and not the teacher's, that created the intentional discrimination. The Court, though, did not specifically address which employees of the school had to have knowledge in order for the intentional discrimination requirement to be satisfied.

Admittedly, Franklin is rather limiting in terms of its guidance. The Court essentially found that schools could be held liable for monetary damages for intentional teacher harassment of students--but no more. Nevertheless, the Court's decision was the catalyst for the myriad of lawsuits that have been filed by and on behalf of students in the latter half of the decade. However, the Supreme Court's failure to squarely address the issue of what liability standard is to applied under Title IX caused "great confusion in the lower courts." [FN165] This confusion is readily seen in the many discrete decisions that subsequently were reached by the OCR and the federal courts. [FN166]

***27** E. Primary and Secondary Students Lead the Way

1. Patricia H.

The District Court for the Northern District of California was the first court to explore the issue of student sexual harassment after Franklin. In looking for guidance as to whether a claim for hostile environment sexual harassment could be brought under Title IX, the court turned to Title VII, the legislative history of Title IX, the Supreme Court's decisions in Meritor Savings Bank and Franklin, and OCR policy.

In Patricia H. v. Berkeley, [FN167] two grade school girls who were allegedly molested outside school grounds by a high school music teacher, claimed that the teacher's mere presence in school created a hostile environment and had a harmful effect upon their school experience. [FN168] The court did not decide whether the teacher's continuing presence did, in fact, create a hostile environment for the two students. Its decision, instead, rested on whether it should apply Title VII hostile environment sexual harassment case law to the girls' Title IX claim. [FN169]

In finding that a student should have the same protection in school that an employee has in the workplace, the court relied extensively on a much-quoted 1987 law review article, which said:

> [T]he importance and function of environment is different in academics than in the workplace ... A nondiscriminatory environment is essential to maximum intellectual growth and is therefore an integral part of the educational benefits that a student receives. A sexually abusive environment inhibits, if not prevents, the harassed student from developing her [or his] full intellectual potential and receiving the most from the academic program....
>
> A higher standard should be imposed upon a faculty member's behavior toward his [or her] student than that which is imposed upon an employer with regard to his [or her] employee.... The student-faculty relationship encompasses a trust and dependency that does not inherently exist between parties in a sexual harassment claim under Title VII. [FN170]

Patricia H. was simply a first step after Franklin. Courts discussing the issue of institutional liability for teacher-to-student sexual harassment reported more than forty opinions before the Supreme Court resolved the matter in 1998 with its decision in Gebser. [FN171] These decisions resulted in the ***28** adoption of three other standards of institutional liability, outside the constructive knowledge standard embraced in Patricia H. [FN172]

Of the forty-two reported decisions, twenty-eight cases involved hostile

environment sexual harassment, six cases involved both hostile environment and quid pro quo sexual harassment, and two cases were limited solely to quid pro quo sexual harassment. [FN173] Thus, prior to Gebser, a total of thirty-four decisions were rendered relating to teacher-to-student hostile environment sexual harassment, while eight decisions were issued with respect to quid pro quo sexual harassment. [FN174]

2. Institutional Liability for Quid Pro Quo Harassment

All eight cases pertaining to quid pro quo sexual harassment held that the tying of academic advancement to the submission of some type of sexual pressure is clearly a form of sexual discrimination under Title IX. [FN175] Courts generally have been of the opinion that an educational institution should be automatically liable for the quid pro quo acts of its employees. [FN176] Under this ***29** approach, a professor is analogous to a workplace supervisor. Thus, the need to have knowledge of any such quid pro quo harassment of a student by a professor, whether the knowledge be actual or constructive, is automatically satisfied as it is imputed to the professor's employer.

3. Institutional Liability for Hostile Environment Sexual Harassment

Courts reviewing the issue of teacher-to-student hostile environment sexual harassment adopted four different standards of institutional liability. These standards were: (1) vicarious or imputed liability under the Restatement (Second) of Agency; (2) the theory of constructive notice, wherein a school is liable if it "knew or should have known" about the harassment but failed to take appropriate action to eliminate it; (3) the showing of actual knowledge requiring knowledge or direct involvement by the school as to the discrimination; and (4) strict liability.

a. Agency principles

The well-established principles of agency law [FN177] allow a plaintiff to seek monetary damages so long as the perpetrator was acting in a supervisory capacity or was aided in the inappropriate behavior as a result of the employee's relationship with the employer. Under this standard, the employer is vicariously liable for the harms committed by its employee where the commission of such harms is facilitated by the powers entrusted to the employee. [FN178] The agency principle is similar to strict liability because it generally will arise without regard to fault or negligence [FN179] and irrespective of whether the school responded to the inappropriate behavior upon becoming aware of it. [FN180]

***30** Seven courts were guided by agency law theory in finding institutional liability when an employee sexually harasses a student. [FN181] The OCR and the Second Circuit both delineated between supervisory and non-supervisory employees in determining liability. The Second Circuit limited the agency approach only to those circumstances where the teacher has a supervisory relationship over the student, such as the authority to assign, review, and grade the student's work; provide career counseling; or give an employment recommendation. Should the teacher not have a supervisory relationship over the student or should not capitalize on his or her supervisory relationship to further the harassment of the student, the Second Circuit held that Title VII's constructive notice test was to be applied to determine liability. [FN182] This standard is synonymous with the OCR's policy Guidance. [FN183]

b. Constructive knowledge

Thirteen decisions were rendered holding that a school is directly liable if the student is able to establish that the school "knew or should have known" of the harassing conduct creating the hostile environment and failed to take the appropriate steps to remedy the discriminatory behavior. [FN184] The constructive notice standard requires actual notice or conduct that is so severe or pervasive

that it would ordinarily create such notice. [FN185] Under this standard, teachers employed by the school stand in the same position as the school itself and, therefore, cannot put their heads in the sand once they know, or should have known, of a hostile educational environment. [FN186]

***31** c. Actual knowledge

The third standard of institutional liability adopted by courts is the showing of actual knowledge, wherein liability is found only in those situations where the school had actual notice of the discrimination. Thus, a school is liable for the harassment only if it can be proven that the school failed to act once it had actual knowledge that one of its employees was creating a hostile environment.

Ten cases were decided limiting liability to the actual notice standard. [FN187] Of these ten cases, courts within the Fifth Circuit considered six. [FN188] The others were reached by the Court of Appeals for the Seventh and Eleventh Circuits. [FN189] All the decisions from the three circuit courts were rendered just two years prior to Gebser.

d. Strict liability

Finally, one district court, after reviewing the various standards of liability, held that the proper standard for finding institutional liability should be characterized as strict liability. [FN190] If Title IX is to have any effect, the court noted, schools must be held automatically liable for the actions of a teacher who engages in blatant sex discrimination. Absent a strict liability standard, the court concluded that a school could shield itself from liability simply by asserting that it did not have knowledge of the harassment. [FN191]

2. Student-to-Student Sexual Harassment

Shortly after its decision in Patricia H, the same California district court created a new cause of action under Title IX: student-to-student sexual harassment. ***32**[FN192] Prior to 1993, the OCR had expressed through its letter findings the opinion that an educational institution's failure to appropriately respond to student-to-student sexual harassment, of which it knew or had reason to know, was a violation of Title IX. [FN193] Yet, no court had reached this conclusion until Doe v. Petaluma. After the district court's decision, a majority of federal courts reviewing the issue likewise held that student-to-student sexual harassment is actionable under Title IX. [FN194]

While most courts and the OCR concluded that peer sexual harassment is a viable cause of action, various standards of institutional liability--much like that for teacher-to-student sexual harassment [FN195]--were adopted. [FN196] Specifically, courts and the OCR established three standards of liability after the Petaluma decision: (1) the "knew or should have known" standard commonly found under Title VII case law, [FN197] (2) actual knowledge with the showing of ***33** intentional discrimination, [FN198] and (3) disparate treatment. [FN199] In addition, the Eleventh Circuit, deviating from the views of the other courts, held that student-to-student sexual harassment is not a viable cause of action under Title IX. [FN200]

One year after deciding Gebser, the Supreme Court resolved as well the issue of institutional liability with respect to peer sexual harassment. [FN201] While not a central theme of this article, Davis v. Monroe County Board of Education and the Court's analysis of student-to-student sexual harassment is quite instructive because the arguments advanced by the parties and justices are similar to those found in Gebser.

In Davis, the Court accepted for review a matter involving a fifth grade student, LaShonda Davis, who endured a pattern of clearly inappropriate behavior from a classmate, G.F. The string of incidents, which occurred over a five-month period,

included attempts by G.F. to fondle Davis' breasts and vaginal area, G.F. rubbing against Davis in a sexually suggestive manner, and comments by G.F. stating that he wanted to "get in bed" with Davis and wanted to "feel herboobs." [FN202]

Davis and her mother reported these incidents to the teacher but no action was taken and the inappropriate behavior continued. [FN203] Davis' mother subsequently contacted the principal of the school, but after obtaining an unsatisfactory response, she notified local law enforcement officials. [FN204] In May ***34** 1993, G.F. was charged with sexual battery to which he eventually pleaded guilty. [FN205]

Davis' mother also filed suit against the school alleging that its failure to act once it knew of the harassment resulted in discrimination against her daughter under Title IX. The district court dismissed the complaint. [FN206] A divided three-judge panel of the Eleventh Circuit, however, reversed and reinstated Davis' Title IX claim. [FN207] At the request of the school district, the court granted a rehearing en banc to consider the Title IX claim. [FN208]

Upon rehearing, the appellate court held that Title IX does not allow a claim for student-to-student sexual harassment. Specifically, the court determined that since Title IX was enacted under the Spending Clause, schools must be given unambiguous notice as to conditions that are attached to the receipt of federal funds. [FN209] Yet, there is no clear notice in the statute, that expresses to schools "that they, rather, than society as a whole," should be held liable for failing to prevent a student's harassment of another. [FN210]

In a sharply divided decision, the Supreme Court ruled that educational institutions receiving federal financial assistance could be sued and forced to pay damages for student-to-student sexual harassment. Students filing sexual harassment claims under Title IX, however, face a difficult hurdle in proving liability.

Writing for the bare majority, Justice O'Connor held that while a private damages action may lie against a funding recipient for student-to-student sexual harassment, liability will arise only where the student is able to show that a school official had actual knowledge of the harassment and was deliberately indifferent to it. [FN211] Moreover, reflecting the justices concerns that traditional teasing might be used in an attempt to demonstrate sexual harassment, O'Connor noted that a school is only to be held responsible for misconduct that is so "severe, pervasive, and objectively offensive" that it effectively makes it impossible for the student to receive the benefits of their public education. [FN212]

The Court also stressed that its holding "[did] not mean that recipients can avoid liability only by purging their schools of actionable peer harassment or ***35** that administrators must engage in particular disciplinary action." [FN213] Instead, O'Connor advised her colleagues not to second guess the disciplinary actions taken by school administrators against their students, commenting that school officials should "continue to enjoy the flexibility they require so long" as their responses to acts of student-to-student harassment or lack thereof are "clearly unreasonable in light of the known circumstances." [FN214]

This high legal standard offered by the Supreme Court clearly was an attempt to prevent students from claiming harassment for every type of sexual remark or taunt and to ensure sufficient flexibility in responding to allegations of sexual harassment,especially at the higher education level. Noting the differences between K-12 schools and postsecondary institutions, Justice O'Connor advised that "[a] university might not ... be expected to exercise the same degree of control over its students that a grade school would enjoy ... and it would be entirely reasonable to refrain from a form of discriminatory action that would expose it to constitutional or statutory claims." [FN215] Yet, like Gebser, absent from the opinion is specific language about which school officials have the authority and responsibility to take action once they have obtained knowledge that peer sexual harassment may have occurred. [FN216] Despite ***36** its limitations, Davis provides additional guidance as one analyzes the Court's earlier path in Gebser. [FN217]

3. Sexual Harassment Policy Guidance

With federal courts setting forth competing views, a lack of direction from the Supreme Court--prior to Gebser and Davis--and Congress' unwillingness to tackle the issue, the Department of Education's OCR attempted to offer educational institutions some assistance with the issuance of its Policy Guidance on March 13, 1997. [FN218]

The purpose of the Guidance is to provide educational institutions at every level with (1) standards that institutions should follow when investigating and resolving claims of sexual harassment, (2) information on how to identify sexual harassment, and (3) information on how best to prevent its occurrence. [FN219] The OCR stated that school officials, when determining what constitutes sexual harassment and the appropriate response to such conduct, must use their judgment and common sense. [FN220]

The OCR took a relatively hard and fast approach as to the acceptance of certain legal theories involving sexual harassment of students. This was so, despite the fact that the legal principles and established law on many of the areas to which the OCR provided guidance were continually evolving and far from universally accepted by the courts--as is best demonstrated by the Supreme Court's decision in Gebser and Davis. [FN221]

Of particular importance are the standards of liability that the OCR will apply when investigating complaints of sexual harassment. The OCR holds that an educational institution will always be held liable, regardless of the number of incidents, for quid pro quo sexual harassment by a school employee whether or not the school knew, should have known, or approved of the harassment. [FN222] As for hostile environment sexual harassment, the OCR imposes liability under two different standards depending upon the facts set forth in the action. First, under vicarious liability principles, an institution will be liable for sexual harassment if a school's employee "(1) acted with apparent authority (i.e., because of the [college's] conduct, the employee reasonably appears to be acting on behalf of the [college], whether or not the ***37** employee acted with authority); or (2) was aided in carrying out the sexual harassment of students by his or her position of authority with the institution." [FN223]

In those situations not involving vicarious liability, typically involving sexual harassment between students or when the employer does not have a supervisory relationship over the student, constructive notice principles will apply. Thus, an educational institution will be held liable if it has actual or constructive notice of the harassment and failed to take action to remedy the situation with appropriate and immediate steps. [FN224]

Many commentators and courts have questioned the legal weight and deference that should be paid to the Sexual Harassment Guidance. [FN225] Despite this criticism, the Guidance has legal binding effect on the Department of Education. Thus, OCR investigators are required to follow the standards and procedures set forth in the Guidance when investigating allegations of student sexual harassment by employees or students of the school. [FN226] Courts, however, are not under this same obligation.

IV. GEBSER V. LAGO VISTA

The myriad of conflicting opinions emerging from the lower courts, as well as the position advanced by the OCR, proved incomplete and unsatisfactory creating both frustration and confusion among colleges and their students. As is evident, courts interpreting Title IX before Gebser disagreed on the scope of protection found in the statute, and failed as well to produce a clear legal framework under which sexual harassment cases could be heard. Direction from either Congress or the Supreme Court was, thus, necessary as it ***38** would allow lower courts, the OCR, and schools to address Title IX cases in a more uniform and fair manner. Yet, neither was quick to respond.

Finally, in 1998 the Supreme Court agreed to hear a case pushed forward by a young

woman who claimed that, while a high school freshman, she was sexually harassed by her teacher. Gebser v. Lago Vista, [FN227] however controversial, provides courts and schools with a definitive answer to the question that had been sought for nearly two decades: what liability standard is to apply for teacher-to-student sexual harassment?

A. The Facts of Gebser

The facts in Gebser show that while in eighth grade at a middle school in the Lago Vista Independent School District, Alida Star Gebser joined a book discussion group in the spring of 1991. [FN228] The book club was led by Frank Waldrop, a teacher at Lago Vista's high school. During the book discussion sessions, Waldrop allegedly made sexually suggestive comments to the students, including Ms. Gebser. [FN229]

Later that year, Gebser entered high school and was assigned to classes taught by Waldrop. In those classes, Waldrop continued to make sexually suggestive comments and began to direct many of the comments toward Gebser-- both in public and private. [FN230] In the spring of 1992, Waldrop initiated a sexual relationship with Gebser. The sexual contact first began with kissing and fondling at Gebser's home and eventually led to intercourse, which the two had on numerous occasions during the remainder of the school year. [FN231]

The sexual relationship continued through the rest of the year and into early 1993. They often had sex during class time but never on school property. [FN232] Finally, in January 1993, Waldrop was arrested after a police officer discovered the two engaging in sexual intercourse in a wooded area. The school immediately terminated his employment and the State of Texas stripped him of his teaching license. [FN233]

Prior to Waldrop's arrest, Gebser did not report the relationship to school officials testifying that she wanted to continue having Waldrop as a teacher and was uncertain how to react to his conduct. In fact, during their relationship, the school district had not promulgated or distributed an official grievance procedure for lodging sexual harassment complaints nor had it issued a formal harassment policy. [FN234] The parents of two other students had complained to the high school principal in October 1992 about Waldrop's alleged inappropriate sexual comments in the classroom. [FN235] The principal subsequently ***39** confronted Waldrop, who indicated that he did not believe that he had made any offensive remarks in class, but nevertheless apologized to the parents. [FN236]

After Waldrop's arrest and termination, Gebser and her mother filed suit in state court in November 1993 seeking compensatory and punitive damages, raising claims against Lago Vista primarily under Title IX and against Waldrop under state negligence law. The case was removed to federal court where summary judgment was granted in favor of Lago Vista on all claims, while the allegations against Waldrop were remanded to state court. [FN237] The district court rejected the Title IX claim finding that notice of discrimination is required under the statute, and the evidence presented "was inadequate to raise a genuine issue on whether the school district had actual or constructive notice that Waldrop was involved in a sexual relationship with a student." [FN238]

Gebser appealed to the Fifth Circuit, arguing that schools should be held liable for the acts of its employees, whether under theories of constructive notice, vicarious liability, or strict liability. The appeal was unsuccessful, however, as the court relied on the precedent of two earlier decisions from the circuit. [FN239] The court held that school districts are not liable for teacher-to-student sexual harassment under Title IX unless an employee who has been invested by the school board with supervisory power over the offending employee actually knew of the abuse, had the power to end the abuse, and failed to do so. [FN240]

B. The Supreme Court Responds: Actual Knowledge Meets Deliberate Indifference

The Supreme Court noted that the Fifth Circuit's analysis represented one of many approaches federal courts had adopted in assessing institutional liability under Title IX for teacher-to-student sexual harassment. [FN241] The Court retreated from the views of those courts casting Title IX in the same light as Title VII. Rather, the majority's analysis was based, in large part, on the contractual nature of Title IX--which unlike Title VII--is framed in terms of a condition rather than an outright prohibition. [FN242] Thus, the opinion centered on whether the school could be held liable for the acts of its employees when it did not know about the harassment.

Gebser argued that the school district should be held liable under two different theories. The first theory related to vicarious liability, in which the ***40** school is liable for sexual harassment by a teacher where the teacher was aided in carrying out the harassment by teacher's position of authority in the school. [FN243] Gebser suggested under the second theory, that a school could be held accountable under a modified constructive notice approach, where an employer would be liable for the misconduct of its employees--whether or not the employer had actual or constructive notice of the harassment--if the school did not have in place an adequate grievance procedure. [FN244]

The Court rejected both theories. Justice O'Connor, writing for the majority of five, first noted that while Title VII contains an express cause of action and specifically provides for limits on available remedies, Title IX provides for an implicit private right of action with no legislative expression of available remedies. [FN245] She subsequently determined that, given Title IX's judicially implicit private right of action, the Court is allowed "a measure of latitude to shape a sensible remedial scheme that best comports with the statute." [FN246] In analyzing the intent of Congress, O'Connor concluded that Title IX, which like Title VI, was enacted under the spending powers of the Constitution, conditions "an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between" the recipient of federal funds and the government. [FN247]

Thus, whereas Title VII, which generally applies to all employers, aims to remove discrimination throughout the economy and to compensate victims of discrimination, "Title IX focuses more on 'protecting' individuals from discriminatory practices carried out by recipients of federal funds." [FN248] This contractual relationship requires that the entity receiving federal funds has notice that it will be liable for monetary damages for noncompliance.

Under the above rules, the majority held "that it would 'frustrate the purposes' of Title IX to permit a damages recovery against a school district for a teacher's sexual harassment of a student based on principles of respondeat superior or constructive notice ...." [FN249] The Court determined that should it adopt Gebser's position, it would amount to a limitless recovery of damages under Title IX even though "it does not appear that Congress contemplated unlimited recovery in damages against a funding recipient where the recipient is unaware of discrimination in its programs." [FN250]

Equally as significant, the Court determined that Title IX's express means of enforcement are administrative in nature. The Department of Education, therefore, has authority to suspend or terminate funding once the receiving entity has been notified that it failed to comply with Title IX's rules and regulations. ***41**[FN251] Within this enforcement scheme, the Court found that it did not appear that Congress intended to require a payment of monetary damages as a condition for finding a grant recipient in compliance with the statute. [FN252]

Therefore, in the absence of further direction from Congress, said the majority, the implied damages remedy under Title IX should lie only when an official of the educational institution, "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." [FN253] Borrowing from Section 1983 law, the Court held that a school is liable for the teacher-to-student sexual harassment only if the response taken by

a school official with authority to stop the harassment amounted to deliberate indifference. [FN254] To establish liability, this standard requires more than a simple showing of mere negligence. Rather, the plaintiff must demonstrate that an appropriate school official had actual knowledge of the harassment and intentionally failed to take action to remedy the inappropriate behavior. [FN255]

Under this analysis, Gebser's complaint did not pass muster. Specifically, the Court determined that Gebser never informed a school official about the harassment, and that the other parents' complaints to the principal about Waldrop's inappropriate comments in the classroom were insufficient to alert the school to the teacher's sexual relationship with Gebser. [FN256] Once the school did have actual knowledge about the relationship, its response consisted of immediately terminating Waldrop's employment. [FN257] As to Lago Vista's failure to promulgate and publicize a policy and grievance procedure for sexual harassment, the Court quickly turned aside this concern finding that it did not establish the requisite actual notice and deliberate indifference. [FN258] Nor did it even constitute discrimination under Title IX. [FN259]

The minority, led by Justice Stevens, delivered a stinging dissent. The four justices took exception to the majority's failure to consider the recently issued Sexual Harassment Guidance, which said that schools are to be held liable for teacher-to-student sexual harassment under agency principles. As the agency charged with administering and enforcing Title IX to ensure that federal funds are not used in contravention of the statute's mandate, the minority argued that the Court should have paid greater deference to the Department of Education's authority. [FN260]

Justice Stevens also took exception with the majority's opinion that agency principles are inapplicable under Title IX. "This case presents a paradigmatic ***42** example of a tort that was made possible, that was effected, and that was repeated over a prolonged period" said Stevens, "because of the powerful influence that Waldrop had over Gebser by reason of the authority that his employer ... had delegated to him" and Waldrop, in fact, "exercised even greater authority and control over his students than employers and supervisors exercise over their employees." [FN261] He further commented that the Court's failure to follow respondeat superior or vicarious liability principles under these circumstances would encourage educational institutions to simply insulate themselves from knowledge about the harassment so that they could claim immunity from damages liability. [FN262] As a result of the holding, concluded the minority, an incredibly high and unrealistic burden has now been put on victims of intentional discrimination and places protection of the school's purse above the protection of students against tortious behavior by the school's employees. [FN263]

C. Gebser: An Appropriate Liability Standard

The issue of a school's liability for the sexually harassing conduct of its teachers was finally resolved in Gebser. The majority made clear that the basis for liability under Title IX is due to the college's own official decisions, or lack thereof, not because of the independent actions of its employees. In other words, students are denied the opportunities and benefits of an education program as a result of sexually harassing conduct only when a college fails to adequately respond to the harassment for which it has actual knowledge.

Thus, the Court clarified its earlier opinion in Franklin--which suggested that agency principles might be germane under Title IX, [FN264]--holding that the appropriate focus is on the relationship between the victim and the educational institution receiving federal funds--not the victim and the harasser. The Court's rationale is perhaps best explained by Judge Coffey, who said in a decision rendered shortly before Gebser:

> [The] "actual knowledge" requirement is the very basis of Title IX liability; and it transcends any differences that might exist between that nature of teacher-to-student and student-to-student sexual harassment. Both demand that the plaintiff establish intentional discrimination before TitleIX liability will attach, and school officials cannot intend to discriminate against an individual unless they

have actual knowledge of harassment in the first place. [FN265]

As shown in Part III, the Supreme Court had a myriad of liability standards from which to choose. At least four different standards had been proposed ***43** by the lower courts. [FN266] Notwithstanding the sharp criticism from the minority, as well as clear digression from the decisions of several lower courts, the actual knowledge standard is the most appropriate and legally supportable of all the liability standards that have been advanced. While a majority of lower courts had advanced different views on the subject, courts were moving in the direction of actual knowledge. Indeed, within a year of Gebser, three appellate courts had rejected the vicarious and constructive notice liability principles and endorsed the actual knowledge standard. [FN267]

D. The Inapplicability of Title VII Principles

1. Constructive Notice

The reliance on Title VII case law by the minority justices in Gebser, as well as various lower courts, is clearly misguided. Title VII and Title IX do have a common characteristic, as they both prohibit discrimination on the basis of sex. But this is where their similarity ends. Those courts that have turned to Title VII to resolve Title IX questions appear to have done so, not because anything in Title IX demanded such an outcome, but because it was convenient to blur the distinctions between these two anti-discrimination statutes. [FN268]

The federal government is a government of limited powers. Thus, Congress "has only those powers that are expressly conferred by the U.S. Constitution or can reasonably be implied from those conferred." [FN269] Two such federal constitutional powers are the spending power and commerce power. Congress' power under the Commerce Clause is very broad. It has the authority to directly govern the employment practices and working conditions and has done so through the enactment of Title VII. [FN270] Commerce power ***44** legislation acts as a prohibition to discrimination. It generally applies to all employers regardless of whether federal funding is involved and seeks to "eradicate [[] discrimination throughout the economy." [FN271] Legislation enacted under the Spending Clause, on the other hand, operates much like a contractual relationship wherein an offer of federal funding is conditioned on a promise by the recipient not to discriminate. [FN272] Under the Spending Clause, Congress has the ability to enact federal aid-to-student programs. [FN273] Consequently, the federal government can establish conditions and requirements on educational institutions for the receipt of federal funds, and has done so with the passage of Title VI and Title IX.

The legislative history of Title IX persuasively points to the conclusion that it was enacted pursuant to the Spending Clause. The comments of congressional legislators illustrate that it was not the intent of Congress to extend Title IX to all educational institutions, but instead was to be restricted to institutions accepting federal funds: "I urge my colleagues to take every opportunity to prohibit Federal funding of sex discrimination," [FN274] "[n]either the President nor the Congress nor the conscience of the Nation can permit money which comes from all the people to be used in a way which discriminates against some of the people," [FN275] and "[n]o person ... shall, on the basis of sex ... be subjected to discrimination under any education program or activity receiving federal financial assistance." [FN276] Several appellate courts, likewise, have found that Title IX is an exercise of Congress' spending power, and not its commerce power. [FN277]

Simply put, Title IX was enacted to accomplish two objectives: (1) to avoid the use of federal resources to support discriminatory practices; and (2) to protect individual citizens from those discriminatory practices. As a result of these objectives, recipients of federal funds enter into a contractual relationship with the federal government and must know the terms of this contract before action can be taken against them. [FN278] There is nothing in the language of Title IX nor its history to suggest that Congress intended to place a requirement on institutions

that, by accepting federal funds, a school's monetary liability would extend to all its employees' acts regardless of whether the school itself had notice of the behavior. If indeed true, then any employee of ***45** the school could cause the "contractual breach" between the school and its acceptance of Title IX funding. [FN279]

However, since Title IX--like Title VI--was enacted under the Spending Clause, [FN280] Congress can only indirectly govern the conditions of the academic environment, which is typically accomplished through the educational program's purse strings. These two statutes do not come into play when the educational institution itself is not the actor that is directly involved in causing the discriminatory condition. [FN281] Thus, both Title VI and Title IX control institutions indirectly by terminating federal funding upon a finding of discrimination. [FN282] There is no such government-employer type contract/notice agreement under Title VII because Congress has the direct ability to regulate employers under the Commerce Clause.

In 1981, the U.S. Supreme Court pronounced its view on this subject, holding:

> [O]ur cases have long recognized that Congress may fix the terms on which it shall disburse federal money to the States .... [H]owever, legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal monies, it must do so unambiguously .... By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation. [FN283]

The power of Congress to legislate under its spending power, therefore, rests on whether the grant recipient knowingly and voluntarily accepted the terms of the contract. [FN284] The knowing acceptance of a contract cannot occur if the ***46** recipient is unaware of the conditions or cannot ascertain what is expected of it. Any other conclusion, such as "[i]mposing liability for the acts of third parties[,] would be incompatible with the purpose of a spending condition, because grant recipients have little control over the multitude of third parties who could conceivably violate the prohibitions of Title IX." [FN285]

The argument against tying together the two statutes is further strengthened after one discovers that Title IX falls far short of Title VII's "central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." [FN286] Congress' principal interest in regulating education programs and activities receiving federal financial assistance is not to make persons whole for injuries suffered through past discrimination, but to ensure that federal funds are not used to support discriminatory practices. [FN287]

Unlike Title VII, which broadly decrees that specified employment practices are illegal for public and private employees regardless of whether they receive any federal assistance, [FN288] Title IX gives educational institutions an option to allow sexual harassment on their campuses, and for that matter any type of discrimination on the basis of sex, if they so desire. The only limitation imposed by Title IX is that should schools agree to accept federal funds, they agree not to discriminate on the basis of sex. This stipulation to the acceptance of federal funds was noted by one legislator during the debate over Title IX, who commented that "[a]ny college or university which discriminates against women applicants ... is free to do so under [Title IX] but such institutions should not be asking the taxpayers of this country to pay for this kind of discrimination." [FN289]

Finally, but just as important, courts that have looked to Title VII's "knew or should have known" standard for finding institutional liability under Title IX apparently have disregarded the intentional discrimination requirement found under both Spending Clause legislation and Supreme Court precedent. [FN290] While a

college that has actual knowledge of sexual harassment occurring on its campus, but fails to respond to it in an appropriate manner, clearly would be acting with the intent to discriminate, the "should have ***47** known" prong is a standard based on negligence, not intent. [FN291] The Supreme Court has long held that negligence alone cannot support a monetary award when such a claim is brought under Spending Clause legislation. [FN292] Consequently, the "should have known" prong commonly found under Title VII principles cannot create liability under Title IX for educational institutions as there is no intentional action on the part of the college. [FN293]

Thus, Title IX and its legislative history, and the decisions found under spending clause and commerce clause legislation, to be sure, support the view that Title VII principles, and in particular the "knew or should have known" liability standard, should not be applied to Title IX claims. Unlike Title VII, which is a regulatory measure and where intentional discrimination is not a prerequisite for the awarding of money damages, Title IX's liability can only emerge when there has been intent to discriminate and the recipient of the federal assistance has notice of the discrimination that is alleged.

2. Agency Principles

Like the constructive notice standard, the standard of vicarious liability espoused by the plaintiff in Gebser, as well as by several lower federal courts and the Department of Education, falls apart under critical review. Courts advancing such an approach often turn to a passage in Franklin where the Supreme Court opined:

> 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. [FN294]

In light of Franklin's dependence on the Court's earlier decision in Meritor, which directs courts to look to agency principles when determining an employer's liability for supervisor-employee sexual harassment, one might suggest that these same principles should apply as well to Title IX actions involving the sexual harassment of a student by a teacher. Indeed, the ***48** Supreme Court's recent Title VII decisions in Faragher and Ellerth add additional support for a blending of the two statutes.

However, unlike Title VII, which specifically provides that an employer is liable for the acts of its agents, Title IX makes no reference to the acts of agents or non-agents of the educational institution. [FN295] Specifically, Title VII prohibits employers from discriminating on the basis of sex. The statute defines "employer" to include any agent. [FN296] Title IX, on the other hand--while providing that recipients of federal funds for a program or activity are prohibited from discriminating--does not define "program or activity" to include agents or employees of the educational institution. [FN297]

The Seventh Circuit Court of Appeals, much like the Supreme Court, adamantly opposed reading into Title IX language expressly included in Title VII but specifically left out of Title IX. [FN298] The court noted that while Title VII's definition of an employer does include agents of the employer and, therefore, "demonstrated Congress' intent to apply agency principles, Title IX conspicuously lacks any language which indicates that Congress intended that agency principles be used to create institutional liability." [FN299]

Simply looking at whether the word agent is included in the statute, however, may be reading Title IX more narrowly than is appropriate, given the intent of Congress. For example, it has been argued that "the Court [in Meritor] was choosing between agency principles and strict liability for hostile environment sexual harassment, not between agency principles ... [and] no liability unless formal discriminatory action is taken by an employer's board of directors." [FN300] Moreover, "if any

meaning is to be read into the absence of the word 'agent' from Title IX, it would be to extend Title IX liability further than Title VII to hold institutions strictly liable for discriminatory conduct without regard to agency principles." [FN301]

Several courts likewise have determined that the absence of the word "agent" from Title IX is not dispositive. [FN302] These courts have reasoned that since sex discrimination under Title IX is to be prohibited in all programs and operations of the educational institution, it follows that these programs and operations will be supervised by agents, whether or not the word agent is found in the statute. As noted by a Virginia district court, since Title IX encompasses "any operation" of an educational institution, and "[g]iven the purpose of Title IX and Congress' mandate that Title IX be broadly interpreted, ***49** it is essentially inconsequential that Title IX does not expressly adopt agency principles." [FN303] Such reasoning appears to follow the directive of the Supreme Court, which instructed lower courts to accord Title IX "a sweep as broad as its language" in order to give Title IX "the scope that its origins dictate." [FN304]

Should the absence of the word "agent" from Title IX's lexicon not dispose of this issue, the focus must then turn Section 219(1) of the Restatement (Second) of Agency. Section 219 sets out the central principle of agency law: a master is subject to liability for the torts of his servants committed while acting within the scope of their employment. [FN305] The general rule, though, is that sexual harassment by a supervisor is not conduct within the scope of one's employment, because the acts of the harassing supervisor normally are "acts for personal motives, motives unrelated and even antithetical to the objectives of the employer." [FN306]

Nevertheless, there are limited situations where agency principles impose liability on the employer even for those acts of its employees that are committed outside the scope of employment. Agency principles setting forth such employer liability are found in Section 219(2) of the Restatement:

> (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
>
> (a) the master intended the conduct or the consequences, or
>
> (b) the master was negligent or reckless, or
>
> (c) the conduct violated a non-delegable duty of the master, or
>
> (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation. [FN307]

Courts and scholars have advanced subsections (b) and (d) respectively as possible grounds for which to find an educational institution liable for the torts of its employees. Subsection (b), which explains that an employer is liable when the tortious act is attributable to the employer's own negligence, ***50** can be put aside with little comment. It is based on a negligence theory and, therefore, lacks the intentional and notice requirements of Franklin and Guardians. [FN308]

Under subsection (d), an employer can be held vicariously liable for the intentional torts committed by an employee when the employee "purported to act or speak on behalf of the [employer] and there was reliance on apparent authority, or [the employee] was aided in accomplishing the tort by the existence of the agency relation." [FN309] The first qualification--apparent authority analysis--is generally inappropriate under claims of sexual harassment at the college level, [FN310] because it "exists only to the extent that it is reasonable for the third person dealing with the agent to believe that the agent is authorized." [FN311]

It should not be sufficient to impute liability to the college simply because teachers have access to students due to their teaching positions. If so, then it "would create liability for [schools] in virtually every case in which a teacher harasses, seduces, or sexually abuses a student." [FN312] Apparent authority exists, though, only to the extent the third party believes that the agent of the employer is authorized to act in such a manner. [FN313] Yet, certain types of sexual harassment--such as rape or severe or persistent verbal abuse--are so outrageous and extreme, that there is no conclusion for a college student to reach ***51** other than

that the teacher was acting outside the ordinary course of business or without the employer's authorization. [FN314]

In the usual case, "a supervisor's harassment involves misuse of actual power, not the false impression of its existence." [FN315] Thus, the heart of this issue concerns the second qualification found under Section 219(2)(d) of the Restatement, which makes clear that an employer is subject to liability for tortious conduct that is made possible or facilitated by the existence of the actual agency relationship. [FN316] It is the actual agency relationship that allows an employee to misuse his or her authority.

Applying this particular agency principle for student sexual harassment, however, is in direct conflict with Title IX's enactment under Congress' spending power. This power, as explained earlier, makes Title IX funds available to a recipient in return for the recipient's adherence to the conditions of the grant. [FN317] An educational institution accepts federal funds so long as it agrees not to discriminate on the basis of sex. The school does not agree to suffer liability whenever its employees, without its knowledge or an opportunity to respond, discriminate on the basis of sex. [FN318] Consequently, agency principles, which simply constitute a fiduciary relationship requiring consent by one person to another that the other shall act on his or her behalf, cannot apply because--like the constructive notice analysis--it "would create institutional liability in cases where the institution lacked the requisite intent to discriminate." [FN319]

Equally as important is that Title IX's express mechanism of enforcement "operates on an assumption of actual notice to officials of the funding recipient." [FN320] Thus, should a violation occur, the Department of Education may initiate enforcement proceedings, but only after the funding "recipient ... has been notified of its failure to comply" and given an opportunity to correct the problem. [FN321]

The purpose of the notice and voluntary compliance requirements "is to avoid diverting education funding from beneficial uses where a recipient was unaware of discrimination in its programs." [FN322] This purpose, though, would ***52** be vitiated should a college be vicariously liable for the sexually harassing acts of the multitude of third parties for which it had no actual knowledge. [FN323]

The Supreme Court's reliance on Congressional intent and statutory construction to reject the application of agency principles for Title IX liability is not novel. The Court previously refused to extend these same agency principles to certain conduct when Congress failed to expressly direct it to apply such a liability standard. For example, in Monell v. Department of Social Services, [FN324] the Court held that the common law agency theory of respondent superior could not be used to hold a municipality liable under Section 1983, because absent from the statute and its legislative history was any intent on the part of Congress to create a higher liability standard. The Court reasoned that:

> [T]he language [of Section 1983] plainly imposes liability on a government that, under color of some official policy, 'causes' an employee to violate another's constitutional rights. At the same time, that language cannot be easily read to impose liability vicariously on governing bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor. [FN325]

Thus, the finding that Title IX instructs courts to impose liability only when action is taken by the grant recipient, and not by its employees, is clearly consistent with the Supreme Court's earlier decisions analyzing agency law.

Finally, there is no sound policy reason to hold an educational institution liable for the illegal acts of its employees, as such a theory would simply convert the school from being the educator of students into their insurer as well. [FN326] While courts and state legislatures have held manufacturers strictly liable for their products, they have done so because the manufacturer is in a better position to search for and discover defects in the manufacture or design of the product than is the consumer. However, schools have nothing "to design, test, or inspect ... its 'products' are its students; they are not the offending item." [FN327]

If the Supreme Court had concluded in Gebser that colleges are to be held liable under pure agency principles, it would have been tantamount to strict liability. [FN328] And such a decision likely would have created a crippling financial ***53** impact on these educational institutions, inevitably leading to the financial damages being paid by taxpayers and the same students that Title IX was enacted to protect. [FN329] The Supreme Court, therefore, correctly interpreted Title IX to mean that by accepting federal funds, the college itself is prohibited from behaving in a discriminatory manner; and not that the college can be held liable for the unauthorized acts of its employees or agents about which the school may have no knowledge and for which Congress never contemplated.

E. OCR's Sexual Harassment Guidance

The minority in Gebser opined as well that greater deference should have been given to the policy Guidance adopted by the OCR. [FN330] While the Sexual Harassment Guidance may represent the apparent longstanding view of the OCR regarding the sexual harassment of students, it has found much criticism. This criticism has come about despite the general deference that is given to legislative rules and regulations. [FN331]

First, there is a question as to the legal foundation of applying Title VII's constructive notice and agency principles to Title IX. The Seventh Circuit Court of Appeals criticized the OCR for drafting a policy guidance that failed to (1) take into account the significant differences between Title IX and Title VII, (2) recognize the statute's enactment under the Spending Clause and not the Commerce Clause, and (3) carefully examine the statutory language of Title IX. [FN332] In fact, the court determined that the policy Guidance offered little persuasive guidance because the OCR "provide[d] no rationale for applying agency principles and thus no basis for the greatly expanded exposure to liability for educational institutions." [FN333]

Similarly, the OCR does not offer much explanation or analysis for why the "knew or should have known" standard found under Title VII principles ***54** should apply as well to Title IX cases. The OCR, just like those courts advancing similar theories, argues for a constructive knowledge standard, in which a college will have notice of discriminating behavior when it "knew or should have known" of the harassment. Such a standard, though, is not appropriate because monetary liability cannot be imposed under Title IX in the absence of intentional discrimination on the part of the grant recipient. [FN334] A constructive knowledge standard, therefore, falls apart under Title IX review because a school generally cannot intentionally commit or allow discrimination on its campus if it does not actually know of the discriminatory behavior.

It is also unclear whether the OCR intended to exercise its delegated authority to make binding rules or to simply explain or clarify existing law and to define for the public the views that the OCR has about issues falling within the course of its mandated functions. [FN335] Thus, any reliance on the Guidance would appear to be on tenuous ground and have little persuasive appeal. In fact, it has been suggested that the first draft of the Guidance was written for the purpose of litigation since it was published the same month that it was included in an amicus brief filed with the U.S. Supreme Court involving a Title IX sexual harassment matter. [FN336] As a result of the Department's apparent need and rush to have a Guidance ready for filing with the Supreme Court, some argue that its interpretation of Title IX deserves little or no deference. [FN337]

To be clear, though, schools should not ignore the requirements found within the Guidance. Shortly after the release of Gebser, Richard Riley, U.S. Secretary of Education, issued a statement explaining that the decision only applied to private Title IX lawsuits and that the Department of Education will continue to have a critical role under Title IX to provide students with a nondiscriminatory educational environment. [FN338] Specifically, Secretary Riley noted:

> The Supreme Court's decision explicitly recognized that the Department can enforce administratively its Title IX regulation that requires schools and school

systems to have well publicized policies against discrimination based on sex, including sexual harassment discrimination; to have effective and well-publicized procedures for students and their families to raise and resolve these issues; and to take prompt and effective ***55** action to equitably resolve sexual harassment complaints. The Department will continue to enforce this requirement. [FN339]

In other words, the Department apparently will continue to hold educational institutions liable under agency principles and will take appropriate action, including the withholding of federal funds, should a school fail to follow its Title IX legal obligations set forth in the Guidance. Consequently, it is possible that the Department will apply more stringent liability standards to those matters it investigates and "hold schools accountable for harassment in more circumstances than courts would" under the Supreme Court's actual knowledge standard. [FN340]

F. Gebser: An Appropriate Standard of Liability

Because Title IX is patterned after Title VI, and since there is nothing in the statute to suggest that Congress intended a different standard of liability other than what it applies in the Title VI context, there is one conclusion to reach: the actual knowledge standard is the most appropriate and legally sound liability standard for teacher-to-student sexual harassment. That is, it is the only standard of liability that meets both the notice and intentional requirements found in the relevant decisional law.

In Guardians Association v. Civil Service Commission, [FN341] the Supreme Court took up, among other things, the issue of whether a showing of intentional discrimination is required to obtain relief under Title VI. While a piecing together of a consensus opinion in Guardians is difficult, it appears that the Court distinguished between intentional and unintentional violations of Title VI. Thus, under Title VI, a plaintiff may be entitled to compensatory relief should intentional discrimination be proven but that same plaintiff would be limited to injunctive relief for unintentional violations of Title VI. [FN342]

In distinguishing between intentional and unintentional violations, notice is the critical element. The Supreme Court explicitly held in Franklin that more than mere negligence is required "to create liability for monetary damages for a violation of Title IX--it requires plaintiffs to show an intent to discriminate." [FN343] The Court noted that money damages are not allowed for unintentional violations of Title IX because "the receiving entity of federal funds lacks notice that it will be liable for a monetary award [a prerequisite under Pennhurst State School and Hospital v. Halderman]." [FN344] However, ***56** where there is intentional discrimination, the lack of notice problem does not exist.

The Gebser liability standard, therefore, is an appropriate limitation upon the liability of colleges because it "will prevent schools from being blind-sided by liability based on events that officials did not even know were taking place." [FN345] Moreover, such a requirement is not too burdensome on students, since if the school does not already have notice of the sexually harassing behavior, "[a]ll that is required of the student is that they report the alleged harassment to responsible school officials, thus giving the school a chance to respond before it is hauled into court." [FN346]

The actual knowledge standard provides the best solution from a public policy standpoint as well. Sexual harassment is deplorable and can undermine the academic environment of a college campus. However, educational institutions, regardless of the actions they take, cannot completely rid themselves of sexual harassment. The standard adopted by the Supreme Court promotes preventive measures while limiting unwarranted and potentially crippling financial liability should the schools' preventive efforts fail.

The Gebser minority disagreed. The four justices opined that the actual knowledge provides no incentive for schools to establish and publicize procedures by which victims of sexual harassment may readily complain of wrongful conduct. [FN347]

Despite the Supreme Court's previous holding under Title VII principles that an employer, without procedures for receiving sexual harassment complaints, cannot assert lack of knowledge as a defense to an employee's sexual harassment suit, [FN348] the Court in Gebser determined that a school's failure to promulgate a sexual harassment procedure does not itself rise to discrimination. [FN349]

Nevertheless, the actual knowledge standard likely will not encourage a college to turn a blind-eye to sexually harassing behavior or negate its duty and responsibility to attempt to prevent it from occurring. Should institutions and school officials be so callous and negligent, they face the threat of legal action outside of Title IX, the potential loss of federal funds, and a public relations nightmare.

Supervisory school officials of public colleges have great interest in ensuring that they follow-up on suspicions of harassing behaviors, because these same public officials could be held personally liable for discrimination committed ***57** by their subordinates under 42 U.S.C. § 1983. [FN350] Similarly, public and private institutions may be subject to state tort laws for assault, battery, negligence, intentional infliction of emotional distress, or breach of contract, [FN351] should they actively avoid learning of problems or potential problems concerning student sexual harassment or fail to take appropriate preventative and remedial measures.

A college also risks upsetting students and alumni, as well as subjecting itself to negative media exposure, if it is made public that it is not taking appropriate and aggressive action to prevent and curb sexually harassing behavior of its students and teachers. Such negligence or recklessness--if not arrogance--by a school could result in lower enrollment and fewer financial gifts.

What is more, colleges must continue to follow the requirements of the OCR, which requires, at the minimum, the publication of sexual harassment policies and procedures and the taking of prompt and effective action to resolve sexual harassment complaints. Colleges face the potential loss of federal funds should they fail to adhere to these requirements. [FN352]

Finally, should institutions focus on what legal avenues may be closed to students who are victims of sexual harassment, rather than prevent or correct discriminatory behavior, they "could be led to do many things that would inhibit the development of a supportive educational environment" and create an environment that is wholly "inconsistent with good educational policy regarding teacher-to-student relationships." [FN353] Thus, schools must be ready and willing to provide more to their students than simply what the law requires.

G. Unfinished Business

In rejecting wholesale the standards of liability found under Title VII's agency and constructive notice principles, [FN354] and instead holding on to actual ***58** knowledge principles, the Supreme Court finally established rules for finding educational institutions liable for teacher-to-student sexual harassment. In doing so, the Court cleared up some of the confusion that had plagued both courts and colleges when problems of sexual harassment had arisen on campus. As a result of Gebser, the focus is not on the conduct of the school's employees, but rather on the action or inaction of the school itself. Thus, the burden is placed on the victim to be proactive in reporting the sexual harassment to an appropriate school official, who has the authority to take corrective action to end the harassing conduct. In the absence of actual knowledge, the court need not address the question of the appropriateness or reasonableness of the school's response to the sexual harassment.

In establishing the above rule, though, the Court left unresolved several questions and created new issues for both colleges and students. In particular, questions as to who is "an appropriate school official," or what constitutes "an adequate response," or "deliberate indifference" will have to be decided on a case-by-case basis. Confusion also remains as to whether the Court's actual knowledge standard applies to quid pro quo harassment as well as hostile environment sexual

harassment. [FN355]

1. Appropriate College Officials

In Gebser, the Supreme Court noted that under Title IX, the remedial scheme is predicated upon notice to an "appropriate person," and under Section 1682 of the legislation that person "is, at a minimum, an official of the recipient entity with authority to take corrective action to end the discrimination." [FN356] The Court, though, did not identify by job title which individuals within the educational institution must have knowledge of the sexually harassing behavior in order for there to be a finding that the institution itself has knowledge of the harassment. [FN357] It was not required to do so because no ***59** school official, other than the offending teacher himself, knew of the sexual harassment.

A review of the decisional law and agency guidelines addressing this matter, before and after Gebser, offer little guidance as courts have not issued any hard and fast rules for specifically identifying who is an appropriate school official. Decisions prior to Gebser offer only general advice. For example, the OCR noted that an educational institution will have notice so "long as an agent or responsible employee of the school received notice." [FN358] When determining who is a "responsible employee," the OCR provided much latitude to colleges and courts by simply announcing that it "will vary depending on factors such as the authority actually given to the employee and the age of the student." [FN359]

The Seventh Circuit Court of Appeals reached a conclusion much like that of the Supreme Court, holding that in order for there to be institutional liability, a responsible school official must have notice of the alleged harassment. [FN360] A school "can be liable for teacher-to-student sexual harassment under Title IX," the court said, "only if a school official who has actual knowledge of the abuse was invested by the school board with the duty to supervise the employee and the power to take action that would end such abuse and failed to do so." [FN361]

The Fifth Circuit likewise took an approach similar to that of Gebser, finding that actual notice will exist only if "someone with authority to take remedial action is notified." [FN362] Unlike the Supreme Court, though, the court hinted that this authority may rest only with a member of a school board. In fact, the court determined that an individual with authority to take remedial action does not necessarily include a teacher who has notice of the sexual abuse of the student. [FN363] The Fifth Circuit clarified its opinion a year later, as it held that a school will be found liable for teacher-to-student hostile sexual harassment, but only when an employee who has been invested by the school board with supervisory powers over the offending student actually knew of the abuse, had the power to end the abuse, and failed to do so. [FN364]

The Gebser decision necessitated courts to take greater care in providing much-needed guidance to colleges in identifying who is an appropriate school official. Decisions addressing this issue since Gebser have narrowly applied the Supreme Court's mandate that an appropriate person is one who has "authority" to take corrective action.

***60** Consequently, several courts have failed to find institutional liability despite a showing of actual knowledge. For example, a professor of a graduate program, who had knowledge that one of his students was possibly being harassed, was found not to be an appropriate official because he had no managerial duties at the college nor supervisory power over the alleged harasser. [FN365] Moreover, the Director of Financial Aid at Providence College, who was informed by a doctoral student that she was being harassed by a professor, was not an official with authority to take corrective action. [FN366] The District Court for Rhode Island determined that the Financial Aid Director was not a supervisor of the alleged harasser and thus, unable to take any corrective action against the professor. [FN367] Nor "was he an official who had authority to police relationships between faculty and doctoral students." [FN368] The court similarly held that the Director of the Graduate History Department at Providence lacked the type of authority

required under Gebser since he had no supervisory authority over a perpetrator who taught in a different department. [FN369]

Courts, though, have found institutional liability after Gebser. In doing so, they have limited the definition of an appropriate school official to one who either has direct supervisory authority over the alleged harasser or is designated to receive and investigate harassment complaints.

A District Court in Ohio concluded that notice given to a grievance officer of a small private college met the threshold of an appropriate school official, because the school's sexual harassment policy provided that harassing conduct should be reported to that particular school official. [FN370] The Tenth Circuit likewise determined that evidence was sufficient to find that the University of Colorado had actual knowledge of sexual harassment within its ROTC program, because students informed the school's University dean and Affirmative Action officer of the alleged harassment. [FN371] Additionally, the Director of a Public Administration Program was found to be an appropriate school official, since the alleged harasser was a professor within the program to whom the Director directly supervised. [FN372]

Notwithstanding the difficulty in fashioning a single definition for determining who is a "responsible school official," courts and Congress should be reluctant to key liability to certain positions at the school. The college culture is often one of shared governance containing a number of layers of responsibility. These layers range from boards of trustees, presidents, vice- presidents and deans to teachers, coaches and secretaries. An employee's authority, responsibility, and supervision is dependent on many factors including ***61** the size of the school, the president's views on the organizational and hierarchical make-up of the institution, and the school official's authority to investigate the allegations of sexual harassment. [FN373]

Thus, whether a college official is a president or an administrative secretary, "the relevant question is whether the official's actual knowledge of sexual [harassment] is functionally equivalent to the school [having] actual knowledge." [FN374] This can occur only when there is a showing that a school official (1) has authority to receive and investigate harassing complaints; [FN375] (2) has supervisory authority to monitor the work of an employee and the power to remedy the wrongdoing, e.g., power to hire, fire, and make other employment decisions; [FN376] or (3) is high enough in the chain- of-command at the institution whereby the individual's acts constitute an official decision by the college itself. [FN377]

While this likely will omit many, if not the bulk, of employees at the institution, any other policy or requirement would simply be inconsistent with the intent of Gebser and unworkable within the campus environment. That is, if liability would lie whenever any employee of the college had actual notice of the harm, regardless of the person's position, then the purpose of Title IX simply would be negated. Under such a requirement, colleges would find themselves facing liability that essentially could be equated to strict liability. [FN378] Yet, should liability be limited to the school itself (i.e., the board of trustees)--as suggested by the Fifth Circuit [FN379]-- the college would virtually never face liability unless a member of the boardintended the discrimination. Neither outcome is what the majority put forth in Gebser.

2. Adequate Response and Deliberate Indifference

The Supreme Court held that even if an official, who could bind a school under Title IX, had actual knowledge of the harassment, facts must be alleged that would allow a jury to find that a college failed to adequately respond to the discrimination. Here, the Court determined that the proper ***62** question is not whether a school did enough to eliminate the student sexual harassment, as that is a negligence inquiry, but is instead whether the action taken by the school evinced an intent to perpetuate a discriminatory environment. [FN380]

For the Supreme Court, there must be evidence of deliberate indifference on the

part of the college in order to establish discriminatory intent and to bring about liability. The "deliberate indifference" requirement is commonly applied to § 1983 claims in establishing governmental liability. It essentially relates to a conscious disregard of "an obvious risk that [another] would subsequently inflict a particular injury." [FN381]

Deliberate indifference "highlight[s] the distinction between an intentional wrong and a wrong that flows from mere neglect." [FN382] It is well settled that "intentional" means that an employer's conduct must have been deliberate rather than accidental or negligent. [FN383] Thus, to recover damages under Title IX, it must be shown that the school deliberately did nothing or took steps that it knew would be ineffectual to protect a student once it had actual knowledge of the harassment.

The most obvious example of this is the existence of a pattern of tortious conduct--as opposed to a one-time negligent act--which so often violates the rights of a victim and is so plainly obvious that the municipality consciously disregards the consequences of its actions. [FN384] Justice Souter elaborated on this point in his dissent in Board of County Commissioners of Bryan County v. Brown, noting that deliberate indifference should be treated much like intent, wherein "inaction by a policymaker deliberately indifferent to a substantial risk of harm is equivalent to the intentional action that setting policy presupposes." [FN385] Thus, deliberate indifference rises to the level of intentional discrimination, as both are equally culpable. [FN386]

***63** Simply put, deliberate indifference is a rigorous standard of fault under which "a showing of simple or even heightened negligence will not suffice." [FN387] Rather, it requires proof that the school consciously or intentionally disregarded a known or obvious consequence of its action resulting in the deprivation of a victim's rights. [FN388]

The only guidance the Supreme Court provided in Gebser for determining when a school is deliberately indifferent, is that it does not necessarily include failing to "promulgate and publicize an effective policy and grievance procedure for sexual harassment." [FN389] This is so even though the Department of Education requires colleges to "adopt and publish grievance procedures providing for prompt and equitable resolution" of discrimination complaints. [FN390] Yet, the majority--in passing--said that the failure to promulgate a grievance procedure "does not itself constitute 'discrimination' under Title IX," nor does it "establish the requisite actual notice and deliberate indifference." [FN391]

Since the Gebser decision, however, courts have offered their own views as to what amounts to deliberate indifference. An Indiana federal court found that while Indiana University did take corrective steps to curb a professor's harassment of students, the University failed to follow-up on its own requirement that it be allowed to monitor the professor's progress in his counseling sessions and fire the teacher should his behavior exist. [FN392] The court determined that "all the university learned was that [the teacher] had several counseling sessions; it did not know if his behavior was likely to get better, worse, or stay the same after counseling." [FN393] And after the professor engaged once again in inappropriate behavior with a student, the university, instead of following-up "on its threat to fire" him for the next offense, did ***64** nothing. [FN394] Thus, in rejecting the University's motion for summary judgment, the court held that a jury could properly conclude that Indiana's nonresponse amounted to condoning the professor's behavior or consciously disregarding an obvious risk that the professor would again engage in the sexual harassment. [FN395]

A New York court determined that allegations by two former members of the Syracuse University women's tennis team alleging that school officials, who had investigated whether the students' former coach had harassed them, appeared to satisfy the deliberate indifference standard. [FN396] The evidence before the court suggested that the school "conspired to conduct a 'sham' investigation and hearing in order to conceal the full extent of the [coach's] misconduct." [FN397] However, deliberate indifference was not shown when a college, after receiving a student's complaint of sexual harassment, processed the complaint shortly thereafter and the victim signed

off on an informal grievance procedure. [FN398] Nor was deliberate indifference established when the University's action, while not personally satisfying to the plaintiff, consisted of an investigation of the complaint, a warning to the alleged harasser about his conduct, and a letter of reprimand in the harasser's personnel file--all which resulted in no further harassment in the form of sexual advances. [FN399]

Lastly, the Supreme Court in Davis v. Monroe County Board of Education [FN400] offered some guidance as to what is needed to trigger deliberate indifference finding that it "must, at a minimum, 'cause [students] to undergo' harassment or make 'them liable or vulnerable' to it." [FN401] Admittedly, the Court's reasoning is related to a peer sexual harassment matter. Nonetheless, the Court's reasoning in Davis as to deliberate indifference under Title IX is couched as a general prohibition and does not limit its analysis to specific perpetrators or acts.

3. Deference to Schools

Colleges, to be sure, have the duty to take appropriate and prompt action to remedy the sexual harassment of its students. This duty does not require, ***65** however, that they be successful in completely eradicating such discriminating behavior from their campuses and programs. Instead, once a school official with authority to act is faced with the knowledge of sexual harassment on campus, the official should have the flexibility to choose from a range of responses. The Supreme Court recently pointed this out in Davis explaining that its holding "does not mean that recipients can avoid liability only by purging their schools of actionable peer harassment or that administrators must engage in particular disciplinary action." [FN402] Rather, school officials, said Justice O'Connor, should "continue to enjoy the flexibility they require so long" as their responses to acts of student-to- student harassment or lack thereof are not "clearly unreasonable in light of the known circumstances." [FN403]

Considerable deference, therefore, must be given to schools, allowing for a wide range of responses in meeting the demands of combating sexual harassment on their campuses. Should a school take reasonable measures and respond with good-faith remedial action, which it believes will achieve the desired result of preventing or ending the sexual harassment, but the harassment persists, a college should not be found to have acted in an intentional manner. [FN404] Under this approach, when a school implements a good-faith remedy--which in hindsight shows that the measures may have been insufficient--intentional discrimination should not be found so long as the remedy was appropriate at the time. [FN405]

However, if the school fails to take appropriate action once it has knowledge of possible discriminatory conduct, the acquiescence should be taken into account when determining whether the inaction rises to intentional discrimination. Moreover, if action undertaken by the college was so de minimis so as to establish an endorsement for the harassment or that treated one sex differently than the other, then there likely would be evidence that the school intentionally discriminated against the complaining student. [FN406]

Also included within a deliberate indifference approach--yet absent from the Gebser decision--should be the requirement that schools be "without excuse" for their actions. [FN407] This "without excuse" requirement would allow ***66** schools to escape liability in those circumstances where it is extremely difficult, and even impossible, to take prompt and effective measures, such as where much of the harassing activity occurred off school premises and after school hours.

The "without excuse" requirement would create more difficulty "for the plaintiff to satisfy when the harassment occurs off the premises [or does not involve school-sponsored activities]; and that is how it should be because it is much more difficult for the school to discover and remedy off-premises harassment [or for conduct that may have no relationship whatsoever to an educational program or activity]." [FN408] Under this principle, the showing of harassment occurring off campus or not involving school-sponsored activities would require the student to

show a "true and meaningful nexus between the harassment alleged and the institution sought to be charged under Title IX." [FN409]

V. CONCLUSION

To be sure, construing Title IX so narrowly will inevitably unleash criticism from those who believe the statute should be interpreted more broadly and used as a sword in combating student sexual harassment. Yet, ambiguities in the statute must be resolved "not by invoking some policy that supersedes the text of the statute, but rather by limiting ourselves to that meaning which a given text will reasonably bear." [FN410] Congress enacted Title IX as a means to help end discrimination in our Nation's schools. It then placed responsibility on our schools and educators to ensure that sexual discrimination would not persist or be tolerated on their campuses.

By placing this responsibility on colleges, however, Congress did not enact Title IX for the purpose of burdening those schools with open-ended negligence or vicarious liability schemes. Had Congress meant to create such a requirement or to apply a standard of liability other than actual knowledge, it could have done so more plainly and persuasively. But Congress did not choose that course.

Perhaps the statutory analysis by the Supreme Court in both Gebser and Davis will put pressure on Congress to reexamine Title IX. [FN411] But that is not where we are today. Instead the Court had before it a statute untouched since its inception. Simply put, then, it had no avenue to turn but the one that captured the intent of Congress and the Court's precedent--one that could lead only to a requirement of actual knowledge and intentional discrimination.

[FNa1]. Assistant Chief in the Education Section of the Ohio Attorney General's Office. The opinions and observations in this Article are the Author's and not necessarily those of the Attorney General of Ohio. Portions of this Article draw upon the Author's dissertation, Sexual Harassment of College Students by Faculty and Peers: Chaos and Confusion Bring No Common Ground for Finding an Appropriate Standard of Institutional Liability (1998) (unpublished Ph.D. dissertation, Bowling Green State University) (on file with author).

[FN1]. See generally NATIONAL COALITION FOR WOMEN AND GIRLS IN EDUC., TITLE IX AT TWENTY-FIVE: REPORT CARD ON GENDER EQUITY (1997) (showing that thirty percent of undergraduates and forty percent of graduate students had experienced sexual harassment); ERNEST L. BOYER, CAMPUS LIFE: IN SEARCH OF COMMUNITY (1990) (revealing that a majority of college presidents at large research and doctorate institutions viewed sexual harassment as a growing threat to the academic environment); BERNICE R. SANDLER & ROBERT J. SHOOP, SEXUAL HARASSMENT ON CAMPUS: A GUIDE FOR ADMINISTRATORS, FACULTY, AND STUDENTS 57 (1997) (finding that sexual harassment may cause female college students to drop classes, change majors or schools, or drop out of college); Fitzgerald et al., The Incidence and Dimensions of Sexual Harassment in Academia and the Workplace, 32 J. OF VOCATIONAL BEHAV. 152, 162 (1988) (reporting that approximately thirty percent of undergraduate and graduate women students surveyed had experienced sexual harassment consisting of generalized remarks and behavior conveying sexist, degrading, or insulting attitudes about women, and that fifteen percent of the female students had experienced sexual coercion or bribery, wherein sexual activity was either coerced or solicited with the promise of particular academic rewards or the threat of punishment).

[FN2]. Pub. L. No. 92-318, 86 Stat. 373 (codified at 20 U.S.C. § 1681 (1994)).

[FN3]. The terms college and university will be used interchangeably throughout the Article.

[FN4]. 524 U.S. 274 (1998).

[FN5]. In 1999, the Court reviewed and answered the question regarding institutional liability as to student-to-student sexual harassment. See Davis v. Monroe County Bd. of Educ., 119 S.Ct. 1661 (1999).

[FN6]. While Title IX applies to both primary and secondary schools and institutions of higher education, the focus of this article is on postsecondary institutions.

[FN7]. 503 U.S. 60 (1992).

[FN8]. Pub. L. No. 88-352, 78 Stat. 253 (codified at 42 U.S.C. § 2000e (1994)).

[FN9]. 20 U.S.C. § 1681(a) (1994).

[FN10]. See Franklin, 503 U.S. 60; Smith v. Metropolitan Sch. Dist., 126 F.3d 1014 (7th Cir. 1997); Brzonkala v. Virginia Polytechnic Inst. & State Univ., 132 F.3d 949 (4th Cir. 1997). The Department of Education first addressed the issue of sexual harassment nearly two decades ago when it issued an internal policy memorandum to help guide its officials when investigating Title IX complaints. See A. J. Califa, Title IX and Sexual Harassment Complaints, Policy Memorandum to Regional Civil Rights Directors, Regions I-X (Aug. 31, 1981). Recently, the Department issued a policy concerning the liability of schools for both student-to-student and teacher-to-student sexual harassment under Title IX. See Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034 (1997) [hereinafter Sexual Harassment Guidance].

[FN11]. See infra notes 177-91 and accompanying text.

[FN12]. See infra notes 197-200 and accompanying text.

[FN13]. Although Gebser involved a public school district, there is no question that its liability standard applies equally to public and private colleges. See Morse v. Regents of the Univ. of Colo., 154 F.3d 1124, 1127- 28 (10th Cir. 1998) (applying Gebser to a higher education case involving a female ROTC member and a superior without noting distinction in level of education between plaintiff in Gebser and plaintiff in matter before it); Burtner v. Hiram College, 9 F. Supp. 2d 852, 853 (N.D. Ohio 1998) (looking to Gebser in deciding sexual harassment case involving college student and her teacher); see also Jill Bodensteinner, Discrimination Against Students in Higher Education: A Review of the 1997 Judicial Decisions, 25 J.C. & U.L. 331, 340 (1998).

[FN14]. Pub. L. No. 88-352, 78 Stat. 252 (codified at 42 U.S.C. § 2000d (1994)).

[FN15]. See generally WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION: A COMPREHENSIVE GUIDE TO LEGAL IMPLICATIONS OF ADMINISTRATIVE DECISION MAKING 197-230 (3d ed. 1995).

[FN16]. Pub. L. No. 88-38, 77 Stat. 56 (codified at 29 U.S.C. § 206(d) (1994)).

[FN17]. Pub. L. No. 88-352, 78 Stat. 253 (codified at 42 U.S.C. § 2000e (1994)).

[FN18]. Pub. L. No. 90-202, 81 Stat. 602 (codified at 29 U.S.C. § § 621- 34 (1994)).

[FN19]. 29 U.S.C. § 701 (1994 & Supp. 1997).

[FN20]. Pub. L. No. 88-352, 78 Stat. 252 (codified at 42 U.S.C. § 2000d (1994)).

[FN21]. Pub L. No. 92-318, 86 Stat. 373 (codified at 20 U.S.C. § 1681 (1994)).

[FN22]. KAPLIN & LEE, supra note 15, at 787.

[FN23]. See KAPLIN & LEE, supra note 15, at 801. Other "federal aid to education" programs, outside of the anti-discrimination statutes, include the Student-Right-to-Know and Campus Security Act, Pub. L. No. 89-329, 100 Stat. 1482 (codified at 20 U.S.C. § 1092 (1914)), and the Family Educational Right and Privacy Act, Pub. L. No. 90-247, 84 Stat. 169 (codified at 20 U.S.C. § 1232 (1994)).

[FN24]. See KAPLIN & LEE, supra note 15, at 801.

[FN25]. See generally Cannon v. University of Chicago, 441 U.S. 677, 716 (1979).

[FN26]. See generally Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 76 (1992).

[FN27]. See 42 U.S.C. § 2000e 5(f) (1994).

[FN28]. See 42 U.S.C. § 1981 (1994). Monetary remedies under the Civil Rights Act of 1991 include compensatory damages (with limitations based on number of employees at the institution), back pay, front pay, and attorney's fees. Other remedies available include reinstatement, promotion and injunctive action. See id.

[FN29]. See generally KAPLIN & LEE, supra note 15, at 199-215.

[FN30]. Pub. L. No. 98-352, 78 Stat. 253 (codified at 42 U.S.C. § 2000e (1994)).

[FN31]. See MARK. A. ROTHSTEIN ET AL., CASES AND MATERIALS ON EMPLOYMENT LAW 192 (1987).

[FN32]. See infra notes 70-76 and accompanying text.

[FN33]. Pub. L. No. 88-352, 78 Stat. 253 (codified at 42 U.S.C. § 2000e (1994)).

[FN34]. Specifically, Title VII provides that it shall be an unlawful employment practice for an employer:

(1) 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 or employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a).

[FN35]. Racial, sexual, and religious discriminatory practices by employers with fifteen or more employees constitutes a violation of Title VII. See 42 U.S.C. § 2000e(b) (1994).

[FN36]. Title VII was introduced primarily as a statute to prohibit race discrimination. Only by accident was "sex" included within its purview. An amendment to ban discrimination on the basis of sex was proposed at the last moment on the floor of the House of Representatives in an attempt to kill the civil rights bill altogether. The proposal drew an unexpected positive reaction from several of the House members reassuring its passage. See Jeffrey Toobin, Annals of the Law: The Trouble with Sex, THE NEW YORKER, Feb. 9, 1998, at 48.

[FN37]. See 42 U.S.C. § 2000e (1994).

[FN38]. See infra notes 42-75 and accompanying text.

[FN39]. See Kauffman v. Allied Signal, 970 F.2d 178 (6th Cir. 1992).

[FN40]. See Harris v. Forklift Sys., 510 U.S. 17 (1993); Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

[FN41]. Jonathan Alger, Love, Lust, and the Law: Sexual Harassment in the Academy, ACADEME, Sept.-Oct. 1998, at 36.

[FN42]. 561 F.2d 983 (D.C. Cir. 1977). Federal courts prior to Barnes rejected sexual harassment as a viable cause of action under Title VII finding it to be "nothing more than a personal proclivity, peculiarity, or mannerism." Corne v. Bausch & Lomb, 390 F. Supp. 161, 163 (D. Ariz. 1975); Cf. Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976); (finding that while misconduct of supervisor was not wrapped in word of quid pro quo or hostile environment sexual harassment, retaliatory action taken by a male supervisor against a female employee because she declined his sexual advances constituted sex discrimination under Title IX).

[FN43]. See Barnes, 561 F.2d at 995.

[FN44]. See Williams v. Civilleti, 487 F. Supp. 1387 (D.D.C. 1980) (finding quid pro quo sexual harassment when female employee was criticized and eventually dismissed after she resisted the social and sexual advances of her supervisors); Munford v. Barnes & Co., 441 F. Supp. 459 (E.D. Mich. 1977) (finding sexual harassment when supervisor made repeated sexual suggestions and innuendoes and

demanded that a female employee share his motel room on a business trip leading to the employee's termination after she refused to comply with supervisor's advances).

[FN45]. 454 F.2d 234 (5th Cir. 1971).

[FN46]. See id. at 236-37.

[FN47]. Id. at 238.

[FN48]. See Firefighters Inst. for Racial Equal. v. St. Louis, 549 F.2d 506 (8th Cir. 1977).

[FN49]. See Compston v. Borden, 424 F. Supp. 157 (S.D. Ohio 1976).

[FN50]. See Cariddi v. Kansas City Chiefs Football Club, 568 F.2d 87 (8th Cir. 1977).

[FN51]. See Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11 (1997). In 1990, the EEOC issued a second policy guidance on sexual harassment with the purpose of providing guidance to both employers and employees. See EEOC Policy Guidance on Current Issues of Sexual Harassment, N- 915.050 (Mar. 19, 1990). The 1990 policy was issued, in large part, as a result of the developing law in sexual harassment since 1980, and in particular after the Supreme Court's decision in Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).

[FN52]. When drafting the Guidelines on Discrimination, which culminated in an expansive definition of sexual harassment, the EEOC "drew upon a substantial body of judicial decisions and EEOC precedent holding that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." Meritor, 477 U.S. at 65. The 1980 Guidelines on Discrimination resulted in the formulation of criteria for determining when the alleged sexual conduct constitutes sexual harassment, identification of circumstances in which an employer may be held liable, and suggestions for affirmative steps that an employer should take to prevent sexual harassment from occurring. See 29 C.F.R. § 1604.11 (1999). The EEOC has applied the guidelines in its enforcement litigation, while several courts have relied on the guidelines when issuing opinions.

[FN53]. The EEOC defined quid pro quo sexual harassment as that conduct of a sexual nature, the submission to which is "made either explicitly or implicitly a term or condition of an individual's employment" or the "rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual." 29 C.F.R. § 1604.11(a)(2) (1999).

[FN54]. Id.

[FN55]. 641 F.2d 934 (D.C. Cir. 1981).

[FN56]. See id. at 945.

[FN57]. Id. at 946. Thus, in finding that hostile environment sexual harassment is a violation of Title VII, the court determined that to hold otherwise would permit an employer to harass an employee and get away with it by not conditioning the harassment upon a tangible job benefit. See id.

[FN58]. 477 U.S. 57 (1986).

[FN59]. See id. at 66-67.

[FN60]. Id. at 67.

[FN61]. Id. (quoting Henson v. Dundee, 682 F.2d 897, 902 (11th Cir. 1982)).

[FN62]. See id. at 72. Several years later, the Supreme Court again addressed the issue of hostile environment sexual harassment in the workplace and, in particular, what constitutes severe or pervasive conduct in Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993). In earlier decisions, lower courts had held that in order for a plaintiff to make a claim for a hostile work environment, he or she had to show that verbal harassment based on sex "had the effect of unreasonably interfering with the plaintiff's work performance and creat[ed] an intimidating, hostile, or offensive work environment that affected seriously the psychological well-being of the plaintiff." Rabidue v. Osceola Ref., 805 F.2d 611, 619-20 (6th Cir. 1986). In Harris, the Supreme Court rejected the argument that serious harm must be demonstrated finding:

> Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatory abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers.

510 U.S. at 22.

[FN63]. See infra notes 177-91 and accompanying text.

[FN64]. See infra notes 243-44 and accompanying text.

[FN65]. 118 S. Ct. 2275 (1998). The Court found that an employer can be held vicariously liable for Title VII discrimination caused by a supervisor with immediate (or successively higher) authority over an employee. Id. at 2290. In reaching this conclusion, the Court determined "that when a person with supervisory authority discriminates in the terms and conditions of a subordinate's employment, [the supervisor's actions] necessarily draw upon his superior position over the people who report to him." Id. at 2291.

[FN66]. 118 S. Ct. 2257 (1998). The Court focused on whether the plaintiff suffered unwelcome and threatening sexual advances in holding that an employee who experiences such sexual advances by a supervisor, yet suffers no adverse, tangible job consequences, may recover damages against the employer. See id. at 2270.

[FN67]. Additionally, the Court, while acknowledging that the terms "hostile environment" and "quid pro quo" are helpful in categorizing different types of sexual harassment, downplayed the overall legal significance of the two labels. The Court instead looked to the power relationships of harassers and victims and the harm resulting from the sexual harassment. See id. at 2264.

[FN68]. Id. at 2270.

[FN69]. See id.

[FN70]. The Court did rule in an earlier decision that same-sex harassment is actionable under Title VII. See Onccale v. Sundower Offshore Services, Inc., 118 S. Ct. 998 (1998).

[FN71]. See Kauffman v. Allied Signal, Inc., 970 F.2d 178 (6th Cir. 1992). The "knew or should have know" standard is often characterized as respondeat superior liability. However, respondeat superior connotes derivative liability, but in co-worker sexual harassment cases, the employer is directly liable for its own negligence. See Fleenor v. Hewitt Soap Co., 81 F.3d 48 (6th Cir. 1996); Hirschfield v. New Mexico Corrections Dep't, 916 F.2d 572 (10th Cir. 1990).

[FN72]. See 29 C.F.R. § 1604.11 (1999). The Guidelines provide that with respect to conduct between co-workers, an employer may be responsible for acts of sexual harassment in the workplace where the employer or its agents or supervisory employees knew or should have known of the conduct, and fails to take immediate and appropriate corrective action.

[FN73]. See Weinsheimer v. Rockwell Int'l, 754 F. Supp. 1559 (M.D. Fla. 1990); EEOC v. Sage Realty, 521 F. Supp. 263 (S.D.N.Y. 1981). See also 29 C.F.R.§ 1604.11 (1999) (as to the conduct of non-employees and possible liability arising therefrom, the employer may be held liable where the job requirement could subject an employee to sexual harassment or when the employer fails to take immediate and appropriate corrective action despite having notice of the harassing conduct by the non-employee).

In determining the potential for liability, the EEOC "will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees." 29 C.F.R. § 1604.11(e).

[FN74]. 119 S. Ct. 1661 (1999).

[FN75]. See infra note 197 and accompanying text.

[FN76]. See 42 U.S.C. § 2000d (1994).

[FN77]. See Jill S. Miller, Title VI and Title VII: Happy Together as a Resolution to Title IX Peer Sexual Harassment Claims, 1995 U. ILL. L. REV. 699, 714-19.

[FN78]. See id. at 715.

[FN79]. See North Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1982); Cannon v. University of Chicago, 441 U.S. 677 (1979). Specifically, the Court determined:

> Title IX was patterned after Title VI of the Civil Rights Act of 1964. Except for the substitution of the word "sex" in Title IX to replace the words "race, color, or national origin" in Title VI, the two statutes use identical language to describe the benefited class. Both statutes provide the same administrative mechanism for terminating federal financial support for institutions engaged in

prohibited discrimination. Neither statute expressly mentions a private remedy for the person excluded from participation in a federally funded program. The drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years.
Id. at 695-96.

[FN80]. See id.

[FN81]. Id.

[FN82]. See 34 C.F.R. § 106.71 (1999). The regulation specifically states: "The procedural provisions applicable to Title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference." Id.

[FN83]. Title VI provides that "[n]o 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 financial assistance." 42 U.S.C. § 2000d (1994). Title IX has similar language but is limited to sex discrimination. Actions that are deemed unlawful under Title VI include denying an individual any service, financial aid, or other benefit provided under the program; providing any service, financial aid, or benefit to an individual in a different manner from that provided to others under the program; and treating any individual differently from others in determining whether he or she satisfies any admission, enrollment, quota, eligibility, membership which individuals must meet in order to be provided any service, financial aid, or other benefit provided under the program. See id.

[FN84]. 463 U.S. 582 (1983).

[FN85]. Id. at 607.

[FN86]. See id.

[FN87]. Id. at 592.

[FN88]. See 34 C.F.R. § 100.7(c) (1999).

[FN89]. See 28 C.F.R. § 42.406 (1999).

[FN90]. See Racial Incidents and Harassment against Students at Educational Institutions: Investigative Guidance, 59 Fed. Reg. 11,448 (1994).

[FN91]. See id.

[FN92]. See Jollee Faber, Expanding Title IX of the Education Amendments of 1972 to Prohibit Student to Student Sexual Harassment, 2 U.C.L.A. WOMEN'S L.J. 85, 111 (1992).

[FN93]. See Kimberly Mango, Students versus Professors: Combating Sexual Harassment under Title IX of the Education Amendments of 1972, 23 CONN. L. REV. 355, 367 (1991).

[FN94]. See Faber, supra note 92, at 112.

[FN95]. See id.

[FN96]. For a good summary of the legislative history of Title IX, see Davis v. Monroe County Bd. of Educ., 120 F.3d 1390, 1395-1399 (11th Cir. 1997).

[FN97]. The House Subcommittee on Education and Labor held thirty-four days of hearings between December 16, 1969 and July 16, 1970 on House Resolution 16098, a bill, in part, which was proposed to amend the Higher Education Act of 1965 and which related to sex discrimination in federally funded educational programs. See, Discrimination Against Women: Hearings on § 805 of H.R. 16098 before the Special Subcommittee on Education of the House Committee on Education and Labor, 91st Cong. (1970).

A new education bill was introduced in the House in April 1971. See 117 CONG. REC. 30,155 (1971). During the 1971 debate, in which Congress considered the need to revise the Higher Education Act of 1965 to provide additional funds for higher education, serious discussions ensued as to whether a clause should be included in the Act prohibiting recipients from discriminating on the basis of sex. See 117 CONG. REC. 30,882 (1971); see generally Faber, supra note 92; Mango, supra note 93. Like the previous bill introduced a year earlier, this bill also contained a provision prohibiting sex discrimination in any education program or activity receiving federal financial support. Again, there was no testimony before the subcommittee discussing sexual harassment of students.

There was no discussion on sexual harassment of students at the committee hearings as it proceeded to amend the House version of Senate Bill 659 with its own original version. See S. REP. NO. 92-604 (1972). The Senate Committee thus sent its version to the Senate floor on February 7, 1972 without an antidiscrimination provision. See 118 CONG. REC. 2806 (1972).

[FN98]. See 118 CONG. REC. at 22,702 (1972).

[FN99]. See 20 U.S.C. § 1681 (1994).

[FN100]. Mango, supra note 93, at 382. However, there is evidence that Congress purposely tracked the language of Title VI when drafting Title IX so that courts and federal agencies, when enforcing Title IX, could draw on the precedents set forth by Title VI case law. See V. L. Williams & D. L. Brake, When a Kiss Isn't Just a Kiss: Title IX and Student-to-Student Harassment, 30 CREIGHTON L. REV. 423, 435-37 (1997).

[FN101]. 118 CONG. REC. 5811 (1972).

[FN102]. 117 CONG. REC. 25,507 (1971).

[FN103]. Id.

[FN104]. See Williams & Brake, supra note 100, at 436.

[FN105]. See id.

[FN106]. See 45 Fed. Reg. 74,677 (1980) (to be codified at 29 C.F.R. pt. 1604).

[FN107]. See Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977).

[FN108]. See KAPLIN & LEE, supra note 15, at 801. Enforcement duties were originally the responsibility of the Department of Health, Education, and Welfare's Office of Civil Right but enforcement was shifted to the Department of Education in 1979. See 34 C.F.R. pts. 100-106 (1999).

[FN109]. See KAPLIN & LEE, supra note 15, at 801. The regulations implementing Title IX became effective on July 21, 1975. The regulations specify detailed prohibitions of sex discrimination in those education activities and programs receiving federal funds. Currently, they provide that "no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives or benefits from federal financial assistance." 34 C.F.R. § 106.9 (1999). Subparts (b)(1) through (b)(7) of Section 106 of the regulations specifically provide that recipients of federal financial assistance shall not, on the basis of sex, treat one person differently from another in the provision of aids, benefits, or services or limit any person in the enjoyment of any right, privilege, advantage, or opportunity, on the basis of sex. 34 C.F.R. § 106.9 (1999).

[FN110]. See 34 C.F.R. § 106.71 (1999).

[FN111]. A grievance procedure is a mechanism by which an individual or group may express a grievance to the college of potential violations of Title IX and receive a fair hearing and resolution of the grievance without fear of reprisal. The procedure's functions should provide the means whereby a determination is made as to whether a violation of a particular act, practice, or policy of Title IX has occurred, and the formulation of appropriate steps for correcting and redressing the violation. See U.S. DEPARTMENT OF EDUCATION, OFFICE FOR CIVIL RIGHTS: TITLE IX GRIEVANCE PROCEDURES: AN INTRODUCTORY MANUAL (1987) [hereinafter GRIEVANCE MANUAL]. A grievance filed with a college "is one which asserts that some policy or practice of an education agency or institution is not in compliance with the Title IX regulation requirements for nondiscrimination on the basis of sex." Id. at 5.

[FN112]. See U.S. DEPARTMENT OF EDUCATION, CASE RESOLUTION MANUAL (1994). Under the complaint procedures, complaints may be filed by individuals or institutions on behalf of themselves or students, employees, or applicants for admission or employment to the educational institution. Complaints generally must be filed with the Office for Civil Rights within 180 calendar days of the last act of the alleged discrimination. See id. at 3. Complainants may seek a waiver of the 180-day filing requirement under certain extenuating circumstances, including when (1) when the complainant was unable to file a complaint because of illness or other incapacitating circumstances; (2) the complainant could not reasonably be expected to know the act was discriminatory; or (3) the complainant filed a complaint alleging the same discriminatory conduct within the 180-day period with another federal, state, or local civil rights enforcement agency or with the recipient's internal grievance procedure. See id. at 4.

The regional officer of the OCR will continue with the investigation until such time as it can determine that an appropriate resolution of the complaint has been reached. See id. at 10. If the investigator does find a violation of Title IX, OCR

first must attempt to achieve compliance through informal means. Should the negotiation process result in a settlement, any agreement must specify the appropriate action that is to be taken to resolve each allegation and the implementation process that will be put in place. See id. at 8. The agreement typically will result in the issuance of a "Case Resolution Closure Letter" although less informal resolution procedures exist. See id. at 11. The closure letter will generally contain the basis for the complaint, a brief statement of the allegations, an explanation of the basis for OCR's determination that the complaint has been resolved, a summary of the pertinent legal standard, and a brief statement and analysis of the facts. See id.

[FN113]. See KAPLIN & LEE, supra note 15, at 14-15. These guidelines are made available to the public to apprise recipients and students of the investigative approach and analysis that the OCR staff will follow when investigating issues pertaining to the possible failure to comply with a civil rights statute.

[FN114]. Sexual Harassment Guidance, supra note 10. In 1981, the OCR issued an internal policy memorandum to help guide field officers investigating Title IX complaints covering harassment of students by faculty and staff of the higher education institution as well as sexual harassment of employees by supervisors or colleagues. See Califa, supra note 10. The purpose of the memorandum was to explain the application of Title IX to sexual harassment, to establish procedures for handling sexual harassment complaints, and to provide some guidance for investigating complaints on this issue. See id. The OCR noted that its "jurisdiction over sexual harassment is based on the fact that such conduct constitutes differential treatment on the basis of sex" and that sexual harassment of students is a violation of Title IX. Id. at 2. The OCR adopted the following working definition of sexual harassment: "Sexual harassment consists of verbal and physical conduct of a sexual nature, imposed on the basis of sex, by an employee or agent of a recipient of federal funds that denies, limits, provides different, or conditions the provision of aid, services, or treatment protected under Title IX." Id. at 3.

In a subsequent informational pamphlet made available to the public in 1991, the OCR reiterated its position that "sexual harassment of students is a violation of Title IX of the 1972 Education Amendments since it constitutes differential treatment on the basis of sex." U.S. DEPARTMENT OF EDUCATION, SEXUAL HARASSMENT: IT'S NOT ACADEMIC (1991). This pamphlet specifically set forth information for academic institutions in understanding the increasing problem of sexual harassment of students by faculty and staff and the institutions' legal responsibility to respond to allegations of sexual harassment. The OCR's pamphlet did not express an opinion as to student-to- student sexual harassment, nor did it differentiate between the two types of sexual harassment.

[FN115]. Sexual Harassment Guidance, supra note 10. See infra notes 218-26 and accompanying text.

[FN116]. A "letter finding" is a final report of the OCR's inquiry into possible violations of Title IX by the institution. See CASE RESOLUTION MANUAL, supra note 112, at 15. Letter findings express the OCR's working interpretations of Title IX. Their statements describe each issue that is to be investigated and the findings of fact for each, explain or analyze the information on which the findings are based, provide a conclusion for each issue with the applicable regulation and appropriate legal standards, and outline the remedial steps that an institution must take to preserve its federal funding should it be found in violation of Title IX. See id. The findings typically are not publicized but can be obtained under a Freedom of Information Act request. A letter finding will ordinarily be issued under one of the following two circumstances: (1) the investigation, whether initiated as a result of a receipt of a complaint or through a compliance review which is agency initiated, establishes that there is no legal basis for a violation of Title IX or the violation has been resolved through an informal process, but a letter finding on the matter would have significant precedential value for the OCR or the public; or (2)

the investigation establishes that there is a violation, negotiations proved unsuccessful, and the OCR initiates enforcement action. See id.

[FN117]. See 20 U.S.C. § 1682 (1994).

[FN118]. See GRIEVANCE MANUAL, supra note 111, at 2.

[FN119]. See Cannon v. University of Chicago, 441 U.S. 677 (1979). In reaching its decision, the Supreme Court turned its attention to Title VI, after which Title IX was patterned, that allows a private cause of action. The Court analyzed the history of Title IX and found that Congress must have intended a private remedy for it because "the drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during preceding eight years." Id. at 694.

[FN120]. See CASE RESOLUTION MANUAL, supra note 112, at 2.

[FN121]. See generally 20 U.S.C. § 1682 (1994).

[FN122]. See Ronna G. Schneider, Sexual Harassment and Higher Education, 65 TEX. L. REV. 525, 527-28 (1987) (noting that students generally spend only a few years at college and therefore may not see the benefit of initiating a lawsuit as litigation may last well beyond the time that the student is enrolled).

[FN123]. See id. at 528. Also, courts generally give academic institutions a great deal of autonomy in their decision-making and are reluctant to evaluate the proprietary of their decisions. Thus academic justifications offered by professors for their actions are given greater weight by courts than explanations advanced by employees in the nonacademic context. See id.

[FN124]. See Faber, supra note 92 at 105-07 (noting that students may perceive that they have little to gain from initiating Title IX litigation given that they might experience reprisals and litigation from both peers and higher education officials should they bring such charges).

[FN125]. See Carrie N. Baker, Proposed Title IX Guidelines on Sex-Based Harassment of Students, 43 EMORY L.J. 271, 280-81 (1994).

[FN126]. 459 F. Supp. 1 (D. Conn. 1977).

[FN127]. See id. at 3-4.

[FN128]. See id. at 4.

[FN129]. See id.

[FN130]. See id.

[FN131]. Id. (citations omitted).

[FN132]. See id. at 6.

[FN133]. Alexander v. Yale Univ., 631 F.2d 178, 185 (2d Cir. 1980) (holding that plaintiff presented a justifiable claim for relief under Title IX although the plaintiff failed to prove that the alleged sexual harassment occurred). Thus, a denial or threatened denial of earned academic awards would be a deprivation of an educational benefit protected by Title IX, and when a student's academic advancement is conditioned upon submission to sexual demands that deprivation becomes sex discrimination prohibited by Title IX. The Second Circuit, therefore, became the first federal appellate court to recognize quid pro quo sexual harassment as a viable cause of action under Title IX.

Alexander and its progeny do not necessarily stand for the proposition that Title IX prohibits all sexual involvement between a university employee and a student. If a consensual relationship exists between a professor and a student, and there is no allegation that the sexual relationship caused the student to be denied any academic benefit unless he or she agreed to have a continuing relationship with the professor, then it is unlikely that a prima facie case for quid pro quo sexual harassment can be made. In Bougher v. University of Pittsburgh, 713 F. Supp. 139 (W.D. Pa. 1989), the court held that a student's complaint did not allege that the consensual sexual relationship with a professor caused denial of academic benefit. Rather, the court determined that the student simply alleged that a consensual relationship with the professor went sour and that the professor turned cold and distant emotionally. She did not allege that the relationship was in any way "unwelcome."

[FN134]. 613 F. Supp. 1360 (E.D. Pa. 1985).

[FN135]. See id. at 1365.

[FN136]. See id. Specifically, the student alleged that he remarked in a private meeting that he was attracted to her and that this attraction was causing jealousy among the staff.

[FN137]. See id. at 1366.

[FN138]. Id. at 1366-67.

[FN139]. See id. at 1369.

[FN140]. See id. at 1366-67. The court also found that such a claim could not rise to quid pro quo sexual harassment because the alleged harassment was not conditioned on the denial or grant of a benefit. The student did not accuse her supervisor of attempting physical contact, threatening her with failure in order to obtain sexual favors, or soliciting sexual intimacies. See id.

[FN141]. Id. at 1369.

[FN142]. 503 U.S. 60 (1992).

[FN143]. See id. at 75.

[FN144]. See Baker, supra note 125, at 281-82.

[FN145]. 503 U.S. at 63.

[FN146]. See id.

[FN147]. See id. at 64.

[FN148]. See id. at 63.

[FN149]. See id. at 64.

[FN150]. See id.

[FN151]. See id. at 71.

[FN152]. See id. at 75.

[FN153]. See id. at 75 n.8.

[FN154]. See Cannon v. University of Chicago, 441 U.S. 677, 695-96 (1979).

[FN155]. See Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 598-99 (1983).

[FN156]. See, e.g., Davis v. Monroe County Bd. of Educ., 120 F.3d 1390, 1397-99 (11th Cir. 1997) (noting that the legislative history shows that when enacting Title IX, Congress intended the statute to be a typical contractual spending power provision); Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1012-13 (5th Cir. 1996) (noting that Title IX was an exercise of Congress' spending power).

[FN157]. See supra notes 24-28, and accompanying text.

[FN158]. See 42 U.S.C. § 1981a (1994). In 1991, Congress made monetary damages available under Title VII, but carefully limited the amount recoverable in any individual case, calibrating the maximum recovery to the size of the employer. See id. at § 1981(b)(3).

[FN159]. Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 74 (1992).

[FN160]. Id. at 75.

[FN161]. See Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

[FN162]. See Franklin, 503 U.S. at 75.

[FN163]. See id. at 75-76.

[FN164]. See id. at 75.

[FN165]. Hastings v. Hancock, 842 F. Supp. 1315, 1318 (D. Kan. 1993).

[FN166]. Much of the case law that followed Franklin pertained to suits brought by elementary and secondary school students. The applicability of the courts' decisions to colleges was, therefore, tenuous given that the primary and secondary educational environment differs greatly from the higher education environment. Unlike college students, elementary and secondary students attend school under compulsion of state law. Also, adolescents are intellectually, emotionally, and socially less mature than most adults and generally are uniquely vulnerable to peer pressure. See generally Gail Sorenson, Peer Sexual Harassment: Remedies and Guidelines under Federal Law, 92 WEST EDUC. L. REP. 1 (1994). Nevertheless, the case law provided colleges with some guidance as to how courts were likely to view sexual harassment on their respective campuses.

[FN167]. 830 F. Supp. 1288 (N.D. Cal. 1993).

[FN168]. See id. at 1294-95.

[FN169]. See id. at 1292-93.

[FN170]. Id. at 1293 (quoting Schneider, supra note 122, at 551).

[FN171]. Overall, more than sixty cases were decided by the various federal courts prior to Gebser. However, many of the same districts and circuits had ruled on the issue of institutional liability on more than one occasion. Moreover, some of the district court decisions were subsequently overturned or overruled by appellate courts. As such, of those cases found and reviewed, a total of thirty-four different federal district and appellate courts had ruled on the issue of the appropriate standard of institutional liability under Title IX. Of these opinions, eight different district courts and no courts of appeals opined on the issue of quid pro quo sexual harassment, six courts of appeals and six district courts issued opinions as to the standard of liability with respect to teacher-to-student hostile environment sexual harassment, and six courts of appeals and eight district courts advanced theories as to the standard of liability that should be applied to student-to-student sexual harassment.

Two decisions involved both teacher-to-student and student-to-student sexual harassment. See Oona R.S. v. Santa Rosa City Sch. Dist., 890 F. Supp. 1452 (N.D. Cal. 1995); DelGrande v. Temple Univ., No. 96-3878, 1997 U.S. Dist. LEXIS 12122 (E.D. Pa. Aug. 7, 1997).

[FN172]. See infra notes 177-91 and accompanying text.

[FN173]. Twenty-three decisions pertained to sexual harassment at the primary and secondary school level, and nineteen decisions related to college students.

[FN174]. Only one court, the District Court for the Western District of Pennsylvania, held that Title IX does not permit a sexual harassment claim based on teacher-to-student hostile environment sexual harassment and determined that a cause of action for sexual harassment is not found under Title IX, and it is the duty of the U.S. Congress or the administrative agency enforcing the Title IX regulations--not the courts--to extend the theory. See Bougher v. University of Pittsburgh, 713 F. Supp. 139, 145 (W.D. Pa. 1989).

As stated at the outset, the Supreme Court did not express an opinion as to the appropriate standard of institutional liability in Franklin. It simply held that damages can be awarded for intentional discrimination under Title IX. An Oklahoma district court also failed to expressly set forth a standard of liability but like the Supreme Court determined that a victim of harassment must prove that the educational institution engaged in intentional sexual discrimination in order for liability to arise under Title IX. See R.L.R. v. Prague Pub. Sch. Dist., 838 F. Supp. 1526, 1533 (W.D. Okla. 1993).

[FN175]. See generally Stilley v. University of Pittsburgh, 968 F. Supp. 252 (W.D. Pa. 1996); Bolon v. Rolla Pub. Schs., 917 F. Supp. 1423 (E.D. Mo. 1996); Kadiki v. Virginia Commonwealth Univ., 92 F. Supp. 746 (E.D. Va. 1995); Slaughter v. Waubonsee Community College, No. 94C2525, 1995 U.S. Dist. LEXIS 14236 (N.D. Ill. Sept. 29, 1995); Slater v. Marshall Community College, 906 F. Supp. 256 (E.D. Pa. 1995); Saville v. Houston County Healthcare Auth., 852 F. Supp. 1512 (M.D. Ala. 1994); Hastings v. Hancock, 842 F. Supp. 1315 (D. Kan. 1993); Alexander v. Yale Univ., 459 F. Supp. 1 (D. Conn. 1977).

[FN176]. See Bolon, 917 F. Supp. at 1423; Kadiki, 92 F. Supp. at 746; Saville, 852 F. Supp. at 1512.

[FN177]. Because of the close definitional connection between vicarious liability and constructive notice, courts and legal scholars often have blended the two standards into one theory. There is a subtle, if not distinct, difference between the two, however. As noted by the Seventh Circuit, Section 219 of the RESTATEMENT (SECOND) OF AGENCY is based on pure agency theory, while Title VII's "knew or should have know" standard is an agency-like theory that is really based on negligence. See Smith v. Metropolitan Sch. Dist., 128 F.3d 1014 (7th Cir. 1997), cert. denied, 118 S. Ct. 2367 (1998); see also Guess v. Bethlehem, 913 F.2d 463, 464-65 (7th Cir. 1990). Under this approach, the "knew or should have known" standard, unlike the pure agency theory under Restatement Section 219, does not impute a teacher's intent (or knowledge) to the college. See Metropolitan Sch. Dist., 128 F.3d at 1029.

[FN178]. See RESTATEMENT (SECOND) OF AGENCY § 219(2)(d)(2). A master is not subject to liability for the torts of his servant acting outside the scope of their employment, unless:

(d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

Id.

[FN179]. See W.P. KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 534 (5th ed. 1984).

[FN180]. Some courts have suggested that liability under the agency standard may be negated if the employer responds in an adequate and effective manner to remedy the sexual harassment. See Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796, 804 (6th Cir. 1994); Yates v. Avco Corp., 819 F.2d 630, 634 (6th Cir. 1987).

[FN181]. See generally Kracunas v. Iona College, 119 F.3d 80 (2d Cir. 1997); Doe v. Claiborne County, 103 F.3d 495 (6th Cir. 1996); Seneway v. Canon MacMillan Sch. Dist., 969 F. Supp. 325 (W.D. Pa. 1996); Stilley v. University of Pittsburgh, 968 F. Supp. 252 (W.D. Pa. 1996); Baby Doe v. Methacton Sch. Dist., No. 94-0244, 1995 U.S. Dist. LEXIS 13373 (E.D. Pa. Sept. 12, 1993); Stilley v. University of Pittsburgh, 968 F. Supp. 252 (W.D. Pa. 1996); Saville v. Houston County Healthcare Auth., 852 F. Supp. 1512 (M.D. Ala. 1994); Hastings v. Hancock, 842 F. Supp. 1315 (D. Kan. 1993).

[FN182]. See Kracunas, 119 F.3d 80.

[FN183]. See Sexual Harassment Guidance, supra note 10.

[FN184]. See generally Bustos v. Illinois Inst. of Tech., No. 93C5980, 1994 U.S. Dist. LEXIS 18023 (N.D. Ill. Dec. 16, 1994); Deborah O. v. Lake Cent. High Sch., 61 F.3d 905 (7th Cir. 1995); DelGrande v. Temple Univ., No. 96-3878, 1997 U.S. Dist. LEXIS 12122 (E.D. Pa. Aug. 7, 1997); Doe v. Covington County Sch. Bd. of Ed., 930 F. Supp. 554 (M.D. Ala. 1996); Kadiki v. Virginia Commonwealth Univ., 92 F. Supp 746 (E.D. Va. 1995); Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463 (8th Cir. 1996); Miles v. New York Univ., 979 F. Supp. 248 (S.D.N.Y. 1997); Moire v. Temple Univ. Sch. of Med., 613 F. Supp. 1360 (E.D. Pa. 1985); Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp. 1288 (N.D. Cal. 1993); Slaughter v. Waubonsee Community College, No. 94C25252, 1995 U.S. Dist. LEXIS 14236 (N.D. Ill. Sept. 29, 1995); Nelson v. Almont Community Sch., 931 F. Supp. 1345 (E.D. Mich. 1996); Oona v. Santa Rosa City Sch., 890 F. Supp. 1452 (N.D. Cal. 1995); Doe v. Beaumont, 8 F. Supp. 2d 596 (E.D. Tex. 1998).

[FN185]. Title VII's "knew or should have known" standard is similar to that found under Section 219(2)(b) of the RESTATEMENT (SECOND) OF AGENCY (1958).

[FN186]. See generally Nicole M. v. Martinez Unified Sch. Dist., 964 F. Supp. 1369 (N.D. Cal. 1997).

[FN187]. See generally Doe v. Lago Vista Indep. Sch. Dist., 106 F.3d 1223 (5th Cir. 1996); Brooks v. Tulane, No. 96-443, 1996 U.S. Dist. LEXIS 18571 (E.D. La. Dec. 10, 1996); Canutillo Indep. Sch. Dist. v. Leija, 101 F.3d 393 (5th Cir. 1996), cert. denied, 520 U.S. 1265 (1997); Floyd v. Waiters, 133 F.3d 786 (11th Cir. 1998), vacated and remanded, 119 S. Ct. 33 (1998); Marsh v. Dallas Indep. Sch. Dist., No. 3:94-CV-2255-R, 1997 U.S. Dist. LEXIS 4819 (N.D. Tex. Mar. 10, 1997), cert. denied, 118 S. Ct. 2374 (1998); Mary M. v. North Lawrence Community Hosp. Sch. Corp., 131 F.3d 1220 (7th Cir. 1997), cert. denied, 118 S. Ct. 2369 (1998); Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648 (5th Cir. 1997); S.B.L. v. Hume Sch. Dist., 857 F. Supp. 676 (W.D. Mo. 1994); Smith v. Metropolitan Sch. Dist., 128 F.3d 1014 (7th Cir. 1997), cert. denied, 118 S. Ct. 2367 (1998); Davis v. Dekalb County Sch. Dist., 996 F. Supp. 1478 (N.D. Ga. 1998); Doe v. Granbury Indep. Sch. Dist., 19 F. Supp. 2d 667 (N.D. Tex. 1998).

[FN188]. See Doe v. Lago Vista Indep. Sch. Dist., 106 F.3d 1223; Rosa H., 106 F.3d 648; Marsh, 1997 U.S Dist. LEXIS 4819; Brooks v. Tulane, 1996 U.S. Dist. LEXIS 18571; Leija, 101 F.3d 393; Granbury, 19 F. Supp. 2d 667. The Fifth Circuit alone found on three separate occasions that an educational institution should be held liable only when a school employee had actual knowledge of the harassing conduct and failed to take action to remedy it. See Rosa H., 106 F.3d at 648; Leija, 101 F.3d at 393; Lago Vista, 106 F.3d at 1223.

[FN189]. See Metropolitan Sch. Dist., 128 F3d 1014; North Lawrence Community Sch. Dist., 131 F.3d 1220; Waiters, 133 F.3d 786. A district court out of the Eighth Circuit came to the same conclusion. See Hume Sch. Dist., 857 F. Supp. 676 (W.D. Mo. 1994).

[FN190]. See Bolon v. Rolla Pub. Schs., 917 F. Supp. 1423 (E.D. Mo. 1996).

[FN191]. See id. at 1429.

[FN192]. See Doe v. Petaluma City Sch. Dist., 830 F. Supp. 1560 (N.D Cal. 1993), rev'd on reh'g., 949 F. Supp. 1415 (N.D. Cal. 1996) (district court held in 1993 that Title IX prohibits peer sexual harassment and that statute required a showing of actual intent to discriminate for a finding of institutional liability. But after granting motion for reconsideration, court applied the "knew or should have known" liability standard found under Title VII).

[FN193]. See Kenilworth Junior High Sch., Letter of Finding by John E. Palomino. Docket No. 09-89-1050 (Region IV, January 27, 1994).

[FN194]. Prior to Davis, more than twenty-five cases were decided on the issue of institutional liability as to student-to-student or third party sexual harassment. It should be noted that only four of the cases resulted from action occurring at the college level. Three cases involved purely peer sexual harassment. See DelGrande v. Temple Univ., No. 96-3878, 1997 U.S. Dist. LEXIS 12122 (E.D. Pa., Aug 7, 1997); Brzonkala v. Virginia Polytechnic Inst. and State Univ., 132 F.3d 949 (4th Cir. 1997); Linson v. University of Pittsburgh, No. 95-3681, 1996 US. Dist. LEXIS 12243 (E.D. Pa. Aug 21, 1996). A fourth decision related to harassment between a student and a patient at the University's dental school. See Murray v. New York Univ. College of Dentistry, 57 F.3d 243 (2d Cir. 1995).

[FN195]. See supra notes 177-91 and accompanying text.

[FN196]. All courts, as well as the OCR, have determined that agency principles are not applicable for peer harassment because under the concept of student-to-student sexual harassment, a student is not an agent of the educational institution. Agency is a fiduciary relationship, which results from the manifestation of consent by one person to another that the other shall act on his or her behalf and subject to his or her control. See RESTATEMENT (SECOND) OF AGENCYY § 219 (1958). Students generally, though, do not act on the college's behalf, are not subject to the college's control, and do not act with consent from the college. See Rowinsky, 80 F.3d at 1010-11 n. 9.

[FN197]. See Alton v. Board of Educ. of Boyne City Pub. Schs., No. 1:96CV564, 1997 U.S. Dist. LEXIS 20046 (W.D. Mich. Nov. 25, 1997); Bosley v. Kearney R-1 Sch. Dist., 904 F. Supp. 1006 (W.D. Mo. 1995); Brown v. Hot, Sexy and Safer Productions, 68 F.3d 525 (1st. Cir. 1995); Brzonkala v. Virginia Polytechnic Inst. and State Univ., 132 F.3d 949 (4th Cir. 1997); DelGrande v. Temple Univ., No. 96-3878, 1997 U.S. Dist. LEXIS 12122 (E.D. Pa. Aug. 7, 1997); Doe v. Petaluma City Sch. Dist., 949 F.Supp. 1415 (N.D. Cal. 1996); Franks v. Kentucky Sch. for the Deaf, 956 F.Supp. 741 (E.D. Ky. 1996); Murray v. New York Univ. College of Dentistry, 57 F.3d 243 (2d Cir. 1995); Nicole M. v. Martinez Unified Sch. Dist., 964 F.Supp 1369 (N.D. Calif. 1997); Doe v. Oyster River Cooperative Sch. Dist., 992 F.Supp. 467 (D.N.H. 1997). The OCR also has determined that such a standard should be applied by its own staff when investigating claims of student-to-student sexual harassment. See Sexual Harassment

Guidance, supra note 10, at 12,039.

[FN198]. Under this standard, a school must not only, to some degree, intend to discriminate, but it also must have actual knowledge of the sexual harassment. The constructive notice standard found under Title VII, therefore, is inadequate, as the school must have actual knowledge of the harassment. The victim of the harassment generally is assigned the responsibility of making the sexual harassment known to school officials. See Bruneau v. South Kortright Cent. Sch. Dist., 935 F.Supp. 162 (N.D. N.Y. 1996); Burrow v. Postville Community Sch. Dist., 929 F.Supp. 1193 (N.D. Iowa 1996); Collier v. Penn Sch. Dist., 956 F.Supp. 1209 (E.D. Pa. 1997); Doe v. Londonberry Sch. Dist., 970 F.Supp. 64 (D. N.H. 1997); Doe v. Univ. of Ill., 138 F.3d 1390 (7th Cir. 1998); Wright v. Mason City Community Sch. Dist., 940 F.Supp. 1412 (N.D. Iowa 1996).

[FN199]. See Piwonka v. Tidewater Indep. Sch. Dist., 961 F. Supp. 169 (S.D. Tex. 1997); Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006 (5th Cir. 1996). Disparate treatment, or the more commonly known equal protection standard, was explained best by the Fifth Circuit Court of Appeals in Rowinsky. There, the court determined that Title IX does not impose liability on schools for student-to-student hostile environment sexual harassment "absent allegations that the school...itself directly discriminated based on sex." Id. at 1008. That is, the student "must demonstrate that the school...responded to sexual harassment claims differently based on sex." Id. at 1016. Thus, according to the Fifth Circuit, a school may be found in violation of "Title IX if it treated sexual harassment of boys more seriously than sexual harassment of girls, or even if it turned a blind eye toward sexual harassment of girls while addressing assaults that harmed boys." Id. It would not be held liable, however, if the school did not take action against any of its own students who were harassing other students even though it knew of the inappropriate behavior.

[FN200]. See Davis v. Monroe County Bd. of Educ., 120 F.3d 1390 (11th Cir. 1997). It was this appellate court decision that the Supreme Court recently heard and reversed.

[FN201]. See Davis v. Monroe County Bd. of Educ., 119 S.Ct. 1661 (1999).

[FN202]. Id. at 1667.

[FN203]. See id.

[FN204]. See id.

[FN205]. See Davis, 120 F.3d at 1390.

[FN206]. See Aurelia D. v. Monroe County Bd. of Educ., 862 F. Supp. 363, 368 (M.D. Ga. 1994).

[FN207]. See Davis v. Monroe County Bd. of Educ., 74 F.3d at 1195 (11th Cir. 1996).

[FN208]. See Davis v. Monroe County Bd. of Educ., 91 F.3d 1418 (11th Cir. 1996).

[FN209]. See Davis, 120 F.3d at 1399.

[FN210]. Id.

[FN211]. Davis, 119 S.Ct. at 1673. Like Gebser, the Court rejected the use of agency principles to impute liability and the negligence standard under Title VII to hold a school liable for failing to react to harassment of which it knew or should have known. See id. at 1671-72.

[FN212]. Id. at 1675. Justice O'Connor recognized that in the school setting, "students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it." Id. But, she remarked, "[d]amages are not available for simple acts of teasing and name-calling among school children ... even where these comments target differences in gender." Id.

[FN213]. Id. at 1673.

[FN214]. Id. at 1674.

[FN215]. Id. O'Connor's observation apparently was in response to Justice Kennedy's concern that colleges do not have the same degree of control over their students as do grade schools and high schools:

> [T]he majority's holding would appear to apply with equal force to universities, which do not exercise custodial and tutelary power over their adult learners.
>
> A university's powers to discipline its students for speech that may constitute sexual harassment is also circumscribed by the First Amendment. A number of federal courts have already confronted difficult problems raised by university speech codes designed to deal with peer sexual and racial harassment. See. e.g., ... UWM Post, Inc. v. Board of Regents of Univ. of Wisconsin Sys., 744 F. Supp. 1163 (E.D. Wis. 1991) (striking down university speech code that prohibited, inter alia, "'discriminatory comments"' directed at an individual that "'intentionally ... demean"' the "'sex ... of the individual"' and "'create an intimidating, hostile or demeaning environment for education, university related work, or other university-authorized activity"').... The difficulties associated with speech codes simply underscore the limited nature of a university's control over student behavior that may be viewed as sexual harassment...[the majority] does not recognize the obvious limits on a university's ability to control its students as a reason to doubt the propriety of a private cause of action for peer harassment. It simply uses them as a factor in determining whether the university's response was reasonable.

Id. at 1683. (Kennedy, J., dissenting).

[FN216]. By failing to address which employees at an educational institution must have knowledge in order for there to be a showing that the school itself has actual knowledge, the Court left it to lower courts to determine whether any school employee, such as a maintenance worker, secretary, or resident advisor, is sufficient for the school to be found to have knowledge of the harassment. The Court did remark, though, that the harasser must be under the school's disciplinary authority in order for the school to have control over the student. Id. at 1673. Specifically, it noted that a recipient's damages liability are limited "to circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs." Id. at 1672.

[FN217]. See supra notes 227-353 and accompanying text.

[FN218]. See Sexual Harassment Guidance, supra note 10. The Guidance combines two earlier draft guidelines issued on August 16, 1996 entitled "Sexual Harassment Guidance: Peer Sexual Harassment" and October 4, 1996 entitled "Sexual Harassment Guidance: Harassment of Student by School Employees." The Guidance reflects OCR's longstanding policy and practice in the area of sexual harassment. See id. at 12,034.

[FN219]. See id.

[FN220]. See id.

[FN221]. In addition, the Fifth Circuit held that educational institutions are not liable for peer sexual harassment under Title IX unless the school intentionally discriminated against the student's gender, while the Eleventh Circuit found that Title IX does not impose any liability upon an educational institution for student-to-student sexual harassment. See Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006 (5th Cir. 1996), and Davis v. Monroe County Bd. of Educ., 120 F.3d 1390 (11th Cir. 1997).

[FN222]. See Sexual Harassment Guidance, supra note 10, at 12,039.

[FN223]. Id.

[FN224]. See id.

[FN225]. See supra notes 317-19 and accompanying text.

[FN226]. It should be noted at the outset that the OCR did not set forth separate guidances for primary and secondary schools and post-secondary institutions nor did it specifically express that differences exist between elementary and secondary schools and colleges and universities. In fact, the OCR noted at the beginning of the Guidance that "Title IX applies to all public and private educational institutions that receive Federal funds, including elementary and secondary schools, school districts, proprietary schools, colleges, and universities." Sexual Harassment Guidance, supra note 10, at 12,038.

However, elementary and secondary schools differ substantially from colleges in terms of their academic missions and the intellectual and emotional maturity of students. Moreover, adolescents generally are required to attend schools at the primary and secondary level in accordance with state law.

The OCR attempted to address these concerns by stating that age and maturity of students should be considered when responding to allegations of sexual harassment. Specifically, the OCR explained that age is relevant and is a factor to be considered in determining, among other things, (1) who is in position of authority in relation to students, (2) whether a student was legally or practically able to consent to a sexual relationship, (3) how a school might respond to situations involving issues of speech and expression, (4) the type of training or education that is needed for students in order to prevent sexual harassment from occurring, and (5) the appropriate remedy and response by the school for the harassing conduct. Id. at 12,034.

[FN227]. 118 S.Ct. 1989 (1998).

[FN228]. See id. at 1993.

[FN229]. See id.

[FN230]. See id.

[FN231]. See id.

[FN232]. See id.

[FN233]. See id.

[FN234]. See id.

[FN235]. See id.

[FN236]. See id.

[FN237]. See id.

[FN238]. Id. at 1994.

[FN239]. See id. The Fifth Circuit earlier held in Rosa H. v. San Elizario Independent School District, 106 F.3d 648 (5th Cir. 1997), and Canutillo Independent School District v. Leija, 101 F.3d 393 (5th Cir. 1996), cert. denied, 117 S. Ct. 2434 (1997), that monetary liability under Title IX could not lie absent actual knowledge on the part of the school district.

[FN240]. See Gebser, 118 S. Ct. at 1994 (quoting Rosa H., 106 F.3d at 1226).

[FN241]. See id.

[FN242]. See id. at 1997.

[FN243]. See id. at 1995.

[FN244]. See id.

[FN245]. Id. at 1996.

[FN246]. Id.

[FN247]. Id. at 1997.

[FN248]. Id.

[FN249]. Id. The Court also found that Title IX does not expressly call for the application of agency principles, as it, unlike Title VII, contains no reference to "agents" of an educational institution. See id. at 1996.

[FN250]. Id. at 1997.

[FN251]. See id. at 1998.

[FN252]. See id.

[FN253]. Id.

[FN254]. See id.

[FN255]. See id. at 1199.

[FN256]. See id. at 2000.

[FN257]. See id.

[FN258]. See id.

[FN259]. See id.

[FN260]. See id. at 2004.

[FN261]. Id. at 2003-04.

[FN262]. See id. at 2004.

[FN263]. See id. at 2007.

[FN264]. See Franklin, 503 U.S. at 64, 75 (1992).

[FN265]. Doe v. University of Ill., 138 F.3d 653, 670 (7th Cir. 1998) (Coffey, J., concurring in part, dissenting in part) (emphasis added).

[FN266]. See supra notes 177-91 and accompanying text (emphasis added).

[FN267]. See Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648 (5th Cir. 1997); Smith v. Metropolitan Sch. Dist., 128 F.3d 1014 (7th Cir. 1997), cert. denied, 118 S. Ct. 2367 (1998); Floyd v. Waiters, 133 F.3d 786 (11th Cir. 1998), vacated and remanded, 119 S. Ct. 33 (1998).

[FN268]. There is support, at least in the employment context, that Title VII rules should apply to Title IX sexual harassment. The legislative history of Title IX shows that when it was drafted, Congress intended it to be Title VII's companion legislation for employment related discrimination at educational institutions. See H.R. REP. NO. 92-554, at 51 (1972). Moreover, the Department of Justice has instructed those agencies investigating and adjudicating employment-related claims to "consider title VII case law and EEOC Guidelines ... in determining whether a [Title IX institution] has engaged in an unlawful employment practice." Judicial Administration: Standards for Investigation, Reviews and Hearings, 28 C.F.R. § 42.604 (1997). Also, one of the first courts to review the question of whether Title VII principles should apply to Title IX actions determined that it was appropriate to apply Title VII case law to Title IX in the employment context. See Lipsett v. University of P.R., 864 F.2d 881 (1st Cir. 1988).

[FN269]. KAPLIN & LEE, supra note 15, at 711.

[FN270]. Edward S. Cheng, Recent Development, Boys Being Boys and Girls Being Girls--Student-to-Student Sexual Harassment from the Courtroom to the Classroom, 7 UCLA WOMEN'S L.J. 263, 297 (1997). ("Because of the nature of its Spending Clause powers, Congress did not seek to directly regulate the activities of federally funded programs. Thus, in contrast to Title VII's direct regulation of employment practices and working conditions, Title VI controls federally funded programs indirectly by terminating funding upon a finding of discrimination"). Id.

[FN271]. Landgraf v. USI Film Products, 511 U.S. 244, 254 (1994). See also Gebser v. Lago Vista Indep. Sch. Dist., 118 S.Ct. 1898, 1997 (1998).

[FN272]. See Guardians Ass'n v. Civil Ser. Comm'n of N.Y. City, 463 U.S. 582, 599 (1983).

[FN273]. See generally KAPLIN & LEE, supra note 15, at 425-31 & 712.

[FN274]. 117 CONG. REC. 30,155, at 30,158 (1971) (statement of Sen. McGovern).

[FN275]. 117 CONG. REC. 39,257 (1971) (statement of Rep. Green).

[FN276]. 118 CONG. REC. 5803 (1972) (statement of Sen. Bayh).

[FN277]. See Davis v. Monroe County Bd. of Educ., 120 F.3d 1390, 1397 (11th Cir. 1997); Rowinsky, 80 F.3d at 1012; Smith v. Metropolitan Sch. Dist., 128 F.3d 1014, 1028 (7th Cir. 1997), cert. denied, 118 S. Ct. 2367 (1998).

[FN278]. See Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60 (1992); Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006 (5th Cir. 1996); Canutillo Indep. Sch.

Dist. v. Leija, 101 F.3d 393 (5th Cir. 1996).

[FN279]. See Floyd v. Waiters, 133 F.3d 786 (11th Cir. 1998).

[FN280]. While lower federal courts had held that Title IX was enacted pursuant to Congress' spending power, the Supreme Court, prior to Gebser, had not specifically ruled on the issue of whether Title IX was enacted under the Spending Clause, the Commerce Clause, or Section 5 of the Fourteenth Amendment. As for the Fourteenth Amendment, Title IX regulates the conduct of private institutions as well as public institutions. Thus, the limits of the Fourteenth Amendment would be pushed if Title IX liability as to private educational institutions, absent state action, rested on that Amendment and not the Spending Clause.

[FN281]. See Cheng, supra note 270, at 292-93.

[FN282]. See Guardians Ass'n. v. Civil Serv. Comm'n., 463 U.S. 582, 596 (1983).

[FN283]. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981) (citations omitted).

[FN284]. Several lower courts, as well, have held that the proper inquiry to determine whether an educational institution can be held liable is "whether Congress gave the [school] unambiguous notice that it could be held liable for failing to stop [the] harassment." Davis v. Monroe County Bd. of Educ., 120 F.3d 1390, 1399 (11th Cir. 1997), rev'd, 119 S. Ct. 1661 (1999). The Seventh Circuit noted that where discriminating conduct alleged to have violated Title IX is intentional, the notice problem does not surface. That is, "the allegation assumes that the combination of knowledge that sexual harassment is occurring in activities under the school's control and [the] ... failure to take prompt, appropriate action" is clear evidence of an intent to discriminate. Doe v. University of Ill., 138 F.3d 653, 663 (7th Cir. 1998).

[FN285]. Rowinsky, 80 F.3d at 1013.

[FN286]. Landgraf v. USI Film Products, 511 U.S. 244, 254 (1994) (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975)).

[FN287]. See Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 595 (1983).

[FN288]. See Landgraf, 511 U.S. at 254; Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989, at 1997 (1998).

[FN289]. 118 CONG. REC. 5806-07 (1972) (statement of Sen. Bayh).

[FN290]. See supra notes 153-160 and accompanying text.

[FN291]. See Guess v. Bethlehem Steel Corp., 913 F.3d 463 (7th Cir. 1990); Smith v. Metropolitan Sch. Dist., 128 F.3d 1014 (7th Cir. 1997), cert. denied, 118 S. Ct. 2367 (1998). See also Burlington Indus. v. Ellerth, 118 S. Ct. 2257, 2267 (1998)

("[A]n employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it.").

[FN292]. See Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992); Guardians Ass'n, 463 U.S. 582; Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981).

[FN293]. See Metropolitan Sch. Dist., 128 F.3d at 1022 (finding that while a school that knew of the harassing conduct and failed to do anything about it would be acting in an intentional manner, the "knew or should have known" standard cannot create institutional liability under Title IX as it is a standard based on negligence); Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648, 656 (5th Cir. 1997) ("Congress did not enact Title IX in order to burden federally funded educational institutions with open-ended negligence liability.").

[FN294]. 503 U.S. at 75 (citations omitted).

[FN295]. See 20 U.S.C. § 1681 (1994).

[FN296]. See 42 U.S.C. § 2000e(b) (1994).

[FN297]. See 20 U.S.C. § 1687(2)(B). Both the Seventh Circuit (Smith v. Metropolitan Sch. Dist., 128 F.3d 1014 (7th Cir. 1997)) and the Eleventh Circuit (Floyd v. Waiters, 133 F.3d 786 (11th Cir. 1998)) held that common law agency principles designated in the Title VII context do not apply to claims under Title IX since its definition of "program or activity" does not include agents of the school.

[FN298]. See Metropolitan Sch. Dist., 128 F.3d 1014.

[FN299]. Id. at 1027.

[FN300]. Williams & Brake, supra note 100, at 450.

[FN301]. Id.

[FN302]. See Kadiki v. Virginia Commonwealth Univ., 892 F. Supp. 746 (E.D. Va. 1995); Hastings v. Hancock, 842 F. Supp. 1315 (D. Kan. 1993).

[FN303]. Kadiki, 892 F. Supp. at 754.

[FN304]. North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982) (quoting United States v. Price, 383 U.S. 787, 801 (1966)). Also, the Seventh Circuit held in a student-to-student sexual harassment claim that simply because Title VII agency-based principles do not necessarily apply in Title IX cases, courts should not be precluded from using Title VII precedent when it involves holding a school directly liable under Title IX for its own failure to respond appropriately and adequately to sexual harassment of which it has actual knowledge. See Doe v. Univ. of Ill., 138 F.3d 653, 667 (7th Cir. 1998). The absence of an agency relationship between the student and the school, therefore, is irrelevant. This is so, according to the Seventh Circuit, because the school should be liable for the harassment so long as

it knew or has reason to know about the harassment and failed to take appropriate action in an attempt to prevent it from occurring. See id.

[FN305]. See RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958).

[FN306]. Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257, 2266 (1998). See also Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

[FN307]. RESTATEMENT (SECOND) OF AGENCY § 219(2) (1958).

[FN308]. See supra notes 291-93 and accompanying text.

[FN309]. RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958).

[FN310]. This is not to suggest that K-12 students should be viewed similarly to college students. As articulated earlier, in the primary and secondary school setting, students generally are minors and typically are recognized by the law as having a limited capacity for judgment especially as it relates to sexual activity. However, in the context of higher education, the enrolled students typically are young adults and are involved in different types of school settings than that found in the primary and secondary school grade level. Therefore, the liability calculus between K-12 school students and colleges students may be significantly different. One legal scholar, commenting on the damage done to students as a result of sexual harassment, noted how terribly more vulnerable younger students are to the sexual advances and conduct of their teachers than are college students. See S. H. Roth, Sex Discrimination 101: Developing a Title IX Analysis for Sexual Harassment in Education, 23 J.L. & EDUC. 459 (1994). Roth stated that "[e]lementary school- age children are taught to comply with the requests of parental authority figures, especially when they have been conditioned to believe that such figures would not do anything to harm them. These students will often not be cognitively capable of discerning the impropriety of a teacher's conduct nor capable of objecting to such conduct." Id. at 510.

[FN311]. RESTATEMENT (SECOND) OF AGENCY, § 8, cmt. c (1958). The Restatement (Second) of Agency endorses the proposition that an employer may be held liable only for a tort that is accomplished through conduct associated with the agency status. That is, "[l]iability is based upon the fact that the agent's position facilitates the consummation of the [tort], in that from the point of view of the third person the transaction seems regular on its face and the agent appears to be acting in the ordinary course of the business confided to him." Gary v. Long, 59 F.3d 1391, 1397 (D.C. Cir. 1995) (quoting RESTATEMENT (SECOND) OF AGENCY § 261 cmt. a (1958)).

[FN312]. Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648, 655 (5th Cir. 1997).

[FN313]. See RESTATEMENT (SECOND) OF AGENCY § 8 (1958).

[FN314]. See Smith v. Metropolitan Sch. Dist., 128 F.3d 1014, 1029. Of course, it may depend on the age and maturity of the student before determining whether such conduct should be viewed as outside the ordinary course of business.

[FN315]. Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).

[FN316]. See RESTATEMENT (SECOND) OF AGENCY § 219 cmt. e (1958) (noting that employer liability exists where "the servant may be able to cause harm because of his position as agent, as where a telegraph operator sends false messages purporting to come from third persons" and where the manager who operate a store "for an undisclosed principal is enabled to cheat the customers because of his position." Id.).

[FN317]. See supra notes 272-82 and accompanying text.

[FN318]. See Rosa H., 106 F.3d at 658; Metropolitan Sch. Dist., 128 F.3d at 1025.

[FN319]. Metropolitan Sch. Dist., 128 F.3d at 1028.

[FN320]. Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989, 1998 (1998).

[FN321]. 34 C.F.R. § 100.8(d) (1999).

[FN322]. Gebser, 118 S. Ct. at 1999.

[FN323]. See Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1013 (5th Cir. 1996).

[FN324]. 436 U.S. 658 (1978).

[FN325]. Id. at 692.

[FN326]. See Metropolitan Sch. Dist., 128 F.3d at 1030. See also Canutillo Indep. Sch. Dist. v. Leija, 101 F.3d 393, 400.

[FN327]. Leija, 101 F.3d at 399 (5th Cir. 1996).

[FN328]. The Fifth Circuit noted in Leija:
> Congress must be unambiguous in expressing to school[s]...the conditions it has attached to the receipt of federal funds. Nothing in the statute, however, places a school ... on notice that it will be strictly liable for its teachers' criminal acts. In fact, the conditions Congress imposed on Title IX recipients are limited to those anti-discrimination factors found in its sparse wording, there is no mention of liability standards, such as intent, actual knowledge, gross negligence, or lack of due diligence, let alone the imposition of liability without fault.

Id. at 398-99.

[FN329]. While students pay for other laws--such as the Student-Right-to- Know and Campus Security Act, Pub. L. No. 101-542 104 Stat. 2381 (codified at 20 U.S.C. § 1092 (1994)), and the Family Educational Right and Privacy Act, Pub. L. No. 93-380, 88 Stat. 571, (codified at 20 U.S.C. § 1232g (1994))-- designed to protect them through higher tuition, these laws, unlike Title IX, generally do not provide for a private cause of action. Rather, relief is limited to an express statutory means of

administrative enforcement whereby federal agencies may terminate or withhold federal funds should their requirements not be followed. See KAPLIN & LEE, supra note 15, at 795. Hence, additional costs finding their way in the budget of educational institutions are based on the need for more personnel, safety measures, and reporting requirements--not monetary damages awarded to student victims.

[FN330]. Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989, 2004 (1998) (Stevens, J., dissenting).

[FN331]. Legislative rules and regulations properly promulgated by the OCR usually are to be given great deference and weight by courts. See Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1015 (5th Cir. 1996); Martin v. Occupational Safety and Health Review Comm'n., 499 U.S. 144 (1991). However, it is not clear that the Guidance policy is either a legislative rule or regulation.

[FN332]. See Metropolitan Sch. Dist., 128 F.3d at 1033.

[FN333]. Id.

[FN334]. See supra notes 291-93 and accompanying text.

[FN335]. See generally Metropolitan Sch. Dist., 128 F.3d at 1033-34 (declining to defer to agency position because Guidance was neither a regulation nor an interpretation of a regulation).

[FN336]. Brief for Respondents at 20, Davis v. Monroe County Bd. of Educ., 74 F.3d 1186 (11th Cir. 1996) (No. 97-843). The draft Sexual Harassment Guidance was published on August 14, 1996, 61 Fed. Reg. 42,728 (Aug. 14, 1996), and included in the Brief of the United States that same week in Rowinsky v. Bryan Independent. School District, 80 F.3d 1006 (5th Cir. 1996).

[FN337]. See Brief of Respondents at 20. See also Kelly v. EPA, 15 F.3d 1100, 1108 (D.C. Cir. 1994) (finding agency's interpretation for purpose of litigation is owed no deference).

[FN338]. See Statement by U.S. Secretary of Education Richard W. Riley (July 1, 1998) <http://www.ed.gov/PressReleases/07-1998/lago.html>.

[FN339]. Id.

[FN340]. THE LAWS ON SEXUAL HARASSMENT § 331 (1998).

[FN341]. 463 U.S. 582 (1983).

[FN342]. See id. at 602-03.

[FN343]. Wright v. Mason City Community Sch. Dist., 940 F. Supp. 1412, 1419 (N.D. Iowa 1996). See generally, Oona R.S. v. Santa Rosa City Schs., 890 F. Supp. 1452

(N.D. Calif. 1995); Bosley v. Kearney R-1 Sch. Dist., 904 F. Supp. 1006 (W.D. Mo. 1995); R. L. R. v. Prague Pub. Sch. Dist., 838 F. Supp. 1526 (W.D. Okla. 1994).

[FN344]. Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 74 (1986).

[FN345]. Doe v. University of Ill., 138 F.3d 653, 668 (7th Cir. 1998).

[FN346]. Id. While such a requirement is simply unworkable and impracticable for certain students at the primary and secondary grade school level because of their lack of intellectual and emotional maturity, this requirement should not prove to be overly burdensome to students of college age.

[FN347]. See Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989, 2004 (Stevens, J., dissenting) (noting that "[a]s long as schools .... can insulate themselves from knowledge about this sort of conduct, they can claim immunity from damage liability.").

[FN348]. See Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72-73 (1986).

[FN349]. See Gebser, 118 S. Ct. at 2000.

[FN350]. See Crawford v. Davis, 109 F.3d 1281, 1284 (8th Cir. 1997) (holding that § 1983 was an additional avenue by which a plaintiff could seek redress for violations of Title IX).

[FN351]. See e.g., S.B.L. v. Evans, 80 F.3d 307 (8th Cir. 1996) (superintendent of school district was not entitled to immunity from state law claim of negligent hiring as a result of school employing a teacher who was later convicted of sexually assaulting two of his students); Harrington v. Louisiana St. Bd. of Elementary and Secondary Educ., 714 So.2d845 (La. Ct. App., 1998) (community college was found to have negligently hired a convicted felon to administer its culinary arts program and ordered to pay damages to a female student after student was raped by the felon); Doe v. Antioch Unified Sch. Dist., No. C94-01307 (Contra Costa County Sup. Ct., Oct. 1996) (California jury awarded female student $500,000 after finding that school district breached its duty of care to the student by failing to protect her from repeated harassment consisting of obscene and sexually abusive names, and threats of abuse).

[FN352]. See supra notes 24, 117, 251-52 and accompanying text.

[FN353]. Gary Pavela, Sexual Harassment: Law and Policy Issues in 1999, SYNFAX WEEKLY REPORT, Feb 15, 1998, at 817.

[FN354]. An actual knowledge standard does not necessarily mean that Title VII principles and case law should never be used as guidance or to enlighten both colleges and courts as to how best to determine whether certain behavior rises to the level of sexual harassment. It is clearly helpful and prudent "to look to Title VII to determine whether the alleged sexual harassment is severe and pervasive enough to constitute illegal discrimination on the basis of sex for purposes of Title IX." Smith v. Metropolitan Sch. Dist., 128 F.3d 1014, 1023 (7th Cir. 1997).

[FN355]. But see, Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 792 (1998) (implying that employer's liability for Title VII sexual harassment should not be based on "quid pro quo" and "hostile work environment" labels). Decisions subsequent to Gebser have concluded that the Court's actual knowledge standard includes both quid pro quo sexual harassment and hostile environment sexual harassment. See also Burtner v. Hiram College, 9 F. Supp. 2d 852 (N.D. Ohio 1998) (holding that student could not show that school had actual knowledge of quid pro quo or hostile environment sexual harassment); X. v. Fremont County Sch. Dist., No. 96-8065, 1998 U.S. App. LEXIS 24587 (10th Cir. Oct. 2, 1998) (holding that quid pro quo and hostile environment allegations need not be addressed as student did not claim actual knowledge); Klemensic v. Ohio St. Univ., 10 F. Supp. 2d 911 (S.D. Ohio 1998) (finding that student failed to present evidence sufficient to raise a genuine issue of material fact as to her allegation of quid pro quo sexual harassment under Gebser's actual notice and deliberate indifference standard).

[FN356]. Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989, 1999 (1998).

[FN357]. Like Gebser, absent from Davis is specific language about who within the school has the responsibility to take action once knowledge is obtained that student-to-student sexual harassment may have occurred.

[FN358]. Sexual Harassment Guidance, supra note 10, at 12,042.

[FN359]. Id. at 12,050.

[FN360]. Smith v. Metropolitan Sch. Dist., 128 F.3d 1014, 1034 (7th Cir. 1997).

[FN361]. Id.

[FN362]. Canutillo Indep. Sch. Dist. v. Leija, 101 F.3d 393, 402 (5th Cir. 1996).

[FN363]. See id.

[FN364]. See Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648 (5th Cir. 1997). See also Adusumilli v. Illinois Inst. of Tech., No. 97C8507, 1998 U.S. Dist. LEXIS 14413, *8 (N.D. Ill. Sept. 9, 1998) (noting that the professor of a graduate program was not a school official with authority to take corrective action to end the alleged harassment).

[FN365]. See Adusumilli v. Illinois Inst. of Tech., No. 97C8507, 1998 U.S. Dist. LEXIS 14413, *8-9 (N.D. Ill. Sept. 8, 1998).

[FN366]. See Liu v. Striuli 36 F.Supp.2d 452 (D.R.I. 1999).

[FN367]. See id. at 466.

[FN368]. Id.

[FN369]. See id. at 466-67.

[FN370]. See Burtner v. Hiram College, 9 F. Supp. 2d 852 (N.D. Ohio 1998).

[FN371]. See Morse v. University of Colo., 154 F.3d 1124 (10th Cir. 1998).

[FN372]. Adusumilli, 1998 U.S. Dist. LEXIS 14413 at *8.

[FN373]. See supra notes 343-349 and accompanying text. Simply put, the more democratic and accessible the college makes itself, in terms of receiving and handling Title IX complaints, the more likely "that it could lead to unnecessary institutional liability when complaints are mishandled or ignored." Alger, supra note 41, at 39.

[FN374]. Rosa H., 106 F.3d at 662.

[FN375]. For example, knowledge by an affirmative action officer as to a complaint of sexual harassment against any university employee likely would be equivalent to the institution having knowledge.

[FN376]. For example, a student informing a department chair that an instructor within the chair's department is harassing a student or a head coach's knowledge that his assistant coach sexually molested a student-athlete, would be sufficient under Gebser for a finding that actual knowledge is possessed by someone with the power and authority to take action to correct the harassing behavior.

[FN377]. For example, a member of a board of trustees, the president, and most likely even a vice-president, who has knowledge of sexually harassing behavior of an employee would generally qualify as the university itself having knowledge.

[FN378]. See supra notes 326-29 and accompanying text.

[FN379]. See Canutillo Indep. Sch. Dist. v. Leija, 101 F.3d 393 (5th Cir. 1996).

[FN380]. See also Doe v. University of Ill., 138 F.3d 679 (Coffey, J., concurring).

[FN381]. Board of County Comm'rs of Bryan County v. Brown, 520 U.S. 397, 411 (1997).

[FN382]. See Rosa H., 106 F.3d at 659.

[FN383]. See, e.g., Rowe v. General Motors, 457 F.2d 348, 359 (5th Cir. 1972); Schaeffer v. San Diego Yellow Cabs, 462 F.2d 1002, 1006 (9th Cir. 1972).

[FN384]. See City of Canton v. Harris, 489 U.S. 378, 389 (1989) (a conscious disregard for the consequences of an employee's actions might be established to trigger municipality liability, if a municipality continued to adhere to a

particular approach or program that it knew or should have known failed to prevent tortious conduct by its employees). The Supreme Court, though, has not foreclosed the possibility that evidence of a single instance of wrongdoing could trigger § 1983 municipality liability under the deliberate indifference standard. See also Brown, 520 U.S. 397. In this case, the Court did not decide whether one instance of inadequate screening of an applicant's record could ever trigger municipality liability.

[FN385]. 520 U.S. 397, 419 (Souter, J., dissenting).

[FN386]. See, e.g., J.I. Case Credit v. First Nat. Bank of Madison City., 991 F.2d 1272, 1278 (7th Cir. 1993) (finding conscious or deliberate ignorance is of such recklessness, it is commonly substituted for intent or actual knowledge); MODEL PENAL CODE § 2.02(2)(c) (1985) (noting that "[a] person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from the conduct.").

[FN387]. 520 U.S. 397, 419 (Souter, J., dissenting).

[FN388]. See Board of County Comm'rs of Bryan County v. Brown, 520 U.S. 397, 410 (1997).

[FN389]. Gebser, 118 S. Ct. 1989, 2000 (1998).

[FN390]. 34 C.F.R. § 106.8(b) (1997).

[FN391]. Gebser, 118 S. Ct. at 2000. But cf. Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986) (holding that an employer without procedures for receiving sexual harassment complaints cannot assert a lack of knowledge as a defense to a sexual harassment suit by and employee); Doe v. University of Ill., 138 F.3d 653, 671 (7th Cir. 1998) (Coffey, J., concurring) (explaining that it is well-settled law that discriminatory intent can be shown when an entity departs from established policies and practices and concluding that since Title IX regulations require institutions to adopt and publish grievance procedures, "it in all probability would not be difficult for a trier of fact to determine whether school officials had 'departed from established practices,' and, resultingly, intentionally discriminated against a particular plaintiff, in violation of Title IX." Id. at 671 n.8. See also Linson v. University of Penn., No. 95-3681, 1996 U.S. Dist. LEXIS 12243, at *2 (E.D. Pa. Aug. 21, 1996) (noting school's failure to take appropriate action to end the harassment, could be circumstantial evidence of intent to discriminate); Wellman v. Faulkner, 715 F.2d 269, 272 (7th Cir. 1983) (noting pattern of negligent responses to complaints of misconduct can be evidence "deliberate indifference").

[FN392]. See Chontos v. Rhea 29 F. Supp. 2d 931, 937 (N.D. Ind. 1998).

[FN393]. Id.

[FN394]. See id.

[FN395]. See id.

[FN396]. See Ericson v. Syracuse Univ., 35 F. Supp. 2d 326 (S.D.N.Y. 1999).

[FN397]. Id. at 328.

[FN398]. See Burtner v. Hiram College, 9 F. Supp. 2d 852 (N.D. Ohio 1998). See also Frye v. Board of Educ., No. 98-1445, 1999 U.S. App. LEXIS 759, at *5 (4th Cir. Jan. 21, 1999) (finding school responded adequately to student's complaint when it compiled information necessary to complete an investigation, school officials met with legal counsel to determine legal options, student was removed from teacher's classroom, and teacher was placed on behavior modification program); Adusumilli v. Illinois Inst. of Tech., No. 97-C8507, 1998 U.S. Dist. LEXIS 14413, *11 (finding that the school cannot be considered to have acted with deliberate indifference to an isolated incident of sexual harassment that, once the school had actual knowledge of it, never occurred again).

[FN399]. Klemensic v. Ohio St. Univ., 10 F. Supp. 2d 911 (S.D. Ohio 1998).

[FN400]. 119 S. Ct. 1661 (1999).

[FN401]. Id. at 1677 (citations omitted) (noting that a school's actions must be "clearly unreasonable" to rise to deliberate indifference).

[FN402]. Id at 1673.

[FN403]. Id. at 1674. See also Doe v. University of Ill., 138 F.3d 653, 667-68 (7th Cir. 1998) (noting that "[a]s long as the responsive strategy chosen is one plausibly directed toward putting an end to the known harassment, courts should not second-guess the professional judgments of school officials. In general terms, it should be enough to avoid Title IX liability if school officials investigate aggressively all complaints of sexual harassment and respond consistently and meaningfully when those complaints are found to have merit.").

[FN404]. Id. at 671.

[FN405]. See Klemensic, 10 F. Supp. 2d at 919-20 (finding university not deliberately indifferent for failing to capitulate plaintiff's demands which required more than what the court believed was necessary to remedy the sexual harassment); Blankenship v. Parke Care Centers., Inc., 123 F.3d 868, 873 (6th Cir. 1997) (regarding employer's duty to remedy Title VII harassment, court found it will be liable only if remedy exhibits such indifference as to indicate an attitude of permissiveness and lack of good faith).

[FN406]. Blankenship, 123 F.3d 868.

[FN407]. Doe v. University of Ill., 138 F.3d at 680 (Posner, J., dissenting from denial en banc).

[FN408]. Id.

[FN409]. Id.

[FN410]. Smith v. Metropolitan Sch. Dist., 128 F.3d 1014,1041 (7th Cir. 1997).

[FN411]. See Alger, supra note 41 at 38.

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