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Silence Broken: *Gebser*’s New Standard of School Liability for Title IX Sexual Harassment

BY CALLIE R. OWEN*

INTRODUCTION

The issue of sexual harassment is at the forefront of our national consciousness, reaching from the White House to the water cooler, from the halls of Congress to the halls of America’s schools and universities. In particular, sexual harassment in educational settings presents unique problems, such as the issue of institutional liability for the misconduct of teachers and students. Last Term, the United States Supreme Court handed down a landmark decision in *Gebser v. Lago Vista Independent School District*,¹ in which the Court declared that a school district could not be liable in damages for a teacher’s sexual harassment of a student under Title IX of the Education Amendments of 1972² unless a school official had actual notice of the harassment and responded with “deliberate indifference.”³ This high standard has provoked much criticism, as well as speculation as to its implications for the issue of school liability where a student sexually harasses another student, which is currently under consideration by the high Court.⁴

This Note will discuss the precursors and components of the *Gebser* case, as well as its applicability to student-student sexual harassment. Part I will review Supreme Court precedent on Title IX sexual harassment leading up to the Court’s decision in *Gebser* and survey the parameters of the debate over the standard of school liability as presented in various

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* J.D. expected 2000, University of Kentucky.
3 *Gebser*, 118 S. Ct. at 1999.

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appellate decisions prior to the Court’s decision. Part II provides an explication of *Gebser*, including both the majority and dissenting opinions. Part III examines the impact of the *Gebser* decision, both in its legal context and in the larger societal context. Finally, Part IV looks toward the immediate future with *Gebser*’s implications for student-student sexual harassment litigation under Title IX.

I. PRE-*GEBSER* TREATMENT OF SCHOOL LIABILITY FOR SEXUAL HARASSMENT: A BRIEF HISTORY

*Alexander v. Yale University* and *Moiré v. Temple University School of Medicine* were two inaugural cases in sexual harassment litigation under Title IX. *Alexander*, which involved a university student’s allegation that she suffered academically for rebuffing a professor’s sexual advances, broke new ground with the recognition “that ‘academic advancement conditioned upon submission to sexual demands constitutes sexual discrimination in education’” violating Title IX. *Moiré* involved sexual harassment in the context of a medical school and is cited for the court’s recognition that hostile environment claims of sexual harassment may be brought under Title IX. Thus, these cases established the status of sexual harassment as a form of sexual discrimination and provided the theoretical underpinnings for the modern Title IX sexual harassment suit; the practical features would soon follow.

The Supreme Court articulated the issue in *Gebser* by referencing two other important precedents concerning sexual harassment under Title IX: *Cannon v. University of Chicago* and *Franklin v. Gwinnett County Public*
Sexual harassment in Schools. The Gebser majority cited Cannon as establishing the enforceability of Title IX through an implied right of action and declined to elaborate further. Nevertheless, it is useful to review this seminal case in beginning an analysis of Title IX litigation.

Title IX provides generally 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." The Cannon Court identified two primary purposes of this legislation: "First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices." In Cannon, a woman was refused admission to two private medical schools, both of which were recipients of federal funds, because she was female. The district court and the court of appeals dismissed the case because no private right of action was explicitly provided for in Title IX, and these courts concluded that none was implied. The Supreme Court reversed, reasoning that "[n]ot only the words and history of Title IX, but also its subject matter and underlying purposes, counsel implication of a cause of action in favor of private victims of discrimination."

In Gebser, the Supreme Court cited Franklin for the proposition that damages can be recovered in an implied private right of action under Title IX. In Franklin, a high school student sued the school district on the basis of sexual harassment committed against her by a teacher, conduct of which school officials were aware, but did nothing about. The lower courts dismissed the complaint on the ground that no damage award was made available under Title IX. The Supreme Court reversed, relying on its...
traditional power to order "any appropriate relief" where a cause of action exists under a federal statute. The Court also cited the post-*Cannon* passage of two amendments to Title IX that imposed no limitation on available remedies to find the recovery of damages appropriate in a case such as Franklin's where intentional discrimination is alleged under Title IX.

*Franklin* was immediately heralded as a landmark decision in sexual harassment litigation under Title IX. Enthusiasts proclaimed that "[f]or the first time, victims of sex discrimination in education will be compensated for their losses" and that the Court's decision "provided the powerful deterrent of monetary liability to encourage educational institutions to address sex discrimination more effectively." It was even boldly predicted that "[o]ver the long-term, ... the incentives and deterrents encompassed in *Franklin* promise a significant change in the treatment of women in education without the necessity of resorting to the adversarial process." It soon became apparent, however, that *Franklin* lacked the requisite clarity to effect such momentous change. By 1997, it was recognized that "[i]n spite of *Franklin*'s rather straightforward holding, the Court's failure to address several major issues in the area of sexual harassment in education has created much confusion in the lower courts." Specifically, the standard of liability for educational institutions was in need of definition; one author enumerated the unresolved issues of *Franklin* as such:

For instance: the Court does not address the specific standard of liability to which a receiving entity will be held for intentional violations of Title IX; the Court does not address whether the entity may avoid liability if it demonstrates efforts to prevent the sexual harassment; nor does the Court address whether the receiving entity must have knowledge of the intentional violations in order to be held liable.

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27 Id. at 70-71.
28 See id. at 72-73.
29 See id. at 76.
31 Id. at 374.
33 Henry Seiji Newman, Note, The University's Liability for Professor-Student Sexual Harassment Under Title IX, 66 FORDHAM L. REV. 2559, 2571 n.83 (1998) (citing Canutillo Indep. Sch. Dist. v. Leija, 101 F.3d 393, 400 (5th Cir. 1996)).
Although Franklin has been regarded as a watershed case that "opened the floodgates" to Title IX sexual harassment suits,\(^{34}\) the majority in Gebser readily acknowledged that Franklin did not "define the contours" of institutional liability, particularly where the discrimination alleged was unintentional.\(^{35}\) The Court alluded to "varying approaches" among the circuits, providing a list of illustrative cases, but did not discuss them beyond a brief review of the Fifth Circuit's reasoning in dismissing Gebser's claims.\(^{36}\) These lower court cases, however, are instructive in framing the debate over the Title IX standard of liability.

For example, in Kracunas v. Iona College,\(^{37}\) the Second Circuit articulated a very different standard from that ultimately adopted in Gebser. The case involved two university students who had been separately subjected to sexual harassment by the same English professor during class-related meetings with him in his office.\(^{38}\) Both students notified the college's dean of students regarding the incidents, but neither felt that the college's response was satisfactory. Consequently, each student brought suit against the school.\(^{39}\) Relying upon an earlier case\(^{40}\) holding that the Title IX standard for institutional liability in sexual harassment cases should utilize agency principles and constructive knowledge concepts as they are applied in the context of Title VII of the Civil Rights Act of 1964,\(^{41}\) the Second Circuit declared:

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\text{[I]f a professor has a supervisory relationship over a student, and the professor capitalizes upon that supervisory relationship to further the harassment of the student, the college is liable for the professor's conduct. If a professor does not rely upon his actual or apparent authority to carry out the harassment, the college will be liable only if it provided no reasonable avenue for complaint or if it knew, or in the exercise of reasonable care should have known, about the harassment yet failed to take appropriate remedial action.}^{42}\]

\(^{34}\) Clark, \textit{supra} note 11, at 358.
\(^{36}\) \textit{Id.} at 1994.
\(^{37}\) Kracunas v. Iona College, 119 F.3d 80 (2d Cir. 1997).
\(^{38}\) \textit{See id.} at 82-83.
\(^{39}\) \textit{See id.} at 85.
\(^{41}\) \textit{See Kracunas}, 119 F.3d at 86.
\(^{42}\) \textit{Id.} at 88.
Applying this standard, the court found sufficient evidence to justify vacating the district court's grant of summary judgment to Iona. 43

Doe v. Claiborne County44 involved a Title IX claim against a school board brought by a high school student who had been sexually abused by the school's baseball coach. 45 The Sixth Circuit held that Title VII constructs, including agency principles, apply equally to sexual harassment claims under Title IX. 46 The court supported this ruling by noting the well-developed status of sexual harassment principles in the context of Title VII and asserting that their application to Title IX "implicitly received the Supreme Court's approval in Franklin,"47 in which the Court cited the Title VII case Meritor Savings Bank, FSB v. Vinson. 48 In addition, the Claiborne County court justified its use of Title VII principles with the legislative history and regulations of Title IX, 49 as well as with a similar stance adopted by the relevant enforcing agency, the Office for Civil Rights ("OCR"). 50 The court reversed the lower court's dismissal of the student's Title IX claim.

In Kinman v. Omaha Public School District, 51 the Eighth Circuit considered a Title IX sexual harassment claim brought by a high school student who had engaged in a homosexual relationship with her English teacher. 53 The court of appeals relied on its own case law as well as its perception of the Supreme Court's reliance on Title VII in Franklin to "apply Title VII standards of institutional liability to hostile environment sexual harassment cases involving a teacher's harassment of a student."54

43 See id. at 91.
44 Doe v. Claiborne County, 103 F.3d 495 (6th Cir. 1996).
45 See id. at 500-01.
46 See id. at 515.
47 Id. at 514.
48 Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986), cited in Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 75 (1992). The Franklin Court found that "[u]nquestionably, 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.'" Franklin, 503 U.S. at 75 (quoting Meritor, 477 U.S. at 64).
49 See Doe v. Claiborne County, 103 F.3d at 514 (citing 1972 U.S.C.C.A.N. 2462, 2512; 34 C.F.R. § 106.2(h) (1980)).
50 See id.
51 See id. at 516.
53 See id. at 465.
54 Id. at 469.
Moreover, the court held "that the 'knew or should have known' standard is the appropriate standard to apply in a case such as this one." The court reversed the lower court's grant of summary judgment to the school district.

Since Gebser came to the Supreme Court from the Fifth Circuit Court of Appeals, the Gebser opinion briefly referenced the Fifth Circuit's reliance on its own case law in affirming the district court's grant of summary judgment to Lago Vista. In particular, the Fifth Circuit's opinion in Rosa H. v. San Elizario Independent School District presents the opposing arguments to the more liberal standards of school district liability under Title IX articulated in cases such as Kracunas v. Iona College, Doe v. Claiborne County, and Kinman v. Omaha Public School District. In Rosa H., the mother of a high school student brought an action against the school district under Title IX, alleging sexual harassment in the form of her daughter's sexual involvement with the school's karate instructor. Unlike the cases previously discussed, the Fifth Circuit adopted an actual notice standard for institutional liability in sexual harassment cases under Title IX. The court required actual knowledge "that the students faced a substantial threat of sexual harassment" by "a school official who . . . was invested by the school board with the duty to supervise the employee and the power to take action," but then failed to take such action as necessary "to alleviate that danger."

In so ruling, the Rosa H. court separated and addressed the arguments that (1) agency principles or (2) Title VII constructs should apply in the Title IX context, ultimately rejecting both. In refusing to apply agency principles, the court focused on the enactment of Title IX pursuant to the Spending Clause of the United States Constitution, a fact which "militates

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55 Id.
56 See id.
60 See supra notes 37-56 and accompanying text.
61 See Rosa H., 106 F.3d at 650-51.
62 Id. at 659.
63 Id. at 660.
64 Id. at 659.
65 See id. at 654-58.
against the imposition of agency principles" because the institutions receiving federal funds would be unaware of their potential liability in damages. The court reasoned that "[w]hen the school board accepted federal funds, it agreed not to discriminate on the basis of sex. We think it unlikely that it further agreed to suffer liability whenever its employees discriminate on the basis of sex." The majority also noted that unlike Title VII, the language of Title IX makes no mention of agency principles. In combatting the applicability of Title VII and its concept of constructive notice, the court took issue with the idea that Franklin prescribed the crossover between the two statutes, asserting that:

*Franklin*'s single citation to *Meritor Savings* to support the Court's conclusion that sexual harassment is sex discrimination does not by itself justify the importation of other aspects of Title VII law into the Title IX context. We can find nothing in *Franklin* to support the trial court's theory that Title IX can make school districts liable for monetary damages when the district itself engages in no intentional discrimination.

Moreover, the court disapproved of the constructive notice standard, stating that "importing this aspect of Title VII law stretches Title IX beyond its language and purpose. Congress did not enact Title IX in order to burden federally funded educational institutions with open-ended negligence liability." Using the newly articulated actual notice standard, the majority reversed and remanded the district court's decision in favor of the plaintiff.

*Smith v. Metropolitan School District Perry Township,* a Seventh Circuit Court of Appeals case, dealt with a Title IX sexual harassment claim brought by a former high school student who had carried on a sexual affair with a teacher during her senior year. The court considered the issue of a school district's liability for sexual harassment under Title IX and wrote a detailed opinion that closely tracked the reasoning of the Fifth Circuit in *Rosa H.* This endorsement was clarified in the court's holding:

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67 *Rosa H.*, 106 F.3d at 654.
68 *Id.*
69 *See id.*
70 *Id.* at 656.
71 *Id.*
72 *See id.* at 661.
74 *See id.* at 1016-17.
We find Rosa H. persuasive and today join the Fifth Circuit in holding that under Title IX, a school district is liable for teacher-student sexual harassment "only if a school official who had 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."\(^{75}\)

Having echoed the Rosa H. actual notice standard, the court reversed the district court's denial of summary judgment to the defendant school district and school board.\(^{76}\)

Thus, the certainty and celebration which Franklin had temporarily provided vanished quickly with this ever-widening split among the circuits. Questions concerning the proper standard for institutional liability as well as the applicability of Title VII and agency principles to Title IX became divisive. To put an end to the controversy, the Supreme Court granted certiorari to consider the Fifth Circuit's decision in Doe v. Lago Vista Independent School District.\(^{77}\)

II. AN EXPLICATION OF GEBSER

The parameters of the debate thus established, the Supreme Court directly addressed the issue of institutional liability for sexual harassment in Gebser v. Lago Vista Independent School District.\(^{78}\) This case involved a suit for monetary damages against a school district for a teacher's sexual harassment of a student. The Court outlined the pertinent facts of the case as follows: Frank Waldrop, a high school teacher in the Lago Vista Independent School District, began a sexual relationship with his ninth-grade student, Alida Gebser, in the spring of 1992.\(^{79}\) This relationship, which lasted almost a year, included sexual intercourse that occurred "during class time, although never on school property."\(^{80}\) School officials had no notice of Waldrop's relationship with Gebser until the two were caught engaging in sexual intercourse by the police and Waldrop was

\(^{75}\) Id. at 1034 (quoting Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648, 660 (5th Cir. 1997)).

\(^{76}\) See id.


\(^{79}\) See id. at 1993.

\(^{80}\) Id.
arrested. He was later terminated from his teaching position at Lago Vista, and his teaching license was revoked. In addition, "the district had not promulgated or distributed an official grievance procedure for lodging sexual harassment complaints; nor had it issued a formal anti-harassment policy."

Since Gebser sought damages (compensatory and punitive) from Lago Vista, the Court framed the issue in terms of "when a school district may be held liable in damages in an implied right of action under Title IX of the Education Amendments of 1972, 86 Stat. 373, as amended, 20 U.S.C. § 1681 et seq. (Title IX), for the sexual harassment of a student by one of the district's teachers." The district court granted summary judgment to Lago Vista on the grounds that school officials had no notice of the sexual harassment, and the Court of Appeals for the Fifth Circuit affirmed.

The Supreme Court affirmed, holding that "damages may not be recovered in those circumstances unless an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct." Justice O'Connor, writing for the majority, began the discussion in Part II of the opinion with reference to Franklin v. Gwinnett County Public Schools, which allowed for monetary liability of a school district in cases of teacher-student sexual harassment but "did not purport to define the contours of that liability." The Court dismissed Gebser's reliance on the indication in Franklin that Title VII constructs of vicarious liability and constructive notice are appropriate in the Title IX context by pointing out that unlike Title VII, the Title IX "private right of action is judicially implied and there is thus no legislative expression of the scope of available remedies, including when it is appropriate to award monetary damages." Using the uncertainty resulting from the implied nature of the Title IX right

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81 See id.
82 Id.
83 Id.
84 See id. at 1993-94.
85 Id. at 1993.
87 Gebser, 118 S. Ct. at 1995.
89 Gebser, 118 S. Ct. at 1996 (citation omitted).
of action, combined with the fact that Franklin was not controlling, the majority noted in Part III its wide “measure of latitude to shape a sensible remedial scheme that best comports with the statute.”

The Court then distinguished the contractual nature of Title IX, whereby an entity promises not to discriminate as a condition of receiving federal funds, from the “outright prohibition” of discrimination which characterizes Title VII, concluding that where a recipient had no notice of the discrimination, Congress did not intend to impose monetary liability. In addition, the majority emphasized the importance of the language in the statute itself requiring agencies that distribute federal funding to notify “the appropriate person or persons” in an educational institution and allow for “voluntary compliance” before proceeding against the institution to exact compliance. Reasoning that this “express remedial scheme” should provide a template for the implied remedy, the Court articulated the appropriate standard in Part IV of the opinion: to recover monetary damages against an educational institution under Title IX, an official with “authority to address the alleged discrimination and to institute corrective measures on the recipient’s behalf” must have actual knowledge of the discrimination and respond with “deliberate indifference.”

Applying this standard, the Court readily dismissed Gebser's claims against Lago Vista, finding that school officials did not have sufficient notice of the sexual relationship between Gebser and Waldrop to hold the district liable.

Four Justices dissented, with Stevens and Ginsburg writing separate opinions. Joined by Justices Souter, Ginsburg, and Breyer, Justice Stevens took issue in his dissent with what he perceived as the majority’s lack of judicial restraint in articulating the Title IX standard as well as with the Court’s policy arguments. He revisited the Court’s holding in Cannon that a private right of action for sexual harassment under Title IX is implied, pointing out that “[a]s long as the intent of Congress is clear, an implicit command has the same legal force as one that is explicit.”

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90 Id.
91 Id. at 1997.
92 See id. at 1998.
93 Id. (citing 20 U.S.C. § 1682).
94 Id. at 1999.
95 See id. at 1999-2000.
96 See id. at 2000-01 (Stevens, J., dissenting).
98 Gebser, 118 S. Ct. at 2001 (Stevens, J., dissenting).
Stevens also reviewed Franklin’s ruling that monetary damages are available in such a cause of action, premised on the finding that Congress intended no restriction on the remedies available.\(^9\) He then asserted that:

Because these constructions of the statute have been accepted by Congress and are unchallenged here, they have the same legal effect as if the private cause of action seeking damages had been explicitly, rather than implicitly, authorized by Congress. We should therefore seek guidance from the text of the statute and settled legal principles rather than from our views about sound policy.\(^{10}\)

In the second part of his dissent, Justice Stevens advocated the use of agency principles in the Title IX context, supported by the similar stance taken in the OCR’s policy “Guidance.”\(^{101}\) He reasoned that the common law’s reliance on these principles of liability served the purposes of Title IX in giving school boards a reason to be aware of and guard against sexual harassment in their institutions; in contrast, he argued, the majority’s new standard “creates the opposite incentive. As long as school boards can insulate themselves from knowledge about this sort of conduct, they can claim immunity from damages liability.”\(^{102}\)

Part II of Stevens’s argument focused on his reading of the necessary implications of the majority opinion—that Franklin was effectively overruled because the “exceedingly high standard” endorsed by the Court would make the recovery of damages in Title IX actions against a school district virtually impossible.\(^{103}\) Finally, Justice Stevens criticized the majority’s choice of policy in allocating the risk of sexual harassment (which he perceived as being placed on the students rather than the school district), with the declaration that:

As a matter of policy, the Court ranks protection of the school district’s purse above the protection of immature high school students that those [agency] rules would provide. Because those students are members of the class for whose special benefit Congress enacted Title IX, that policy choice is not faithful to the intent of the policymaking branch of our Government.\(^{104}\)

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\(^9\) See id. at 2001-02 (Stevens, J., dissenting).

\(^{10}\) Id. at 2002 (Stevens, J., dissenting).

\(^{101}\) See id. at 2004 (Stevens, J., dissenting).

\(^{102}\) Id. (Stevens, J., dissenting).

\(^{103}\) Id. at 2006 (Stevens, J., dissenting).

\(^{104}\) Id. at 2007 (Stevens, J., dissenting).
Justice Ginsburg’s dissent was decidedly more narrow than Justice Stevens’s. She elected to emphasize a question which Stevens had presented but did not decide—whether a school district’s enactment of well-articulated policies and procedures designed to deal with sexual harassment could provide it with an affirmative defense to a Title IX claim. Ginsburg stated her willingness to allow such a defense, provided that the district’s “internal remedies were adequately publicized and likely would have provided redress without exposing the complainant to undue risk, effort, or expense.” A measure such as this, she reasoned, would enable a school district to avoid liability where such procedures were in place, but the complaining party “unreasonably” refused to take advantage of them.

III. IMPACT: THE AFTERMATH OF GEBSER

That the Court’s ruling in Gebser v. Lago Vista would elicit a response from the legal community was inevitable; a bit more surprising, however, is the reaction to it from society at large—a reaction which has been mostly critical. The day after the decision was handed down, the Washington Post reported:

The 5-to-4 decision . . . raises a high hurdle for anyone trying to hold school districts responsible under federal education law for abuse that occurs on their watch. Some women’s rights advocates asserted that without such liability, schools have little incentive to uncover and prevent the sexually crude talk and touching that many students endure.

The issue made the cover of U.S. News & World Report, which interviewed Marcia Greenberger, co-president of the National Women’s Law Center, who echoed this criticism of Gebser by commenting, “There’s less responsibility for a teacher who harasses a student than a teacher who harasses another employee,” and indicated that her organization intended to seek congressional action to remedy the situation. The Boston Globe

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105 See id. (Ginsburg, J., dissenting).
106 Id. (Ginsburg, J., dissenting).
107 See id. (Ginsburg, J., dissenting).
reported *Gebser* as “signaling that a majority of the justices would like to start changing the punitive climate that pervades sexual-harassment law”\(^{110}\) and cited Boston's executive director of the Title IX Advocacy Project, Victoria Alzapiedi, for the prediction that

the ruling will have a chilling effect on the reporting and follow-up of sexual harassment incidents in middle schools and high schools. "If students have to let school administrators, as opposed to teachers or counselors, know about harassment, they will fear the implications for themselves and the stigma among their peers," said Alzapiedi, whose nonprofit group works with adolescents on Title IX issues. "The backlash—subtle or blatant—will be a major disincentive to report a hostile sexual environment."\(^{111}\)

In addition, the *Washington Post* reported a week after the ruling that civil rights advocates were also critical of the new standard, commenting that "it defied common sense for the court to set tougher standards to protect adults against sexual harassment while refusing to safeguard harassed students in the same way."\(^{112}\)

Reactions within the legal community were also critical of the *Gebser* ruling, although they tended to vary in degree. Margo L. Ely, writing an article entitled "Bare Majority Strips Students of Sex-Harassment Shield" for the *Chicago Daily Law Bulletin* on August 10, 1998, exclaimed:

>This holding is similar to the burden imposed upon a prisoner in bringing a civil rights action for mistreatment while incarcerated. While many students would probably attest that they feel more like prisoners than employees, the American people should be outraged. And Congress should spend some time, and attention, on this very important issue."\(^{113}\)

Marcia Coyle, a staff reporter for the *National Law Journal*, characterized the decision as "one major setback in the term for victims of alleged sexual harassment" and quoted Charles Craver of the George Washington


\(^{111}\) *Id.*


University National Law Center as saying, "'[w]hat this does is reward school districts who refuse to have meaningful anti-harassment policies for students. . . . In fact, if I were a lawyer, I'd be hard-pressed to tell the district to have a policy. I'm amazed they rewarded ignorance here.'"\textsuperscript{114}

Other commentators, however, took a more moderate approach to the ruling, focusing instead on its immediate implications for Title IX litigation. Deborah I. Volberg, writing for the \textit{New York Law Journal}, viewed Gebser's impact this way:

Unquestionably, this decision has rendered Title IX sexual harassment cases more difficult to pursue for plaintiffs. It does not mean that cases cannot and will not be brought; the Court itself acknowledged that sexual harassment of students is all too common. However, plaintiff clients must be apprised as early as possible that, if they are being subjected to harassing treatment, they must give actual notice to the appropriate person at that institution.\textsuperscript{115}

\textit{Gebser} was also not without its supporters; the \textit{Boston Globe} quoted Anne Bryant, the executive director of the school boards association, as saying that the decision "‘reinforces the importance of preventive action, and in no way lets any school administrator off the hook.’"\textsuperscript{116} The paper also noted the school district’s side of the story, quoting Lago Vista’s attorney Wallace Jefferson: "‘Most school districts would be financially devastated by jury verdicts holding them liable for sexual harassment, which they could not have prevented.’"\textsuperscript{117}

Regardless of public opinion, new case law is emerging which unflinchingly adheres to \textit{Gebser}. Morse v. Regents of the University of Colorado,\textsuperscript{118} a Tenth Circuit Court of Appeals case decided nearly two months after \textit{Gebser}, considered a hostile environment sexual harassment claim brought under Title IX against a university by two female students in the university’s ROTC program.\textsuperscript{119} The court credited \textit{Gebser} with having clarified Title IX law and proceeded to apply the \textit{Gebser} actual

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\textsuperscript{116} Leonard, \textit{supra} note 110, at A6 (quoting Anne Bryant).
\textsuperscript{117} Id. (quoting Wallace Jefferson).
\textsuperscript{118} Morse v. Regents of Univ. of Colo., 154 F.3d 1124 (10th Cir. 1998).
\textsuperscript{119} See id. at 1126.
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The court used this standard to reverse the district court's dismissal of the plaintiffs' claims, finding that the pleadings properly stated a claim under Title IX by alleging that:

[T]he ROTC program was a program offered by (therefore presumably controlled by) the University ... [and] the fellow student who harassed Plaintiff Morse was a superior cadet in the ROTC program. It is reasonable to infer that because the student was a superior cadet he exercised some measure of authority over Plaintiff Morse. Plaintiffs also allege that the sexually hostile environment created by the fellow student was exacerbated and perpetuated by the acts of an ROTC instructor. We may reasonably infer from the complaint that the allegedly offending ROTC Colonel was acting in his capacity as an instructor in the University's ROTC program. Plaintiffs assert that they were denied opportunities within the ROTC program because they reported incidents of sexual harassment by ROTC participants. The pleadings explicitly allege that Plaintiffs reported "acts of sexual harassment and gender bias ... to representatives of the University of Colorado at Colorado Springs ... without any remedial action taken by the University in response to the complaints." 121

After finding that the university officials to whom the plaintiffs reported the harassment had the requisite authority as articulated in Gebser, 122 the court reversed the earlier dismissal and remanded the case. 123 Morse illustrates the fallacy of the argument by Gebser's critics that the actual notice standard makes recovery against an institution under Title IX virtually unattainable. 124

District court cases also illustrate the way in which the new actual notice and deliberate indifference standards articulated in Gebser are modifying Title IX litigation. In Klemencic v. Ohio State University, 125 the court dealt with a quid pro quo sexual harassment claim against Ohio State University ("OSU") brought by a student athlete based on the conduct of

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120 See id. at 1127.
121 Id. at 1128 (citations omitted).
122 See id.
123 See id. at 1129.
one of the school's athletic coaches. Beginning its discussion of the standard for institutional liability, the court noted that it had "previously denied Defendant OSU's Motion for Summary Judgment on Plaintiff's claim for quid pro quo sexual harassment under Title IX because it considered Plaintiff's claim in terms of agency principles" and that since Gebser, "a new analysis of Plaintiff's claim . . . is warranted." Applying the Gebser standard, the court found that the plaintiff failed to show deliberate indifference on the university's part, declaring that "[w]hen the educational institution responds with good-faith remedial action, this Court cannot say that the institution has itself committed an act of discrimination." The court dismissed the plaintiff's Title IX claim against the university.

In Burtner v. Hiram College, the plaintiff brought claims under Title IX against a college, alleging both hostile environment and quid pro quo sexual harassment. The court adhered to the Gebser ruling, noting that "between the time the parties filed their motions for summary judgment and this Court's ruling, the Supreme Court decided that theories of respondeat superior liability and constructive notice are not enough to hold schools liable for sexual discrimination under Title IX." The court considered the plaintiff's complaint, which stemmed from a sexual relationship she had with her philosophy professor at the college; Burtner had filed a written complaint against the professor upon her graduation from the school, lodging it with the college grievance officer. While the court found that this official met the Gebser authority standard, the fact

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126 See id. at 912. Denise Klemencic alleged that she was prevented from training with or serving as a volunteer coach for the OSU women's track and cross country teams after her eligibility to compete expired, despite an understanding she had with Thomas Ed Crawford (an assistant coach for the two teams), because she had refused Crawford's sexual advances. See id. at 912-13.
127 Id. at 918.
128 Id. at 920.
129 See id. at 920-21.
131 See id. at 856. Burtner, a female student, alleged that she was sexually harassed by her philosophy professor on an ongoing basis, beginning with "comments, innuendos, the singing of sexually suggestive songs, and some touching." Id. at 854. Burtner alleged that this conduct culminated in a sexual relationship during which the professor "would sometimes demand sex from Burtner in his Hiram office." Id.
132 Id. at 856.
133 See id. at 855.
134 See id. at 856.
that Burtner waited until her graduation to file the complaint "gave the defendant school little or no time to correct the problem. It tends to demonstrate that the plaintiff cannot show that the defendant school also was deliberately indifferent to her situation." Moreover, the court found two additional factors significant: the relative maturity of the plaintiff (as contrasted with Alida Gebser) and the fact that the school had promulgated both a policy and procedure to deal with sexual harassment (as distinguished from the Lago Vista school district, which had neither). The court granted summary judgment to the college on all Title IX claims.

IV. TOWARD THE FUTURE: GEBSER'S IMPLICATIONS FOR PEER SEXUAL HARASSMENT AND THE FORTHCOMING DAVIS DECISION

The impact of Gebser has been felt throughout Title IX sexual harassment litigation and not just in the context of teacher and student. Immediately after the ruling was handed down, attorneys for both parties in Gebser recognized its potential application to sexual harassment committed by other students. Prior to Gebser, the same type of split over the standard of institutional liability for student-student sexual harassment existed among the circuits. Resolution of the issue is imminent, as the Supreme Court has now granted certiorari in Davis v. Monroe County Board of Education.

The case law emerging in the lower courts since Gebser already indicates a willingness to apply the actual notice standard in the peer-inflicted sexual harassment context. In Carroll K. v. Fayette County Board of Education, for example, the United States District Court for the Southern District of West Virginia considered a case in which a female student in the sixth grade was violently harassed by her peers, harassment which the plaintiff claimed was due to her sex. In ruling on the defendant

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135 Id. at 857.
136 See id.
137 See id. at 858.
138 See Biskupic, supra note 108, at A8.
139 See Clark, supra note 11, at 367.
141 See id. at 620. One incident, in which a male student picked her up, swung her around and then threw her against a steel pole, left Carroll K. with "a severe cervical spine injury and... blind in her left eye." Id. The plaintiff alleged that the
school board’s motion to dismiss, the court acknowledged that “[t]his case involves a situation of alleged peer-to-peer harassment, a Title IX scenario with which the Supreme Court has not yet been presented.” Yet, the court reiterated the standard for institutional liability reached in Gebser and applied the components of actual notice and deliberate indifference in determining that the plaintiff’s Title IX claim survived the motion to dismiss. Although the court stated that it had considered the opinions of other courts on the issue of student-student sexual harassment under Title IX, it relegated those opinions to a footnote, while it explicitly discussed and relied on Gebser.

Another case in which the Gebser standard was held applicable to peer harassment is Adusumilli v. Illinois Institute of Technology. Adusumilli involved a student suit under Title IX for sexual harassment claims based on the conduct of teachers and other students, alleging twelve separate incidents in all, two of which the plaintiff reported to school officials. In considering the defendant university’s motion to dismiss, the court reviewed the Supreme Court’s holding in Gebser:

Though the facts of Lago Vista involved teacher-student sexual harassment, the court sees no reason to distinguish, and formulate a different rule for, student-student sexual harassment. The Court’s analysis in Lago Vista focused not on the conduct of the school’s agents, but the action or inaction of the school itself. This emphasis on liability based on the actions of the funding recipient rather than the alleged harasser ought not to vary depending on whether the offending third party is a teacher or fellow student. Thus, Adusumilli must allege actual knowledge and deliberate indifference on the part of IIT to sustain her Title IX action.

teacher made a verbal exclamation while the altercation was occurring, but otherwise “made no attempt to intervene.” Id.

143 Id. at 621.
144 See id. at 621-22.
145 See id. at 621.
147 See id. at *1.

The incidents of teacher harassment involved “ogling” and “unwanted touching” of Adusumilli’s left arm and back. The student harassment included unwanted touching of Adusumilli’s hand, shoulder, back, and leg, two incidents of unwanted touching of the top and bottom of her breast, and one incident where Kenneth Webb [a fellow student identified in the complaint] kissed her cheek on graduation day.

Id.

148 Id. at *3.
Having adopted the *Gebser* standard, the court found that only one of the incidents Adusumilli alleged was reported to a proper official with the requisite level of authority to act and that she could not show the institution’s reaction to this incident constituted deliberate indifference. The court granted HT’s motion to dismiss.

In *Doe v. Sabine Parish School Board*, a kindergarten boy was repeatedly subjected to sexually aggressive behavior and assaults by another boy in his class. School officials were aware of the perpetrator’s prior history of sexual aggression toward other students, and the victim’s parents had notified their son’s teacher, the principal, and the school counselor of the particular misconduct directed at their child. The teacher and the principal arranged protective measures to keep the two children separated, but “[t]he protective measures were not carried out on a consistent basis, resulting in continued acts of sexual aggression.” When the aggressor’s brother also began to sexually harass the plaintiffs’ son, they brought suit.

Although the plaintiff John Doe (the victim’s father) had, after the death of his wife Jane Doe, moved for and had been granted a voluntary

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149 See id. at *3-4. Specifically, the court inferred that Professor Beam, to whom Adusumilli reported that Frank Limon (a fellow student) touched her body and the bottom of her breast, was an “appropriate” school official by virtue of his status as the director of the master’s degree in public administration (“MPA”) program in which Adusumilli was enrolled. In contrast, Professor Weisberg (to whom Adusumilli reported a different incident of unwanted touching by another student) was held not to be “a school official ‘with authority to take corrective action to end’ the alleged discrimination,” since the plaintiff had provided no basis for this inference in her complaint. Id. at *3.

150 See id. at *5.


152 See id. at 658-59. The complaint alleged that “[t]he Brown child began to commit acts of sexual aggression upon the Doe child while at school, including ‘the display of genitals, unwelcome touching of genitals, and acting out sexual acts and trying to get the Doe child to participate.’” Id. at 658. Moreover, it was alleged that the teacher should have known of the Brown child’s propensity for sexual aggression, because the Brown child’s folder was available to her and contained such information and “[i]n fact, the Brown child had been placed in [the teacher]’s classroom because he had exhibited acts of sexual aggression toward children in another kindergarten class, generating complaints from children and their parents.” Id.

153 See id.

154 Id. at 659.

155 See id.
dismissal of all claims brought by him (and thus the Title IX claim was no longer before the court), the court’s opinion included the report and recommendation issued by the magistrate judge prior to the voluntary dismissal. In considering the Does’ Title IX sexual harassment claim, the court (as represented in the magistrate judge’s opinion) framed the issue in terms of “whether a school can be liable for failing to remedy known sexual harassment of one student by other students, known as peer harassment,” and noted that Davis would soon decide this issue directly. The court stated:

We must await the Supreme Court’s decision in Davis to know whether it will recognize, and what standard it will adopt, for peer harassment claims. We do know, however, the standard for imposing liability upon the school district for teacher-student harassment. [The court then cited Gebser and its articulation of the standard.] At least one district court has said post-Gebser that it sees no reason to distinguish and formulate a different rule for student-student sexual harassment. On the other hand, the Gebser opinion carefully limits its express scope to teacher-student harassment cases.

The court declined to reconcile Gebser with the standard previously articulated by the Fifth Circuit in Rowinsky v. Bryan Independent School District, finding that the plaintiffs had satisfied the requirements of Rule 12(b)(6) regardless of the standard used.

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156 See id. at 657.
157 Id. at 665.

[i]n the case of peer sexual harassment, a plaintiff must demonstrate that the school district responded to sexual harassment claims differently based on sex. Thus, a school district might violate 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.

Davis, scheduled for review by the Supreme Court this Term,\textsuperscript{161} is a sobering case, illustrating the problem of peer sexual harassment in America’s classrooms. In Davis, the mother of a female student in the fifth grade at Hubbard Elementary School sued the local board of education under Title IX, alleging that her daughter was subjected to eight incidents of sexual harassment perpetrated by a male classmate, many of which involved offensive touching.\textsuperscript{162} The Court of Appeals for the Eleventh Circuit framed the issue as “whether Title IX allows a claim against a school board based on a school official’s failure to remedy a known hostile environment caused by the sexual harassment of one student by another.”\textsuperscript{163} The court ultimately answered this question in the negative, primarily due to its perception of the constraints imposed by Title IX’s enactment under the Spending Clause,\textsuperscript{164} a consideration which characterized the debate that Gebser resolved.\textsuperscript{165} In affirming the district court’s dismissal of the plaintiff’s suit, the court stated:

We condemn the harm that has befallen LaShonda, a harm for which Georgia tort law may indeed provide redress. Appellant’s present complaint, however, fails to state a claim under Title IX because Congress gave no clear notice to schools and teachers that they, rather than society as a whole, would accept responsibility for remedying student-student sexual harassment when they chose to accept federal financial assistance under Title IX.\textsuperscript{166}

The Eleventh Circuit’s opinion in Davis utilizes some of the same principles relied on by the Gebser Court in articulating the standard of institutional liability under Title IX for teacher-student sexual harassment, namely the contractual nature of Title IX and the importance of notice to the recipient of federal funds.\textsuperscript{167} This similarity, in addition to other factors (such as emerging case law which applies the Gebser standard to peer-inflicted sexual harassment cases),\textsuperscript{168} bodes well for the extension of the

\textsuperscript{161} See Davis v. Monroe County Bd. of Educ., 120 F.3d 1390 (11th Cir. 1997), cert. granted in part, 119 S. Ct. 29 (1998).
\textsuperscript{162} See id. at 1393-94.
\textsuperscript{163} Id. at 1394 (footnote omitted).
\textsuperscript{164} See id. at 1406.
\textsuperscript{165} See, e.g., supra notes 59-72 and accompanying text.
\textsuperscript{166} Davis, 120 F.3d at 1406.
\textsuperscript{167} See supra notes 91-92 and accompanying text.
\textsuperscript{168} See supra notes 138-50 and accompanying text.
actual notice standard into the realm of student-student sexual harassment. As sharp as the criticism of Gebser has been, the Supreme Court’s next ruling on Title IX sexual harassment is certain to be followed closely by both the legal community and the public at large.

The arguments for and against importing the Gebser actual notice standard into the context of peer sexual harassment, however, necessarily require an evaluation of the Gebser standard itself. Several months after the ruling, criticism of Gebser remains strong. For example, Deborah L. Rhode, writing for the National Law Journal, characterizes Gebser as “a step in the wrong direction.” She reiterates one of the initial criticisms of the Gebser standard—that it protects students to a lesser degree than employees from sexual harassment—commenting that

[d]ouble standards in sexual matters are nothing new, but these are especially perverse. Students often have fewer options for avoiding an abusive situation than do adult employees, and their values are more open to influence. Schools are powerful socializing institutions, and failure to address harassment perpetuates the attitudes that perpetuate problems.170

Such criticism is not limited to commentators; though the courts are following the Gebser standard, allegiance is not unequivocal. In X v. Fremont County School District No. 25, the court applied Gebser to find that a school district could not be held liable for a fifth grade science teacher’s alleged sexual assault of a ten-year-old male student, absent actual notice by school officials of the harassment and deliberate indifference thereto. In a concurrence, however, Circuit Judge Lucero voiced his dissatisfaction with the Gebser standard, based on his perception that it provides inadequate protection to younger victims of sexual harassment:

It is difficult to see how conditioning institutional liability under Title IX on a ten-year old child’s reporting sexual abuse by his teacher serves either of [Title IX’s primary] goals. Very young children, with little experiential basis to make a judgment as to what constitutes appropriate or inappropriate behavior, and taught from an early age to respect their

170 Id.
172 See id. at *2-3.
teachers as role models, are neither likely nor well-equipped to report acts of harassment by those same parties. That is particularly so when—as is alleged in this case—a harassing teacher exploits his or her authority as a teacher to effect the harassment. In such circumstances, a very young student may have little sense that the offensive conduct is abnormal or in any way inappropriate, or that there is anyone to whom he or she can turn to report it.

It seems likely, then, that one result of Gebser, contrary to its expressed intent, will be to limit protection of very young students against teacher harassment, and, by the same token, perpetuate the use of federal resources to support such harassment. In effect, an actual notice standard interprets Congressional silence to provide better protection against harassment to older students than to their younger counterparts. I am doubtful Congress intended such a result.173

Another lingering criticism of the actual notice standard is that it motivates educational institutions to avoid gaining actual knowledge of misconduct, rather than confronting the problem directly and thereby risking liability due to this awareness. Justice Stevens made this assertion in his Gebser dissent.174 Deborah L. Rhode also utilized this argument in her commentary on the Gebser ruling, warning that “[t]he see-no-evil, hear-no-evil attitudes already in place in many education districts may become the strategy of choice.”175 She went on to advocate Justice Ginsburg’s approach to the problem, which, Rhode asserted, “would have imposed liability on school districts unless they had an effective policy for reporting and redressing harassment that the complainant had unreasonably failed to use”; Rhode concluded by urging that Congress amend Title IX to adopt this approach.176

Others are not so quick to predict disaster; Perry A. Zirkel, writing for the Phi Delta Kappan, had this to say:

Lago Vista is the latest, but not last, chapter in the continuing legal saga arising from sexual harassment in the public schools. Will school officials, as the Ginsburg dissent feared, take the stance of not seeing or

173 Id. at *3 (Lucero, J., concurring).
175 Rhode, supra note 169.
176 Id.
hearing when teachers monkey around with students? Probably not. For, in addition to OCR compliance activities, the companion Title VII rulings provide the incentive for effective grievance policies, and, depending on the jurisdiction, liability may be possible under common law negligence or Section 1983 constitutional tort. Moreover, as Waldrop’s fate in Lago Vista illustrates, the victimizing teacher faces teacher termination, license revocation, and common-law liability.

The “OCR compliance activities” of which Zirkel speaks refers to the OCR’s power to terminate federal funding, a power which often motivates educational institutions to promulgate grievance policies and procedures voluntarily. In spite of these reassurances, however, Zirkel concedes that “Title IX, unless it is amended, provides a narrow and uphill path; the consequences will not be costly if school officials do not make efforts to root out the evil of teacher-on-student (and, by extension, student-on-student) sexual harassment unless they actually hear or see such evil.”

Justice O’Connor, in delivering the majority opinion in Gebser, acknowledged the gravity of the problem of sexual harassment in schools but defended the Court’s decision. She stated:

No one questions that a student suffers extraordinary harm when subjected to sexual harassment and abuse by a teacher, and that the teacher’s conduct is reprehensible and undermines the basic purposes of the educational system. The issue in this case, however, is whether the independent misconduct of a teacher is attributable to the school district that employs him under a specific federal statute designed primarily to prevent recipients of federal financial assistance from using the funds in a discriminatory manner. Our decision does not affect any right of recovery that an individual may have against a school district as a matter of state law or against the teacher in his individual capacity under state law or under 42 U.S.C. § 1983. Until Congress speaks directly on the subject, however, we will not hold a school district liable in damages under Title IX for a teacher’s sexual harassment of a student absent actual notice and deliberate indifference.

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178 Id.
179 Id.
O'Connor's reference to the legislative branch's silence on an appropriate standard has been regarded by some as "an open invitation to Congress to amend Title IX," which "is already being answered by diverse organizations which are reviewing the possibility of federal and state legislative action."181

Considering the criticism to which the Gebser actual notice standard is subjected in the teacher-student sexual harassment context, it is no surprise that many oppose the application of such a standard to peer sexual harassment cases. Some of these opponents advocate the injection of Title VII concepts, namely the "knew or should have known" standard, into Title IX law; this policy was endorsed by the OCR with the publication of its Sexual Harassment Guidance in 1996, which "explicitly articulated [the OCR's] practice of applying Title VII's standard of liability in the context of student-against-student sexual harassment claims."182 It has been argued that

"[t]he Title VII standard allowing constructive knowledge to be a sufficient basis to hold an educational institution liable for peer sexual harassment strikes a proper balance and offers the greatest student-victim protection. Moreover, because the standard promulgated by the OCR is consistent with sexual harassment law as it developed in the employment context, there is no reason to offer our students covered by Title IX less protection than our workforce is offered under Title VII. Nor is there a reasonable basis for permitting educational institutions to exercise a lower standard of care than employers may exercise."183

There is a strong response to such assertions, especially regarding the applicability of Title VII in Title IX sexual harassment law. Kathy Lee Collins, for instance (writing prior to the Gebser decision), counters by pointing out crucial differences between Title IX and Title VII; she reasons that "[s]urely Title VII presupposes that adults in the workplace are capable of mature restraint, by requiring that 'juvenile' behavior—sexual innuendo, propositions, vulgar language, and off-color jokes—be curtailed by the employer. Children in a school setting are by nature and

181 Volberg, supra note 115, at 27.
183 Id. at 821-22 (footnote omitted).
Should the school district be responsible for correcting a nine-year-old's behavior toward another student in the same way that an employer is responsible for dealing with a forty-two-year-old employee's behavior toward a coworker? It seems abundantly clear that the two situations are not analogous. Title VII standards may offer some guidance for the Title IX student-to-student sexual harassment situation, but the wholesale importation to Title IX of case law and analysis under Title VII is ill advised for exactly those reasons—the victims and the harassers are not similarly situated, nor are the school district and the employer. While it would certainly be appropriate to apply Title VII standards in the event a school employee complaining of sexual harassment in the workplace chose to file suit under Title IX instead of Title VII, and it may even be appropriate to use the Title VII analysis if a student is sexually harassed by a school employee because the Title VII standards are rooted in agency principles. Using Title VII to guide Title IX investigations and analysis in student-to-student cases is, however, misguided and inapt.18

Aside from her speculation regarding the propriety of agency principles where a school employee harasses a student, Collins's assertions were largely vindicated by the majority's ruling in Gebser. Ultimately, Collins proposed that a nearly identical standard to the one articulated in Gebser be adopted for peer sexual harassment cases; she advocated a standard that

requires plaintiff students to offer either evidence of an intent to discriminate on the basis of sex (gender) by school officials charged with the duty to respond to and investigate complaints under Title IX or to show proof of deliberate indifference or other direct evidence of intent to discriminate when the cause of action is based on sexual harassment of the plaintiff by his or her peers. Such a standard keeps the focus on the acts of the recipient—the entity subject to the conditions of acceptance of Title IX funds—but...considers that deliberate indifference of a reported situation by school officials can foster or fan the flames of a sexually hostile educational environment. This standard requires intent, not negligence.186

185 Id. at 824-25 (footnotes omitted).
186 Id. at 833 (footnotes omitted).
Almost prophetic in her foresight, Collins succinctly bolsters the majority's reasoning in Gebser and sets forth the argument in favor of extending the actual notice standard into the context of student-student sexual harassment. Her reasoning rings true; though Gebser continues to provoke criticism, the significant differences between sexual harassment in the employment context and in the educational context cannot be ignored. Since the Court has ruled that Title VII concepts and agency principles do not apply in the Title IX context where a teacher (who could reasonably be viewed as an agent of the school) sexually harasses a student, it seems inconceivable that the forthcoming Davis decision would repudiate that standard where sexual harassment of a student by other students is in issue. The Court's ruling in Gebser represents an honest interpretation of

While this Note was going to press, the Supreme Court issued a ruling in Davis v. Monroe County Board of Education, No. 97-843, 1999 WL 320808 (May 24, 1999). Although the Court reversed the Eleventh Circuit Court of Appeals by holding that a private cause of action is available against a school district for peer sexual harassment, the Court affirmed and retained the Gebser actual notice and deliberate indifference standard. See id. at *3. Specifically, the Court held that "a private damages action may lie against the school board in cases of student-on-student harassment... but only where the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities." See id. The Court discussed the Gebser ruling at length in the opinion, reiterating its rejection of agency principles in the Title IX context and framing the issue in terms of "whether the misconduct identified in Gebser—deliberate indifference to known acts of harassment—amounts to an intentional violation of Title IX... when the harasser is a student rather than a teacher." Id. at *10. The Court stressed that it was merely holding that a school board could be liable for its own misconduct in responding to a student's sexual harassment of another student, and only where the board's misconduct helped to effect the discrimination. See id. at *11. The Court stated:

We thus conclude that funding recipients are properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.

Id. at *13. Moreover, the Court noted that peer sexual harassment, which by definition occurs between students, would be less likely to satisfy the strictures of this standard than would sexual harassment of a student by a teacher, such as that which occurred in Gebser. See id at *15.

Thus, the Gebser standard for school liability in Title IX sexual harassment cases remains intact and has now been adopted in the peer sexual harassment context. The Court used its opinion in Davis to reaffirm the logic and policy underpinning the Gebser standard and to delineate further the precise nature of
Title IX as it now exists, rather than an attempt to dictate policy through judicial activism. It is within the province of Congress to intervene; in the absence of congressional action, the Court has reached a proper resolution of this conflict.

CONCLUSION

The issue of sexual harassment, though still a fairly recent concept, has become pervasive in American society, even invading the nation’s schools and universities. In these settings, the issue of liability for sexual harassment is particularly controversial, due to the underlying interests and emotions involved. The Supreme Court’s decision in Gebser resolved a debate that raged among the circuits since the Franklin decision was handed down in 1992. Although many are critical of this new standard, it imparts a sense of certainty to Title IX litigation that has been lacking. Moreover, it provides a reasonable template for the comparable issue of institutional liability for sexual harassment committed upon students by other students. Gebser is sure to be viewed as a landmark decision, not only for its impact upon the law under Title IX but also for its impact on the lives of individuals and the future of educational institutions everywhere.

actionable “deliberate indifference” (it “must, at a minimum, ‘cause [students] to undergo’ harassment or ‘make them liable or vulnerable’ to it”). Id. at *10. While this latest ruling may not silence Gebser’s critics, its use of the Gebser reasoning as a template bolsters the credibility of the standard and paves the way for its widespread acceptance.