Restoring Effective Protections for Students against Sexual Harassment in Schools: Moving Beyond the *Gebser* and *Davis* Standards

By Fatima Goss Graves*

Over the past 35 years, Title IX of the Education Amendments of 1972[1] – the federal law that prohibits sex discrimination by educational institutions that receive federal funds – has been instrumental in dismantling longstanding discriminatory programs and activities and in promoting equal opportunities for women and girls in education. Its reach has spanned all facets of education, from professional schools to athletic programs. But sex discrimination in education remains pervasive, and sexual harassment in particular remains widespread in schools throughout the country, from elementary and secondary schools through colleges and universities. Indeed, 81 percent of students report that they have experienced sexual harassment in secondary schools; 89 percent of college students report that sexual harassment occurs among students at their schools, with almost two-thirds of students stating that they have been sexually harassed.[2] And over one-third of students age 13-20 report that they have experienced physical harassment on the basis of their sexual orientation.[3] The cases litigated in state and federal courts involve everything from harassment and sexual assaults by university football players and recruits, to a barrage of sexually offensive language and physical threats by students, to sexual assaults by teachers against students.[4]

Title IX provides, in pertinent part, that "[n]o person * * * shall, on the basis of sex, be excluded from participation, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." In enacting Title IX, Congress intended both to "avoid the use of federal resources to support discriminatory practices" and to "provide individual citizens effective protection against those practices."[5] Thus, the Supreme Court has made clear that Title IX bars sexual harassment and that a damages remedy is available in actions brought to enforce this prohibition.[6] This mandate against discrimination is broad;

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[1] 21 U.S.C. §§ 1681 *et seq.*

[2] CATHERINE HILL & ELENA SILVA, AMERICAN ASSOC. OF UNIV. WOMEN EDUC. FOUND., DRAWING THE LINE: SEXUAL HARASSMENT ON CAMPUS 14 (2005); AMERICAN ASSOC. OF UNIV. WOMEN EDUC. FOUND., HOSTILE HALLWAYS: BULLYING, TEASING AND SEXUAL HARASSMENT IN SCHOOL 20-21 (1998).

[3] GAY, LESBIAN, & STRAIGHT EDUC. NETWORK, THE 2005 NATIONAL SCHOOL CLIMATE SURVEY: EXPERIENCES OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN OUR NATION'S SCHOOLS 26 (2005).

[4] *See, e.g.*, *Simpson v. University of Col. Boulder*, 500 F.3d 1170, 1177 (10th Cir. 2007) (allegation that the University was deliberately indifferent to the likelihood of sexual assault in its football recruitment program); *Sauls v. Pierce County Sch. Dist.*, 399 F.3d 1279 (11th Cir. 2005) (allegation that school district was ineffective in preventing sexual assault by teacher); *Vance v. Spence County Pub. Sch. Dist.*, 231 F.3d 253 (6th Cir. 2000) (allegation that the school district ignored complaints by students of ongoing verbal and physical peer harassment).

[5] *Cannon v. University of Chi.*, 441 U.S. 677, 704 (1979).

[6] *Franklin v. Gwinnet County Pub. Sch.*, 503 U.S. 60 (1992).

indeed, the Supreme Court has stated that it should receive "a sweep as broad as its language."[7]

But at the same time, the Court has imposed crippling burdens on students who attempt to recover damages for the harassment that they suffer at the hands of their teachers and peers. First, in *Gebser v. Lago Vista Ind. Sch. Dist.*,[8] a case involving teacher-student sexual harassment, the Supreme Court determined that for an educational institution to be liable for damages for sexual harassment under Title IX, an appropriate school official must have had knowledge of the harassment and, in the face of that knowledge, been deliberately indifferent. The Court echoed that same standard in the context of student-on-student harassment and, in *Davis* v. *Monroe County. Bd. of Educ.*, held that a private damages action in a peer harassment case will succeed only where "the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect."[9]

Together these standards have raised the bar, in perverse and unacceptable ways, for bringing private lawsuits for damages under Title IX. In many instances students may be more vulnerable to harassment than adults, particularly at the K-12 level where students are required to attend school, leaving few ways to escape unchecked pervasive harassment. Moreover, students report that they endure treatment, including sexual touching, grabbing and pinching, that in no way would be tolerated among adults.[10] And less than half of students say that they would report peer harassment to adults.[11] Yet, despite the role of schools as parens patriae, there are fewer protections from harassment for students in school than for employees in the workplace, and students are as a result often unable to prevail in their cases. In the near decade since the Court articulated the standards for damages liability in a Title IX harassment case, the many cases of serious sexual harassment demonstrate that students lack critical protections and that schools lack sufficient incentives to take the necessary steps to prevent and effectively remedy it when it occurs.

This issue brief explains why the current Title IX standards for harassment claims are unsound and explores promising federal and state law solutions that could both restore the right of recovery for students who experience harassment in school and provide meaningful incentives for school districts to promote safe school environments. The Supreme Court majority in *Gebser* placed any additional relief for students under federal law squarely on the shoulders of Congress, calling on it to specifically outline the parameters for a Title IX sexual harassment claim. By enacting the Civil Rights Act of 2008, Congress can and should remove the unfair burdens imposed by the Court and reiterate its commitment to protecting students from sex discrimination by making clear that in *Gebser* and *Davis* the Court added hurdles that Congress never intended for Title IX plaintiffs to have to meet. In addition to a federal legislative fix, moreover, a recent,

[7] *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982).

[8] 524 U.S. 274 (1998).

[9] 526 U.S. 629, 652 (1999).

[10] AMERICAN ASSOC. OF UNIV. WOMEN EDUC. FOUND., *supra* note 2, at 22-23.

[11] *Id.* at 14.

groundbreaking case illustrates the prospects for applying state antidiscrimination laws to improve student protections against harassment. In *L.W. v. Toms River Regional School Board of Education*,[12] the New Jersey Supreme Court explicitly rejected the rigid Title IX liability standards and emphasized that, under New Jersey law, students are entitled to protection from discrimination and harassment in the classroom to the same extent that adults are protected in the workplace. Advocates and policymakers in other states should take the lead offered by the New Jersey Supreme Court and seek similar interpretations of their state laws.

I. Sexual Harassment in Education Programs

Sexual harassment in schools includes any unwelcome or unwanted behavior based on sex that interferes with a student's ability to learn, study, achieve, work or participate in school activities, benefits, services or opportunities.[13] It can take many forms, including verbal or written (including on-line) insults, epithets, or inappropriate jokes; physical or verbal intimidation; offensive touching; pressure for sexual activity; and rape.[14] Although often overlapping, sexual harassment in schools may result in quid-pro-quo conditions (*i.e.*, a reward for sexual favors or a punishment for declining them) or a hostile environment.[15]

Both male and female students have reported that they have experienced sexual harassment, and both male and female students can be perpetrators of harassment. In fact, at the secondary level, 79 percent of male students and 83 percent of female students report experiencing harassment in school, while more than half of male students and approximately half of female students admit that they have harassed someone.[16] Moreover, male and female students at the college level are equally likely to be harassed, with 61 percent of male students and 62 percent of female students reporting that they have been subject to it.[17]

School employees also both experience and commit sexual harassment. Although students are more commonly harassed by peers, 41 percent of girls and 36 percent of boys report harassment by school employees.[18] Regardless of the source of the harassment, students report emotional and behavioral consequences. Girls, in particular, report feeling self-conscious, embarrassed, afraid, and less confident. Further, students report that they stop participating in class, "find it hard to study," avoid "particular places in the school or on the school grounds."[19] Indeed, students report that they routinely

[12] 915 A.2d 535 (N.J. 2007).
[13] *See generally* U.S. Department of Education, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 66 FED. REG. 5512 (Jan. 19, 2001).
[14] *Id.*
[15] *Id.*
[16] AMERICAN ASSOC. OF UNIV. WOMEN EDUC. FOUND., *supra* note 2, at 21.
[17] HILL & SILVA, *supra* note 2 at 17.
[18] AMERICAN ASSOC. OF UNIV. WOMEN EDUC. FOUND., *supra* note 2, at 14.
[19] *Id.* at 36-37.

avoid the harassers – and the environment in which the harassment occurs – which in some cases can mean avoiding particular courses or leaving school altogether.[20]

Despite its widespread occurrence, schools have failed to take the steps necessary to fully address and prevent sexual harassment in schools. Although schools must maintain and distribute policies prohibiting sex discrimination and harassment, along with effective grievance procedures, many schools have failed to develop and promote effective policies.[21] Furthermore, schools have few incentives to invest resources in developing adequate policies or remedying hostile school climates. Indeed, as I explain further below, the decisions in *Gebser* and *Davis* created incentives that undermine Title IX's goals of protecting students for discriminatory practices by allowing schools to "insulate themselves from knowledge about [harassment]."[22]

II. Pre-*Gebser/Davis* Standards of Liability

Although Title IX does not expressly mention the term "sexual harassment," the Supreme Court in *Franklin v. Gwinnett County Public Schools*[23] recognized that sexual harassment is a form of sex discrimination that is prohibited by Title IX in the educational setting – just as it is barred by Title VII of the Civil Rights Act of 1964[24] in the workplace. In a unanimous holding that "all appropriate remedies," including monetary damages, were available for violations of Title IX and that the statute's mandate to end sex discrimination in education necessarily encompassed the eradication of sexual harassment, the Court in *Franklin* observed that "Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe."[25] Citing *Meritor v. Savings Bank, FSB v. Vinson*[26] – the case that initially established employer liability for sexual harassment in the workplace under Title VII – the Court compared the obligation to provide students with an educational environment free of harassment with similar employer duties under Title VII:

> 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." We believe the same rule should apply when a teacher sexually harasses and abuses a student.[27]

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[20] *Id.*; GAY, LESBIAN, & STRAIGHT EDUC. NETWORK, *supra* note 3, at 46-47.
[21] AMERICAN ASSOC. OF UNIV. WOMEN LEGAL ADVOCACY FUND, A LICENSE FOR BIAS: SEX DISCRIMINATION, SCHOOLS, AND TITLE IX (2000) (finding that many schools ignore Title IX requirements for policies and grievance procedures addressing sex discrimination). Schools must have policies prohibiting sex discrimination, including sexual harassment, and appropriate grievance procedures, but there is no requirement that there be a separate sexual harassment policy. 34 CFR § 106.8(a).
[22] *Gebser*, 524 U.S. at 300 (Stevens, J., dissenting).
[23] 503 U.S. 60 (1992).
[24] 42 U.S.C. §§ 2000 *et seq.*
[25] *Id.* at 75.
[26] 477 U.S. 57 (1986).
[27] *Franklin*, 503 U.S. at 75.

Taking the Court's lead in its reliance on Title VII, lower courts applied agency principles of liability, a common law standard used in the employment context, to Title IX sexual harassment cases. Indeed, some judges argued that Title IX should set stricter standards than Title VII.[28] Thus, some courts determined that school districts could be liable any time a teacher (supervisor) harassed his/her students (subordinates). Other courts applied a "constructive notice" standard, determining that school districts could be liable if they "knew or should have known" of the harassment and failed to appropriately remedy it.[29]

III. The Hurdles Set for Title IX Sexual Harassment Plaintiffs in *Gebser* and *Davis*

The Supreme Court ended the debate among lower courts over whether, and what form of, agency theory was appropriate for Title IX sexual harassment claims in *Gebser v. Lago Vista Independent School District*.[30] In that case, Alida Gebser was sexually abused by one of her high school teachers over an extended period of time and never reported the abuse because she was "uncertain how to react and she wanted to continue having him as a teacher."[31] Following complaints by parents of other students about the teacher's sexually inappropriate comments, the principal warned but never disciplined the teacher and also never informed the school district superintendent about the parents' complaints.[32] The abuse continued for several months, until a police officer discovered Alida and her teacher engaged in intercourse; the teacher was then arrested and dismissed from his teaching position.[33]

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[28] *Smith v. Metropolitan Sch. Dist. Perry Twp.*, 128 F.3d 1014, 1047 (7th Cir. 1997) (Rovner, J., dissenting).

[29] *Compare Kracunas v. Iona College*, 119 F.3d 80, 88 (2d Cir. 1997) (applying Title VII supervisor-employee agency standard) *with Lipsett v. University of P.R.*, 864 F.2d 881, 899-900 (1st Cir. 1988) (applying a constructive notice standard).

[30] 524 U.S. 274 (1998). Contrary to suggestions by some courts, *Gebser* and *Davis* are limited to the harassment context. See *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174-75 (2005) (describing retaliation as a form of discrimination that is separate from deliberate indifference to sexual harassment and finding that both violate Title IX). Moreover, even in the sexual harassment context, courts have found that the *Gebser* and *Davis* standards are easily met in certain circumstances. For example, in *Simpson v. University of Col. Boulder*, 500 F.3d 1170, 1177 (10th Cir. 2007), the court contrasted the facts of *Gebser* and *Davis* with the conduct of the University of Colorado, holding that the notice requirements were met automatically where the allegations were that the university "sanctioned, supported, even funded a program (showing [football] recruits a 'good time') that, without proper control, would encourage young men to engage in opprobrious acts." It also is unclear whether *Gebser* and *Davis* would apply to the quid pro quo context. The Supreme Court was silent on this issue and, since *Gebser*, there has been disagreement among the district courts over whether *Gebser* applies to quid pro quo claims. Compare *Liu v. Striuli* (applying *Gebser* to quid pro quo claims) with *Dodd v. Pizzo*, 2002 WL 1150727 (M.D. N.C. May 24, 2002) (holding that *Gebser* does not apply to employment quid pro quo claims). The Department of Education's Office for Civil Rights, which has primary responsibility for enforcing and interpreting Title IX, applies a strict liability standard to quid pro quo harassment. *See generally* U.S. Department of Education, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 66 FED. REG. 5512 (Jan. 19, 2001).

[31] *Gebser*, 524 U.S. at 278.

[32] *Id.*

[33] *Id.*

In a 5-4 decision, the Court rejected arguments made by Gebser and the United States as *amicus* that damages should follow automatically when a teacher has harassed a student and the "teacher's authority over the student facilitates the harassment."[34] It likewise rejected the argument that a school district could be liable for harassment when it "knew or 'should have known' about harassment and failed to uncover and eliminate it."[35] Listing several reasons, the majority claimed that using the Title VII agency model would "frustrate the purpose" of Title IX.[36] For example, the Court emphasized that a judicially implied standard for Title IX liability should be more constrained than under Title VII, which expressly outlines the cause of action and forms of relief.[37] The Court also focused on the "contractual nature" of Title IX, which conditions federal funds on a "promise * * * not to discriminate."[38] Because Title IX was enacted pursuant to Congress' Spending Clause authority, the Court expressed concern that an agency theory of liability could hold a recipient of federal funds liable even where it was unaware that discrimination had occurred.[39] By contrast, the Court emphasized that Title VII is an "outright prohibition" and applies "without regard to federal funding."[40] Finally, the Court noted that the Title IX administrative enforcement scheme did not indicate that an agency theory of liability was an appropriate standard.[41]

Rejecting the Title VII comparison it had embraced in *Franklin*, the Court developed a new standard that it determined was consistent with the structure of Title IX and its regulatory scheme. As applied by lower courts, that standard has erected a series of hurdles that have grossly undermined Title IX's protections.[42] I will address each portion of the standard in turn.

1. The first hurdle established in *Gebser* and followed in *Davis* is a requirement that, to recover damages for sexual harassment, a plaintiff must show that the school has received "actual notice" of the harassment. The Court made clear that the knowledge of the teacher/harasser does not constitute "actual notice"; instead, an "appropriate official"[43] of the school must receive notice. Thus, in *Gebser*, the Court disregarded the teacher's obvious knowledge that he had abused a student and determined that the school district did not receive notice of the harassment sufficient to trigger liability under Title IX.

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[34] *Id.* at 282-83.
[35] *Id.*
[36] *Id.* at 285.
[37] *Id.* at 289-90.
[38] *Id.* at 286.
[39] *Id.* at 286-88.
[40] *Id.* at 286.
[41] *Id.* at 288-89.
[42] The Court made clear that these liability standards were limited to private actions for money damages. *Gebser*, 524 U.S. at 283. Thus, administrative enforcement actions and actions for injunctive relief are not subject to the inconsistent standards. Nonetheless, the standards severely undermine enforcement in harassment cases because a graduated student likely lacks standing to seek prospective relief. *See Franklin*, 503 U.S. at 76 (in many school cases prospective relief would leave a harassment plaintiff "remediless."). Without the availability of damages, moreover, school districts have few incentives to make improvements in their programs.
[43] *See* discussion *infra* Part III.2.

Since *Gebser*, courts around the country have relied on the actual notice requirement to dismiss claims of egregious sexual harassment and in some cases promote an even more rigid standard. *Baynard v. Malone*[44] provides a particularly troubling example. There, a school principal was warned by a former student that a teacher had a history of sexual abuse and observed that the teacher had "excessive physical contact with one of his students." The abuse of that student continued for several months before the principal took any action other than warning the teacher not to engage in excessive physical contact with his students. Nonetheless, the Fourth Circuit concluded that the school district could not be liable under Title IX because the evidence showed only that [the principal] "should have been aware of the *potential for* * * * *abuse*," not that he was "*in fact*" aware of abuse.[45] So construed, not only does the actual notice requirement remove incentives for school districts to promote effective harassment prevention policies; but it also affirmatively creates perverse incentives for school districts to insulate themselves from knowledge of the harassment that occurs in schools.

2. Title IX harassment plaintiffs must also demonstrate that the required notice was given to an "appropriate person" with authority to "take corrective action." The Court in *Gebser* did not provide examples of such persons, but some courts have made this "appropriate official" requirement extremely burdensome. For example, some courts have found that counselors and teachers are not appropriate officials who may take action.[46] Moreover, the Fourth Circuit has determined that notice to a school principal was not enough to hold a school district liable, even where the principal supervised teachers and other staff, evaluated employees, and could recommend disciplinary action.[47] Indeed, one district court in the Fourth Circuit determined that even a school superintendent was not an appropriate official.[48]

3. Beyond the onerous notice requirements, the Court further restricted recovery for damages in a Title IX harassment claim by determining that the school district response must amount to "deliberate indifference to discrimination."[49] Although the Court did not provide examples of deliberate indifference in *Gebser*, it addressed the issue again the following year in *Davis v. Monroe County Board of Educ.*, a case

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[44] 268 F.3d 228 (4th Cir. 2001).
[45] 268 F.3d at 238 (emphasis added).
[46] *Warren ex rel. Good v. Reading Sch. Dist.*, 278 F.3d 163 (3d Cir. 2002) (holding that jury should have been instructed that school guidance counselor cannot be an "appropriate person" for purposes of actual notice). Similarly, in *Liu v. Striuli*, 1999 WL 24961, at *10 (D. RI 1999), a court held that the director of financial aid and the Director of the Graduate History Department were not "appropriate officials" because they lacked supervisory authority over the alleged harasser and therefore could not fall within the scope of officials having "the authority to police relationships between faculty and doctoral students."
[47] *Baynard*, 268 F.3d at 238-39. *Cf. Bostic v. Smyrna Sch. Dist.*, 418 F.3d 355, 362 (3d Cir. 2005) (holding that the school principal and assistant principal could not be considered "appropriate officials" based solely on their positions).
[48] *Rasnick v. Dickenson County Sch. Bd.*, 333 F. Supp. 2d 560, 566 (W.D. Va. 2004) ("while local superintendents in Virginia have somewhat greater authority than school principals, including the authority to temporarily suspend teachers, in the present case only the School Board could take[] the sole corrective measure that would have ultimately protected the plaintiffs from harm – removing [the abusive teacher] as a teacher at the school.").
[49] *Gebser*, 524 U.S. at 290.

involving the sexual harassment of a student by another student. In *Davis*, fifth-grader LaShonda Davis and her mother repeatedly complained to her teachers and the school principal about a classmate who bombarded her with vulgar comments such as "I want to feel your boobs" and "I want to get in bed with you"; the student engaged in physical contact as well, once sexually rubbing against her.[50] Despite the complaints, school officials never disciplined the boy for his conduct. Moreover, it took over three months of complaints before LaShonda was even permitted to change her seat so that she was not directly next to him; even then, the two students remained in the same classroom. Finally, during the period of harassment, none of the school's personnel had been instructed on how to respond to sexual harassment. Applying the "deliberate indifference" standard, the Court held that school districts may be considered deliberately indifferent "where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances[.]"[51] Fortunately for LaShonda Davis, the Court found that the district was indeed clearly unreasonable in failing to address her situation.

Since *Gebser* and *Davis*, however, other plaintiffs have fared less well as lower courts have grappled with the type of school response that amounts to deliberate indifference, and, in many cases, have systematically removed incentives for schools to make concerted efforts to end harassment. For example, the Fifth Circuit has repeatedly emphasized that a school board is not "clearly unreasonable" even when its actions to stop harassment have been "proven ineffective."[52] And the First Circuit found that a university was not "clearly unreasonable" when it recommended that a visiting professor who had sexually assaulted a student continue on the faculty for an additional year despite the fact that he had made "mistakes."[53]

The results have been no better in peer harassment cases. In *Porto v. Tewksbury*,[54] for example, the court vacated a $200,000 jury verdict, holding that there was no deliberate indifference as a matter of law. Although the school was notified on multiple occasions of the peer harassment and sexual abuse, it did nothing more than temporarily separate the students.[55] In finding for the town, the court emphasized that the test for Title IX is "not one of effectiveness by hindsight."[56] *Rost v. Steamboat Springs Re-2 Sch. Dist.*[57] provides a similarly disturbing example. There, the Tenth Circuit found that the school district was not deliberately indifferent when it failed to discipline four male students who had harassed and assaulted a female student with learning disabilities. A police report confirmed that the student had been coerced into performing oral sex. In addition, the boys verbally harassed and threatened to start sexual rumors about the student and to distribute naked pictures of her. Nonetheless, citing *Davis* the court emphasized that the standard for schools is not to "remedy" peer harassment and that it

[50] *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999).
[51] *Id.* at 648.
[52] *E.g.*, *Doe v. Dallas Indep. Sch. Dist.*, 220 F.3d 380, 387-89 (5th Cir. 2000).
[53] *Wills v. Brown*, 184 F.3d 20 (1st Cir. 1999).
[54] 488 F.3d 67 (1st Cir. 2007).
[55] *Id.* at 70-71.
[56] *Id.* at 74.
[57] 2008 WL 54772 (10th Cir. Jan. 4, 2008).

should not second-guess disciplinary decisions (or in this case, the lack of) taken by the school.[58]

4. The Court provided a final obstacle for Title IX harassment plaintiffs in *Davis.* In addition to reaffirming the rigorous *Gebser* standard, the Court added that actionable harassment amongst peers must be "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."[59] The language used by the Court also contrasts with Title VII, under which plaintiffs must demonstrate only that peer harassment in the workplace is severe *or* pervasive.[60]

Following *Davis*, some courts have made the burden for plaintiffs in Title IX peer sexual harassment cases nearly insurmountable. For example, in *Ross v. Corporation of Mercer Univ.*, the court concluded that a "single incident [of rape], however traumatic to its victim, is not likely to be pervasive, or to have a systemic effect on educational activities."[61] Further, in *Hawkins v. Sarasota County Sch. Bd.*,[62] the court determined that persistent harassment by an 8 year-old, including sexually explicit and vulgar language and offensive touching, did not deprive students of their educational opportunities, despite the fact that targeted students feigned illness to avoid attending school.

The deliberate indifference standard in peer harassment cases is particularly striking when compared to the standard under Title VII. Of course perfection is not required, but employers that pursue an unreasonable course of action, particularly one that results in continued harassment, can be liable for damages in suits brought by their employees.[63] Not so under Title IX – courts have held that school districts can take what are clearly inadequate steps, such as maintaining the harasser in the same classroom or employing ineffective discipline policies, without meeting the Court's "clearly unreasonable" test.[64]

The combined *Gebser* and *Davis* standards have sorely undermined the remedies available for student victims of harassment and have eliminated incentives for school districts to take steps to address and prevent harassment in schools. I will discuss next

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[58] *Id.* at *6-7.
[59] *Davis*, 526 U.S. at 650.
[60] *Cf. Meritor v. Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986). This is the standard adopted by the Office for Civil Rights in its sexual harassment guidance. U.S. Department of Education, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 66 FED. REG. 5512 (Jan. 19, 2001).
[61] 506 F. Supp.2d 1325, 1358 (M.D. Ga. 2007).
[62] 322 F.3d 1279, 1288 (11th Cir. 2003).
[63] In *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), the Court clarified that an employer may be "vicariously liable for actions of discrimination caused by a supervisor, subject to * * * the reasonableness of the employer's conduct as well as that of a Title VII plaintiff."
[64] For example, a district court found that there was no Title IX liability where after two sexual assaults by an eight year-old against a seven year-old the school kept children in same reading room and further non-sexual harassment occurred. *Vaird v. School Dist. of Phila.*, 2000 WL 576441, at *2 (E.D. Pa. May 12, 2000).

alternatives to these rigid standards that could provide students with a broader range of legal protections and that are more consistent with the purposes of Title IX both to avoid supporting discriminatory practices with federal funds and to ensure effective protection from such practices.

IV. Federal Reform: The Civil Rights Act of 2008

The Supreme Court made clear in *Gebser* that it was not open to revisiting its actual notice and deliberate indifference standards absent further guidance from Congress "directly on the subject" of damages liability for sexual harassment claims under Title IX.[65] Congress initiated a response this month with the introduction of an omnibus civil rights bill intended to remedy the recent rollback of a number of civil rights protections, including the Court's decisions in *Gebser* and *Davis*.[66] Among other things, the Civil Rights Act of 2008, introduced by Senator Kennedy and Representative Lewis and others, would amend Title IX (as well as Title VI of 1964 Civil Rights Act, the Age Discrimination Act of 1975, and Section 504 of the 1973 Rehabilitation Act)[67] to provide the same protection from harassment for students that employees receive under Title VII.

The Act would make full legal relief – including damages, costs, and fees – available where harassment occurs in an educational setting and the requisite standards are met. First, if an employee or an agent of an educational institution that receives federal funds engages in unlawful harassment that results in a tangible adverse action, such as a lowered grade or expulsion from school, the educational institution would be automatically liable. In addition, educational institutions would face liability and damages (as well as costs and fees) for the harassing conduct of its agents and employees that did not result in a tangible adverse action unless the institutions could show that they "exercised reasonable care to prevent and correct promptly any harassment," and demonstrate that the harassed individual unreasonably "failed to take advantage of preventive or corrective opportunities." Finally, educational institutions could be held liable for the harassment by persons who are not agents and employees if they "knew or should of known" of the harassment and failed to exercise "reasonable care to prevent and promptly correct the harassment."

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[65] *Gebser*, 524 U.S. at292.

[66] In addition to the Title IX sexual harassment standards, the Civil Rights Act of 2008 would address a broad number of Supreme Court decisions that have undermined the enforcement of federal civil rights statutes, including *Alexander v. Sandoval*, 532 U.S. 275 (2001), *Barnes v. Gorman*, 536 U.S. 181 (2002), *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000), *Circuit City Stores v. Adams*, 532 U.S. 105 (20001), *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dept. of Health & Human Res.*, 532 U.S. 598 (2001), *Alden v. Maine*, 527 U.S. 706 (1999), and *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002). The Act also would amend gaps in the Equal Pay Act of 1963, 29 U.S.C. § 201 *et seq.* to enhance enforcement of equal pay provisions and would eliminate the cap on damages under Title VII. A prior version of the bill was introduced in 2004, but did not move forward. H.R. 3809, 108th Cong. (2004); S. 2088, 108th Cong. (2004).

[67] Title VI of the 1964 Civil Rights Act prohibits discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance. 42 U.S.C. § 2000d. The Age Discrimination Act of 1975 prohibits discrimination on the basis of age in programs and activities receiving federal financial assistance. 42 U.S.C. § 6101. Section 504 of the 1973 Rehabilitation Act similarly prohibits discrimination on the basis of disability in programs and activities that receive federal financial assistance. 29 U.S.C. § 794(a).

To demonstrate that it "exercised reasonable care to prevent and correct promptly any harassment," an educational institution would be required to prove that it had:

> (1) established, adequately publicized, and enforced an effective, comprehensive harassment prevention policy and complaint procedure that is likely to provide redress and avoid harm without exposing the person subjected to the harassment to undue risk, effort, or expense;
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> (2) undertaken prompt, thorough, and impartial investigations pursuant to its complaint procedure; and
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> (3) taken immediate and appropriate corrective action designed to stop harassment that has occurred, correct its effects on the aggrieved person, and ensure that the harassment does not recur.

By adopting this framework, the Civil Rights Act of 2008 would provide meaningful incentives for schools to take steps to prevent sexual harassment and address it when it occurs. Congress should act without further delay to address the inequities created by the *Gebser* and *Davis* decisions and enact this critical legislation.

V. State Level Reform: *L.W. v. Toms River Regional School Board of Education*

In addition to advising Congress to "speak directly on the subject," the Court in *Gebser* specifically noted that its "decision does not affect any right of recovery that an individual may have against a school district as a matter of state law * * *."[68] Many schools are subject to state laws and regulations that expressly bar discrimination on the basis of sex in education programs and provide for relief in addition to Title IX. Some states bar discrimination in all places of public accommodation; other states have broad human rights or civil rights laws that expressly prohibit discrimination on the basis of sex in educational programs. For example, the Florida Education Equity Act specifically prohibits sex discrimination in education, while the New Jersey Law Against Discrimination bars discrimination in all places of public accommodation, including schools.[69] Furthermore, many states added Equal Rights Amendments to their state constitutions in the 1970s and 1980s to expand the protection against sex discrimination beyond that in the federal constitution.[70]

Although states frequently look to federal law for guidance in interpreting their own laws, many state statutes provide broad protection against sex discrimination that extends beyond the mandates of Title IX. Moreover, even in those states that do not expressly provide broader protection than Title IX, the interpretation and application of state civil rights statutes need not be hampered by the barriers the Supreme Court applied in *Gebser* and *Davis*. Indeed, there often are critical differences between Title IX and

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[68] *Gebser*, 524 U.S. at 292.

[69] FLA. STAT. §§ 1000.05 *et seq.*; N.J. STAT. ANN. §§ 10:5-1 *et seq.*

[70] See Linda Wharton, *State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination*, 36 RUTGERS L. J. 1201 (2005).

state anti-discrimination laws that suggest that states could provide fuller protections for students against harassment in schools, while serving as a catalyst for reform at the federal level. The recent New Jersey Supreme Court decision, *L.W. v. Toms River Regional School Board of Education*,[71] illustrates this point.

The *Toms River* decision arose from the following facts. Beginning in the fourth grade, L.W. was harassed by his classmates, who regularly used epithets such as "gay," "homo" and "fag' toward him at school.[72] The harassment continued and intensified through middle school and into high school and at times was so severe that L.W. refused to attend school.[73] Most of the abuse was verbal, but L.W. also was physically assaulted twice.[74] Although the schools disciplined the individual harassers, school officials failed to address the broader anti-homosexual environment.[75] The harassment continued for years until L.W. transferred to another school.[76]

L.W.'s mother filed a complaint with the New Jersey Division on Civil Rights on behalf of her son and herself under the New Jersey Law Against Discrimination (LAD). The LAD is a broad civil rights statute that "ensures that the civil rights guaranteed by the State Constitution are extended to all its citizens."[77] Its language states that "All persons shall have the opportunity to * * * obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation * * * without discrimination" based on, among many other categories, sex and affectional or sexual orientation.[78] The Act covers all places of public accommodation, including primary and secondary schools, high schools and any other educational institutions supervised by the New Jersey State Board of Education.[79] It also expressly includes a private right of action for damages.[80]

Despite the LAD's broad language, the administrative law judge who first reviewed the plaintiff's complaint applied the narrow Title IX standards to L.W.'s claim and found that the school district was not deliberately indifferent to the harassment because it had disciplined the individual harassers.[81] On appeal, however, the New Jersey Supreme Court rejected the *Davis* and *Gebser* models and emphasized that the LAD was not subject to any of Title IX's limitations. Rather, in interpreting the LAD, the court emphasized that courts should apply the same standards to workplace discrimination and discrimination in public schools and that any other conclusion would

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[71] 915 A.2d 535 (N.J. 2007).
[72] *Id.* at 540-544.
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.* at 546.
[78] N.J. STAT. ANN. §§ 10:5-1 *et seq.*
[79] *Id.*
[80] *Id.*
[81] 915 A.2d 535, 544 (N.J. 2007). Because L.W.'s mother filed her complaint with the Division of Civil Rights, she appealed the administrative law judge decision to the Director of the Division, who held – like the New Jersey Supreme Court and the New Jersey appellate Court – that the district should be liable under the New Jersey Law Against Discrimination for the harassment L.W. suffered.

conflict with the state's strong commitment against discrimination and its public policy of protecting students.[82]

In distinguishing Title IX and the LAD, the New Jersey Supreme Court first emphasized that it had already recognized that an employer may be held liable to its employees under the LAD for a hostile work environment if the employer knew or should have known of the harassment and failed to take effective measures to stop it.[83] Thus, the court reasoned, applying two separate standards for the same antidiscrimination statute – one for students and one for employees – would be both inconsistent and unfair. As the court put it, "[s]tudents in the classroom are entitled to no less protection from unlawful discrimination and harassment than their adult counterparts in the workplace."[84]

Second, the court pointed to three substantial differences between the structure and language of Title IX and that of the LAD: the LAD protects a number of characteristics in addition to sex; the LAD is not a spending statute – it applies universally to places of public accommodation, including schools, regardless of whether they receive state or local funds; and finally, unlike Title IX's *implied* right of action, the LAD *expressly* empowers aggrieved persons to file private causes of action seeking legal and equitable remedies.[85]

Applying this more flexible standard, the New Jersey Supreme Court held that "as a matter of state law it would be unfair to apply a more onerous burden on aggrieved students than on aggrieved employees."[86] The court recognized that, "to avoid liability" a school district need not "purge its schools" of harassment[87] – indeed, that no school can prevent all instances of peer harassment. But schools must "implement effective preventive and remedial measures to curb severe or pervasive discriminatory mistreatment."[88] The decision in *Toms River* thus strikes the right balance, providing necessary incentives for school districts to address harassment, including a broader hostile environment, and take preventative measures to protect students from invidious discrimination in schools.

Although the *Toms River* decision applies to schools only in the state of New Jersey, similarly broad protections can be construed in other states where there are laws with a structure and history comparable to that of the LAD. For example, although the Rhode Island Supreme Court has not yet considered the appropriate standard for a sexual harassment case, students in Rhode Island may be entitled to a standard more flexible than under Title IX in the Rhode Island Civil Rights Act of 1990 (RICRA).[89] The RICRA, like the LAD, is a broad civil rights statute that is significantly different in scope than Title IX. Like the LAD, it prohibits discrimination based on a number of

[82] *Id.* at 550.
[83] *Id.* at 548.
[84] *Id.* at 549.
[85] *Id.*
[86] *Id.*
[87] *Id.* at 550.
[88] *Id.*
[89] R.I. GEN. LAWS §§ 45-112-1 *et seq.*

characteristics and is not restricted to recipients of local or state funds. It also expressly guarantees a private right of action for damages, costs and fees.

The Maine Human Rights Act[90] and the Minnesota Human Rights Act,[91] among other state laws, may similarly be appropriate candidates for a less onerous standard for sexual harassment claims in schools. Like the LAD, these statutes prohibit discrimination in educational institutions as well as the workplace, prohibit forms of education discrimination in a broad number of categories, and apply to educational institutions regardless of whether they receive state or local funds – indeed, both statutes cover all public and private schools at the elementary, secondary and post-secondary levels. Finally, unlike Title IX, they explicitly provide for a private right of action.

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By adopting the rigid *Gebser* and *Davis* standards, the U.S Supreme Court ensured that Title IX harassment claims would receive short shrift from courts around the country and, as a result, that school districts would be slow to adopt effective strategies for ending harassment. A more flexible standard could prompt school districts to develop effective practices that limit harassment and address the culture that leads to it – an outcome that is surely consonant with, and indeed required by the principles of, any broad antidiscrimination law. The Civil Rights Act of 2008 provides a vehicle for Congress to restore this balance.

Moreover, it is critical that victims of harassment (and their parents) take advantage of their broad state antidiscrimination laws in addition to Title IX. Most state courts have yet to examine the appropriate standard that should apply to student harassment claims in educational institutions, but as the law develops there is no reason for state courts to import the Supreme Court's application of more onerous standards for remedying harassment in the education than in the employment context. To the contrary, state courts should take into consideration that schools, particularly at the K-12 level, have broad duties to their students and substantial control over student conduct. Indeed, just last term the Supreme Court reiterated that schools have tremendous control over the conduct of their students.[92]

With over 80 percent of secondary students and 60 percent of college students reporting that they have been subjected to harassment in school, the issue demands prompt attention from federal and state policymakers as well. The Civil Rights Act of 2008 provides a model for amending Title IX and state officials may also proactively issue interpretations of state law that follow the *Toms River* and Civil Rights Act models. The Supreme Court has left the next steps up to Congress and the states, and it is time to begin the restoration process.

[90] ME. REV. STAT. ANN. 5 §§ 4551 *et seq.*
[91] MINN. STAT. § 363.01 *et seq.*
[92] *Morse v. Frederick*, ___ U.S. ___, 127 S. Ct. 2618 (2007).