39 Wake Forest L. Rev. 311

Wake Forest Law Review
Summer 2004

Article

LIMITING GEBSER: INSTITUTIONAL LIABILITY FOR NON-HARASSMENT SEX DISCRIMINATION UNDER TITLE IX

David S. Cohen [a1]

In Gebser v. Lago Vista Independent School District, the Supreme Court set an exacting standard for establishing institutional liability under Title IX for a teacher sexually harassing a student. That standard, rejecting the simple application of agency principles and instead requiring a student to notify the school of the harassment and then the school to be deliberately indifferent to the student's complaints, has been inconsistently applied by lower courts faced with other, non-harassment forms of sex discrimination under Title IX. In other areas of the law, the Supreme Court has regularly applied well-established federal common-law agency principles to statutes when determining liability issues. When faced with Title IX non-harassment claims, courts should do the same because the policy reasons that offer the only reasonable explanation of the result in Gebser are not present in cases of non-harassment sex discrimination in schools and because non-harassment sex discrimination lies at the heart of Title IX's prohibition of sex discrimination in federally funded educational institutions.

I. Introduction

Title IX of the Education Amendments of 1972 [1] usually evokes thoughts of either athletics equity or sexual harassment. For good reason: Athletics equity, for one, dominates the media coverage of Title IX. Whether in articles extolling the virtues of the law that paved the way for the creation of the Women's National Basketball ***312** Association [2] and the success of the United States women's soccer team in the 1999 World Cup [3] or press coverage of lawsuits that have garnered national attention for attempting to reign in the law to "save" men's collegiate wrestling programs, [4] Title IX is almost synonymous with sports. That much was evident when, in 2002, with great fanfare and immense media attention, President Bush appointed a fifteen member Secretary's Commission on Opportunity in Athletics to study Title IX, but limited the Commission's focus to athletics equity. [5]

While athletics equity dominates the press, sexual harassment has recently consumed the Title IX legal arena. Except for a few procedural issues, [6] the Supreme Court has yet to hear a case addressing the substantive aspects of Title IX and athletics equity, ***313** forcing the lower courts to set the standards in this area. [7] On the other hand, the Supreme Court has decided three Title IX sexual harassment cases in the past decade, [8] and hundreds of Title IX sexual harassment cases are among the reported decisions of the lower courts. Cases involving teachers sexually harassing students have been the most common, but cases involving students sexually harassing other students are joining the ranks as well.

But what about other forms of sex discrimination? Congress did not enact Title IX as a statute limited to sexual harassment and athletics equity. As originally conceived by Congress, Title IX's purpose was to cover a broad range of sex discrimination

in education: in admissions, in entrance to academic programs within a school, in athletics, in disciplinary enforcement, in extracurricular activities, in employment, and in any other area of education. [9] Administrative regulations, promulgated in the years following Title IX's enactment and then approved by Congress, [10] further defined sex discrimination under the statute to include discrimination based on marital status and pregnancy, [11] as well as retaliation. [12] These forms of sex discrimination engaged in by schools, those besides the commonly thought of areas of athletics equity and sexual harassment, are the focus of this Article. [13]

These forms of sex discrimination--rather than sexual ***314** harassment-- were central to the concerns that gave rise to Title IX. In fact, when Congress enacted Title IX in 1972, courts had not yet recognized the concept of sexual harassment as the legal theory regarding and the political activism surrounding sexual harassment developed later in the decade. [14] Likewise, the application of Title IX to sexual harassment, something most likely never contemplated by the drafters of Title IX, took over two decades to be recognized and clarified by the Supreme Court.

When the Supreme Court finally weighed in on the issue, it announced a standard for courts to apply when determining whether an educational institution is liable in money damages for sexual harassment of students. That standard, first articulated in the context of teacher-student sexual harassment in Gebser v. Lago Vista Independent School District [15] and then reiterated one year later in the context of student-student sexual harassment in Davis v. Monroe County Board of Education, [16] is an exacting one:

> [F]unding 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. [17] Since those two decisions, lower courts have struggled with applying the specifics of the standard to the multitude of sexual harassment cases that have come before them. [18]

However, Gebser and Davis made one aspect of their holdings very clear for the lower courts: courts are not to use agency principles to support a claim for damages arising from sexual harassment in the educational setting. In other words, a federal funding recipient is not liable for its agent's sexual harassment merely by virtue of the harasser being an agent of the funding ***315** recipient. Conversely, for student-student sexual harassment, that the student harasser is not an agent of the school is immaterial in determining the institution's liability. Rather, in order for the funding recipient to be liable, it must have had actual knowledge of the sexual harassment and been deliberately indifferent to it. The Court clearly articulated these principles in Gebser and Davis, and lower courts have applied them to all sexual harassment cases without wavering. [19]

Gebser and Davis have been widely and justifiably criticized: The holdings of the two cases unnecessarily thwart Title IX's purpose by establishing a difficult hurdle for students who seek to hold an institution liable for sexual harassment that adults in similar employment situations do not have to overcome. Their holdings also fail to create an incentive for schools to proactively change and police their agents. [20] Yet, despite the heavy and warranted criticism, Congress has not changed Title IX, [21] and Gebser and Davis are the current law. This Article does not seek to add to the extensive body of work that has appropriately and soundly criticized these cases; rather, it works from the existing legal framework to address a problem not addressed in those two cases: non-harassment sex discrimination.

So, what about this other form of sex discrimination? Are agency principles applicable when someone brings a Title IX claim for money damages to redress an instance of sex discrimination that takes a form other than sexual harassment? How are courts to evaluate a suit for damages by a high school student who has been denied a position on the school's prestigious math team because the teacher running the program does not believe that girls should or could excel in math? Or a lawsuit by a former

star college basketball player whose coach removed her from the team, took ***316** away her scholarship, and withdrew her from school simply because she became pregnant? Or a claim by a doctoral candidate who believes that the degree committee routinely denies the highest accolades to female candidates? Or a suit by a suspended male elementary school student whose teacher disciplines boys more harshly than girls who commit the same offense? In each of these scenarios, it is not the federal funding recipient itself that has discriminated against the student; rather, an agent of the federal funding recipient commits the discriminatory act or acts. Gebser squarely rejected institutional liability based on an agent's actions in the sexual harassment context. Does Gebser's holding that liability cannot be based on agency principles apply to other forms of sex discrimination in schools besides sexual harassment?

This inquiry is an important one. A student deprived of an educational opportunity on the basis of her sex may not be aware of the appropriate person within the school's authority structure to whom she should complain. Furthermore, a student may suffer irreparable harm in the form of denied educational opportunities before even being aware that anything the school or its agents did was wrong or discriminatory. Precluding the student from obtaining recovery from the school on the basis that the student did not complain to the appropriate authority within the school denies the student effective redress for denials of educational opportunities that have already occurred. It also gives schools no incentive to prevent discriminatory denials of educational opportunities, instead requiring the schools to remedy them only after they have taken place. At heart, resolving this inquiry determines the extent of Title IX's commitment to ending sex discrimination in schools. [22]

This Article explores this issue and concludes that Gebser should not apply to claims of non-harassment sex discrimination. Section II of this Article reviews the history of Title IX and its pre-Gebser jurisprudence concerning the application of agency principles. Section III of this Article examines Gebser's holding, specifically focusing on language in the opinion addressing whether a school is liable for its agents' sexual harassment. Section III also looks at Davis' articulation of the Gebser standard because, although Davis interprets Gebser in a different context, its rearticulation of the institutional liability standard has relevance to the question raised in this Article. Section IV reviews post-Gebser lower court cases that have attempted to apply Title IX to lawsuits seeking to establish institutional liability for non-harassment sex discrimination. Finally, Section V, after reviewing non-Title IX Supreme Court precedent in applying agency principles to federal ***317** causes of action, develops the analysis that concludes that Title IX should not incorporate agency principles in cases that do not involve sexual harassment.

While the Supreme Court erroneously but clearly removed agency principles from the analysis of Title IX sexual harassment lawsuits, it did so against a well-established backdrop of federal statutory interpretation jurisprudence that incorporates common law principles of agency-based liability into congressionally-created causes of action. What motivated the Court in Gebser and Davis to deviate from that commonly-applied principle of statutory interpretation was the Court's unsubstantiated fear, particular to its perception of sexual harassment, that the federal courts would be deluged by such lawsuits. Because there is no empirical evidence that would support a similar fear concerning non-harassment sex discrimination lawsuits, the background statutory interpretation principle should apply, and generally-accepted agency principles should inform the Title IX analysis when litigants seek to establish institutional liability for Title IX money damages claims based on these other forms of sex discrimination.

II. Title IX

Until Gebser, there was no clear standard for evaluating a Title IX claim for damages against an educational institution [23] based on sexual harassment. [24] The statute itself says nothing about sexual harassment, standards for institutional liability, or even bringing a claim in federal court. In relevant part, the statute is simply a thirty-seven word command instructing educational institutions receiving federal funding not to discriminate based on sex: “No person in the United States shall, on the basis of

sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." [25]

A. Legislative and Regulatory History

Congress enacted Title IX in response to the perceived gap created by Title VI and Title VII. Title VI, enacted in 1964, prohibits race discrimination by institutions that receive federal ***318** funding. [26] Title VII, also enacted in 1964, prohibits discrimination in employment on a variety of bases, including sex. [27] However, neither law prohibited sex discrimination in the academic environment. In the early 1970's, Congress undertook remedying this missing aspect of discrimination law. In 1971, Senator Birch Bayh introduced the first version of what became Title IX. [28] After the amendment was defeated based on a germaneness objection from Senator Strom Thurmond, [29] Senator Bayh reintroduced the amendment in 1972. [30] The new amendment, titled "Title IX - Prohibition of Sex Discrimination," [31] contained the language that ultimately became the enacted version of Title IX. In support of the amendment, Senator Bayh railed against sex discrimination in education:

> Mr. President, one of the great failings of the American educational system is the continuation of corrosive and unjustified discrimination against women. It is clear to me that sex discrimination reaches into all facets of education--admissions, scholarship programs, faculty hiring and promotion, professional staffing, and pay scales. . . . [Title IX] is broad . . . . [T]he heart of this amendment is a provision banning sex discrimination in educational programs receiving Federal funds. The amendment would cover such crucial aspects as admissions procedures, scholarships, and faculty employment, with limited exceptions. [32]

. . . .

This portion of the amendment covers discrimination in all areas where abuse has been mentioned--employment practices for faculty and administrators, scholarship aid, ***319** admissions, access to programs within the institution such as vocational education classes, and so forth. [33]

. . . .

While the impact of this amendment would be far-reaching, it is not a panacea. It is, however, an important first step in the effort to provide for the women of America something that is rightfully theirs--an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice with equal pay for equal work. [34]

. . . .

We are dealing with discrimination in admission to an institution, discrimination of available services or studies within an institution once students are admitted, and discrimination in employment within an institution, as a member of a faculty or whatever. [35]

In speeches on the Senate floor, Senator Bayh frequently cited discrimination in admissions, employment, scholarships, and staffing. He also was very clear that Title IX was intended to cover sex discrimination in "programs within the institution such

as vocational classes" and to allow women "to develop the skills they want." Nothing in the debate indicates that other Senators objected to the comprehensive nature of Title IX's prohibitions as described by Senator Bayh. [36]

After Title IX became law in 1972, the Department of Health, Education, and Welfare [37] promulgated regulations. Under the procedure applicable at the time, Congress gave the Department of Health, Education, and Welfare the power to adopt regulations interpreting and applying Title IX but held for itself the power to ***320** approve the regulations. [38] The regulations promulgated by the Department elucidated the scope of Title IX by including a variety of forms of sex discrimination within the scope of the statute's prohibition, including discrimination based on family size and pregnancy. [39] When the regulations were laid before Congress in 1975, the focus of the Congressional debate was on aspects of Title IX not related to the topic of this Article: religion, athletics, grievance procedures, self-evaluations, and record-keeping. [40] Ultimately, Congress approved the regulations. [41]

What is important for the purpose of this Article is that neither Congressional debate nor the Department of Health, Education, and Welare's regulations approved by Congress under the "lay before" procedure mentioned sexual harassment. Courts did not recognize the legal concept of sexual harassment until later; [42] activists from the era did not begin to campaign about the issue until the middle of the decade; [43] and scholarly treatment of the issue began to appear toward the end of the decade. [44] Congress' failure to mention sexual harassment when considering Title IX certainly does not mean that the statute's broad language cannot include sexual harassment as an act that falls within the term discrimination "on the basis of sex"; [45] however, by virtue of timing, Title IX sexual harassment jurisprudence clearly lay outside the main focus of the Congress that passed Title IX and the Congress that approved its regulations.

***321 B. Initial Case Law Development of Title IX**

Application of agency principles was not the first issue that arose in the development of Title IX jurisprudence. Initially, the Supreme Court faced the question of whether a private litigant could bring a lawsuit to enforce Title IX. A female medical-school applicant tried to sue under Title IX for injunctive relief to stop allegedly discriminatory admissions criteria at two medical schools. [46] The petitioner complained that she was qualified to attend the medical schools but that each school had policies prohibiting admission for those over the age of thirty. [47] Because more women than men had interrupted educational paths and attended graduate school later, this policy had a discriminatory impact on women. [48]

Title IX itself does not provide for a private cause of action; rather, the only enforcement mechanism on the face of the statute is enforcement through the administrative agency responsible for funding the educational institution. [49] However, during a time of a more robust implied-cause-of-action jurisprudence, [50] the Court looked to the four factors from Cort v. Ash [51] to determine whether litigants could bring a claim under Title IX in the federal courts under an implied-cause-of-action theory. [52] The Court found that Title IX conferred a benefit on those who have been discriminated against on the basis of sex and that Congress intended to create a ***322** remedy for those people. [53] In its analysis, the Court articulated the "two related, but nevertheless somewhat different" purposes of Title IX: "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." [54] Cutting off federal funding, the administrative remedy authorized in the statute itself, was appropriate for "institutions engaged in discriminatory practices"; however, the Court felt that remedy was too severe "if merely an isolated violation has occurred." [55] For isolated violations, the Court found little sense in making an individual "demonstrat[e] that an institution's practices are so pervasively

discriminatory that a complete cutoff of federal funding is appropriate." [56] In those situations, the "award of individual relief to a private litigant" is appropriate. [57]

The quoted language seems to demonstrate that the Court considered "isolated violations" of Title IX as well as pervasively discriminatory practices and policies as falling within the prohibition of Title IX. The Court appears to view "isolated violations" as including those violations brought about by agents of the funding recipient rather than the funding recipient itself. Such a reading is apparent in the Court's rejection of one of the schools' main arguments--that admissions decisions by universities should not be subject to judicial scrutiny. [58] The Court concluded that the respondents' argument was really a disagreement with the Congressional policy behind Title IX because Congress clearly had already determined that Title IX's prohibition of sex discrimination would be a reasonable form of interference with academic independence. [59] The Court framed the respondents' argument as a concern about "the independence of members of university committees" [60] and assured the respondents that, based on the history of Title VI litigation, Title IX would not have the effect of making "university administrators . . . so concerned about the risk of litigation that they will fail to discharge their important responsibilities in an independent and professional manner." [61] By ***323** referring to individual administrators and members of committees rather than entire school boards or funding recipients themselves, the Court specifically contemplates the actions of individual members of the school administration subjecting the school to Title IX liability. Agency principles, thus, appear to be endorsed in Cannon's words and reasoning, albeit in dicta. The inquiry cannot end here, however, because Cannon addressed only injunctive relief and not suits for money damages. [62]

Having decided that Title IX supports an implied cause of action, the Court turned, over a decade later, to whether Title IX allowed for a suit for money damages. In Franklin v. Gwinnett County Public Schools, [63] the Court unanimously held that Title IX did allow for a claim for money damages. [64] A precursor to Gebser, Franklin involved a student who had been sexually harassed by a man who was both her sports coach and teacher. [65] The harassment included several instances of sexually explicit conversation and contact, as well as "coercive intercourse." [66] According to the complaint, teachers and administrators knew about the harassment but did nothing to stop it and actually discouraged the victim from pursuing a formal complaint against the teacher. [67] Both the district court and the court of appeals held that Title IX did not permit an action for monetary damages. [68]

Relying on a common law presumption of "the availability of all appropriate remedies unless Congress has expressly indicated otherwise," [69] the Supreme Court reversed. The Court traced this common law presumption from its roots in Marbury v. Madison [70] and Bell v. Hood [71] through the more recent case of Guardians Association v. Civil Service Commission. [72] Congress' silence as to ***324** the presumption of the availability of all appropriate remedies in Title IX's legislative history was of no import because the Title IX cause of action was implied and not express. [73] Relying on the reasoning the Court used to create the implied cause of action in Cannon, the Court found that "the same contextual approach used to justify an implied right of action more than amply demonstrates the lack of any legislative intent to abandon the traditional presumption in favor of all available remedies." [74] Based on those cases and the long-standing canon of construction in favor of all available remedies, the Court concluded that "a damages remedy is available for an action brought to enforce Title IX." [75]

C. Pre-Gebser Standards for Money Damages in Sexual Harassment Cases

Left unaddressed by Franklin was the standard courts should use to determine if a plaintiff could hold an educational institution liable for money damages for discrimination under Title IX. In the specific context of sexual harassment, which was the only type of discrimination at issue in Franklin, the Court allowed the sexual harassment claim for money damages to go forward

but was silent as to what standard the remand court should use to determine whether institutional liability should attach. [76] Subsequent to Franklin, but without any specific guidance from the Supreme Court, the lower courts took up this issue, [77] answering the question with a variety of conflicting approaches based on Title VI, Title VII, strict liability or agency principles, and the funding recipient's actual knowledge of discrimination. [78]

***325** Because the Court relied on Title VI in much of its reasoning in finding that Title IX included an implied cause of action in Cannon, some courts followed Franklin by holding that Title VI principles applied to Title IX institutional liability claims for money damages. For instance, the Fifth Circuit affirmed a district court's holding that "the 'intentional discrimination' standard set forth in Title VI" is appropriate for Title IX claims. [79] In that case, the court addressed a claim of sex discrimination in educational employment, but offered very little analysis other than the citation to Cannon. [80] Similarly, a district court in Oklahoma imported the intentional discrimination standard from Title VI, requiring a student claiming that her basketball coach sexually abused and harassed her to prove "discriminatory intent [by showing a] custom or policy, acquiescence in, conscious disregard of, or failure to investigate or discipline on the part of the School District or any named defendant." [81]

More frequently, courts looked to Title VII for guidance following Franklin. These courts took direction from the Franklin Court's citation to Meritor Savings Bank v. Vinson, [82] claiming that the lone reference in Franklin to a Title VII case indicated that the Court wanted Title VII principles to apply to every aspect of Title IX litigation. Employing a very simple analysis of the issue, the Eighth Circuit reasoned that, because Franklin cited Meritor, even though on a separate isolated issue, Meritor's substantive holding on the standard for analyzing discrimination suits under Title VII also applies to Title IX. [83] The Meritor standard varies based on whether the plaintiff's claim alleges intentional discrimination or hostile environment sexual harassment; a court faced with a case alleging intentional discrimination uses agency principles to impute the employee's actions to the employer while a court faced with a hostile environment claim determines whether the employer knew or should have known about the harassment before imputing liability. [84] Because the Eighth Circuit case involved a hostile environment in ***326** the form of sexual harassment, it held that the "knew or should have known" standard applied to Title IX teacher-student sexual harassment claims. [85]

Other courts reached the same conclusion with slightly more analysis. Noting the same citation of Meritor that the Eighth Circuit found so instructive, the Sixth Circuit looked further into the legislative history of and agency regulations promulgated under Title IX to reach the same conclusion. [86] In the legislative history, the court found guidance that Congress intended Title IX to remedy the specific exemption for educational institutions contained in Title VII; thus, Congress intended Title IX to mirror Title VII. [87] Further, the Office of Civil Rights' regulations apply Title VII principles to Title IX claims. [88] Thus, according to the Sixth Circuit, there was "ample authority" supporting its holding that Title VII liability standards apply to Title IX lawsuits. [89]

Still other courts took an even more plaintiff-friendly approach to institutional liability under Title IX. These courts adopted principles of strict liability or respondeat superior to hold an institution liable for sexual harassment by its agents in all cases, not just the intentional discrimination cases for which Meritor uses agency principles. A district court in Missouri relied on a passage from Franklin to hold that principles of respondeat superior applied, "regardless of whether the intentional discrimination is the creation of a hostile environment, the demand for sexual favors, the removal of females from the classroom, or any other intentional discrimination based on sex in violation of Title IX." [90] Another district court, this one in the Western District of Texas, looked closely at the principles behind the enactment of Title IX and found that "the intent of Congress to provide a remedy for intentional discrimination [must not be] thwarted." [91] Accordingly, the court applied strict liability principles to analyze Title IX claims. [92]

Some courts took the opposite approach, developing the least ***327** plaintiff-friendly of all the standards. Under this standard for institutional liability, a school district is liable only if it actually knew of the teacher's harassment of the student and then failed to remedy the problem. Courts adopting this standard, including the Fifth and Seventh Circuits, employed an analysis very similar to the analysis the Supreme Court ultimately adopted.[93] These courts' analyses, similar to the Court's analysis in Gebser,[94] relied heavily on the language differences between Title VII and Title IX, the fear of excess litigation that a more plaintiff-friendly standard would invite, and the principles behind Spending Clause statutes generally.[95]

Courts were not the only ones confused about the standard for analyzing institutional liability for teacher-student sexual harassment; commentators, too, disagreed about the proper standard. Several commentators suggested that the standard mirror Title VII,[96] while others advocated for principles of strict liability or agency liability.[97] One creative commentator suggested a mixed standard varying the school's liability based on whether the harassment was "egregious or rampant" (the school is liable if it had constructive knowledge of the harassment), whether the harassment was "severe or pervasive" (school is liable if it had actual knowledge), or whether the school did not have "effective and accessible" procedures (school is liable always).[98] However, no commentator proposed or supported the standard adopted by the Fifth and Seventh Circuits and ultimately adopted by the Supreme Court in Gebser.[99]

The discussions of Title IX standards in the case law and the scholarly commentary focused almost exclusively on institutional ***328** liability for claims of sex discrimination in the form of sexual harassment.[100] Only a few courts mentioned forms of discrimination other than harassment, and those courts adopted different standards.[101] Commentary on the subject was almost non-existent, with the most relevant discussion being a discussion of non-sexual gender-based harassment;[102] however, such harassment is a subset of sexual harassment and is not a form of non-harassment sex discrimination.[103] Thus, no definitive standard for institutional liability for non-harassment sex discrimination existed prior to the Supreme Court's jumping into the Title IX institutional liability arena with Gebser.

III. The Supreme Court's Title IX Sexual Harassment Jurisprudence

A. Gebser v. Lago Vista Independent School District

In Gebser, the Supreme Court settled the confusion over the institutional liability standard for a teacher sexually harassing a student. The Fifth Circuit had held that neither a strict liability nor an agency analysis was appropriate under Title IX and that, unlike under Title VII, constructive notice could not form the basis of institutional liability.[104] Its holding placed it firmly in the strictest camp for evaluating sexual harassment claims: "[S]chool districts are not liable in tort for teacher-student 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 ***329** abuse, had the power to end the abuse, and failed to do so."[105] After taking the case, the Supreme Court went one step further.

While an eighth-grade middle school student, Alida Star Gebser participated in a book discussion group led by a teacher from the local high school.[106] During the book group sessions and over the course of the next year when Gebser was formally a student of that high school teacher's, the teacher, Frank Waldrop, often made sexually suggestive comments to the group and to his students.[107] Eventually, Waldrop began having sexual contact with Gebser, first at her home when he visited to drop off a book and then throughout the school year during school time.[108] Gebser never complained to school officials about the relationship, but the following year, parents of other students in Waldrop class complained to the principal about Waldrop's inappropriate comments.[109]

The principal held a meeting with Waldrop and the parents at which Waldrop denied making inappropriate comments but nonetheless apologized and said nothing similar would occur again. [110] No one brought up Gebser's relationship with Waldrop, and no information about the problem was passed along to the district superintendent. [111] The principal's reaction did not stop Waldrop and Gebser's relationship, and Waldrop was eventually caught by police having sex with Gebser. [112] When it found out, the school district fired Waldrop. [113]

Gebser brought suit against the school district, claiming that it was liable under Title IX for the sexual harassment she suffered. Both the district court and the Fifth Circuit ruled against Gebser, finding no basis for imputing the teacher's actions to the school. [114] A divided Supreme Court agreed, holding that "damages may not be recovered . . . 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." [115]

Part of the basis for the Court's holding was an explicit rejection of agency principles in the school sexual harassment context. ***330** Gebser argued, as some lower courts had held, [116] that Franklin incorporated Title VII agency principles into Title IX by virtue of the following statement:

Unquestionably, Title IX placed on [the school district] 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." [117] We believe the same rule should apply when a teacher sexually harasses and abuses a student. [118] However, the Court disagreed, stating that its reference to Meritor in Franklin applied only to the holding that sexual harassment constitutes a form of sex discrimination, a conclusion Meritor reached with respect to Title VII. [119] The Court added that Meritor's basis for finding agency principles applicable to Title VII was the statute's explicit definition of "employer" as including "any agent." [120] In contrast, "Title IX contains no comparable reference to an educational institution's 'agents,' and so does not expressly call for application of agency principles." [121]

Because the statute does not "expressly" call for agency principles to apply, the Court determined that its job was to "examine the relevant statute" to "fashion the scope" of the "implied right" in a manner that comports with "the statutory structure and purpose." [122] Looking first to the purpose of Title IX, the Court found that allowing 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" would "frustrate the purposes" of Title IX. [123] The Court identified those purposes as "to avoid the use of federal resources to support discriminatory practices" and "to provide individual citizens effective protection against those practices." [124] However, the Court failed to identify exactly how allowing recovery based on constructive notice or agency principles would frustrate those two identified purposes. [125]

***331** Turning to the structure of the statute, the Court put great emphasis on the "contractual framework" of Title IX, as compared to the "outright prohibition" contained in Title VII. [126] A contractual framework "focuses more on 'protecting' individuals from discriminatory practices carried out by recipients of federal funds" rather than on compensating them for past discrimination. [127] Furthermore, a Spending Clause statute, such as Title IX, requires that the recipient of federal funds be on notice of its potential liability, and the Court believed that Congress would never have envisioned a recipient of federal funds to be liable based on principles of constructive notice or respondeat superior for one of its employees' acts of sexual harassment. [128] Finally, the Court looked to the express means of enforcement provided by the statute itself. Title IX's administrative remedy

allows the funding agency to terminate funding only after the agency has notified the federal funding recipient of a violation and the recipient has failed to remedy that violation. [129] That remedial scheme "avoid[s] diverting education funding from beneficial uses where a recipient was unaware of discrimination in its programs and is willing to institute prompt corrective measures." [130] Ultimately, the Court concluded that "[w]here a statute's express enforcement scheme hinges its most severe sanction on notice and unsuccessful efforts to obtain compliance, we cannot attribute to Congress the intention to have implied an enforcement scheme that allows imposition of greater liability without comparable conditions." [131]

Based on this reasoning, the Court concluded that actual notice to an appropriate person was required before a federal funding recipient could be held liable. Although the holding came in a case involving sexual harassment, the Court's concluding statement on its face appears broader:

> Consequently, in cases like this one that do not involve official policy of the recipient entity, we hold that a damages remedy will not lie under Title IX unless an official who at a minimum ***332** 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. [132]

Expanding on the standard, the Court required that the recipient who receives actual notice be deliberately indifferent to the harassment before being held liable. [133] Under this standard, Gebser could not hold the school district liable because once the school knew of the teacher's harassment, the school fired him. [134]

Much of the language in Gebser appears limited to sexual harassment. Before coming to its ultimate conclusion, the Court notes that sexual harassment of students "is an all too common aspect of the educational experience" and that the harm the student suffers because of the teacher's "reprehensible" conduct is "extraordinary." [135] Furthermore, its final statement of the holding speaks in terms of sexual harassment: "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." [136] Language limiting the holding of the case to sexual harassment would indicate that other forms of sex discrimination committed by teachers may not be subject to the actual notice and deliberate indifference standard.

However, alongside those limiting statements are the Court's broader statements implying that its holding captures all Title IX sex discrimination complaints seeking to establish institutional liability for the acts of agents. For instance, its discussion of the statutory enforcement scheme talks generally of situations "where a recipient was unaware of discrimination in its programs." [137] The broadest statement of the Court's holding applies to "cases like this one that do not involve official policy of the recipient entity." [138] The concluding section, after discussing the particular harm involved in sexual harassment noted above, defines the issue of the case as "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." [139] If these statements are taken at face value and given precedence over the limiting statements about sexual harassment, those other forms of sex discrimination that are the focus of this Article would also be ***333** subject to the actual notice and deliberate indifference standard.

B. Gebser as Seen in Davis v. Monroe County Board of Education

Gebser left unresolved the issue of whether student-student sexual harassment could form the basis of a Title IX damages action against a federal funding recipient. Until 1999, there had been considerable confusion as to whether Title IX could support such

a cause of action. [140] The Supreme Court resolved the issue in the case of Davis v. Monroe County Board of Education. [141] Although the resolution of this particular issue has no direct bearing on the subject matter of this Article because students are generally not agents of schools, [142] language in the Court's decision is useful in analyzing the issue.

In Davis, a fifth-grader was the victim of a pattern of sexual harassment suffered at the hands of one of her classmates. The classmate eventually was charged with and pleaded guilty to sexual battery, but in the meantime, he caused the victim to undergo several months of harassment at school. [143] The victim repeatedly informed her teachers of the harassment, and the victim's mother informed the victim's teachers and was assured that the school principal had been informed of the incidents. [144] Despite these actions taken to notify school authorities, no one at the school made any effort to discipline the harasser or even to separate the harasser from the victim. [145] The school board itself had no policy on the issue of student-student sexual harassment. [146]

The victim's mother filed suit on the victim's behalf, alleging that the school was responsible for the interference with her daughter's education based on its inadequate response to the victim's complaints of harassment. [147] In ultimately concluding that ***334** a Title IX claim of student-student sexual harassment seeking money damages is subject to the same analysis as a claim of teacher-student sexual harassment, [148] the Court discussed Gebser in ways that are instructive for this Article's analysis. For instance, much of the discussion of Gebser is within the context of sexual harassment. The Court restates the Gebser holding with a specific mention of "sexual harassment" rather than a more generalized term: "In Gebser, we concluded that a recipient of federal education funds may be liable in damages under Title IX where it is deliberately indifferent to known acts of sexual harassment by a teacher." [149]

However, other statements in Davis speak of Title IX in terms broader than just sexual harassment. At various points in the opinion, the Court uses the general terms "misconduct" or "discrimination" to describe the conduct analyzed under the Gebser standard and not just the specific term "sexual harassment." In speaking of the rejection of agency principles, the Court wrote that in Gebser "we rejected the use of agency principles to impute liability to the district for the misconduct of its teachers" [150] and that "we concluded in Gebser that recipients could be liable in damages only where their own deliberate indifference effectively 'caused' the discrimination." [151] A reiteration of the holding of Gebser different than those cited above [152] speaks broadly as well: "Gebser thus established that a recipient intentionally violates Title IX, and is subject to a private damages action, where the recipient is deliberately indifferent to known acts of teacher-student discrimination." [153]

Looking at Davis to answer the question posed by this Article is thus not conclusive. On the one hand, several of the references to ***335** Gebser refer to "misconduct" and "discrimination," of which sexual harassment is just one form. [154] However, as in Gebser, the Court frames the issue in the beginning of its opinion as an issue of determining the standard for "cases of student-on-student harassment," [155] not "student-on-student discrimination." Davis's entire analysis of Gebser, both the parts that specifically refer to sexual harassment and those that refer to the more generalized terms of misconduct or discrimination, occurs within this framework. Furthermore, similar to Gebser, the Court faced the prospect of devising a standard for behavior that is incredibly commonplace and feared overloading the lower courts with frivolous lawsuits based on everyday childhood interaction. [156] This desire to restrict the cause of action in Davis could have led the Court to talk more restrictively about the Gebser holding as well. With both possibilities apparent on the face of both Gebser and the analysis of that opinion in Davis, it is clear that the Supreme Court has not issued the final word regarding whether agency principles apply when determining institutional liability in Title IX non-harassment sex discrimination cases. [157]

IV. Lower Court Analysis Since Gebser

Gebser and Davis settled the question of what standard to apply to determine institutional liability for monetary damages under Title IX for sexual harassment claims. Commentators have appropriately criticized the decisions and raised questions about unanswered details after the two decisions; [158] lower courts have struggled over how to apply certain aspects of the announced standard, [159] but the standard itself is clear: Only when a federal funding recipient had actual notice of and was deliberately indifferent to sexual harassment would that federal funding recipient be liable for money damages. However, as noted above, because those two cases were sexual harassment cases, they left open the question whether the same standard applies for claims of ***336** sex discrimination that involve forms of discrimination other than sexual harassment. This Article answers that question in Section V, but first it is useful to look at how the lower federal courts have applied Title IX to non-harassment claims of sex discrimination since Gebser.

Since Gebser, several courts have addressed non-harassment claims of sex discrimination under Title IX. For those cases that do not involve challenges to a policy of a recipient of federal funding, [160] no clear standard has emerged. Instead, there appear to be two different approaches the courts have taken: adopting Gebser or applying antidiscrimination law from Title VII. Unfortunately, courts that have faced this issue have not undertaken any extensive analysis in reaching their conclusions.

A. Courts That Apply Gebser

Of the courts that have applied Gebser to Title IX claims of sex discrimination that do not involve sexual harassment, none has fully grappled with the issue of whether Gebser applies equally to these non-harassment cases as it does to sexual harassment cases. The only circuit court to have reached this conclusion merely stated the Gebser standard and applied it. [161] In Grandson v. University of Minnesota, [162] the University of Minnesota faced two different claims for damages: one by a student claiming that she was denied scholarship and financial support by the school because it discriminated against female athletes by providing fewer opportunities for them and another by three other students bringing a class action suit on behalf of female students claiming that the ***337** school discriminated against women's athletics generally. [163] The court twice applied Gebser. First, because the class plaintiffs had not alleged notice to the appropriate school officials or deliberate indifference on their part, the court affirmed the denial of the class plaintiffs' motion to amend their complaint to add a claim for money damages. [164] Without those allegations, according to the court, the damages claim "would have been futile under Gebser." [165] Likewise, the individual plaintiff's claim failed because of Gebser's requirement that "money damages should not be awarded except for knowing violations." [166] The court closely analyzed the plaintiff's claims that she satisfied the Gebser standard, but ultimately concluded that she did not meet the burden. [167] The opinion does not indicate that either the individual plaintiff or class plaintiffs argued that Gebser did not apply to this type of case.

Six district courts have faced these types of sex discrimination claims [168] and based their rulings on Gebser. The first to do so was the Northern District of New York in Niles v. Nelson. [169] In a case that also asserted claims of sexual harassment by a teacher, the plaintiff alleged that her ninth grade German teacher treated his female students differently than he treated his male students by calling on male students first in class and offering male students, but not female students, immediate help when they were having difficulty. [170] Without differentiating between the sexual harassment claims and the differential treatment claims, the court stated that the Gebser standard applied to the case. [171]

The Northern District of Illinois faced a claim by a girls' hockey team and its members alleging that the state amateur hockey association discriminated against the team based on sex. [172] The hockey association oversaw all amateur hockey in the state, including high school girls' hockey. [173] The team and its members ***338** claimed that the association did not offer the same

opportunities to girls' hockey teams as it offered to boys' teams. [174] Central to the plaintiffs' claim was proving that the association was subject to Title IX. [175] Answering the question left open in NCAA v. Smith [176] --whether a non-federally funded entity might be subject to Title IX if a federally funded entity has "cede[d] controlling authority over" the program to the non-federally funded entity [177] --the court rejected the "controlling authority" argument, holding that the association was not subject to Title IX because it was not "itself a recipient of federal financial assistance." [178] The court responded to the concern that its holding would enable federally funded institutions to escape liability under Title IX when they ceded authority over a program to a non-federally funded entity by stating that, based on Gebser, agency principles do not apply in Title IX, but the federally funded entity may be liable for the discriminatory acts of the third party if the federally funded entity had notice of and was deliberately indifferent to the discrimination. [179] Thus, although the court did not specifically hold that Gebser applied to the case before it, its reasoning necessarily implies that it would apply Gebser to all Title IX cases.

A more explicit application of Gebser to non-harassment sex discrimination cases appears in Mercer v. Duke University. [180] That case addressed the claims in the much-publicized case of the female college student who wanted to be a place kicker on the Duke football team. [181] During the plaintiff's first year at the school, the coach gave her a try-out, but told her that her skills were not good enough. [182] She spent the year helping the team as a manager and then made the team the following year. [183] The coach quickly regretted his decision to give her a position on the team and started to take actions to discourage her from participating: He did not allow her to attend pre-season camp; he told her she should try out for the cheerleading squad; and he refused to issue her a uniform or pads for the season. [184] After her year as the only non-active member of the team, the plaintiff was told, before the beginning of the next season, that she was dismissed from the team because she lacked ***339** sufficient kicking skills, even though no other player had ever been dismissed by the coach for performance reasons. [185] Even after the dismissal, the plaintiff participated in winter conditioning with the team, but the coach eventually told her that she had no right to participate. [186]

Mercer brought a Title IX claim based on the discrimination and prevailed before a jury. [187] In reviewing the jury's verdict on a motion for judgment as a matter of law, the district court held that the school's actions had to be judged against the Gebser standard. [188] The court referred to Gebser broadly, without noting the specific sexual harassment facts of the case: "In Gebser, the Court established a three-pronged test for determining whether an institution may be held liable for the acts of its employees, where no official policy of the recipient entity is involved." [189] The jury, according to the court, had enough evidence before it to conclude that the proper school officials had notice of the discriminatory treatment and had not reacted sufficiently, thus satisfying the Gebser standard. [190]

Applying the same standard, the Northern District of Iowa rejected a Title IX claim by a female high school student who alleged that female student-athletes were disciplined more harshly than male student-athletes. [191] A police officer observed April Marie Schultzen, a member of the high school's women's volleyball team, smoking at a local convenience store. [192] The officer reported the incident to the school principal, who suspended Schultzen from school activities for twelve weeks. [193] Schultzen sued the school, alleging that male athletes who violated the school's code of conduct were not suspended. [194] Before the court was the defendant's limited motion to dismiss the claim for punitive damages, so the court did not specifically address the standard for the non-harassment claim; however, the court analyzed the punitive damages question in detail, at one point stating that, based on Gebser, "school districts are only subject to liability for their own wrongdoing" and not the wrongdoing of a teacher. [195] While the court broadly stated the holding of Gebser at first, it did later reiterate the holding of both ***340** Gebser and Davis in terms of sexual harassment. [196]

The Northern District of New York faced another claim by a student that she was subject to non-harassment sex discrimination in Curto v. Smith. [197] The court addressed the claims of a veterinary student who had twice failed the final examination for a core first year course. [198] As a result, based on school policy, she was barred from re-registering at the school. [199] The plaintiff based her Title IX claims on her assertion that the only students expelled from her class had been female and that two male students with similar academic problems had not been expelled. [200] Without mentioning Gebser by name, or any case for that matter, the court concluded that the plaintiff had stated the basic requirements of a Title IX claim by complaining to university officials about the differential treatment. [201] Thus, the court implicitly, but, like the others, without analysis, applied Gebser to the non-harassment claim.

The only court to apply Gebser and to recognize the issue of whether Gebser applies beyond sexual harassment did so in the context of a claim for unlawful retaliation after a complaint of sexual harassment. [202] In that case, Litman v. George Mason ***341** University, [203] the Eastern District of Virginia faced a claim of retaliation under Title IX following a student's complaint to the school's equity office about a computer science professor's sexual harassment. [204] The school acknowledged that the plaintiff faced incidents of retaliation when the professor closed the computer lab and initiated disciplinary hearings against the student, but claimed, based on Gebser, that it was not deliberately indifferent to those incidents. [205]

Before analyzing the issue, the court noted that there had been "very little case law development of the proper standard to apply in a Title IX retaliation claim." [206] Although the court recognized the Gebser issue raised by this Article, the court answered it by merely setting forth a simple dichotomy: For Title IX claims involving discriminatory policies, a plaintiff need only prove discriminatory animus; for discrimination that is not an official policy, "courts have applied the actual knowledge plus deliberate indifference framework." [207] The only elaboration the court provided was a statement that "[r]etaliation that is not an institution's official policy is akin to harassment that is likewise not the institution's official policy." [208] Thus, after recognizing the issue but without fully analyzing it, the court found that the plaintiff had to prove actual knowledge and deliberate indifference. [209]

***342 B. Courts That Have Not Applied Gebser**

Like the courts that have either held or stated in dicta that Gebser applies to cases of non-harassment sex discrimination, most of the courts that have not applied Gebser have done so without discussion of the matter. Neither of the two circuit courts that have so concluded have addressed Gebser in their analyses. The first to face the issue, the Fourth Circuit, probably did not even consider the issue when addressing two different cases of discrimination against female students by universities. In the first, a graduate student in applied mathematics was dismissed from the University of Maryland for failing to satisfy basic requirements for the program by failing ten qualifying exams. [210] She sued the school, alleging race and gender discrimination under various federal statutes, including Title IX. [211] The Fourth Circuit analyzed her claims as one, applying the Title VII framework for determining if an action is discriminatory. [212] Because the alleged actions by the plaintiff's professors were not discriminatory and because there was no evidence of pretext, her discrimination claims failed. [213] Implicitly, the court applied agency principles by analyzing the actions of the professors; it never mentioned Gebser.

The other Fourth Circuit case involved a pre-trial appeal in the football place kicker case. [214] The facts of the case are set forth in detail above. [215] After the district court initially dismissed the case because it believed Title IX provided a complete exemption for contact sports, [216] the Fourth Circuit reversed. [217] In holding that the plaintiff, Heather Sue Mercer, had stated

a claim under Title IX, without any citation to Gebser, the Fourth Circuit stated the facts of ***343** the case that were sufficient to set forth the Title IX violation: that "Duke allowed her to try out for its football team (and actually made her a member of the team), then discriminated against her and ultimately excluded her from participation in the sport on the basis of her sex . . . ." [218] In that conclusion, the court refers to "Duke" as the actor who discriminated against Mercer; however, that statement must be read in light of the court's recitation of the facts of the case earlier in the opinion. In that section, the court refers to the actions of the coach only, not the actions of any officials at Duke who would satisfy the Gebser notice requirements. [219] Therefore, given that the court was free to affirm the district court's dismissal on any ground on appeal, one can read the opinion only as concluding that the alleged discriminatory actions by the coach were sufficient to hold Duke liable under Title IX.

The other circuit court that has faced a case raising the issue handled it in the same manner--by ignoring Gebser and attributing the discriminatory actor's conduct to the school. In Gossett v. Oklahoma, [220] the Tenth Circuit faced the Title IX claim of a male nursing student who claimed that he received a failing grade in a core course and was thus dismissed from the nursing program as a result of the discriminatory actions of the course's instructors. [221] Specifically, he alleged that he sought assistance from the instructors after he struggled in the class but that the instructors did not give him the same "help, counseling, and opportunities to ***344** improve" as they gave the female students. [222] In analyzing the case, the court cited a pre-Gebser Second Circuit case and stated that "[c]ourts have generally assessed Title IX discrimination claims under the same legal analysis as Title VII claims." [223] The Court proceeded to analyze the case under the burden-shifting framework of Title VII from McDonnell Douglas Corp. v. Green, [224] finding that the plaintiff had presented enough evidence to defeat the defendant's motion for summary judgment. [225] The key evidence relied upon was an alleged pattern of discrimination by the instructors, [226] not the administration and not the administration's response to the plaintiff's complaints of discrimination, as Gebser would require.

Like the two circuit courts, the district courts that have not applied Gebser have, for the most part, simply ignored the case. The first district court to do so was the Northern District of Illinois in Adusumilli v. Illinois Institute of Technology. [227] In that case, a graduate student alleged both sexual harassment, by professors and students, and other forms of sex discrimination, specifically that one of her professors disapproved her paper topic without reason and that she was given unfair grades on three papers. [228] The court analyzed the sexual harassment claims under Gebser, [229] but separately analyzed the disparate treatment claims. [230] For those claims, even though the court had already stated the Gebser standard, the court stated that "the standards from Title VII cases generally apply to claims of sexual discrimination under Title IX." [231] In dismissing the claims for failing to allege that she was treated differently than others with the same level of performance, the court mentioned nothing of Gebser and the requirement that the plaintiff notify the appropriate school officials and that they fail to respond reasonably.

In a pregnancy discrimination case, the Eastern District of Kentucky employed the same analysis. In Chipman v. Grant County School District, [232] two high school students alleged that they had been excluded from the school's national honor society chapter because they had been pregnant and then given birth to children ***345** and because they had engaged in premarital sex. [233] The students alleged that they were the only students with a 3.5 grade point average who were not offered admission, that no other students had been asked if they had engaged in premarital sex, and that the honor society's admissions committee would not have denied admission to a male student who had fathered a child. [234] Although the relationship between the admissions committee and the school board was not clear in the opinion, there was no indication that the admissions committee was acting based on a school policy or that anyone in the school administration had been informed of the admissions committee's discriminatory acts. Rather, it appears that the admissions committee, like the teachers and professors in the other cases discussed in this Article, was an agent of the school board for purposes of deciding who was admitted to the honor society.

The court analyzed the claim, brought under the Title IX regulations prohibiting discrimination based on parental status [235] and pregnancy, [236] by importing the standards from the Pregnancy Discrimination Act, an amendment to Title VII prohibiting pregnancy discrimination in employment. [237] The court used the traditional burden-shifting analysis from employment law, finding that the plaintiffs had met their burden of showing they were treated differently but that the defendants had not offered a legitimate non-discriminatory reason for the disparate treatment. [238] Accordingly, without discussing Gebser or whether the committee's actions should be attributed to the school, the court held that the plaintiffs had demonstrated a sufficient likelihood of success for a preliminary injunction. [239]

In two decisions in Kemether v. Pennsylvania Interscholastic Athletic Association, [240] the Eastern District of Pennsylvania explicitly applied agency principles to a Title IX claim alleging that a statewide high school athletic association discriminated against female referees in assignments for basketball games. The plaintiff alleged that the association, through its local chapter's referee assignors, refused to assign female referees to boys' varsity ***346** basketball games. [241] After reviewing master/servant liability and aided-by-the-agency-relationship liability [242] and then applying those principles to the plaintiff's Title VII claim, [243] the court analyzed the plaintiff's Title IX claim under the identical framework. [244] Gebser had been decided two months before Kemether, yet the court never mentioned it. In its decision a year later denying the defendant's motion for judgment as a matter of law following a jury verdict in favor of the plaintiff, the court applied the same analysis. [245]

Another district court ignored Gebser in a case in which a nursing student claimed he had been placed on probation and then expelled because of his sex and national origin. [246] In that case, the student received multiple warnings about his academic performance before he was ultimately dismissed from the school by the school's Progression and Promotion Committee. [247] He based his claim of discrimination on various comments made by his instructors, none of which the court found to constitute discriminatory statements. [248] In reviewing the claims under Title IX, Title VI, and Section 1981, the court employed the same Title VII framework for all of the claims. [249] The court never mentioned Gebser or its possible implications for the case.

The same judge in the Northern District of New York employed this analysis in two cases --Bucklen v. Rensselaer Polytechnic Institute [250] and Curto v. Smith. [251] Curto, discussed above, [252] involved the alleged discriminatory treatment of a veterinary student. The court analyzed one of the student's claims, regarding the decision to expel her and the determinations leading up to that decision, under a standard that appeared to apply Gebser. [253] However, the court analyzed a separate sex discrimination claim, regarding being denied access to facilities at the school after being expelled, without applying Gebser. [254] Instead, the court relied on a pre-Gebser Second ***347** Circuit case that had held that "Title IX bars the imposition of university discipline where gender is a motivating factor in the decision to discipline." [255] Based on that case, the court required the plaintiff to prove that "expelled women were treated more harshly than expelled men." [256] Without looking to the Gebser issues of notice and deliberate indifference, the court analyzed the evidence, finding that the evidence the plaintiff had produced did not compare her case to similarly situated men; thus, the plaintiff did not prove discrimination. [257]

In another graduate school case, the same court faced the claim of a male student who claimed that although his evaluations were uniformly positive, he was forced to drop out of school after failing the oral part of his preliminary examination three times and then being denied a fourth opportunity. [258] He based his claim of sex discrimination on his allegation that a female student who had suffered from the same nervousness he had faced had been allowed to take the oral portion of the exam in a written format. [259] Reviewing the case on a motion to dismiss, the court stated that "courts in this Circuit, and others, analyze Title IX claims under the Title VII framework." [260] Therefore, the plaintiff, according to the court, "must simply show that he was

excluded from participation, denied the benefits of, or subjected to discrimination in an educational program, that the program receives federal assistance, and that the exclusion was on the basis of his sex." [261] Without citing Gebser or inquiring into notice or deliberate indifference, the court found that the plaintiff had alleged facts sufficient to prove a Title IX violation. [262]

The final district court case facing this issue separates itself from the others because it actually addressed Gebser and the issue of whether it applies to non-harassment cases. In Dodd v. Pizzo, [263] the Middle District of North Carolina considered the claim of a former Assistant Professor of Pathology at Duke University. [264] The former professor claimed she encountered problems in the department after she was improperly accused of purchasing a piece of equipment for the laboratory. [265] She notified the school's Office of ***348** Institutional Equity about her problems, but still was removed from her position. [266] The court dismissed portions of her sex discrimination claims but permitted her claim for quid pro quo discrimination to go forward based on allegations that her supervisor, with whom she had previously had a relationship, demoted her after she refused to continue their relationship. [267] The court first analyzed the claims under Title VII and then held that the quid pro quo claim could also proceed under Title IX. [268] The defendant had argued to the court that Gebser should apply; however, the court held that "Title VII principles apply to Title IX employment discrimination" because Gebser arose in the context of sexual harassment, not sex discrimination in employment. [269] The court, claiming that applying Gebser would impose "a significant . . . evidentiary hurdle" for Title IX employment discrimination plaintiffs, expressed uncertainty as to whether Gebser should apply to employment cases and did not apply it. [270]

In discussing Gebser and whether it applies outside the sexual harassment context, the Middle District of North Carolina joined the Eastern District of Virginia as the only courts to have recognized the issue rather than simply applying or not applying Gebser without analysis. However, the minimal analysis in those two cases is insufficient to completely answer the question posed by this Article. It is clear that the courts that did not apply Gebser but did apply pre-Gebser Title IX cases ignored an important precedent in Title IX jurisprudence. At the same time, the courts that applied Gebser ***349** without analysis also missed an important distinction--that Gebser involved sexual harassment and not other forms of sex discrimination. Thus, while the above cases provide an important start to the analysis of the question posed by this Article, as well as a good look into the types of non-harassment sex discrimination claims that might arise under Title IX, a more detailed analysis of the issue is required.

V. Institutional Liability Standard for Non-Harassment Cases

From discriminatory treatment by a teacher within a class to differential treatment in extracurricular activities based on pregnancy, it is clear that non-harassment sex discrimination in education exists and poses a sex-based barrier to educational opportunities. Such barriers were at the heart of Title IX's enactment; yet, as illustrated above, the courts have demonstrated no consistent approach to the question of institutional liability in these cases. To date, no court has seriously grappled with the issue; instead, most have opted either to apply Gebser without analysis or to ignore the case without acknowledging its possible application.

Consequently, the question posed by this Article remains unanswered: What standard should apply in determining institutional liability for Title IX non-harassment sex discrimination claims? This section of the Article answers the question by analyzing the Title IX jurisprudence laid out above in light of basic common-law interpretive principles widely applied by the Supreme Court in cases of statutory interpretation. The conclusion reached here is that Gebser, wrongly decided based on a frustratingly narrow view of Title IX, was a context-specific case that developed a standard of institutional liability for sexual harassment cases only; in other cases of sex discrimination under Title IX, courts should apply the well-established federal common law of agency to determine whether the school is liable for the discriminatory acts of its employees.

A. Common Law Backdrop

A basic principle of federal statutory interpretation is that when Congress legislates it does so against the backdrop of federal common law principles relevant to the issue at hand. The Supreme Court expressly utilized this principle in Franklin v. Gwinnett County Public Schools. [271] In that case, the Court applied the background common-law principle that "all appropriate relief is available in an action brought to vindicate a federal right . . . ." [272] ***350** Using that principle, the Court found that Title IX's remedies included not only injunctive relief but also monetary damages. [273] Several times within the opinion, the Court noted the interpretive rule of applying generally-accepted common-law principles to Congressional statutes. For instance, the Court wrote that "although we examine the text and history of a statute to determine whether Congress intended to create a right of action, we presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise." [274] The Court made that presumption because it regularly applies such widely-accepted presumptions to Congressional statutes when "Congress is silent on the question [at issue]." [275] Even though the private cause of action under Title IX is implied rather than expressly created in the statute itself, [276] the Court applied this well-accepted presumption because there was no "clear direction to the contrary by Congress." [277]

A similar background presumption exists in Supreme Court jurisprudence with respect to the application of agency doctrine to statutory law. In 2003, the Supreme Court reiterated the longstanding presumption in Meyer v. Holley, [278] a case interpreting the Fair Housing Act. [279] The Act prohibits "any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate" based on certain protected categories. [280] Like Title IX, the Act "says nothing about vicarious liability." [281] Thus, the Act applies to those whose business is to engage in residential real estate, but not, on its face, to their agents.

As is to be expected, though, those persons covered by the words of the Act are not the ones who are likely to engage in discrimination. Instead, their agents, the ones who interact with aspiring tenants, are the likely discriminators. In Meyer, a ***351** salesman for the defendant real-estate corporation allegedly denied the plaintiffs a house for racially discriminatory reasons. [282] The plaintiffs sued both the salesman and the corporation under the Fair Housing Act, and, among its various defenses, the corporation claimed that it was not liable for the acts of its agents under the Act. [283] Using a logic similar to Franklin's, the Court unanimously held that the Act allows for vicarious liability through traditional agency principles. [284]

The Court's reasoning is very instructive in answering the question raised in this Article. As in Franklin, the Court stated that Congress' silence as to an issue regarding liability in a statutory tort action "permit[s] an inference that Congress intended to apply ordinary background tort principles . . . ." [285] The Court applied this principle, relevant to the question in Meyer and to the issue raised in this Article, to vicarious liability: "[T]he Court has assumed that, when Congress creates a tort action, it legislates against a legal background of ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate those rules." [286] One of the sources for this principle was a 1991 case that stated:

> Congress is understood to legislate against a background of common-law . . .principles. Thus, where a common-law principle is well established, . . .the courts may take it as given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident. [287]

Vicarious liability principles fall into this category of well-established common-law background. “It is well established that traditional vicarious liability rules ordinarily make principals or employers vicariously liable for acts of their agents or employees in the scope of their authority or employment.” [288] In support of that conclusion, the Court cited an 1872 Supreme Court case that mentioned the federal common law of agency: “The principal is liable for the acts and negligence of the agent in the course of his ***352** employment, although he did not authorize or did not know of the acts complained of.” [289] The Court also cited the 1957 Restatement (Second) of Agency and its rules of principle/agent liability. [290]

It is apparent from both Franklin and Meyer that the Supreme Court regularly applies background common-law principles to Congressional statutes that are silent on the issue at hand. It is also apparent from Meyer that vicarious liability is one of those commonly-accepted background common-law principles. Furthermore, it is apparent from Franklin that the rule of applying background common-law principles applies equally to Title IX, even though Title IX's cause of action is implied rather than expressly created by Congress. Putting these well-accepted canons of statutory interpretation together would indicate that Title IX, silent on the issue of vicarious liability, should incorporate the backdrop of commonly-accepted agency principles. However, Gebser did not apply this common-law presumption, ignored this line of reasoning altogether, and instead opted for an actual knowledge/deliberate indifference model for institutional liability. Determining exactly why the Court avoided this canon of statutory construction helps in determining the standard of institutional liability that this Article seeks.

B. Gebser's Rejection of Agency Principles

Why, then, did Gebser ignore the unanimously agreed-upon principle from Meyer that “when Congress creates a tort action, it legislates against a legal background of ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate those rules” ? [291] As discussed above, [292] Gebser contains ***353** four explicit reasons for rejecting vicarious liability in Title IX sexual harassment cases: the purpose of Title IX, its statutory difference with Title VII, its Spending Clause origins, and the statute's explicit remedial scheme. None of these reasons adequately explains why the Court rejected the “common-law background” analysis that the Court later employed in Meyer.

The Court identified two purposes behind Title IX. As first articulated in Cannon and later reiterated in Gebser, the two main objectives of Title IX are to “avoid the use of federal resources to support discriminatory practices” and “to provide individual citizens effective protection against those practices.” [293] Title IX's protective purpose stands in contrast to Title VII's purpose, which is to recompense victims of discrimination. [294] Without explaining exactly how, Gebser stated that applying agency principles to Title IX sexual harassment claims would “frustrate the purposes of Title IX.” [295] Yet, the Court did not fully probe this claim with reference to its past statements about vicarious liability. In fact, the Court has stated, albeit in a different context, that if an organization “is civilly liable for the . . . violations of its agents acting with apparent authority, it is much more likely that similar . . . violations will not occur in the future. ‘[P]ressure [will be] brought [on the organization] to see to it that [its] agents abide by the law.”’ [296] Applied to Title IX and schools, the same principle would indicate that agency principles would help protect students from discriminatory action in the school setting because holding the institution liable for the acts of its agents would prevent the institution from turning a blind eye to its agents' discriminatory actions. Therefore, applying agency principles to Title IX is not inherently incompatible with its protective purpose.

Another key aspect of Gebser's reasoning is that Title IX, unlike Title VII, does not define educational institution to include the institution's agents “and so does not expressly call for application of agency principles.” [297] However, the Court failed to consider that the ***354** converse is also true: Title IX also does not expressly prohibit the application of agency principles. Such agnosticism as to the application of agency principles would appear to require courts to look to background common-law principles to determine whether agency principles should apply. In line with the reasoning of Franklin and Meyer, the Court

has written that "[i]n order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law." [298] Even when the cause of action is judicially implied, as with Title IX, rather than expressly created by Congress, the Court presumes the applicability of common-law principles in defining the boundaries of that cause of action "unless Congress has expressly indicated otherwise." [299] Lacking Title VII's clear direction to apply agency principles, but also lacking a clear statement that agency principles do not apply, Title IX is a perfect candidate for application of any applicable background common-law principle with respect to institutional liability. As discussed above, [300] application of agency principles to federal statutory causes of action falls into this category. Therefore, Gebser's comparison to Title VII also does not adequately explain its failure to apply agency principles.

Gebser also gave great weight to the fact that Title IX has a "contractual framework" in which the federal government has "condition[ed] an offer of federal funding on a promise by the recipient not to discriminate." [301] Without specifically identifying Title IX as a Spending Clause statute, [302] the Court states that, as in other Spending Clause statutes, the funding recipient must have notice that it will be liable for its actions. [303] However, the Court wavers about the specific type of notice required--must the recipient have notice upon receiving funding that it will be held liable in situations that meet certain criteria or must the recipient know upon taking certain actions that it will be held liable for those particular actions. Language in Gebser supports both readings, [304] ***355** and Spending Clause jurisprudence generally supports both readings. [305]

With respect to discrimination statutes, though, the latter reading would seem to require that the funding recipient not only know of the discriminatory act but also know that the act is in fact a discriminatory violation of the law. Requiring that level of intent would push Title IX beyond the requirements of all other civil rights statutes [306] as well as beyond the requirements the Supreme Court ultimately set forth in Gebser. Gebser's institutional liability standard does not require any showing that the funding recipient actually knew that its actions constituted discrimination based on sex nor even that the funding recipient actually knew that the complained of sexual harassment by the teacher actually constituted discrimination based on sex. Rather, Gebser merely requires that the school know about the acts that the student claims constitute harassment and then be deliberately indifferent to the student's complaint. Nothing in the opinion requires the school to know it itself was acting discriminatorily.

Therefore, the only consistent reading of Gebser's discussion of Spending Clause notice is that the funding entity must know before it accepts federal funds that it will be liable in certain situations. [307] This conclusion does not foreclose the application of agency principles, especially given that the Court has recognized the application of such principles as a general backdrop for statutory interpretation for over a century, if not longer. Given the well-established nature of such principles, it would be inconceivable that institutions receiving federal funds would not be aware upon receipt of the funds that they would be liable under agency principles. [308] Accordingly, the notice required for liability under Spending Clause ***356** statutes would be present.

Also important in Gebser is the Court's concern that application of agency principles would thwart the explicit remedial scheme contained in Title IX. [309] Title IX provides for the agency administering the statute to terminate funding after the agency has notified the federal funding recipient that it has violated the statute and the recipient fails to remedy that violation. [310] The Gebser Court believed that allowing agency-based institutional liability would allow the imposition of greater liability than Congress contemplated because damages liability could exceed the amount of federal funding the institution receives. [311] This analysis strangely ignores Cannon, which specifically states that cutting off federal funding is a "severe" remedy that should not be employed for isolated violations; rather, "[t]he award of individual relief to a private litigant who has prosecuted her own suit is not only sensible but is also fully consistent with--and in some cases even necessary to--the orderly enforcement of the statute." [312] Furthermore, the Court's analysis ignores the fact that federal funding occurs on a repeat basis, whereas a damages

award occurs only once; therefore, even a damages award greater than the yearly federal funding a school receives is much less harsh than taking away a school's annual federal funding. In fact, it follows that Congress would require a more elaborate scheme--notice to the school of a violation and failure to remedy that violation--before allowing the agency to terminate highly valuable repeat federal funding. Thus, contrary to Gebser's claim, individual relief for isolated violations of Title IX without actual notice to the school is consistent with Title IX's express enforcement scheme.

It is thus evident that the Court's stated reasons for its decision in Gebser fail to explain adequately why it departed from the accepted common law principle that agency principles apply to federal statutes that do not expressly reject them. The only basis for the decision left is the Court's policy-based justification--the fear of exposing schools to possibly limitless liability for the acts of their agents. Twice the Court wrote about the possible “unlimited recovery” to which a contrary ruling would subject schools, [313] without any recognition that compensatory damages in sexual harassment claims, like all other claims, are limited to those that compensate the victim for the harm suffered. The Court also showed its true reasoning when it announced its concern with “diverting education funding from beneficial uses.” [314] It lamented ***357** that sexual harassment “is an all too common aspect of the educational experience.” [315] Before the Court were briefs about how common sexual harassment was in the schools. [316] Although on the separate issue of student-student sexual harassment, four of the Justices from the Gebser majority dissented in Davis expressing the same concerns about the frequency of sexual harassment and their fear of exposing schools to expansive liability. [317]

This policy judgment, although explicitly stated in the Court's opinion, was not labeled as the basis for the decision. Nonetheless, because the actual stated reasons do not adequately counter the presumption that agency principles are applied to federal statutory causes of action, a reasonable conclusion is that the Supreme Court made a results-oriented policy judgment that agency principles should not apply to Title IX sexual harassment cases because the Court feared that institutional liability based on agency principles would subject schools to near-endless liability. The Court did not support this fear of boundless liability with any facts or figures, and its concern about sexual harassment liability stands in marked contrast to the Cannon Court's warning that an individual complaint about an “isolated violation” should not lead to the withdrawal of federal funds from the entire institution. [318] However, despite the serious problems with the Court's policy justification, it stands as the only basis for its opinion.

C. Limiting Gebser

Viewing Gebser through the lens described here makes it apparent that the decision rested on the Court's unsubstantiated but specific concerns about sexual harassment in the school setting, as the Justices feared that opening schools to vicarious liability for sexual harassment would open educational institutions to endless lawsuits in federal courts. In essence, the Court carved out a special niche of sex discrimination in education for treatment with the heightened actual notice/deliberate indifference standard. All language in Gebser and Davis indicating that the standard applied more broadly went beyond the Court's rationale for departing from the presumptive application of agency principles and thus beyond the holding of the case.

So, what about the standard for non-harassment sex discrimination claims? As opposed to the sexual harassment claim at the heart of Gebser, these types of sex discrimination in education ***358** claims are much less commonplace. Reviewing Title IX cases since Franklin, which firmly established that monetary damages were available for violations of Title IX, and the cases since Gebser highlighted earlier in this Article, indicates that cases of non-harassment sex discrimination are hardly as common as the sexual harassment cases. In fact, they are so uncommon that the lower courts that have been presented with these fact-patterns are not even aware that they fall into a different category of cases than the sexual harassment cases and that they might present a different issue for analysis.

A four-year study of Title IX complaints brought before the Office of Civil Rights confirms this conclusion. The American Association of University Women reviewed sixty-one percent of the non-athletics-related complaints filed with the Office between October 1993 and September 1997. [319] The vast majority of all Title IX complaints--almost two-thirds of the cases--involved sexual harassment. [320] The numbers were even higher for female students: Ninety percent of complaints filed by female elementary and secondary school students and seventy percent of complaints filed by female college students involved sexual harassment. [321] These numbers comport with an earlier study that found that twenty-five percent of girls and ten percent of boys reported sexual harassment by school faculty and staff. [322] Office of Civil Rights Title IX complaints in other areas of sex discrimination in education--discipline, participation in non-traditional fields, unfair grading, employment--were dwarfed by the sexual harassment complaints, and many of the complaints in these other areas were unsubstantiated. [323] Because these non-harassment Title IX complaints, both before the Office of Civil Rights and the courts, are much less common than sexual harassment complaints, Gebser's ***359** reason for departing from the presumption of the applicability of agency principles is not present. Thus, based on the generally applicable common-law presumption, agency principles should apply.

Paradoxically, this Article's argument means that courts would employ a stricter standard for institutional liability in the most common cases of sex discrimination in education--sexual harassment--and would employ a less stringent standard in the less common, non-harassment, forms of sex discrimination. [324] Ideally, such a difference would be unnecessary because the arguments in the Gebser dissent would have swayed the Court and the Court would have applied agency principles to all cases under Title IX; [325] however, Gebser is the current law and new Title IX issues must be addressed in its light. And, while each form of discrimination certainly has the potential to interfere equally seriously with educational opportunity, as described earlier, the types of claims addressed in this Article lie at the heart of the original rationale behind Title IX. [326] Moreover, this difference could have been lurking behind Gebser's reasoning. The Court never so stated or held in Gebser, but it probably understood that at the time Congress passed Title IX, while sexual harassment itself has been around for ages, the legal and political concept of sexual harassment had not yet been developed. [327] Thus, the legislators would not have contemplated that sexual harassment would create liability under the statute. Other forms of discrimination were contemplated--discrimination in employment, academic programs, scholarships, admissions, etc. [328] --but not sexual harassment.

Non-harassment sex discrimination that deprives a student of an educational opportunity falls within the explicit language of the statute, for the discriminatory acts of the teachers or other agents of the funding recipient cause the students to be “excluded from ***360** participation in, be denied the benefits of, or be subjected to discrimination under” a school program. Thus, for these types of cases, there is no sound reason that the logic of Meyer, applying the general rule of vicarious liability based on common law agency principles, should not apply. Gebser incorrectly ignored that logic for sexual harassment cases and concluded that a more restrictive standard for institutional liability applies for those cases. However, that standard has no application in non-harassment sex discrimination cases because Gebser's policy-based rationale for the departure from traditional agency principles is inapplicable to other forms of sex discrimination.

VI. Conclusion

Predicating institutional liability for damages under a federal statute on agency principles is a statutory interpretation principle dating back over a century. Without specifically stating that it was doing so, the Court deviated from that principle in Gebser, instead holding that agency principles did not apply in sexual harassment claims under Title IX. Rather, in that case, the Court set forth a more exacting standard of liability for money damages, one requiring a plaintiff to show that the funding recipient was deliberately indifferent to known acts of sexual harassment.

However, barring any reversal by the Court or change from Congress, that standard should be limited to the cases the Court was actually considering in Gebser--those of sexual harassment. Other forms of sex discrimination in schools do not raise the same concern of overwhelming schools and the federal courts that motivated the Court to depart from presumptively applicable agency principles. Furthermore, such forms of sex discrimination are at the heart of the concerns that led Congress to pass Title IX in 1972, many years before anyone articulated sexual harassment as a legal concept.

For students at federally funded schools whose teachers subject them to sexual harassment, the Court has already set an exacting standard that imposes significant barriers to obtaining relief. For students at federally-funded schools whose teachers or other agents exclude them from educational opportunities based on sex, that standard has no application and agency principles should apply instead.

Footnotes

a1 Staff Attorney, Women's Law Project, Philadelphia, Pennsylvania; Lecturer-in-Law, University of Pennsylvania School of Law; J.D., Columbia University Law School (1997). Thanks to Susan Frietsche, Terry Fromson, Andrew Hyman, Carol Sanger, Michelle Seldin, Lauren Sorrentino, and Linda Wharton who all generously read drafts of this Article and offered insightful comments. Special thanks to Cassie Ehrenberg for her encouragement, intelligent and thoughtful reviewing and editing, and all-round assistance.

1 20 U.S.C. §§ 1681-88 (2000).

2 See, e.g., Mary Voboril, Women on the Court: The Ball Is Smaller. The Shot Clock Is Longer. And, for the Players, the Dream Is Fulfilled, Newsday, June 19, 1997, at B4; David Wharton, Title IX 25 Years Later: Progress Has Been Made, but Gender Equity Remains a Very Contentious Subject in Sports, L.A. Times, June 23, 1997, at C1 (quoting a WNBA general manager as saying "[w]e are the product of Title IX").

3 See, e.g., Frederick C. Klein, Goals for Women's Soccer, Wall St. J., Apr. 16, 1999, at W8; Amy Shipley, Getting with the Program: U.S. Women Set Standard, Now World Is Catching Up, Wash. Post, June 13, 1999, at D1.

4 See, e.g., Nat'l Wrestling Coaches Ass'n v. U.S. Dep't of Educ., 263 F. Supp. 2d 82 (D.D.C. 2003); Ben Feller, Title IX Lawsuit Thrown Out of Court: The Suit Sought to End What It Described as Discrimination Against Male Athletes, Phil. Inquirer, June 12, 2003, at E3 (describing federal court's rejection of lawsuit by National Wrestling Coaches Association that claimed that Department of Education discriminated against men in application of Title IX to achieve athletics equity for women); John Irving, Wrestling with Title IX, N.Y. Times, Jan. 28, 2003, at A21.

5 See United States Department of Education, About the Commission-- Secretary's Commission on Opportunity in Athletics, at http:// www.ed.gov/about/bdscomm/list/athletics/about.html (last visited Mar. 17, 2004) (describing Commission's purpose as "improving the application of current Federal standards for measuring equal opportunity for men and women and boys and girls to participate in athletics under Title IX"); see also United States Department of Education, Charter--Secretary's Commission on Opportunity in Athletics, at http://www.ed.gov/about/bdscomm/list/athletics/charter.html (July 25, 2003). The Commission issued a report on February 28, 2003, recommending a variety of changes to Title IX's implementation. See United States Department of Education, Secretary's Commission on Opportunity in Athletics, "Open to All": Title IX at Thirty, available at http:// www.ed.gov/about/ bdscomm/list/athletics/title9report.pdf (Feb. 28, 2003). However, the Bush administration decided in July 2003 to keep Title IX enforcement the same as it had been. See Letter from Gerald Reynolds, Assistant Secretary for Civil Rights, United States Department of Education, to "Colleague," (July 11, 2003), available at http:// www.ed.gov/about/offices/list/ocr/title9guidanceFinal.html.

6 See, e.g., NCAA v. Smith, 525 U.S. 459 (1999) (holding NCAA not subject to Title IX); Grove City College v. Bell, 465 U.S. 555 (1984) (holding that Title IX applies only to specific program within school receiving federal aid, not to entire school), legislatively overruled by 20 U.S.C. § 1687 (1988).

7 See, e.g., Pederson v. La. State Univ., 213 F.3d 858, 879 (5th Cir. 2000); Neal v. Bd. of Trs., 198 F.3d 763, 770 (9th Cir. 1999); Cohen v. Brown Univ., 101 F.3d 155, 170 (1st Cir. 1996). These cases and others have applied the Department of Education's three-part test

in analyzing issues of athletics equity. See Department of Health, Education, and Welfare, Title IX of the Education Amendments of 1972, a Policy Interpretation, Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71413, 71418 (Dec. 11, 1979) (codified at 45 C.F.R. pt. 86).

8 The three cases are discussed infra at Sections II.B. and III.

9 The history of Title IX is discussed infra at Section II.A. See also Wills v. Brown Univ., 184 F.3d 20, 36-37 (1st Cir. 1999) (Lipez, J., dissenting) ("Sex discrimination in education involves the denial of educational benefits or the alteration of conditions of the educational environment on the basis of sex.").

10 The Department of Health, Education, and Welfare promulgated regulations that, according to a procedure effective at the time, had to be laid before Congress prior to the regulations taking effect. By not enacting a disapproval resolution within forty-five days, Congress approved the regulations. See N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 531-34 (1982) (describing process).

11 See 34 C.F.R. § 106.40 (2003).

12 See 34 C.F.R. § 106.71 (2003) (incorporating Title VI regulation prohibiting retaliation, 34 C.F.R. § 100.7 (2003)).

13 This Article refers to this type of sex discrimination as "non-harassment sex discrimination." Some forms of athletics discrimination are included in this category. Most athletics equity lawsuits involve injunctions and class-based relief. These types of claims are not covered in this Article because they do not raise issues of institutional liability. Rather, athletics discrimination that is covered is discrimination for which individuals seek monetary redress.

14 See discussion infra notes 42-44 and accompanying text.

15 524 U.S. 274 (1998).

16 526 U.S. 629 (1999).

17 Id. at 650; see also Gebser, 524 U.S. at 290 ("[W]e hold that a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond.").

18 Areas in dispute following Gebser and Davis have included what constitutes actual notice, who is an appropriate person to receive the notice, what constitutes deliberate indifference, whether a single incident of harassment is enough to constitute sex discrimination, and whether the harassment has to continue to occur following the notice to the appropriate person. See generally Deborah L. Brake, School Liability for Peer Sexual Harassment After Davis: Shifting from Intent to Causation in Discrimination Law, 12 Hastings Women's L.J. 5, 25-29 (2001).

19 See, e.g., Morse v. Regents of the Univ. of Colo., 154 F.3d 1124, 1127 (10th Cir. 1998) (applying Gebser to quid pro quo sexual harassment as well as hostile environment sexual harassment); Liu v. Striuli, 36 F. Supp. 2d 452, 464 (D.R.I. 1999) (same); Klemencic v. Ohio State Univ., 10 F. Supp. 2d 911, 918-21 (S.D. Ohio 1998) (same).

20 See, e.g., Catherine Fisk & Erwin Chemerinsky, Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983, and Title IX, 7 Wm. & Mary Bill Rts. J. 755 (1999); William A. Kaplin, A Typology and Critique of Title IX Sexual Harassment Law After Gebser and Davis, 26 J.C. & U.L. 615 (2000); Anne D. Byrne, Note, School District Liability Under Title IX for Sexual Abuse of a Student by a Teacher: Why Has the Supreme Court Allowed Schools to Put Their Heads in the Sand? Gebser v. Lago Vista Independent School District, 118 S. Ct. 1989, 22 Hamline L. Rev. 587 (1998); Amy K. Graham, Note, Gebser v. Lago Vista Independent School District: The Supreme Court's Determination That Children Deserve Less Protection than Adults from Sexual Harassment, 30 Loy. U. Chi. L.J. 551 (1999).

21 On February 11, 2004, members of Congress introduced the Fairness Act, one provision of which would overturn Gebser and Davis. See H.R. 3809, 108th Cong. §§ 111-14 (2004).

22 Similar policy issues are, of course, raised by the issue of sexual harassment in the schools. However, in Gebser and Davis, the Supreme Court foreclosed further legal consideration of those issues with respect to sexual harassment.

23 Title IX's explicit language applies to institutions, not to individuals. See 20 U.S.C. § 1681 (2000) (applying to "education program or activity receiving Federal financial assistance"); see also, e.g., Smith v. Metro. Sch. Dist., 128 F.3d 1014, 1018-19 (7th Cir. 1997); Lipsett v. Univ. of P.R., 864 F.2d 881, 885 n.7, 901 (1st Cir. 1988).

24 See Bolon v. Rolla Pub. Sch., 917 F. Supp. 1423, 1427 (E.D. Mo. 1996) (stating that courts "have adopted several different approaches" to determining institutional liability under Title IX).

25 20 U.S.C. § 1681 (2000).

26 Section 601 of Title VI of the Civil Rights Act of 1964, 78 Stat. 252 (codified at 42 U.S.C. § 2000d (2000)). Title VI provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Id.

27 42 U.S.C. § 2000e-2 (2000).

28 117 Cong. Rec. 30,399 (1971). The original amendment to the Education Act focused on increased access to higher and graduate education. Id. at 30,399-426.

29 Id. at 30,415.

30 118 Cong. Rec. 4953, 5802-03 (1972).

31 Id. at 5803.

32 Id. at 5803.

33 Id. at 5807.

34 Id. at 5808.

35 Id. at 5812.

36 See Paul C. Sweeney, Abuse Misuse & Abrogation of the Use of Legislative History: Title IX & Peer Sexual Harassment, 66 Univ. Mo. Kansas City L. Rev. 41, 55-67 (1997) (recounting full legislative history of Title IX).

37 Congress since created a separate agency responsible for education, the Department of Education, with an enforcement division, the Office of Civil Rights. 20 U.S.C. § 3413 (1980). Congress transferred the educational responsibilities of the Department of Health, Education and Welfare to the newly created agency. 20 U.S.C. § 3441 (1980).

38 20 U.S.C. § 1232(d)(1) (1970 & Supp. IV 1974) required that all Education Act regulations be "laid before" Congress in order to become effective. In 1983, the Supreme Court held that a similar provision was unconstitutional under the separation of powers doctrine. See I.N.S. v. Chadha, 462 U.S. 919, 951-59 (1983).

39 34 C.F.R. § 106.40 (2003) (prohibiting family and pregnancy discrimination).

40 Sex Discrimination Regulations: Hearings Before the Subcommittee on Postsecondary Education of the House Committee on Education and Labor, 94th Cong., 1st Sess. 1 (1975).

41 See N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 530-33 (1982) (fully describing the "lay before" process and Congress' approval of regulations).

42 Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976). The EEOC guidelines on sexual harassment were not released until 1980. See 29 C.F.R. § 1604.11 (1980).

43 See Vicki Schultz, The Sanitized Workplace, 112 Yale L.J. 2061, 2079 n.38 (2003) (describing political history of "sexual harassment" activism); Vicki Schultz, Reconceptualizing Sexual Harassment, 107 Yale L.J. 1683, 1696-1701 (1998) (same in more depth).

44 See, e.g., Carroll M. Brodsky, The Harassed Worker (1976); Lin Farley, Sexual Shakedown: The Sexual Harassment of Women on the Job (1978); Catharine A. MacKinnon, Sexual Harassment of Working Women (1979).

45 See Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 75 (1992) (citing Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986)).

46 Cannon v. Univ. of Chi., 441 U.S. 677, 680 (1979).

47 Id. at 680 n.2.

48 Id. The Court did not decide the issue of whether a policy that has a discriminatory impact (rather than a discriminatory intent) could qualify as discrimination under Title IX, although on remand the Seventh Circuit concluded that Title IX does not permit a disparate impact claim. See Cannon v. Univ. of Chi., 648 F.2d 1104 (7th Cir. 1981). Later, the Supreme Court strongly hinted that discriminatory intent is necessary and that discriminatory impact is not enough to make out a Title IX claim of discrimination. See Franklin, 503 U.S. at 70. But see Brake, supra note 18, at 29-37 (noting Gebser's and Davis' shift to causation analysis rather than intent analysis).

49 20 U.S.C. § 1682 (2000). The Court of Appeals in Cannon ruled that the agency enforcement mechanism was the exclusive remedy of Title IX. See Cannon v. Univ. of Chi., 559 F.2d 1063, 1071-75 (7th Cir. 1976).

50 Today, the Court is stingy with implied causes of action. See, e.g., Alexander v. Sandoval, 532 U.S. 275 (2001); Blessing v. Freestone, 520 U.S. 329 (1997).

51 422 U.S. 66, 78 (1975).
First, is the plaintiff "one of the class for whose especial benefit the statute was enacted,"--that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?
Id. (citations omitted) (alteration in original).

52 Cannon v. Univ. of Chi., 441 U.S. 677, 689-709 (1979).

53 Id. at 694.

54 Id. at 704.

55 Id. at 704-05.

56 Id. at 705.

57 Id.

58 Id. at 709.

59 Id.

60 Id.

61 Id. at 709-10. The Cannon Court noted:

Although victims of discrimination on the basis of race, religion, or national origin, have had private Title VI remedies available at least since 1965, respondents have not come forward with any demonstration that Title VI litigation has been so costly or voluminous that either the academic community or the courts have been unduly burdened.
Id. at 709 (citation omitted).

62 See Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 65-66 (1992).

63 503 U.S. at 60.

64 Id. at 76, 78 (Scalia, J., writing for Rehnquist, C.J., and Thomas, J., concurring in judgment).

65 Id. at 63.

66 Id.

67 Id. at 64.

68 Id. at 64-65 (citing Franklin v. Gwinnett County Pub. Sch., 911 F.2d 617 (11th Cir. 1990)).

69 Id. at 66.

70 5 U.S. (1 Cranch) 137 (1803) (cited in Franklin, 503 U.S. at 66). The Court relied on Marbury's pronouncement that the government of the United States would cease being "a government of laws, and not of men... if the laws furnish no remedy for the violation of a vested legal right." Id. at 163.

71 327 U.S. 678 (1946) (cited in Franklin, 503 U.S. at 66). Bell's statement that "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done," id. at 684, provided the major support for the holding in Franklin.

72 463 U.S. 582 (1983) (cited in Franklin, 503 U.S. at 70). In Guardians, a majority of Justices "expressed the view that damages were available under Title VI in an action seeking remedies for an intentional violation, and no Justice challenged the traditional presumption in favor of a federal court's power to award appropriate relief in a cognizable cause of action." Franklin, 503 U.S. at 70.

73 Franklin, 503 U.S. at 71.

74 Id. at 71-72. The Court also found that legislation passed after the decision in Cannon supported this holding. Both the Rehabilitation Act Amendments of 1986, 100 Stat. 1845, 42 U.S.C. § 2000d-7, and the Civil Rights Restoration Act of 1987, Pub. L. 100-259, 102 Stat. 28, presumed that Title IX allowed for an action seeking money damages. Franklin, 503 U.S. at 71-73. It was on this basis that Justice Scalia, writing for Chief Justice Rehnquist and Justice Thomas, joined the judgment of the Court. Franklin, 503 U.S. at 78.

75 Franklin, 503 U.S. at 76.

76 Id.

77 Thomas M. Melsheimer et al., The Law of Sexual Harassment on Campus: A Work in Progress, 13 Rev. Litig. 529, 538-39 (1994) (noting that "[s]ince Franklin, development of Title IX substantive law has been confined to the lower courts").

78 For a very thorough recounting of the variety of standards used by the courts before Gebser to determine institutional liability for teacher-student sexual harassment, see Dawn A. Ellison, Comment, Sexual Harassment in Education: A Review of Standards for Institutional Liability Under Title IX, 75 N.C. L. Rev. 2049, 2095-2118 (1997). Ellison groups the standards into seven different categories (strict liability, agency principles or negligence, agency principles only, negligence, intentional discrimination, actual knowledge of harassment, and reasonable avenue of complaint available). See id. For purposes of this Article, such sub-division is not necessary, as the standards adopted by the courts generally map into the four categories described in this Section.

79 Chance v. Rice Univ., 984 F.2d 151, 153 (5th Cir. 1993), aff'g No. H-88-1302, 1991 WL 296636 (S.D. Tex. July 12, 1991).

80 Id.

81 R.L.R. v. Prague Pub. Sch. Dist. I-103, 838 F. Supp. 1526, 1534 (W.D. Okla. 1993) (relying on the Title VI case of Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 607 (1983)).

82 Franklin, 503 U.S. at 75 (citing Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986), for the principle that sexual harassment constitutes discrimination on the basis of sex).

83 Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463, 469 (8th Cir. 1996).

84 Id. (citing Meritor, 477 U.S. at 70-71).

85 Id.

86 Doe v. Claiborne County, 103 F.3d 495, 513-15 (6th Cir. 1996).

87 Id. at 514 (citing legislative history).

88 Id. (citing United States Department of Education, Office for Civil Rights, Sexual Harassment: It's Not Academic 2, 4 (1988)).

89 Id.; see also Kracunas v. Iona Coll., 119 F.3d 80 (2d Cir. 1997) (holding that Title VII liability standards apply to Title IX lawsuits); Murray v. N.Y. Univ. Coll. of Dentistry, 57 F.3d 243 (2d Cir. 1995).

90 Bolon v. Rolla Pub. Sch., 917 F. Supp. 1423, 1427-28 (E.D. Mo. 1996) (deciding a case involving sexual misconduct allegation against teacher).

91 Leija v. Canutillo Indep. Sch. Dist., 887 F. Supp. 947, 953 (W.D. Tex. 1995), rev'd, 101 F.3d 393 (5th Cir. 1996).

92 Id. (citing Ronna Greff Schneider, Sexual Harassment and Higher Education, 65 Tex. L. Rev. 525, 569-71 (1987)); see also Doe v. Petaluma City Sch. Dist., 830 F. Supp. 1560, 1575 (N.D. Cal. 1993), reconsideration granted, 949 F. Supp. 1415 (N.D. Cal. 1996) (adopting the Title VII standard instead of respondeat superior).

93 Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648, 654-58 (5th Cir. 1997); Smith v. Metro. Sch. Dist. Perry Township, 128 F.3d 1014, 1022-34 (7th Cir. 1997) (relying heavily on Rosa H.).

94 See discussion infra Section III.A.

95 Rosa H., 106 F.3d at 654-58; Smith, 128 F.3d at 1022-34.

96 See, e.g., Stefanie H. Roth, Sex Discrimination 101: Developing a Title IX Analysis for Sexual Harassment in Education, 23 J.L. & Educ. 459, 516-19 (1994); Kaija Clark, Note, School Liability and Compensation for Title IX Sexual Harassment Violations by Teachers and Peers, 66 Geo. Wash. L. Rev. 353, 377 (1998) (but also calling for a Congressional limit on compensation similar to that under Title VII, see 42 U.S.C. § 1981a(b)(3)(D) (2000)); Kimberly A. Mango, Comment, Students Versus Professors: Combatting Sexual Harassment Under Title IX of the Education Amendments of 1972, 23 Conn. L. Rev. 355, 412 (1991).

97 Carrie N. Baker, Comment, Proposed Title IX Guidelines on Sex-Based Harassment of Students, 43 Emory L.J. 271, 303-07 (1994); Neera Rellan Stacy, Note, Seeking a Superior Institutional Liability Standard Under Title IX for Teacher-Student Sexual Harassment, 71 N.Y.U. L. Rev. 1338, 1365-70 (1996).

98 Henry Seiji Newman, Note, The University's Liability for Professor-Student Sexual Harassment Under Title IX, 66 Fordham L. Rev. 2559, 2601-02 (1998).

99 See Ellison, supra note 78, at 2122.

100 The case law and commentary surrounding student-student sexual harassment is not discussed here because it is not parallel to teacher-student sex discrimination; however, before the Supreme Court's opinion in Davis, such case law and commentary was proliferating.

See, e.g., Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006 (5th Cir. 1996); Doe v. Petaluma City Sch. Dist., 54 F.3d 1447 (9th Cir. 1995); Daniel B. Tukel, Student Versus Student: School District Liability for Peer Sexual Harassment, 75 Mich. Bar J. 1154 (1996); Alexandra A. Bodnar, Comment, Arming Students for Battle: Amending Title IX to Combat the Sexual Harassment of Students by Students in Primary and Secondary School, 5 S. Cal. Rev. L. & Women's Stud. 549 (1996).

101 Compare Chance v. Rice Univ., 984 F.2d 151, 153 (5th Cir. 1993), aff'g No. H-88-1302, 1991 WL 296636 (S.D. Tex. July 12, 1991) (applying Title VI standard to employment discrimination claim), with Bolon v. Rolla Pub. Sch., 917 F. Supp. 1423, 1427-28 (E.D. Mo. 1996) (concluding respondeat superior standard applied to all cases of sex discrimination under Title IX, including "the removal of females from the classroom, or any other intentional discrimination based on sex in violation of Title IX"), and Yusuf v. Vassar Coll., 35 F.3d 709, 714-15 (2d Cir. 1994) (looking to Title VII case law).

102 See Baker, supra note 97, at 313-18 (calling on the Office of Civil Rights to address non-sexual gender-based harassment in guidelines).

103 See Vicki Schultz, Reconceptualizing Sexual Harassment, 107 Yale L.J. 1683 (1998).

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

105 Id. at 1226.

106 Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277 (1998).

107 Id. at 277-78.

108 Id. at 278.

109 Id.

110 Id.

111 Id.

112 Id.

113 Id.

114 Id. at 279.

115 Id. at 277. The Supreme Court's "deliberate indifference" standard is stricter than the "failed to remedy" standard adopted by the lower courts. Under a "failed to remedy" standard, the school must remedy the problem; under the Supreme Court's "deliberate indifference" standard, the school is only responsible for making reasonable efforts to remedy the problem.

116 See supra notes 82-89 and accompanying text.

117 Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 75 (1992) (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986)). Meritor held that agency principles were a part of the Title VII institutional liability standard. See discussion supra notes 82-89 and accompanying text.

118 Id. at 75.

119 Gebser, 524 U.S. at 283 (citing Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80-81 (1998), as well as Meritor, 477 U.S. at 65).

120 Id. (citing 42 U.S.C. § 2000e-2(a), e(b) (2000), and Meritor, 477 U.S. at 72).

121 Id.

122 Id. at 284.

123 Id. at 285.

124 Id. at 286 (quoting Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979)).

125 Cf. id. at 301 (Stevens, J., dissenting) ("It seems quite obvious that both of those purposes would be served--not frustrated--by providing a damages remedy in a case of this kind.").

126 Id. at 286.

127 Id. at 287.

128 Id. at 287-88 (citing Rosa H. v. San Elizardio Indep. Sch. Dist., 106 F.3d 648, 654 (5th Cir. 1997) ("When 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.")).

129 Id. at 288-89 (noting that in Franklin, the agency found a violation of Title IX, but the school came into compliance by accepting the teacher's resignation and instituting a grievance procedure for students).

130 Id. at 289.

131 Id. at 290 (noting that the defendant received $120,000 in federal funding and could face damages liability well exceeding that amount).

132 Id. (emphasis added).

133 Id.

134 Id. at 291.

135 Id. at 292.

136 Id. at 292-93.

137 Id. at 289.

138 Id. at 290.

139 Id. at 292.

140 Compare Davis v. Monroe County Bd. of Educ., 120 F.3d 1390, 1406 (11th Cir. 1997), and Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1016 (5th Cir. 1996) (both holding that school could be held liable only if treated complaints differently based on gender), with Doe v. Univ. of Ill., 138 F.3d 653, 668 (7th Cir. 1998), Oona, R.S. v. McCaffrey, 143 F.3d 473, 478 (9th Cir. 1998), and Brzonkala v. Va. Polytechnic Inst. & State Univ., 132 F.3d 949, 961 (4th Cir. 1997) (all holding school could be held liable for inadequate response to such complaints).

141 526 U.S. 629, 653-54 (1999).

142 In the rare case in which a student is an agent of a school by virtue of a position of responsibility held at the school, discriminatory actions by the student would fit within the subject matter of this Article the same way those of a teacher or other agent of the school would.

143 Davis, 526 U.S. at 634.

144 Id.

145 Id. at 635.

146 Id. In Gebser, the Court established that failure to have a policy is not itself a violation of Title IX, but it could be considered in the deliberate indifference equation. 524 U.S. 274, 291-92 (1998).

147 Davis, 526 U.S. at 635-36.

148 Id. at 650. The Court wrote:
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.

149 Id. at 641; see also id. at 642 ("[W]e concluded that the district could be liable for damages only where the district itself intentionally acted in clear violation of Title IX by remaining deliberately indifferent to acts of teacher-student harassment of which it had actual knowledge.").

150 Id. at 642; see also id. at 643 ("As an initial matter, in Gebser we expressly rejected the use of agency principles in the Title IX context, noting the textual differences between Title IX and Title VII."); id. at 645 ("We rejected the use of agency analysis in Gebser, however, and we disagree that the term 'under' somehow imports an agency requirement into Title IX."); id. at 646 ("The terms 'subjec[t]' and 'under' impose limits, but nothing about these terms requires the use of agency principles.") (alteration in original).

151 Id. at 642-43.

152 See supra note 149 and accompanying text.

153 Davis, 526 U.S. at 643.

154 See id. at 649-50 (noting that the Court has "previously determined that 'sexual harassment' is 'discrimination' in the school context under Title IX").

155 Id. at 633.

156 See id. at 651-53 (describing discussion about "severe, pervasive, and objectively offensive" standard in light of the understanding 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" and the dissent's concern that teasing and being called offensive names would be enough to trigger liability); see also id. at 680 (Kennedy, J., dissenting) ("The number of potential lawsuits against our schools is staggering.").

157 Cf. Alexander v. Sandoval, 532 U.S. 275, 282 (2001) ("But in any event, this Court is bound by holdings, not language.")

158 See Joan E. Schaffner, Davis v. Monroe County Board of Education: The Unresolved Questions, 21 Women's Rts. L. Rep. 79 (2000).

159 See generally Brake, supra note 18, at 25-29.

160 If the plaintiff is challenging a policy of the federal funding recipient, Gebser and Franklin make clear that the institution will be liable upon a showing that the policy itself constitutes intentional discrimination. See Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998) (stating actual knowledge/deliberate indifference holding for "cases like this one that do not involve official policy of the recipient entity"); Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 70 (1992) (relying on Guardians to conclude that Title IX, like Title VI, addresses intentional discrimination by the federal funding recipient). Several cases have applied this principle to discrimination in official policies or programs. See Pederson v. La. State Univ., 213 F.3d 858, 881 (5th Cir. 2000); Horner v. Ky. High Sch. Athletic Ass'n, 206 F.3d 685, 692 (6th Cir. 2000); Weser v. Glen, 190 F. Supp. 2d 384, 395 (E.D.N.Y. 2002), aff'd, No. 01-9251, 2002 WL 1880139 (2d Cir. Aug. 15, 2002); Landow v. Sch. Bd., 132 F. Supp. 2d 958, 967 (M.D. Fla. 2000). Likewise, if the plaintiff is challenging actions of the funding recipient itself rather than one of its agents, as in Adams v. Lewis Univ., No. 97-

C-7636, 1999 WL 162762, at *1 (N.D. Ill. Mar. 12, 1999), the issue of the application of agency principles does not arise. In Adams, the court appropriately applied Title VII standards to analyze the actions of the school. Id., at *5.

161 Grandson v. Univ. of Minn., 272 F.3d 568, 575-76 (8th Cir. 2001), cert. denied, 535 U.S. 1054 (2002).

162 272 F.3d 568 (8th Cir. 2001).

163 Id. at 572. The class claim originally was for injunctive relief only; however, the class plaintiffs were appealing a denial of their attempt to amend the complaint to add a claim for money damages. Id. at 575.

164 Id.

165 Id.

166 Id. at 576.

167 Id.

168 The Eastern District of Virginia, in Bracey v. Buchanan, 55 F. Supp. 2d 416 (E.D. Va. 1999), addressed an unspecified form of sex discrimination and applied Gebser to the claim. Because the court did not identify whether the claim was for sexual harassment or another form of discrimination, I do not include it in this review.

169 72 F. Supp. 2d 13 (N.D.N.Y. 1999).

170 Id. at 16.

171 Id. at 19. The court did not rule on whether the plaintiff's allegations satisfied the Gebser standard, instead ruling that the plaintiff's state-law negligence claim was not duplicative of the Title IX claim. Id.

172 Johnny's Icehouse, Inc. v. Amateur Hockey Ass'n of Ill., 134 F. Supp. 2d 965 (N.D. Ill. 2001).

173 Id. at 967.

174 Id. at 968.

175 Id.

176 525 U.S. 459 (1999).

177 Id. at 469-70.

178 Johnny's Icehouse, 134 F. Supp. 2d at 970.

179 Id. at 971.

180 181 F. Supp. 2d 525 (M.D.N.C. 2001). Unrelated to the issue addressed here, the district court held that punitive damages were available in Title IX actions. Id. at 545. The Fourth Circuit reversed that holding on appeal. Mercer v. Duke Univ., No. 01-1512, 2002 WL 31528244 (4th Cir. Nov. 15, 2002).

181 Mercer, 181 F. Supp. 2d at 529.

182 Id. at 530.

183 Id. at 530-31.

184 Id. at 531-32.

185 Id. at 533-34.

186 Id. at 534.

187 Id. at 535.

188 Id. at 539.

189 Id.

190 Id. at 540-42.

191 Schultzen v. Woodbury Cent. Cmty. Sch. Dist., 187 F. Supp. 2d 1099 (N.D. Iowa 2002).

192 Id. at 1102.

193 Id.

194 Id.

195 Id. at 1123.

196 Id. (stating that schools will not be held liable for "teacher-student or student-on-student sexual harassment absent actual notice and deliberate indifference on the part of the recipient") (citations omitted).

197 248 F. Supp. 2d 132 (N.D.N.Y. 2003).

198 Id. at 136.

199 Id.

200 Id. at 144.

201 Id.

202 Most Title IX retaliation claims faced by the courts have followed complaints of sexual harassment. Besides the case discussed in the text, all of the Title IX retaliation cases since Gebser have applied Title VII discrimination standards, including agency principles, and without requiring actual knowledge and deliberate indifference. See Frazier v. Fairhaven Sch. Comm., 276 F.3d 52, 67 (1st Cir. 2002) (citing Hazel v. U.S. Postmaster Gen., 7 F.3d 1, 3 (1st Cir. 1993), a Title VII retaliation case, to determine the elements of Title IX retaliation claim); Mandsager v. Univ. of N.C. at Greensboro, 269 F. Supp. 2d 662, 675-76 (M.D.N.C. 2003) (citing 1994 Fourth Circuit case, Preston v. Va. ex. rel. New River Cmty. Coll., 31 F.3d 203, 207 (4th Cir. 1994), for the proposition that Title VII provides standards for Title IX cases and applying that to Title IX retaliation claim); Burwell v. Pekin Cmty. High Sch. Dist. 303, 213 F. Supp. 2d 917, 918 (C.D. Ill. 2002); Mostaghim v. Fashion Inst. of Tech., No. 01 Civ. 8090(HB), 2002 WL 1339098, at *3 (S.D.N.Y. June 19, 2002) (using Title VII retaliation standard based on pre-Gebser Second Circuit case applying Title VII standards to Title IX claims); Landon v. Oswego Unit Sch. Dist. #308, No. 00 C 1803, 2001 WL 649560, at *6 (N.D. Ill. June 8, 2001); Adams v. Lewis Univ., No. 97 C 7636, 1999 WL 162762, at *5-*6 (N.D. Ill. Mar. 12, 1999) (applying Title VII retaliation standard to Title IX claim); Legoff v. Trs. of Boston Univ., 23 F. Supp. 2d 120, 128 n.4 (D. Mass. 1998) ("Like other substantive aspects of Title IX, retaliation claims may be judged by the standards elaborated under Title VII" (citation omitted)). Because of the uniformity of these decisions, they are not discussed in depth in this Article.

The Supreme Court has expressed interest in a case that may reach the issue of what standard should be applied in a Title IX retaliation claim. In Jackson v. Birmingham Board of Education, 309 F.3d 1333 (11th Cir. 2002), the Eleventh Circuit held that there is no private claim for money damages under Title IX for retaliation. Id. at 1344-46. The plaintiffs have petitioned the Supreme Court for certiorari, 71 U.S.L.W. 3736 (May 13, 2003) (No. 02-1672), and on October 6, 2003, the Supreme Court asked the Solicitor General for its opinion on the issue. See Jackson v. Birmingham Bd. of Educ., No. 02-1672 (U.S. filed 2003) (docket), at http://www.supremecourtus.gov/docket/02-1672.htm. As of yet, the Solicitor has not filed its brief and there has been no decision on the

petition for certiorari. Id. The Fourth Circuit possibly increased the chances the Supreme Court grants certiorari by ruling, after the Court requested a brief from the Solicitor, that there is a private claim for money damages under Title IX. See Litman v. George Mason Univ., No. 01-2128, 2004 WL 345758 (4th Cir. Feb. 25, 2004). If the Court were to accept the Eleventh Circuit case for review and hold that Title IX does include a claim for retaliation, it may reach the issue of what standard courts should hold a Title IX claim to when a litigant seeks money damages for retaliation.

203 131 F. Supp. 2d 795 (E.D. Va. 2001), affirmed in part, vacated in part, remanded by, No. 01-2128, 2004 WL 345758 (4th Cir. Feb. 25, 2004).

204 Id. at 797-98.

205 Id. at 800-01.

206 Id. at 801; see also id. at 802 ("No court has yet addressed the issue before the Court today."). Oddly, the court did not cite Legoff or Adams, see supra note 202, both decided before the court considered Litman.

207 Id. at 802 (citing Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998), and Horner v. Ky. High Sch. Athletic Ass'n, 206 F.3d 685, 693 (6th Cir. 2000)). The Horner cite is curious, considering Horner did involve a challenge to a school policy.

208 Id.

209 Id. The court found, on the defendant's motion for summary judgment, that the plaintiff may be able to prove deliberate indifference because the school knew of the incidents but did nothing. Id. at 802-04. The court rejected the school's claim that it had no duty to act because the plaintiff never formally complained of the retaliation; instead, the court found that Title IX imposes a duty upon actual notice, regardless of whether the school receives notice through official channels. Id.

210 Middlebrooks v. Univ. of Md., 166 F.3d 1209, No. 97-2473, 1999 WL 7860, at *2 (4th Cir. Jan. 11, 1999) (unpublished).

211 Id.

212 Id. at *4 (citing Preston v. Virginia ex. rel. New River Cmty. Coll., 31 F.3d 203, 207, 208 (4th Cir. 1994), a pre-Gebser case that held that Title IX discrimination claims are interpreted in accordance with Title VII).

213 Id. at *5-*6.

214 Mercer v. Duke Univ., 190 F.3d 643, 644-45 (4th Cir. 1999).

215 See discussion supra notes 181-86.

216 Mercer, 190 F.3d at 644. The district court based this conclusion on the Title IX regulation that allows schools to operate sex-segregated teams for contact sports. See 34 C.F.R. § 106.41(b) (2003).

217 The Fourth Circuit read 34 C.F.R. § 106.41(b) more narrowly than the district court, concluding that although a school is not required to allow women to participate in men's contact sports, once the school decides that women are allowed to participate, it cannot discriminate against them on the basis of sex. Mercer, 190 F.3d at 648.

218 Id.

219 Id. at 644-45. The important passage from the opinion states the following:
During this latter period, Mercer alleges that she was the subject of discriminatory treatment by Duke. Specifically, she claims that Goldsmith did not permit her to attend summer camp, refused to allow her to dress for games or sit on the sidelines during games, and gave her fewer opportunities to participate in practices than other walk-on kickers. In addition, Mercer claims that Goldsmith made a number of offensive comments to her, including asking her why she was interested in football, wondering why she did not prefer to participate in beauty pageants rather than football, and suggesting that she sit in the stands with her boyfriend rather than on the sidelines.

At the beginning of the 1996 season, Goldsmith informed Mercer that he was dropping her from the team. Mercer alleges that Goldsmith's decision to exclude her from the team was on the basis of her sex because Goldsmith allowed other, less qualified walk-on kickers to remain on the team. Mercer attempted to participate in conditioning drills the following spring, but Goldsmith asked her to leave because the drills were only for members of the team. Goldsmith told Mercer, however, that she could try out for the team again in the fall.
Id. at 645. In that description, the actor is consistently Goldsmith, an agent of the school, and not the university.

220 245 F.3d 1172 (10th Cir. 2001).

221 Id. at 1176.

222 Id.

223 Id. (citing Murray v. New York Univ. Coll. of Dentistry, 57 F.3d 243, 248 (2d Cir. 1995)).

224 411 U.S. 792 (1973).

225 Gossett, 245 F.3d at 1176.

226 See id. at 1178 n.2.

227 No. 97-C-8507, 1998 WL 601822 (N.D. Ill. Sept. 9, 1998).

228 Id. at *1-*2.

229 Id. at *2-*3.

230 Id. at *4-*5.

231 Id. at *5. The plaintiff also alleged a very unclear claim of retaliation. Id. at *4. The court also dismissed that claim without basing its analysis on the Gebser standard of proving discrimination under Title IX. Id. at *5.

232 30 F. Supp. 2d 975 (E.D. Ky. 1998).

233 Id. at 977.

234 Id.

235 “A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex.” 34 C.F.R. § 106.40(a) (2003).

236 “A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom....” 34 C.F.R. § 106.40(b)(1) (2003).

237 42 U.S.C. § 2000e(k) (2000).

238 Chipman, 30 F. Supp. 2d at 979-80.

239 Id. at 980.

240 15 F. Supp. 2d 740 (E.D. Pa. 1998).

241 Id. at 745-46.

242 Id. at 748-49.

243 Id. at 750-55.

244 Id. at 755 ("The Title VII standard for proving discriminatory treatment will also be applied to plaintiff's claim under Title IX.").

245 Kemether v. Pa. Interscholastic Ass'n, No. CIV-A-96-6986, 1999 WL 1012957, at *16 (E.D. Pa. Nov. 8, 1999).

246 Lerner v. Ravenswood Hosp. Med. Ctr., No. 98-C-5369, 1999 WL 1267710 (N.D. Ill. Nov. 10, 1999).

247 Id. at *1-*3.

248 Id. at *5.

249 Id. at *4 & n.4 ("The Title VII framework will be used for the limited purpose of structuring and analyzing a method of proof for Plaintiff's claims.").

250 166 F. Supp. 2d 721 (N.D.N.Y. 2001).

251 248 F. Supp. 2d 132 (N.D.N.Y. 2003).

252 See supra notes 197-201.

253 248 F. Supp. 2d at 144; see also discussion supra notes 197-201 and accompanying text.

254 Id. at 146-47.

255 Id. at 146 (citing Yusuf v. Vassar Coll., 35 F.3d 709, 715 (2d Cir. 1994)).

256 Id.

257 Id. at 147.

258 Bucklen v. Rensselaer Polytechnic Inst., 166 F. Supp. 2d 721, 722-23 (N.D.N.Y. 2001).

259 Id. at 723.

260 Id. at 726 (citing the pre-Gebser cases of Murray v. N.Y. Univ. Coll. of Dentistry, 57 F.3d 243, 248 (2d Cir. 1995), and Lipsett v. Univ. of P.R., 864 F.2d 881, 896-97 (1st Cir. 1988)).

261 Id.

262 Id.

263 No. 100CV1265, 2002 WL 1150727 (M.D.N.C. May 24, 2002).

264 Id. at *1.

265 Id.

266 Id.

267 Id. at *2-*3.

268 Id. at *3-*4.

269 Id. at *3-*4.

270 Id. at *4 n.3. There have been several tenure denial cases since Gebser in which the disappointed tenure applicant brought claims under both Title VII and Title IX. In those education employment cases, the courts unfailingly apply the standards of Title VII to

the Title IX claim because of the symmetry of the employment claim. See Arceneaux v. Vanderbilt Univ., 25 Fed. Appx. 345, 347 (6th Cir. 2001) ("Because Title IX does not provide an analytical framework for claims of gender discrimination by an educational institution, most circuits, including ours, have applied [the framework from] Title VII."); Clinger v. N.M. Highlands Univ., Bd. of Regents, 215 F.3d 1162, 1168 (10th Cir. 2000) ("We find no persuasive reason not to apply Title VII's substantive standards regarding sex discrimination to Title IX suits.") (quoting Mabry v. State Bd. of Cmty. Colls. & Occupational Educ., 813 F.2d 311, 316 (10th Cir. 1987)); Weinstock v. Columbia Univ., 224 F.3d 33, 42 n.1 (2d Cir. 2000) ("The identical standards apply to employment discrimination claims brought under Title VII [and] Title IX...."); Mehus v. Emporia State Univ., 295 F. Supp. 2d 1258, 1271 (D. Kan. 2004) ("Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. is 'the most appropriate analogue when defining Title IX's substantive standards...."'); Tapp v. St. Louis Univ., 78 F. Supp. 2d 1002, 1016-17 & 1016 n.10 (E.D. Mo. 2000) ("The method of evaluating Title IX gender discrimination claims is the same as those in a Title VII case.") (quoting Mabry, supra, at 316 n.6). None of these post-Gebser cases mentioned Gebser, but their analysis is not very instructive here because of the identity of the Title VII claim.

271 503 U.S. 60 (1992). For a complete description of Franklin, see supra notes 63-75 and accompanying text.

272 Id. at 68.

273 Id. at 76.

274 Id. at 66 (citation omitted).

275 Id. at 69 (citing Davis v. Passman, 442 U.S. 228, 247 n.26 (1979)).

276 See Cannon v. Univ. of Chi., 441 U.S. 677, 717 (1979). Three Justices concurred in the result in Franklin because they believed that Title IX's implied cause of action cannot have a presumed rule of Congressional intent laid on top of it. Franklin, 503 U.S. at 76-78 (Scalia, J., concurring). The concurrence stated:
We can plausibly assume acquiescence in our Bell v. Hood presumption when the Legislature says nothing about remedy in expressly creating a private right of action; perhaps even when it says nothing about remedy in creating a private right of action by clear textual implication; but not, I think, when it says nothing about remedy in a statute in which the courts divine a private right of action on the basis of "contextual" evidence such as that in Cannon....
Id. at 77.

277 Franklin, 503 U.S. at 70-71.

278 537 U.S. 280 (2003).

279 42 U.S.C. §§ 3604(b), 3605(a) (2000).

280 42 U.S.C. § 3605(a) (2000).

281 Meyer v. Holley, 537 U.S. 280, 285 (2003).

282 Id. at 283.

283 Id. at 283.

284 Id. at 285-91.

285 Id. at 286 (emphasis in original omitted); id. at 287 ("Where Congress, in other civil rights statutes, has not expressed a contrary intent, the Court has drawn the inference that it intended ordinary rules to apply.").

286 Id. at 285.

287 Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991) (internal citations and quotations omitted).

288 Meyer v. Holley, 537 U.S. 280, 285 (2003). In applying ordinary principles of vicarious liability, the Court rejected the Ninth Circuit's application of more extensive vicarious liability that held the individual corporate owners and officers, rather than the corporation itself, liable for the acts of its agents. Id. at 286.

289 New Orleans, Mobile, & Chattanooga R.R. Co. v. Hanning, 82 U.S. 649, 657 (1872), quoted in Meyer, 537 U.S. at 286; see also Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp., 456 U.S. 556, 568 (1982) ("[F]ew doctrines of the law are more firmly established or more in harmony with accepted notions of social policy than that of the liability of the principle without fault of his own.") (quoting Gleason v. Seaboard Air Line Ry. Co., 278 U.S. 349, 356 (1929)).

290 Restatement (Second) of Agency (1957), cited in Meyer, 537 U.S. at 286. Section 219(1) states the basic principle of principal/agent liability. Restatement (Second) of Agency § 219(1) (1957) ("A master is subject to liability for the torts of his servants committed while acting in the scope of their employment."). The section that would most likely apply to sex discrimination directed against a student by a teacher is section 219(2)(d), which states that a master is not liable for a servant's torts when the servant acts "outside the scope of their employment" unless "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. § 219(2)(d).

291 Meyer, 537 U.S. at 285. As described in the previous section, even though the Court wrote Meyer about six years after it decided Gebser, the quoted principle articulated by the Court in Meyer was by no means a new statement of the law.

292 See discussion supra Section III.A.

293 Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979). This language from Cannon was quoted in Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 286 (1998).

294 Gebser, 524 U.S. at 286-87.

295 Id. at 285 (internal quotations omitted).

296 Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp., 456 U.S. 556, 572 (1982) (quoting United States v. A & P Trucking Co., 358 U.S. 121, 126 (1958)) (alterations in original); see also Gebser, 524 U.S. at 301 (Stevens, J., dissenting) ("It seems quite obvious that both of those purposes would be served--not frustrated--by providing a damages remedy in a case of this kind."); William M. Landes & Richard A. Posner, The Positive Economic Theory of Tort Law, 15 Ga. L. Rev. 851, 914-15 (1980) (arguing that liability based on respondeat superior creates an incentive for employers to oversee employee conduct so that it conforms with the law).

297 Gebser, 524 U.S. at 283 ("Title IX contains no comparable reference to an educational institution's 'agents,' and so does not expressly call for application of agency principles.").

298 United States v. Texas, 507 U.S. 529, 534 (1993) (quoting Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978)).

299 Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 66 (1992). Faced with Justice Scalia's concurrence that an implied cause of action cannot be interpreted based on this "clear statement" rule, the majority of the Court obviously did not agree. Id. at 76-78 (Scalia, J., concurring).

300 See supra notes 288-90 and accompanying text.

301 Gebser, 524 U.S. at 286.

302 See Melanie Hochberg, Note, Protecting Students Against Peer Sexual Harassment: Congress's Constitutional Powers to Pass Title IX, 74 N.Y.U. L. Rev. 235, 267-75 (1999) (arguing that courts should view Title IX as enacted under both the Spending Clause and section five of the Fourteenth Amendment).

303 Gebser, 524 U.S. at 287.

304 Compare id. at 287 ("Our central concern in that regard is with ensuring that 'the receiving entity of federal funds [has] notice that it will be liable for a monetary award.'") (alteration in original) (quoting Franklin, 503 U.S. at 74), with id. ("If a school district's

liability for a teacher's sexual harassment rests on principles of constructive notice or respondeat superior, it will likewise be the case that the recipient of funds was unaware of the discrimination.").

305 See, e.g., Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981); Courtney G. Joslin, Recognizing a Cause of Action Under Title IX for Student-Student Sexual Harassment, 34 Harv. C.R.-C.L. L. Rev. 201 (1999).

306 Requiring a plaintiff to show that a school actually knew that it was violating the law before the plaintiff is able to obtain compensatory damages from the school is tantamount to requiring a Title IX plaintiff to prove what other civil rights plaintiffs have to prove to obtain punitive damages. See Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 535-37 (1999) (discussing punitive damages standard for Title VII).

307 See Barnes v. Gorman, 536 U.S. 181, 187 (2002) ("One of these implications [for statutes enacted under the Spending Clause], we believe, is that a remedy is 'appropriate relief,' Franklin, 503 U.S. at 73, only if the funding recipient is on notice that, by accepting federal funding, it exposes itself to liability of that nature.").

308 See id. (same analysis applied to damages under Spending Clause statutes).

309 Gebser, 524 U.S. at 289-90.

310 20 U.S.C. § 1682 (2000).

311 Gebser, 524 U.S. at 290.

312 Cannon v. Univ. of Chi., 441 U.S. 677, 704-06 (1979).

313 Gebser, 524 U.S. at 285, 286.

314 Id. at 289.

315 Id. at 292.

316 See, e.g., Brief of Amici Curiae National Women's Law Center et al. in Support of Petitioners at 24-26, Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998) (No. 96-1866).

317 Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 680 (1999) (Kennedy, J., dissenting).

318 See Cannon v. Univ. of Chi., 441 U.S. 677, 704-05 (1979).

319 AAUW Legal Advocacy Fund, A License for Bias: Sex Discrimination, Schools, and Title IX 24 (2000).

320 Id. at 29.

321 Id. at 30.

322 Permanent Commission on the Status of Women, In Our Own Backyard: Sexual Harassment in Connecticut's Public High Schools (1995).

323 AAUW Legal Advocacy Fund, supra note 319, at 38-50. The AAUW study broke the non-harassment complaints into four categories: admissions, financial aid, and testing; discipline; participation in nontraditional fields; and employment. Most of the admissions, financial aid, and testing cases appeared to involve allegations of programmatic-level discrimination rather than discrimination by agents of the funding recipient. See id. at 38-41. The discipline cases, constituting twelve percent of the total cases in the study, id. at 28, fall into the category analyzed by this Article, but most were not substantiated. Id. at 42. No cases were found involving complaints about participation in nontraditional fields; instead, the Office of Civil Rights addressed the issue with fifteen self-initiated compliance reviews. Id. at 44. The employment cases, constituting less than ten percent of the cases, mostly involved sexual harassment and retaliation. Id. at 50.

324 While such a scheme may be slightly paradoxical, it is not unheard of. In a set of companion Title VII cases, the Supreme Court declared that courts should evaluate a job discrimination claim based on a "tangible employment action" under a different, more plaintiff-friendly standard than claims based on sexual harassment in which no "tangible employment action" took place. See Faragher v. City of Boca Raton, 524 U.S. 775, 807-08 (1998); Burlington Indus. v. Ellerth, 524 U.S. 742, 765 (1998). Likewise, the standard developed in this Article is a different, more plaintiff-friendly one for proving institutional liability for Title IX sex discrimination claims that allege a tangible denial of educational opportunity.

325 See articles cited supra note 20 and accompanying text.

326 See discussion supra notes 32-36 and accompanying text.

327 Four of the five Justices in the Gebser majority recognized this point in dissent in Davis v. Monroe County Board of Education, 526 U.S. 629, 663-64 (1999) (Kennedy, J., dissenting) ("When Title IX was enacted in 1972, the concept of 'sexual harassment' as gender discrimination had not been recognized or considered by the courts.").

328 See supra notes 32-36 and accompanying text.