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.
• Issued 2011 Dear Colleague Letter
• Ramped up Title IX program compliance reviews
• Created "list of shame"
• Was not deferential
• As a result, schools for first time in Title IX's history took extraordinary steps to comply and ceased handling cases informally
• Disciplined students begin aggressively challenging institutions
• VAWA is reauthorized with Clery amendments
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.
How is that? The beard? Is it comfortable? Is it itchy? Are you pleased with it?
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. Gwinnet 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.”

- 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 Oncle 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 involving 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 invited 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 subtle 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.”

• 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)

The Victim

By DAVID FIRESTONE

Atlanta, May 16—LaShonda Davis was 11 when she told her mother a very long time to lose a child. Her mother, Auriella Davis, was shocked to learn that her 6-year-old daughter had been sexually abused by a boy in her day care center.

But hiring a lawyer seemed beyond them. In May, Davis was told that she had to give up custody of LaShonda. But she said she couldn't give up custody of her child.

Now, Davis is fighting for custody of her child.

For years, Davis says, LaShonda has been living in a day care center. But Davis had no idea that her daughter was being sexually abused there.

When a Tormented Child Cried Stop

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

Davis v. Monroe County Board of Education (1999)

The Victi...
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.”
“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?