HUSCH BLACKWELL

New to Title IX

Title IX: The Basics

- 39 words
- Cannot discriminate on the basis of sex in education programs receiving federal funds
- Designate Title IX Coordinator
- Policies and Procedures
- Notice: Prompt, Equitable, Appropriate Response

45 Years of Title IX History In Under Five Minutes

- Modeled after Title VI. Original concern was employment and admissions practices of universities.
- Impact on athletics became apparent early on and proponents beat back repeated attempts to water down legislation.
- Historically, regulatory agencies (HEW and ED) have been lackluster in enforcement.
- Changed significantly with Obama Administration.

Change Administration: OCR

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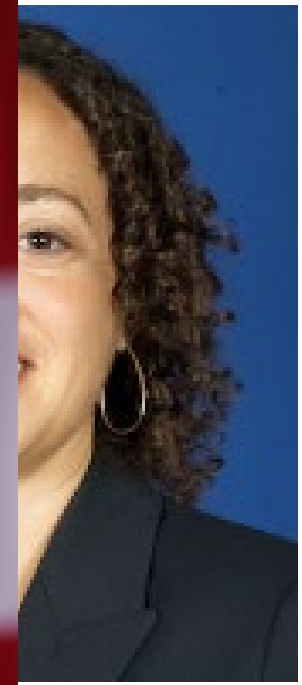


The New York Times

DeVos's Rules Bolster Rights of Students Accused of Sexual Misconduct

Education Secretary Betsy DeVos released final regulations for schools dealing with sexual misconduct, giving them the force of law for the first time and bolstering due-process rights.

The rules preserve Education Secretary Betsy DeVos's broad goals in overhauling Title IX. Anna Moneymaker/The New York Times


How is that? The beard? Is it comfortable?
Is it itchy? Are you pleased with it?

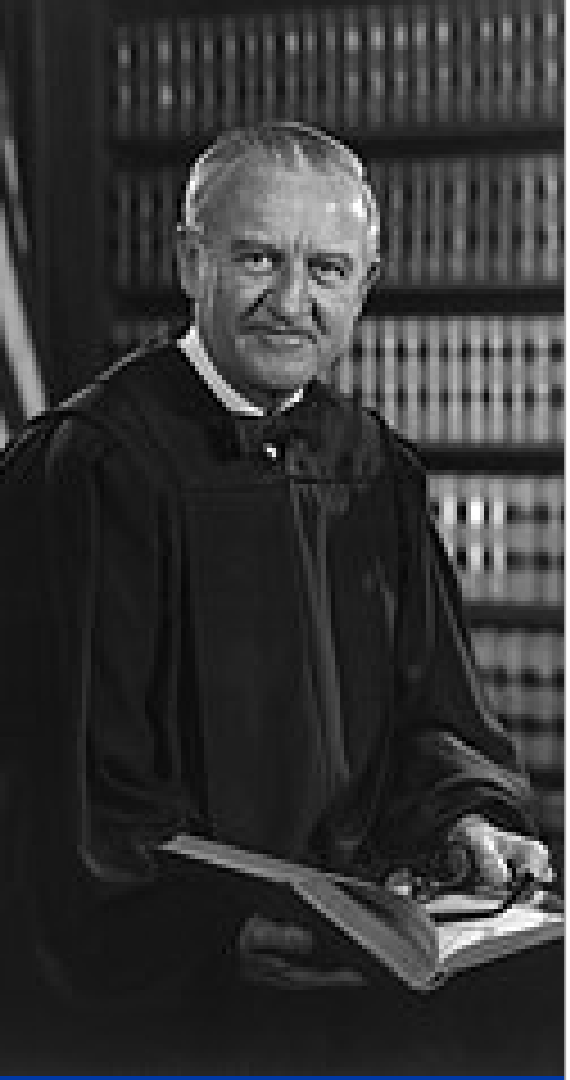

5

Cannon v. University of Chicago (1979): Facts

- Geraldine Cannon was a nurse at Skokie Valley Hospital, the wife of a Chicago lawyer, and the mother of five children aged 12 to 21.
- Her lifelong dream was to become a doctor. It was a dream that was rekindled when her youngest child started elementary school and Cannon finally had the opportunity to return to school as a full-time student at Trinity College.
- Graduated with honors at age 39 and began applying to medical schools, including Univ. of Chicago's Pritzker School of Medicine.
- Cannon was denied admission in 1975.

Cannon v. University of Chicago: Supreme Court

- "This case presents as a matter of first impression the issue of whether Title IX of the Education Amendments 1972 may be enforced in a federal civil action . . . ."
- Private cause of action was necessary to ensure that the "sweeping promise of Congress" to end sex discrimination in education was more than "merely an empty promise."
- **"Is [Title IX] an empty promise or will it be enforced and for the present, it simply must be enforced by the courts or it's not going to be enforced at all."**



Cannon v. University of Chicago: Supreme Court

- 6-3 opinion crafted by Justice John Paul Stevens & included Justices Brennan & Rehnquist
- **Holding**: There *is* an implied cause of action for individuals to sue under Title IX.
- Title IX was patterned after Title VI and that "when Title IX was enacted, the critical language in Title VI had already been construed as creating a private remedy."
- The Supreme Court also accepted the argument advocated by John Cannon and also HEW that private enforcement was necessary to effectuate the purposes of the law.

Franklin v. Gwinnett County (1992): Facts

- Christine Franklin was a student at North Gwinnett High School between September 1985 and August 1989. Franklin was subjected to continual sexual harassment beginning in the autumn of her tenth grade year (1986) from Andrew Hill, a coach and teacher employed by the district.
- Although Gwinnett County became aware of and investigated Hill's sexual harassment of Franklin and other female students, teachers and administrators took no action to halt it and discouraged Franklin from pressing charges against Hill.
- Hill ultimately resigned on condition that all matters pending against him be dropped. The school thereupon closed its investigation.

Franklin v. Gwinnett County: Issue & Holding

- Issue: Does Title IX implied right of action support a claim for monetary damages?
- Unanimous holding: "[W]e conclude that a damages remedy is available for an action brought to enforce Title IX."

THE NEW YORK TIMES **LAW** FRIDAY, JULY 15, 1994 B7

Students Seeking Damages for Sex Bias

School Officials Around Nation View Lawsuits With Trepidation

By TAMAR LEWIN

Two years after the Supreme Court ruled that students could sue schools for monetary damages for sexual harassment or sex discrimination, the first round of cases is nearing trial — and schools across the country are watching closely, worried about their potential liability.

No one has won any significant money yet. And because the field is so new, there is still widespread uncertainty about how offensive the behavior must be before a student has a right to damages, how a school should respond to complaints of harassment or discrimination and when a school is responsible for one student harassing another.

But it is clear that administrative complaints of sexual harassment at school are skyrocketing, and plaintiffs' lawyers see this area of law as ripe for litigation.

"This is a very, very sensitive issue, even tougher than sex education," said Gwendolyn Gregory, deputy general counsel for the National Association of School Boards. "There isn't much law yet, it's very fact specific, and I don't think anybody feels clear where the lines are. Everybody has a right not to be harassed, but if you go too far you're going to run into free-speech rights."

to a student's problem.

"This went on for a year and a half, during which she and her mother reported the problem to the counselor many times," Ms. Blanco said. "The whole thing snowballed because no one stepped in to stop it early on. The school should have called the parents of the harassers immediately, told them what the kids did, reprimanded the kids and provided counseling.

"The final straw came when it happened in class, when a boy stood up and said: 'I have a question. I want to know if Jane Doe has sex with hot dogs.' Then it was so blatant the school took action," Ms. Blanco added.

Lawyers for the school board, however, say the school's actions were exemplary. "The school did what a lot of schools might not have done," said Larry J. Frierson, the San Francisco lawyer handling the case. "Once it became aware of the problem, it took immediate steps to address it."

A Supreme Court ruling is fostering litigation.

"School boards can tell their employees, 'I don't care what your intent is, just stop this behavior,' but it's hard or to know how far you can or should control what students say," she said.

Until 1992, when the United States Supreme Court ruled in Franklin v. Gwinnett County (Ga.) Public Schools that the Federal law barring sex discrimination in schools allowed students to seek monetary damages, there were few individual lawsuits under that law, Title IX of the 1972 amendments to the Education Act.

Useless Remedies

But lawyers quickly noticed the financial potential of Title IX lawsuits once the High Court rejected the Bush Administration's argument that the law provided only for awards of back pay or injunctions ending the discriminatory behavior — remedies that were all but useless to students, who do not get paid and often have left the school by the time a court order is issued.

Sexual harassment complaints to the Department of Education's Office of Civil Rights, which oversees the enforcement of Title IX, jumped to 156 in the fiscal year ended last September, from 49 two years earlier.

And while no one knows exactly how many private suits for damages under Title IX have been filed, the

Lawsuits by students accusing schools of permitting harassment or sex discrimination are on the rise after a court ruling allowing students to seek damages. On Wednesday, Eve Bruneau, 12, right, with her mother, Pat Schofield, filed a suit against the South Kortright Central School District in Delaware County, N.Y., asserting that a teacher allowed boys to snap girls' bras and grab their breasts.

Gebser v. Lago Vista Indep. School District (1998)

- Gebser was assigned to classes taught by Waldrop. While visiting her home, Waldrop kissed and fondled Gebser. They had sexual intercourse on a number of occasions.
- In January 1993, police discovered Waldrop and Gebser engaging in sexual intercourse and arrested Waldrop. Lago Vista immediately terminated his employment.
- School district did not have an official grievance procedure for lodging sexual harassment complaints; nor had it issued a formal anti-harassment policy.

High Court to Weigh Liability of Schools in Sexual Abuse of Student

By LINDA GREENHOUSE

WASHINGTON, Dec. 5 — The Supreme Court agreed today to decide when school districts can be found liable under Federal law for a teacher's sexual abuse of a student.

The issue, closely watched by school districts around the country, has divided the lower courts in the five years since the Supreme Court first ruled that individuals could sue for damages under a law that prohibits sex discrimination in educational institutions that receive Federal money. In interpreting that law, Title IX of the Education Amendments of 1972, to permit private lawsuits, the Justices did not specify how liability was to be determined.

The case the Court accepted today grew out of a yearlong affair between a teacher in a public high school near Austin, Tex., and one of his students, a 15-year-old girl who, with her mother, eventually brought a Title IX suit against the Lago Vista Independent School District.

Two lower Federal courts ruled for the school district, holding that it could not be found liable in the absence of "actual knowledge" on the part of school officials of the teacher's misconduct. This is the most protective standard the courts have applied in interpreting Title IX; at the other extreme, some courts have held districts automatically liable for sexual abuse of students by teachers.

This is the third case involving sexual abuse or harassment that the Court has accepted for decision this term, and it may not be the last. The Justices were asked last month to resolve another unsettled question under Title IX: the liability of a school district for sexual harassment of one student by another.

Last month, the Justices agreed to resolve a closely related issue in the context of the Federal law that prohibits sex discrimination in employment. The question in that case, Faragher v. Boca Raton, is the liability of an employer for a supervisor's sexual harassment of a lower-level employee. Just this week, in Oncale v. Sundowner Offshore Services, the Justices heard arguments on whether sexual harassment between people of the same sex can ever violate the employment law, Title VII of the Civil Rights Act of 1964.

The anti-discrimination laws involved in these disputes have been on the books for decades, raising the question of why so many cases posing such fundamental issues of interpretation and application have suddenly made their way onto the Court's docket.

The reason may be that only in the last few years have monetary damages become available as a remedy for people who can prove violations of the two laws: through the Supreme Court's interpretation of Title IX in a 1992 case, Franklin v. Gwinnett County, and through Congress's 1991 amendment to Title VII, making available compensatory and, in some cases, punitive damages, in addition to the back pay that was the only monetary remedy under the original Civil Rights Act. The prospect of substantial recoveries have made the laws more useful to plaintiffs and attractive to their lawyers just as lower courts have been struggling with what the laws actually mean.

In the case the Court accepted today, Doe v. Lago Vista Independent School District, No. 96-1866, school officials apparently had no knowledge of the affair between the student and teacher. The family's lawsuit asked the Federal District Court in San Antonio to apply a theory of strict liability, holding the district responsible for the wrongful acts of its teachers.

The district court ruled, however, that there could be no liability in the absence of "actual or constructive notice" on the part of school authorities. The United States Court of Appeals for the Fifth Circuit, in New Orleans, agreed, holding that there was no liability "unless an employee who has been invested by the school board with supervisory power over the offending employee actually knew of the abuse, had the power to end the abuse, and failed to do so."

In its appeal, the family told the Justices that because "the vast majority of instances of sexual abuse is subtler and more covert" than the Fifth Circuit's approach would encompass, the decision would have the effect of "virtually immunizing school districts from liability."

Last spring, the United States Department of Education issued guidelines for administrative enforcement of Title IX, under which a school district would be held liable if a teacher, even without officials' knowledge, "was aided in carrying out the sexual harassment of students by his or her position of authority with the institution."

In a second case today, the Court agreed to decide an important issue under the Anti-Terrorism and Effective Death Penalty Act of 1996, which imposed strict new deadlines on state prison inmates for petitions for habeas corpus in Federal court. In states that agree to make adequate legal representation available, inmates on death row get only 180 days in which to file.

The question in the case, Calderon v. Ashmus, No. 97-391, is whether death row inmates can sue a state pre-emptively for a declaration that the accelerated deadline should not apply because the state does not have an adequate representation system in place. California is arguing that it should have been held immune from such a suit, in which a group of more than 300 inmates prevailed in the United States Court of Appeals for the Ninth Circuit, in San Francisco.

Gebser: Plaintiff's Argument

- Gebser and DOJ claimed that liability should be evaluated using the same standards plaintiffs use in employment sex harassment cases under Title VII.
- A "teacher is 'aided in carrying out the sexual harassment of students by his or her position of authority with the institution,' irrespective of whether school district officials had any knowledge of the harassment and irrespective of their response upon becoming aware."
- Alternatively, a school should be "liable for damages based on a theory of constructive notice, *i.e.*, where the district knew or 'should have known' about harassment but failed to uncover and eliminate it."

Gebser: The Rule

- An "appropriate person" . . . is, at a minimum, an official of the recipient entity with **authority to take corrective action** to end the discrimination.
- "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 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**."
- "[T]he response must amount to **deliberate indifference to discrimination**."

Jackson v. Birmingham Bd. of Ed. (2005)

- Roderick Jackson, a teacher in the Birmingham, Alabama, public schools, complained about sex discrimination in the high school's athletic program and was retaliated against.
- Sued pursuant to Title IX
- Does Title IX prohibit retaliation? Yes.

Davis v. Monroe County Board of Education (1999)

Alan S. Weiner for The New York Times

"They should have done something right from the start," said Aurelia Davis of the harassment endured by her daughter LaShonda at school six years ago. The two posed yesterday at home in Forsyth, Ga.

THE VICTIM

When a Tormented Child Cried Stop

By DAVID FIRESTONE

ATLANTA, May 24 — LaShonda Davis was 10 when she told her mother it was time to hire a lawyer.

Her mother, Aurelia Davis, was bewildered at first. For months, LaShonda had been harassed by a boy in her fifth-grade class in Forsyth, Ga., about 50 miles southwest of Atlanta. The school, Hubbard Elementary, had not done anything to stop the boy, even though he had grown increasingly provocative, rubbing against LaShonda and asking for sex.

But hiring a lawyer seemed drastic to Ms. Davis. Even today, after the United States Supreme Court handed down a significant ruling supporting the Davis family's contention that schools can be held liable for prolonged harassment, Ms. Davis was still appalled that the matter had required such high-level legal attention, and the support of women's rights groups.

"It should never have had to go all the way to the Supreme Court," said Ms. Davis, a hospital file clerk in Forsyth who had never hired a lawyer before. "They should have done something right from the start. But they didn't have any kind of respect for my child, and they didn't want to admit that they were wrong in what they did."

A Georgia mother and daughter's six-year legal battle.

The harassment, which started in December 1992, went on almost every day for five months, Ms. Davis said. She said she complained to the teacher and the principal, but nothing was done until she called the sheriff and had the boy prosecuted.

He eventually pleaded guilty to sexual battery.

During those five months, Ms. Davis said, LaShonda grew increasingly upset and despondent, talking of suicide and having a difficult time in class. She is now 16 and a junior in high school.

School officials in Monroe County, which includes Hubbard, would not comment today, but the school board's lawyers have argued that Federal law never explicitly held schools responsible for preventing the harassment of one student by another.

That all changed today with the Court's 5-to-4 decision, which applies to any school in the nation that accepts Federal money. The Court's reasoning was based on an interpretation of Title IX, the 1972 law barring sexual discrimination at those schools, and occasioned an impassioned debate among the Justices over the degree to which the Federal Government should be involved in what Justice Anthony M. Kennedy in his dissenting opinion called "the routine problems of adolescence."

All of that is beside the point for Ms. Davis, who said she was also unconcerned about the monetary damages for which she is now eligible to sue. For her, it comes down to a much more basic principle:

"They make you send your kids to school, right? So don't you think they should protect them while they're there?"

Court Is Asked Not to Extend Harassment Law in Schools

By LINDA GREENHOUSE

WASHINGTON, Jan. 12 — The lawyer for a Georgia school board warned the Supreme Court today that school districts across the country would face dire financial consequences if the Court extended Federal sexual harassment law to apply to harassment of one student by another and made schools liable for failing to curb students' sexual misconduct.

In the closely watched case, the Justices appeared sympathetic to the school board's concerns — somewhat surprisingly so, in light of the Court's generous reading of sexual harassment law in a variety of other contexts.

This fifth sexual harassment case to come before the Court in the last 15 months is an appeal by a woman whose fifth-grade daughter was subjected to months of a male classmate's unwanted poking, grabbing and taunting while school administrators in Forsyth, Ga., refused to intervene.

Does teasing among young students necessarily amount to a Federal case?

Finally, the mother, Aurelia Davis, went to the police, and the boy pleaded guilty to sexual battery. Ms. Davis then sued the Monroe County Board of Education under Title IX of the Education Amendments of 1972, a Federal law that bars sex discrimination by schools that receive Federal money.

Last June, in another Title IX case, the Court ruled that schools could be liable for a teacher's sexual harassment of a student as long as top officials knew of the problem and did nothing to stop it.

That definition of liability appeared comfortably to fit the current case, with the one difference the harasser's identity as a fellow student rather than a teacher. But it quickly became evident today from the Justices' skeptical questions to Ms. Davis's lawyer that this difference might well mean all the difference in the world for the legal analysis.

How does one draw the line between harassment that amounts to sex discrimination and garden-variety teasing and flirting in the school yard, the Justices wanted to know.

"Little boys tease little girls through their years in school," Justice Sandra Day O'Connor told Verna L. Williams, representing Ms. Davis on behalf of the National Women's Law Center here. "Is every incident going to lead to a lawsuit?"

A "necessary consequence" of the plaintiff's argument, Justice Anthony M. Kennedy warned, was "a Federal code of conduct in every classroom in the country."

Justice Stephen G. Breyer, along with several other Justices, said the courts' experience in dealing with sexual harassment in the workplace was not easily transportable into the classroom. Behavior problems in school are appropriately handled by counseling, calling in the family, "discussion and mediation," Justice Breyer said, adding, "What's worrying is the gearing up of the great legal mechanism to replace that."

Ms. Williams and Barbara D. Underwood, a Deputy Solicitor General who presented the Government's argument in support of Ms. Davis, labored to allay the Justices' concerns.

"Ordinary teasing is not an actionable wrong," Ms. Underwood said, adding that the law would not apply unless the behavior was so "egregious" that the victim was effectively deprived of the ability to benefit from the educational program. In addition, she said, the school would not be expected to solve every problem, only to respond reasonably and appropriately.

W. Warren Plowden Jr., the school board's lawyer, would not accept those limitations on liability.

"No matter how high you set the bar," Mr. Plowden said, "once you open the door to these lawsuits, some Federal judge has to make a judgment on was the response enough."

Searching for a principle beyond the context of sexual harassment, Justice John Paul Stevens asked Mr. Plowden whether a school could be liable under Title IX if boys prevented girls from using a baseball field that had been set aside for them, while the school athletic director stood by and did nothing.

No, Mr. Plowden said, because the misconduct would be not the adult's but the children's.

Returning to sexual harassment, he said "the potential here is enormous" for school liability because three-quarters of all girls and two-thirds of boys, in one study, had reported being sexually harassed between the 8th and 11th grades.

Justin Lane for The New York Times

Julie Underwood of the National School Board Association and W. Warren Plowden Jr., lawyer for the Monroe County Board of Education in Georgia outside the Supreme Court yesterday after oral arguments.

Justice Ruth Bader Ginsburg objected that "we don't know the definition of harassment" under that particular study. Justice Ginsburg said that while she understood the difficulty of drawing the line between innocent teasing and sexual harassment, "I don't understand why it's so hard" to evaluate the adequacy of a school's response.

Justice Ginsburg said there was a clear difference between simple negligence, for which a school would not be liable, and "deliberate indifference," the standard the Court adopted in the teacher harassment case last year. She defined deliberate indifference as "meaning you have to know and you don't do anything."

The case, Davis v. Monroe County Board of Education, No. 97-843, is an appeal from a 1997 ruling by the United States Court of Appeals for the 11th Circuit, in Atlanta. In dismissing the lawsuit, that court ruled that Title IX imposed no liability on schools for students' wrongdoing. The 7-to-4 decision overturned an earlier ruling in the case by a three-judge panel of the same court, which saw the issue differently and held that a school could be found liable for its officials' "failure to take action to stop the offensive acts of those over whom the officials exercised control."

Davis v. Monroe County Board of Education: Holding

- “We consider here whether the misconduct identified in Gebser —deliberate indifference to known acts of harassment— amounts to an intentional violation of Title IX, capable of supporting a private damages action, when the harasser is a student rather than a teacher. We conclude that, in certain limited circumstances, it does.”
- Recipients of federal funding may be liable “where the recipient is deliberately indifferent to known acts of student-on-student sexual harassment and the harasser is under the school's disciplinary authority.”

Davis: Majority Decision

- "School administrators will continue to enjoy the flexibility they require so long as funding recipients are deemed 'deliberately indifferent' to acts of student-on-student harassment only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances."
- "The recipient must merely respond to known peer harassment in a manner that is not clearly unreasonable. This is not a mere 'reasonableness' standard, as the dissent assumes. In an appropriate case, there is no reason why courts, on a motion to dismiss, for summary judgment, or for a directed verdict, could not identify a response as not 'clearly unreasonable' as a matter of law."

Respondent Litigation

- Due Process
- Title IX ("Erroneous Outcome": Doubt + Gender Bias)
- Breach of Contract
- Other Tort Claims

Title IX lawsuits have skyrocketed in recent years, analysis shows

QUESTIONS?