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Sex and the Public School Teacher: When Is a School District Liable Under Title IX for a Teacher's Sexual Misconduct with a Student?

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Case at a Glance

Title IX of the Education Amendments provides federal funding to many, if not most, of the public school districts in the country. The statute also forbids sex discrimination, including sexual harassment and similar misconduct, by recipients of Title IX funding.

This case asks the Supreme Court to determine when a school district is liable under Title IX for a public school teacher's sexual misconduct with a student.

Sex and the Public School Teacher: When Is a School District Liable Under Title IX for a Teacher's Sexual Misconduct with a Student?

by Jay E. Grenig

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ISSUE

What is the proper standard of liability for a public school district under Title IX of the Education Amendments when a teacher sexually harasses a student?

FACTS

Alida Star Gebser first met Frank Waldrop, a teacher at Lago Vista High School in Travis County, Texas, when Gebser was a student in the eighth grade class of Waldrop's wife during the 1990-91 school year. At the time, Gebser was 13.

As a ninth grade student, Gebser was assigned to Waldrop's class in advanced social studies. Waldrop, in fact, was the only teacher who offered advanced-placement classes for which students could receive college credit. During the school year, Waldrop went out of his way to flatter Gebser and spend time alone with her.

Waldrop initiated sexual contact with Gebser at Gebser's home in the spring of 1992. Knowing Gebser

would be home alone, Waldrop visited her there under the pretext of returning a book. He proceeded to fondle her breasts and unzip her pants.

This incident turned out to be the beginning of a sexual relationship between Waldrop and Gebser during which Waldrop had sex on a regular basis with Gebser, who was then 15 years old. None of the sexual encounters took place on school property.

The relationship was halted in January 1993, when a police officer discovered Waldrop and Gebser having sex. The Lago Vista Independent School District ("Lago Vista" or the "District") fired Waldrop, and Texas education authorities revoked his teaching license.

Gebser and her mother responded by suing the District in state court, alleging a violation of Title IX's sex discrimination prohibition as well as claims arising under Texas state law.

ALIDA STAR GEBSER AND ALIDA
JEAN MCCULLOUGH V. LAGO VISTA
INDEPENDENT SCHOOL DISTRICT
DOCKET NO. 96-1866

ARGUMENT DATE:
MARCH 25, 1998
FROM: THE FIFTH CIRCUIT

The District had the case moved to federal court.

Gebser gave a deposition during discovery in the case (see Glossary) in which she acknowledged that she did not report Waldrop's conduct to her family or to school officials or other teachers. She explained her failure to make any report by saying she believed that if she informed anyone of Waldrop's behavior, "then I wouldn't be able to have this person as a teacher anymore and that was my main interest in any relationship with him." Gebser also stated that she "didn't know what to do" because Lago Vista had done nothing to inform her or other students about how to respond to sexual harassment or other discrimination.

There was no direct evidence that any school official in the District was aware of Waldrop's sexual exploitation of Gebser until the officer discovered them in January 1993. However, the parents and guardian of two other students of Waldrop had complained to the high school principal that Waldrop had made inappropriate remarks in the presence of female students.

The principal investigated those complaints and confronted Waldrop who denied the charges. The principal took no further action and did not bring the matter to the attention of the District's superintendent.

The District did have a written policy prohibiting employees from sexually harassing students. Under the policy, any student or parent with a sexual-harassment complaint could request a conference with the principal or a designee. However, the District's superintendent, who also was the Title IX coordinator, apparently did not know that Title IX regulations require recipient school districts to put in place a specific

system for sexual-harassment complaints and to inform students of the complaint system and how to use it.

Lago Vista successfully moved for summary judgment (see Glossary) at the end of discovery. In an unreported decision, the district court concluded that Lago Vista could not be held liable under Title IX unless it had failed to act after it had actual or constructive notice of Waldrop's conduct. In the court's view, the District had no such notice.

Gebser and her mother appealed to the Fifth Circuit and that court affirmed. 106 F.3d 1223 (5th Cir. 1997). The court reasoned that "school districts are not liable for teacher-student harassment under Title IX unless an employee invested by the school board with supervisory power over the offending employee actually knew of the abuse, had the power to end the abuse, and failed to do so." 106 F.3d at 1226. According to the appeals court, Gebser could not use Title IX to bring a suit based on the mere fact that a teacher's employment status aided in the commission of sexual harassment.

The Supreme Court now reviews the Fifth Circuit's decision, having granted the petition of Gebser and her mother for a writ of certiorari. 118 S. Ct. 595 (1997).

CASE ANALYSIS

The pertinent section of Title IX provides that no person shall "on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance . . ." 20 U.S.C. § 1681(a) (1994).

The Supreme Court has interpreted the provision to prohibit sexual

harassment, including teacher-student sexual harassment. Specifically, in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), ABA PREVIEW 149 (Dec. 10, 1991), the Court held that a public school teacher's sexual harassment of a student constitutes a form of sex discrimination prohibited by Title IX. Moreover, the Court also ruled that private litigants — students or parents — may use Title IX to recover damages (see Glossary) when a teacher sexually harasses or otherwise engages in sexual misconduct with a student.

Unquestionably, said the *Franklin* Court, Title IX imposes on school districts the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor discriminates on the basis of sex." 503 U.S. at 75. That rule, the Court held, applies when a teacher sexually harasses and abuses a student. In the Court's view, Congress surely did not intend for federal funds to be expended to support the intentional actions it sought by statute to proscribe.

The Court in *Franklin* considered only whether damages were available to a harassed student in a suit brought to enforce Title IX. Thus, the Court did not consider the proper standard for imposing liability on a school district for a teacher's sexual harassment or abuse. The standard of liability was not an issue in *Franklin* because, unlike this case, the school district actually knew about the teacher's sexual misconduct.

The role of actual knowledge or actual notice in Title IX is central to this case, but in the employment context covered by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17, it has little sig-

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nificance. Like Title IX, Title VII prohibits sex discrimination, including sexual harassment. Applying Title VII's prohibition, the Court has held that an employer without procedures for receiving sexual-harassment complaints cannot assert its lack of knowledge of harassment as a defense to an employee's sexual-harassment suit. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

Most federal appeals courts to have addressed the issue have held that *Meritor's* actual-notice holding applies to Title IX's prohibition of sexual harassment. See *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988); *Kracunas v. Iona College*, 119 F.3d 80 (2d Cir. 1997); *Doe v. Claiborne County*, 103 F.3d 495 (6th Cir. 1996); *Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463 (8th Cir. 1996).

Other appeals courts, including the Fifth Circuit, have taken a different view after finding critical differences between Title VII and Title IX. These courts have imposed an actual-notice standard of liability. See *Rosa H. v. San Elizario Ind. Sch. Dist.*, 106 F.3d 648 (5th Cir. 1997); *Smith v. Metropolitan Sch. Dist.*, 128 F.3d 1014 (7th Cir. 1997); see also *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390 (11th Cir. 1997), *pet. for cert. pending*, (refusing to apply Title VII's standard of liability to a Title IX student-on-student sexual-harassment case).

Lago Vista uses this authority to argue that Gebser cannot recover unless the courts are willing to hold educational institutions strictly liable for teacher misconduct. The District claims that the Fifth Circuit got it right; school districts should not be liable for teacher-student harassment under Title IX unless the offending teacher's supervisor

knew of the misconduct and did nothing to stop it. In the District's view, its lack of actual knowledge means it cannot be liable for Waldrop's misconduct.

Gebser responds that by requiring proof of actual knowledge by a school district's supervisory personnel of a teacher's sexual harassment of a student, public schools would be held to a lower standard of liability than is currently the law for employers. According to Gebser, not only does an actual-notice standard misconstrue Title IX, but it provides no incentive for school districts and their governing boards to establish and publicize procedures by which students may readily complain of improper conduct before it escalates to a damaging level.

Gebser urges the Court to impose a modified constructive-notice standard similar to the standard followed by some courts in Title VII cases. Gebser argues that school districts should be liable for sexual harassment of which they knew or should have known or for which they afforded no reasonable avenue for complaint and redress.

Gebser maintains that no school district should be able to rely on lack of actual notice as a defense to liability for a teacher's sexual harassment unless it had promulgated and publicized adequate procedures to uncover and stop misbehavior by teachers as quickly as possible. Says Gebser, in the absence of such procedures, a school district should be liable for sexual harassment and other forms of intentional sex discrimination, at least when committed by its own agents.

Gebser then argues that Waldrop was an agent of the District because his status as a teacher made his abuse possible. Gebser asserts that

Waldrop used his authoritative position to take advantage of an adolescent student who, while seeking college credit, wanted to please her teachers and fit in socially. In Gebser's view, the distinct language and purpose of Title IX and the unique educational context in which it operates calls for imposing liability on a school district for intentional discrimination, such as sexual harassment and abuse, carried out by teachers or others who are aided in their harassment by their authority over student victims.

Gebser declares that imputed liability is consistent with traditional agency-law principles under which a principal is responsible for the harm committed by its agent in situations in which committing the harm is facilitated by the authority entrusted to the agent. This standard of liability, says Gebser, is consistent with Department of Education guidelines.

Gebser also argues that imputed liability would provide a strong incentive for school districts vigilantly to police sexual misconduct by their agents. The standard also would prompt school districts to implement effective complaint and investigative procedures and would be consistent with the responsibility of school districts under Title IX to ensure that students are not subject to discrimination in educational programs.

Lago Vista contends that Gebser's agency argument in the context of this case is equivalent to strict liability. Such a standard, says the District, is inappropriate. On this point, Lago Vista argues that Congress enacted Title IX under the Constitution's Spending Clause. U.S. CONST. art. I, § 8, cl. 1. According to the District, because Spending Clause legislation is contractual in nature, Title IX must, but does not,

give notice that a school district will be held strictly liable for the sexual harassment and other sexual misconduct of its teachers.

SIGNIFICANCE

The issue in this case recently was addressed by the Department of Education's Office for Civil Rights ("OCR") in a policy guidance statement announced on March 13, 1997. The statement provides, in relevant part, that "a school will . . . be liable for hostile-environment sexual harassment by its employees, i.e., for harassment that is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from the education program or to create a hostile or abusive educational environment, if the employee — (1) acted with apparent authority (i.e., because of the school's conduct, the employee reasonably appears to be acting on behalf of the school whether or not the employee acted with authority); or (2) was aided in carrying out the sexual harassment of students by his or her position of authority with the institution." Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,039-40 (1997).

The OCR statement clearly conflicts with the Fifth Circuit's ruling in this case. Although Lago Vista advanced the statement as a reason for the Court to decline to take the case and although it is not binding on the Supreme Court, the Court may conclude, much to the District's chagrin, that it states the proper standard of liability and should apply here.

A decision that school districts receiving Title IX funds are deemed to have constructive notice of sexual harassment based on their failure to issue effective policies and complaint procedures likely would speed the process of providing meaningful channels for reporting incidents of sexual harassment. Of course, such a holding would greatly increase the liability exposure of school districts for sexual harassment initiated by their employees, making districts liable for damages for virtually any incidence of teacher-student sexual harassment. Although this approach would provide increased protection for students, it would impose significant costs on school districts that the districts, unlike ordinary businesses, may not be able to spread. On the other hand, a decision affirming the Fifth Circuit will make it more difficult for victims of teacher-student sexual harassment to recover damages against the employing districts.

ATTORNEYS OF THE PARTIES

For Alida Star Gebser and Alida Jean McCullough (Terry L. Weldon; (512) 477-2256).

For Lago Vista Independent School District (Wallace B. Jefferson; Crofts, Callaway & Jefferson; (210) 299-0279).

AMICUS BRIEFS

In support of Alida Star Gebser and Alida Jean McCullough

National Education Association (Counsel of Record: Laurence Gold; (202) 833-9340);

Joint brief: National Women's Law Center and 15 other women's rights organizations (Counsel of Record: Nancy L. Perkins; Arnold & Porter; (202) 942-5000);

United States (Counsel of Record: Seth P. Waxman, Solicitor General; Department of Justice; (202) 514-2217).

In support of Lago Vista Independent School District

American Insurance Association (Counsel of Record: William J. Kilberg; Gibson, Dunn & Crutcher; (202) 955-8500);

Kentucky School Boards Association (Counsel of Record: Michael A. Owsley; English, Lucas, Priest & Owsley; (502) 781-6500);

Joint brief: National School Boards Association and New Jersey School Boards Association (Counsel of Record: Gwendolyn H. Gregory; (540) 687-3339);

Joint brief: Texas Association of School Boards, Texas Association of School Administrators, Texas Council of School Attorneys, and nine other state school boards associations (Counsel of Record: Carolyn M. Hanahan; TASB Legal Assistance Fund; (512) 467-3610).