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Cover Page Footnote

J.D. Candidate, December 2012, The Catholic University of America, Columbus School of Law; B.S., 2008, Juniata College. The author would like to thank Professor Ted Sky for his thoughtful commentary and advice. The author also wishes to thank his family, friends, and fellow evening law students for their support and his colleagues on the Catholic University Law Review for their invaluable assistance throughout the publication process.

IF IT'S BROKEN, LET THEM FIX IT: WHY THE GEBSER PRE-LITIGATION NOTICE REQUIREMENT SHOULD APPLY TO TITLE IX ATHLETICS LAWSUITS

Zachary Swartz⁺

“With regard to athletics, I have to say, Mr. Chairman and members of the committee, I had not realized until the comment period closed that the most important issue in the United States today is intercollegiate athletics.”¹ Caspar Weinberger,² then-Secretary of the Department of Health, Education and Welfare (HEW), made this tongue-in-cheek comment during HEW’s efforts to implement Title IX—the federal statute that prohibits recipients of federal funding from discriminating “on the basis of sex” with regard to “any education program or activity.”³ In making this statement, Secretary

⁺ J.D. Candidate, December 2012, The Catholic University of America, Columbus School of Law; B.S., 2008, Juniata College. The author would like to thank Professor Ted Sky for his thoughtful commentary and advice. The author also wishes to thank his family, friends, and fellow evening law students for their support and his colleagues on the *Catholic University Law Review* for their invaluable assistance throughout the publication process.

1. *Sex Discrimination Regulations: Hearings Before the H. Subcomm. on Postsecondary Educ. of the Comm. on Educ. and Labor*, 94th Cong. 439 (1975) (statement of Caspar W. Weinberger, Secretary, Dep’t of Health, Educ. and Welfare).

2. Caspar Weinberger was an influential political figure with an interesting background. A graduate of Harvard Law School and a veteran of the United States Army, Weinberger was elected to the California State Assembly in 1952. *SecDef Histories – Caspar W. Weinberger*, DEP’T OF DEFENSE, http://www.defense.gov/specials/secdef_histories/bios/weinberger.htm (last visited July 15, 2012). Weinberger came to Washington, D.C. in 1970 to serve as chair of the Federal Trade Commission. *Id.* He later became the deputy director (from 1970 to 1972) and the director (from 1972 to 1973) of the Office of Management and Budget, and the Secretary of the Department of Health, Education, and Welfare (from 1973 to 1975). *Id.* During his time in Washington, Weinberger became well known for his cost-cutting abilities, earning him the nickname “Cap the Knife.” *Id.* Weinberger is most prominently known, however, for his service as the Secretary of Defense under President Ronald Regan from 1981 to 1987. *Id.* Belying his nickname, then-Congressman Al Gore dubbed Weinberger “Cap the Ladle” for his support of large increases to the defense budget while at the Pentagon. James Kelly, *More a Ladle than a Knife*, TIME, Dec. 20, 1982, at 14–15.

3. Title IX, Education Amendments of 1972, 20 U.S.C. § 1681(a) (2006). The Department of Health, Education and Welfare (HEW) promulgated regulations to implement Title IX. *See* DEBORAH L. BRAKE, GETTING IN THE GAME: TITLE IX AND THE WOMEN’S SPORTS REVOLUTION 18–19 (2010). HEW received approximately 10,000 written comments on the proposed Title IX regulations relating to the statute’s applicability to intercollegiate athletics. *Id.* at 21. This is what prompted a “bemused” Secretary Weinberger to make the above-quoted statement. Ellen Staurowsky, *Title IX in its Third Decade: The Commission on Opportunity in Athletics*, 2 ENT. LAW. 70, 73–74 (2003).

Weinberger was, in all likelihood, being facetious.⁴ Nonetheless, Title IX has had a stunning impact on intercollegiate athletics. In the 40 years since its enactment, the statute, its implementing regulations, and the case law interpreting Title IX have continued to be a source of conflict.⁵ This Note addresses one of these sources of conflicts—whether an allegation of gender discrimination in the athletics context should require pre-litigation notice and an opportunity to cure before a plaintiff may recover monetary damages.⁶ Resolution of this issue has important policy ramifications. Failing to apply a pre-litigation notice and opportunity-to-cure requirement to Title IX athletics lawsuits could subvert the very purpose of the statute by diverting funding from reducing gender discrimination in education to defending and paying large legal-damages awards.⁷

Although the Supreme Court has never addressed this issue, it has required pre-litigation notice and an opportunity to cure in the context of teacher-student sexual harassment cases.⁸ In *Gebser v. Lago Vista Independent School District*, the Supreme Court addressed a clear violation of Title IX: a high school teacher had engaged in sexual relations with one of his students.⁹ Nonetheless, the Court did not permit the plaintiff to recover damages because she had not notified the defendant school district of the discrimination nor provided the school district the opportunity to rectify the discrimination.¹⁰ In essence, the Court in *Gebser* established a higher threshold of proof for the plaintiff in order to recover damages in Title IX cases involving allegations of teacher-student sexual harassment.¹¹

4. See BRAKE, *supra* note 3, at 21 (noting that Secretary Weinberger's comments were made "with a tinge of sarcasm"). Secretary Weinberger's statement is particularly striking given its timing, as Richard Nixon had resigned as president just a year before Weinberger's comment. Carroll Kilpatrick, *Nixon Resigns*, WASH. POST, Aug. 9, 1974, at A1. Moreover, the Vietnam War had recently ended. Gabriel Kolko, *Lesson from a Total Defeat for the US: The End of the Vietnam War, 30 Years Ago*, COUNTERPUNCH (May 1, 2005), <http://www.counterpunch.org/2005/05/01/the-end-of-the-vietnam-war-30-years-ago/>.

5. See, e.g., Michael Rietmulder, *Title IX Controversy Continues*, MINN. DAILY, April 14, 2010, at 1.

6. See, e.g., Diane Heckman, *The Glass Sneaker: Thirty Years of Victories and Defeats Involving Title IX and Sex Discrimination in Athletics*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 551, 612–13 (2003) (asking whether "educational institutions [would] be shielded from possible Title IX liability because the student or prospective student-athlete did not inform the proper authority of the failure to provide equal opportunity in the selection of sports or benefits").

7. See *infra* Part III.D.

8. See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998).

9. *Id.* at 277–78. In *Franklin v. Gwinnett County Public Schools*, the Supreme Court had already established that "a school district can be held liable in damages in cases involving a teacher's sexual harassment of a student." 503 U.S. 60, 74–75 (1992).

10. *Gebser*, 524 U.S. at 277, 292–93.

11. *Id.*

The *Gebser* decision left a number of questions unanswered.¹² It comes as no surprise, then, that a circuit split has emerged over the question of whether the *Gebser* notice requirement should be expanded to apply to Title IX athletics suits.¹³ The United States Court of Appeals for the Fifth Circuit and the United States Court of Appeals for the Ninth Circuit have held that *Gebser*'s pre-litigation notice and opportunity to cure requirement do not apply to Title IX athletics suits,¹⁴ whereas the United States Court of Appeals for the Eighth Circuit has held that this requirement does apply to such suits.¹⁵

This Note argues that the *Gebser* pre-litigation notice and opportunity to cure requirements should apply to Title IX athletics suits. First, this Note traces the development of Title IX generally, addressing the jurisprudential principles applicable to Title IX as a statute enacted pursuant to Congress's power under the Spending Clause, the statute's sole administrative enforcement mechanism, and the judicial creation of a private right of action. Next, this Note examines *Gebser* and highlights the circuit split over whether *Gebser* should apply to Title IX lawsuits alleging unequal provision of intercollegiate athletic opportunities. Lastly, this Note analyzes the circuit court opinions in light of Supreme Court jurisprudence and the purpose of Title IX and concludes that *Gebser*'s notice and opportunity to cure requirement should be applied to Title IX athletics lawsuits for legal and policy reasons.

12. See Heckman, *supra* note 6, at 612–13 (discussing the questions left unanswered after *Gebser*). These questions ranged from whether *Gebser* “requires all individuals to place the offending educational institutions on notice in Title IX cases, even when not pursuing a sexual harassment claim,” to “who would be required to be informed and what serves as sufficient notice,” to whether “educational institutions [would] be shielded from possible Title IX liability” because the wrong authority was informed. *Id.*

13. Compare *Mansourian v. Regents of Univ. of Cal.*, 602 F.3d 957, 961 (9th Cir. 2010) (holding that *Gebser*'s pre-litigation notice and opportunity to cure requirement do not apply to Title IX athletics suits) and *Pederson v. La. State Univ.*, 213 F.3d 858, 864 (5th Cir. 2000) (coming to similar conclusion), with *Grandson v. Univ. of Minn.*, 272 F.3d 568, 576 (8th Cir. 2001) (holding that *Gebser*'s requirements apply to Title IX athletics suits). See also Diane Heckman, *The Entrenchment of the Glass Sneaker Ceiling: Excavating Forty-Five Years of Sex Discrimination Involving Educational Athletic Employment Based on Title VII, Title IX, and the Equal Pay Act*, 18 VILL. SPORTS & ENT. L.J. 429, 449 (2011) (“[W]hether an employee of an educational institution would also be required to place the educational institution on notice that an employment-related violation occurred as a condition precedent to the commencement of a Title IX lawsuit not involving sexual harassment or in a Title IX case involving retaliation is unclear.”).

14. *Mansourian*, 602 F.3d at 968; *Pederson*, 213 F.3d at 882.

15. *Grandson*, 272 F.3d at 576.

I. TRACING THE STATUTORY AND LEGAL HISTORY OF TITLE IX

A. *The Passage of Title IX*

Congress enacted Title IX in response to a broad societal movement toward strengthening women's rights.¹⁶ In 1964, eight years before the passage of Title IX, Congress passed Title VII, which banned discrimination in the workplace on the basis of "race, color, religion, sex, or national origin."¹⁷ Subsequently, women's rights advocates turned their efforts toward eradicating gender discrimination in education.¹⁸

The congressional debates barely mention the issue of gender discrimination in athletics, and, as a result, the statutory language of Title IX does not explicitly address this issue.¹⁹ Rather, the statute's terms are quite broad,²⁰ stating that "[n]o person in the United States shall on the basis of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."²¹

Following the passage of Title IX, the National Collegiate Athletic Association (NCAA) lobbied to restrict applying the statute to intercollegiate athletics.²² However, the proposed legislation ran into opposition as it would have exempted intercollegiate athletics from Title IX entirely.²³ Subsequent efforts sought to exempt intercollegiate athletic activities from Title IX

16. BRAKE, *supra* note 3, at 17.

17. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII § 703, 78 Stat. 241, 255 (codified as amended at 42 U.S.C. § 703 2000e-2 (2006)).

18. BRAKE, *supra* note 3, at 17.

19. *Id.* at 17–18. Nonetheless, data demonstrate a positive correlation between Title IX and gender equity in intercollegiate athletics. For example, from 1971 to 1972, a mere 29,972 women participated in NCAA varsity athletics, compared to 170,384 men. *Title IX Athletic Statistics*, AM. ASS'N OF UNIV. WOMEN, <http://www.aauw.org/act/laf/library/athleticStatistics.cfm> (last visited Sept. 9, 2011). However, by 2005, there was a 456 percent increase in female NCAA varsity athletic participation, with 166,728 women participating. *Id.* During the same time period, male participation in NCAA varsity athletics increased only 31 percent. *Id.* Nonetheless, women's rights advocates continue to argue rightly that women are still shortchanged with respect to intercollegiate athletic opportunities. See *id.* (calculating that "[w]hile women made up 54% of all undergraduate students during the 2005–2006 school year, the female share of athletes was only 45%" and that "[f]emale NCAA athletes receive only 45% of college athletic scholarship dollars, which is \$166 million less in scholarships than male college athletes"); see also NAT'L WOMEN'S LAW CTR. & DLA PIPER, *BREAKING DOWN BARRIERS: A LEGAL GUIDE TO TITLE IX AND ATHLETIC OPPORTUNITIES* 4 (2d ed. 2007) (noting that "female participation in intercollegiate sports remains below pre-Title IX male participation").

20. See Kenneth L. Thomas & Ramadanah M. Salaam, *The Face of Title IX: Post-Jackson v. Birmingham Board of Education*, 66 ALA. LAW. 429, 433 (2005) (quoting *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005)) (noting that, in Title IX cases, the Supreme Court relies "on the 'broad language' of the statute to define discrimination").

21. Title IX, Education Amendments of 1972 § 901, 20 U.S.C. § 1681(a) (2006).

22. BRAKE, *supra* note 3, at 18–19.

23. *Id.* Senator John Tower, a Republican from Texas, sponsored this legislation. *Id.*

“insofar as such activit[ies] provide[d] to the institution gross receipts or donations required by such institution to support that activity.”²⁴ Corresponding legislation passed the Senate, but was ultimately replaced by a compromise that instructed HEW to implement regulations enforcing Title IX’s prohibition of sex discrimination through “reasonable provisions considering the nature of particular sports.”²⁵ This compromise became an amendment to Title IX and provided the impetus for the development of regulations addressing Title IX’s application to intercollegiate athletics.²⁶

B. Title IX, the Spending Clause, and Principles of Contract Law

The Spending Clause provides the constitutional authority for Congress’s enactment of Title IX.²⁷ Legislation enacted pursuant to the Spending Clause is contractual in nature: to receive federal funding from Congress, state and state-run entities agree to comply with certain imposed conditions.²⁸ Thus, as the Supreme Court noted in *Pennhurst State School and Hospital v. Halderman*, “the legitimacy of Congress’ power to legislate under the spending power . . . rests on whether the [recipient] voluntarily and knowingly accepts the terms of the ‘contract.’”²⁹ As a result, Congress may only impose conditions—or contract terms—that are unambiguous.³⁰ Pursuant to these

24. Amendment of Title IX of the Education S. 2106, 94th Cong. § 2 (1975). Senator Tower also sponsored this legislation. *See id.*; BRAKE, *supra* note 3, at 18–19.

25. Education Amendments of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (1974) (codified at 20 U.S.C. § 1691 (2006)); *see* BRAKE, *supra* note 3, at 19. Senator Jacob Javits, a Republican from New York, offered the compromise provision. *Id.*

26. BRAKE, *supra* note 3, at 19–21; Education Amendments of 1974 § 844.

27. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998); U.S. CONST. art. I, § 8, cl. 1 (“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.”).

28. *See* *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 181–82 (2005) (quoting *Pennhurst*’s discussion of the contractual nature of congressional legislation enacted under the Spending Clause); *Bd. of Educ. v. Rawley*, 458 U.S. 176, 204 n.26 (1982) (likening Spending Clause legislation to a contract); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

29. *Pennhurst*, 451 U.S. at 17.

30. *Id.*; *see also* *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). The requirement that “Spending Clause legislation must be clear about the obligations it is imposing . . . is . . . a rule of statutory construction [that] has become known as the ‘clear statement’ rule.” Terry Jean Seligmann, *Muddy Waters: The Supreme Court and the Clear Statement Rule for Spending Clause Legislation*, 84 TUL. L. REV. 1067, 1069 (2010). In addition to the requirement that the imposed condition be unambiguous, the Supreme Court has recognized several other “general restrictions” on legislation enacted pursuant to the Spending Clause. *See* *South Dakota v. Dole*, 483 U.S. 203, 207–08 (1987) (discussing cases that articulate these general restrictions). The first of these restrictions requires that “the exercise of the spending power must be in pursuit of ‘the general welfare.’” *Dole*, 483 U.S. at 207 (citing *Helvering v. Davis*, 301 U.S. 619, 640–41 (1937) and *United States v. Butler*, 297 U.S. 1, 65 (1936)). Second, the conditions imposed should be related “‘to the federal interest in particular

principles, courts closely examine situations in which Congress passes legislation allowing courts to hold recipients liable in monetary damages for failing to comply with the condition that is attached to the funding.³¹

C. Implementing Title IX: The HEW Regulations, the 1979 Policy Interpretation, and the Administrative Enforcement Mechanism

Subsequent to the passage of the compromise legislation discussed in Part I.A, HEW began the difficult task of promulgating regulations that apply Title IX to intercollegiate athletics.³² HEW received thousands of written comments during the drafting process.³³ Ultimately, the final regulations provided:

No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient [of federal funding], and no recipient shall provide any such athletics separately on such basis.³⁴

Much like the statutory language of Title IX, the implementing regulations were quite broad and left a number of questions unanswered.³⁵

Thus, more than three years after the regulations went into effect, HEW issued a “Policy Interpretation” in which it sought, among other things, to provide additional guidance to institutions of higher education with respect to Title IX compliance in their intercollegiate athletic programs.³⁶ This policy interpretation set forth a three-part test to assess whether an institution is in compliance with Title IX’s mandate to provide equal opportunities to participate in intercollegiate athletics.³⁷ First, if the institution demonstrates that it offers opportunities to participate in intercollegiate athletics “in numbers substantially proportionate” to the respective enrollments of male and female

national projects or programs.” *Dole*, 483 U.S. at 207–08 (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978)). Further, “other constitutional provisions may provide an independent bar to the conditional grant of federal funds.” *Dole*, 483 U.S. at 208 (citing *Lawrence Cnty. v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 269–70 (1985)); *see also* *Buckley v. Valeo*, 424 U.S. 1, 90–91 (1976) (per curiam); *King v. Smith*, 392 U.S. 309, 333 n.34 (1968).

31. *Gebser*, 524 U.S. at 287 (1998) (citing *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 74–75 (1992), *Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582, 596–603 (1983), and *Pennhurt*, 451 U.S. at 28–29).

32. BRAKE, *supra* note 3, at 19–21.

33. *Id.* at 21.

34. 34 C.F.R. § 106.41(a) (2011).

35. *See generally* BRAKE, *supra* note 3, at 21–23.

36. Title IX of the Education Amendments of 1972, A Policy Interpretation: Title IX and Interscholastic Athletics, 44 Fed. Reg. 71,413, 71,413 (Dec. 11, 1979) (codified at 45 C.F.R. § 86 (2010)).

37. *Id.* at 71,418.

students at the institution, it will be in compliance with Title IX.³⁸ However, even if the athletic opportunities offered are not substantially proportionate to the respective enrollments of male and female students, the institution may still be in compliance if it can satisfy one of the other two parts of the test.³⁹ Second, the test states that the institution can establish compliance with Title IX if it can “show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members” of the underrepresented sex.⁴⁰ Third, an institution is found compliant if it can show “that the interests and abilities of the members of [the underrepresented] sex have been fully and effectively accommodated by the present program.”⁴¹ Federal courts defer to this three-part test

38. *Id.* The plaintiff carries the burden to establish that the institution has not complied with the first element of the three-part test. *See, e.g.,* *Roberts v. Colo. Bd. of Agric.*, 998 F.2d 824, 829 n.5 (10th Cir. 1993) (“Because an institution is not required to maintain gender balance, it is fair to conclude that proving an imbalance lies with the plaintiff.”); *Cohen v. Brown Univ.*, 991 F.2d 888, 901 (1st Cir. 1993); *Favia v. Ind. Univ. of Pa.*, 812 F. Supp. 578, 584 (W.D. Pa. 1992). If the plaintiff does not carry his or her burden, “the institution will be found in compliance.” NAT’L WOMEN’S LAW CNTR. & DLA PIPER, *supra* note 19, at 35.

39. NAT’L WOMEN’S LAW CNTR. & DLA PIPER, *supra* note 19, at 35.

40. Title IX of the Education Amendments Act of 1972, A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,418. To satisfy the second element, the institution carries the burden of demonstrating both “a history and a continuing practice of upgrading the competitive opportunities available to the historically disadvantaged sex as warranted by developing abilities among the athletes of that sex.” *Id.* In assessing whether an institution has “a history of program expansion that is demonstrably responsive to the developing interests and abilities of the underrepresented sex,” the Office of Civil Rights, as well as courts, will consider the following non-exhaustive list of factors:

[A]n institution’s record of adding intercollegiate teams, or upgrading teams to intercollegiate status, for the underrepresented sex; [] an institution’s record of increasing the numbers of participants in intercollegiate athletics who are members of the underrepresented sex; and [] an institution’s affirmative responses to requests by students or others for addition or elevation of sports.

OFFICE FOR CIVIL RIGHTS, DEP’T OF EDUC., CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE: THE THREE-PART TEST (1996) (emphasis omitted). Further, when reviewing whether an institution has a continuing practice of such program expansion, the following non-exhaustive list of factors is considered:

[A]n institution’s current implementation of a nondiscriminatory policy or procedure for requesting the addition of sports (including the elevation of club or intramural teams) and the effective communication of the policy or procedure to students; and an institution’s current implementation of a plan of program expansion that is responsive to developing interests and abilities.

Id.

41. Title IX of the Education Amendments Act of 1972, A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,418. It is unsettled which party carries the burden of proving unmet interest and ability on the part of the underrepresented sex. *See* NAT’L WOMEN’S LAW CNTR. & DLA PIPER, *supra* note 19, at 41 (advising plaintiffs to be prepared to carry the burden of persuasion on the third element of the test). According to the Department of Education, an institution is considered in compliance with the third element unless “there is (a) unmet interest in a particular sport; (b) sufficient ability to sustain a team in the sport; and (c) a

when addressing compliance with Title IX by educational institutions.⁴²

Federal agencies are expressly tasked with enforcing the anti-discrimination mandate of Title IX.⁴³ However, a federal agency may not commence enforcement actions until it has “advised the appropriate person or persons of the failure to comply with” Title IX and “determined that compliance cannot be secured by voluntary means.”⁴⁴

reasonable expectation of competition for the team.” OFFICE FOR CIVIL RIGHTS: THE THREE-PART TEST, *supra* note 40 (1996). In assessing whether sufficient interest exists among the underrepresented sex to sustain an intercollegiate team, the Department of Education and the courts consider the following:

requests from students . . . that a particular sport be added; [] requests that an existing club sport be elevated to intercollegiate team status; [] participation in particular club or intramural sports; [] interviews with students, . . . coaches, administrators and others regarding interest in particular sports; [] results of questionnaires of students . . . regarding interests in particular sports; and [] participation in particular in interscholastic sports by admitted students.

Id. Further, in assessing whether interested students of the underrepresented sex can sustain an intercollegiate team, courts will consider factors like the requisite athletic experience of the interested students, the opinions of coaches and others in the field about whether the interested students have “the potential to sustain a varsity team,” and the past competitive experiences of the interested students. *Id.* Even if sufficient interest and ability are established, there still must be “a reasonable expectation of intercollegiate competition for [the] particular sport in the institution’s normal competitive region.” *Id.*

42. See, e.g., *McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 290 (2d Cir. 2004) (noting the parties’ agreement that the court “should defer to the Policy Interpretation”); *Chalenor v. Univ. of N.D.*, 291 F.3d 1042, 1047 (8th Cir. 2002) (holding that “controlling deference is due” to the Policy Interpretation); *Cohen v. Brown Univ.*, 101 F.3d 155, 173 (1st Cir. 1996) (holding “that the district court did not err in the degree of deference it accorded” to the Policy Interpretation); *Horner v. Ky. High Sch. Athletic Ass’n*, 43 F.3d 265, 272–75 (6th Cir. 1994) (utilizing the Policy Interpretation to analyze plaintiffs’ Title IX claim alleging gender discrimination); *Kelley v. Bd. of Trs.*, 35 F.3d 265, 271 (7th Cir. 1994) (citing *Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144, 150 (1991)) (establishing that the court must defer to the Policy Interpretation because it meets the reasonableness standard); *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168, 171 (3d Cir. 1993) (quoting *Cohen v. Brown Univ.*, 991 F.2d 888, 895 (1st Cir.1993)) (articulating that the Policy Interpretation is entitled to “appreciable deference”).

43. Title IX, Education Amendments of 1972, § 902, 20 U.S.C. § 1682 (2006) (“Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity . . . is authorized and directed to effectuate the provisions of section 1681 of this Title with respect to such program or activity by issuing rules, regulations, or orders of general applicability . . .”). The President must approve any rule, regulation, or order adopted pursuant to this statute. *Id.* The statute provides that federal departments and agencies can enforce the rules, regulations, and orders they adopt by terminating or refusing to grant or continue federal assistance to any federal monies recipient “as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement.” *Id.* The statute also gives federal agencies the freedom to utilize any other means authorized by law to enforce their rules. *Id.*

44. 20 U.S.C. § 1682 (2006).

D. The Judicial Creation of Title IX's Private Cause of Action and Right to Monetary Damages

Title IX is silent with respect to whether a private right of action exists under the statute.⁴⁵ However, in *Cannon v. University of Chicago*, the Supreme Court held that the language, history, and underlying purpose of Title IX implicitly supported a finding that the statute creates a private right of action to enforce its anti-discrimination mandate.⁴⁶ Subsequently, in *Franklin v. Gwinnett County Public Schools*, the Supreme Court held that monetary damages are an available remedy for a private action to enforce Title IX.⁴⁷ In order to bring a successful claim, a Title IX litigant must establish that: (1)

45. See, e.g., *Cannon v. Univ. of Chi.*, 441 U.S. 677, 683 (1979) (“The statute does not . . . expressly authorize a private right of action by a person injured by a violation of [Title IX].”).

46. *Id.* at 709. In reaching this conclusion, the majority relied heavily on what it construed as congressional acquiescence to the Fifth Circuit’s creation of a private right of action under Title VI of the Civil Rights Act of 1964. *Id.* at 694–96 (citing *Bossier Parish Sch. Bd. v. Lemon*, 370 F.2d 847, 852 (5th Cir. 1967)). The *Cannon* majority reasoned that Title IX was “patterned after” Title VI because both statutes use identical language, have “the same administrative mechanisms for terminating federal financial support for institutions engaged in prohibited discrimination,” and neither statute contains a private right of action. *Id.* at 694–96. The Court also asserted that the congressional debates indicated that the drafters of Title IX assumed that the legislation would be interpreted and applied in the same manner as Title VI. *Id.* at 696 (citing 117 CONG. REC. 30408 (1972) (statement of Sen. Birch Bayh); 118 CONG. REC. 5807, 18437 (1971) (statement of Sen. Birch Bayh)). Thus, the Court “presum[ed] [] that [Congress] w[as] aware of the prior interpretation of Title VI and that that interpretation reflect[ed] [Congressional] intent with respect to Title IX.” *Id.* at 697–98. Justice White, in a dissent joined by Justice Blackmun, argued that “the legislative history and statutory scheme [of Title IX] show[ed] that Congress intended not to provide a new private cause of action.” *Id.* at 718 (White, J., dissenting). In a separate dissent, Justice Powell contended that separation of powers principles counseled against the judicial creation of a private right of action under Title IX. *Id.* at 730–49 (Powell, J., dissenting).

47. 503 U.S. 60, 76 (1992) (“[W]e conclude that a damages remedy is available for an action brought to enforce Title IX.”). In reaching this determination, the Court noted “[t]he general rule . . . that absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute.” *Id.* at 70–71. Thus, the question before the *Franklin* Court was whether Congress had intended to limit the power of the federal courts to award appropriate relief under Title IX. *Id.* at 71. In order to facilitate its determination, the Court referred to two congressional amendments to Title IX enacted subsequent to its decision in *Cannon*: the Rehabilitation Act Amendments of 1986 and the Civil Rights Restoration Act of 1987. *Id.* at 72. The Rehabilitation Acts Amendment eliminated sovereign immunity as a bar to Title IX suits, and the Civil Rights Restoration Act “broaden[ed] the coverage of [Title IX’s] antidiscrimination provisions.” *Id.* at 72–73. The Court determined that no evidence, including these amendments, demonstrated that Congress intended to limit Title IX claimants’ remedies. *Id.* at 73. Therefore, the Court concluded that Congress had acquiesced to the Court’s decision in *Cannon*, thereby permitting monetary damages in private Title IX suits. *Id.*; see also *id.* at 78 (Scalia, J., concurring in the judgment) (“Because of legislation enacted subsequent to *Cannon*, it is too late in the day to address whether a judicially implied exclusion of damages under Title IX would be appropriate.”).

gender discrimination occurred; (2) in an educational activity or program; (3) offered by an institution that receives federal funding.⁴⁸ As discussed below, the Supreme Court, in *Gebser*, added a fourth element—a notice requirement.⁴⁹

II. *GEBSER* AND THE SUBSEQUENT CIRCUIT SPLIT OVER THE APPLICABILITY OF *GEBSER* TO TITLE IX ATHLETICS SUITS

A. *The Imposition of a Notice Requirement: Gebser v. Lago Vista Independent School District*

1. *The District Court and the Fifth Circuit: Laying the Groundwork for the Imposition of a Notice Requirement by the Supreme Court*

In *Gebser v. Lago Vista Independent School District*, an eighth-grade student, Alida Star Gebser, was involved in a sexual relationship with Frank Waldrop, a teacher in the Lago Vista Independent School District.⁵⁰ Unrelated to Waldrop's sexual relationship with Gebser, Waldrop gained a reputation among the students of making sexually inappropriate comments, prompting parents to complain to the high school's principal.⁵¹ When the principal met with Waldrop, Waldrop indicated that he did not believe that he had made sexually offensive statements, but agreed to apologize to the parents nonetheless.⁵² The principal warned Waldrop "to be careful about his classroom comments" and informed the school's guidance counselor about the meeting.⁵³ However, the principal did not report the complaint to the school district's Title IX coordinator.⁵⁴

Subsequently, a police officer caught Waldrop and Gebser "engaging in sexual intercourse."⁵⁵ After Waldrop was arrested, the school district fired him, and the State of Texas revoked his teaching license.⁵⁶ At the time of Waldrop's arrest and subsequent termination, the school district had not established a formal procedure for accepting sexual harassment complaints, nor had it issued an official anti-harassment policy.⁵⁷

48. Heckman, *supra* note 6, at 553–54 (citing 20 U.S.C. § 1681(a) (2000)).

49. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998); *see also* Diane Heckman, Symposium, *Is Notice Required in a Title IX Athletics Action Not Involving Sexual Harassment?*, 14 MARQ. SPORTS L. REV. 175, 177 (2003).

50. *Gebser*, 524 U.S. at 277–78. *See* Andrew Speranzini, Case Comment, *Paying for Sex—When Is a School District Liable for Teacher-Student Sexual Harassment Under Title IX?*, 51 FLA. L. REV. 589, 589–98 (1999) (providing a concise but thorough summary of the *Gebser* case).

51. *Gebser*, 524 U.S. at 277.

52. *Id.* at 278.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

Gebser and her mother filed suit against the school district under Title IX in the United States District Court for the Western District of Texas.⁵⁸ The district court and the parties agreed that Title IX provides “a private cause of action”⁵⁹ in this context, but disagreed over the standard with which to evaluate the school district’s liability for the acts of its employee.⁶⁰ Gebser argued that the school district should be held strictly liable for Waldrop’s discrimination.⁶¹ Conversely, Lago Vista Independent School District contended that absent “some knowledge or reason to know of the discrimination[,]” a school district is not liable under Title IX.⁶² The district court ultimately agreed with the school district, reasoning that imposing liability without a finding of adequate notice of the discrimination and an opportunity to cure does not serve Title IX’s purpose to “counter *policies* of discrimination . . . in federally funded education programs.”⁶³ The district court found that the school district received complaints only related to Waldrop’s sexually offensive comments.⁶⁴ The court held that these complaints alone were not sufficient to put the school district on either “actual or constructive notice of Waldrop’s sexually discriminatory conduct” and consequently granted the school district’s motion for summary judgment.⁶⁵

The Fifth Circuit affirmed the district court’s ruling.⁶⁶ On appeal, the plaintiffs argued that the court should apply agency law and hold the school district vicariously liable for Waldrop’s tortious conduct.⁶⁷ The Fifth Circuit

58. *Doe v. Waldrop*, No. A 95 CA 126 126 SS, 1995 U.S. Dist. LEXIS 21946, at *1–2 (W.D. Tex. Nov. 28, 1995), *aff’d*, *Doe v. Lago Vista Sch. Dist.*, 106 F.3d 1223, 1224 (5th Cir. 1997), *aff’d* *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 293 (1998). Gebser and her mother also alleged that the school district had negligently supervised Waldrop and that the school district had violated Gebser’s civil rights under 42 U.S.C. § 1983 (2006). *Id.* The district court granted the school district’s motion for summary judgment on all three claims, but the plaintiff appealed only the Title IX claim. *See Doe*, 106 F.3d at 1225.

59. *Waldrop*, 1995 U.S. Dist. LEXIS 21946, at *6–7.

60. *Id.* at *7 (noting that this question is the “pivotal issue of disagreement”).

61. *Id.*

62. *Id.*

63. *Id.* at *8–9 (emphasis in original) (citing *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 n.36 (1979)) (noting that “impos[ing] . . . strict liability on school districts” does not further Title IX’s goals).

64. *Id.* at *13.

65. *Id.* at *14.

66. *Doe v. Lago Vista Indep. Sch. Dist.*, 106 F.3d 1223, 1225 (5th Cir. 1997), *aff’d*, *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 293 (1998).

67. *Doe*, 106 F.3d at 1225 (noting that the theory of strict liability was no longer available to the plaintiff because the Fifth Circuit had recently rejected strict liability under Title IX in *Canutillo Independent School District v. Leija*, 101 F.3d 393 (5th Cir. 1996), and that the theory of constructive evidence was not helpful to the plaintiffs because there was not enough evidence to argue that the school district should have known about the abuse).

rejected this argument,⁶⁸ holding that it would be improper to permit plaintiffs to use Title IX, a Spending Clause statute, to bring tort actions merely because a teacher's employment status had facilitated sexual harassment.⁶⁹ On December 5, 1997, the Supreme Court granted Gebser's petition for certiorari.⁷⁰

2. *The Supreme Court Affirms the Lower Courts*

In a five-four decision,⁷¹ the Court held that damages are not available "unless an official who at a minimum has authority to address the alleged discrimination . . . has actual knowledge of discrimination in the recipient's programs and fails adequately to respond."⁷² The Court rejected Gebser's argument that the standard for teacher-student sexual harassment should be similar to the standard applied in Title VII supervisor-employee sexual harassment cases,⁷³ pointing out that, "[u]nlike Title IX, Title VII contains an

68. *Id.* at 1226 (citing *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648 (5th Cir. 1997) (rejecting an agency theory of liability under Title IX by requiring actual knowledge by the school district)).

69. *Id.*

70. *Gebser v. Lago Vista Indep. Sch. Dist.*, 522 U.S. 1011, 1011 (1997).

71. Justice Sandra Day O'Connor authored the majority opinion in *Gebser*, joined by Chief Justice William Rehnquist as well as Justices Antonin Scalia, Anthony Kennedy, and Clarence Thomas. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 274 (1998). Justice John Paul Stevens filed a dissenting opinion, joined by Justices David Souter, Ruth Bader Ginsburg, and Stephen Breyer. *Id.* Justice Ginsburg also filed a separate dissenting opinion, which Justices Souter and Breyer joined. *Id.* During her tenure on the Court, Justice O'Connor wrote many of the majority opinions in Title IX cases. See *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 632 (1999); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 171 (2005). In *Davis*, the Court recognized student-on-student sexual harassment as a potential basis for a Title IX private action. *Davis*, 526 U.S. at 633. As discussed *infra* note 88, the Court in *Jackson* held that Title IX's private right of action encompasses claims for retaliatory conduct. *Jackson*, 544 U.S. at 171, 181–84. Chief Justice Rehnquist and Justices Kennedy, Thomas, and Scalia dissented in both *Davis* and *Jackson*. The voting dynamics in these three cases are interesting. In *Gebser*, which was decided first, Justice O'Connor sided with Chief Justice Rehnquist and Justices Kennedy, Thomas, and Scalia in a holding that restricts the ability of litigants under Title IX to recover damages. But, true to her reputation as a "swing vote," in her plaintiff-friendly opinions in *Jackson* and *Davis*, Justice O'Connor voted with Justices Stevens, Souter, Ginsburg, and Breyer—the dissenters in *Gebser*. See Tom Curry, *O'Connor Had Immense Power as Swing Vote*, MSNBC (July 1, 2005, 10:33:14 AM), http://www.msnbc.msn.com/id/5304484/ns/us_news-the_changing_court/t/oconnor-had-immense-power-swing-vote/#.TrcsG82bFwc.

72. *Gebser*, 524 U.S. at 290.

73. *Id.* at 281–82. It is not surprising that Gebser made this argument, given the fact that the statutory language and structure of Title IX borrows extensively from Title VII. See Earl C. Dudley, Jr. & George Ruthergien, *Ironies, Inconsistencies, and Intercollegiate Athletics: Title IX, Title VII, and Statistical Evidence of Discrimination*, 1 VA. J. SPORTS & L. 177, 192–94 (1999) (noting that Title IX is framed "[l]ike other civil rights statutes" and that one of Title IX's provisions "is taken directly from the corresponding provision in Title VII . . ."). Although beyond the scope of this Note, the question of whether Title VII standards and jurisprudence should be applied to Title IX claims has generated some legal scholarship. See, e.g., Michael E. Buchwald, Comment, *Sexual Harassment in Education and Student Athletics: A Case for Why*

express cause of action . . . and specifically provides for relief in the form of monetary damages.”⁷⁴ Noting that Title IX’s private right of action was judicially created, the Court stressed that Congress had not addressed the scope of this private right of action or when monetary damages should be awarded.⁷⁵

In order to craft a remedial scheme, the Court attempted to infer how Congress would have addressed the issue by looking to Title VII, another civil rights statute.⁷⁶ The majority noted that when Title IX was enacted, Title VII contained an express right of action, but did not provide for monetary damages and permitted only injunctive and equitable relief.⁷⁷ Further, Congress did not expressly authorize monetary damages under Title VII until 1991 and specifically limited the amount recoverable in different actions.⁷⁸ Thus, the Court reasoned that adopting Gebser’s position would allow unlimited recovery in a private Title IX action even though Congress had previously rejected such an expansive scope of damages under Title VII.⁷⁹ The Court further distinguished Title IX and Title VII by comparing the different purposes of the two statutes: Title VII seeks to “*compensate* victims of discrimination,” while Title IX focuses on “*protecting* individuals from discriminatory practices” by entities receiving federal funds.⁸⁰

The Court also noted that Title IX operates under a “contractual framework” whereby only educational institutions that receive federal funding are subject to its prohibitions.⁸¹ The Court observed that when Congress attaches certain

Title IX Sexual Harassment Jurisprudence Should Develop Independently of Title VII, 67 MD. L. REV. 672, 675 (2008) (arguing that “Title IX jurisprudence should develop independently of Title VII”).

74. *Gebser*, 524 U.S. at 283. In his dissent, Justice Stevens argued that the majority opinion amounted to an “assertion of lawmaking authority [that was] not faithful either to our precedents or to [the Court’s] duty to interpret, rather than to revise, congressional commands” and that “the majority’s policy judgment about the appropriate remedy . . . thwarts the purposes of Title IX.” *Id.* at 293 (Stevens, J., dissenting). The dissent argued that the school district should be held liable for Waldrop’s tort. *Id.* at 299 (quoting RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1997)) (concluding that Waldrop was “aided in accomplishing the tort by the existence of the agency relation”).

75. *Id.* at 284 (majority opinion) (citing *Cannon v. Univ. of Chi.*, 441 U.S. 677, 717 (1979)).

76. *Id.* at 285–86 (noting that crafting a sensible remedial scheme is an “endeavor [that] inherently entails a degree of speculation, since it addresses an issue on which Congress has not specifically spoken”).

77. *Id.*

78. *Id.* at 286 (noting that Congress “carefully limited the amount recoverable in any individual case”).

79. *Id.* The dissent rejected the majority’s comparative analysis of Title VII and Title IX, arguing that the congressionally imposed ceiling on the amount of damages that can be recovered in Title VII cases “does not have any bearing on when damages may be recovered from a defendant in a Title IX case.” *Gebser*, 524 U.S. at 302 (Stevens, J., dissenting).

80. *Id.* at 287 (majority opinion) (emphasis added).

81. *Id.* at 286–87. The “contractual nature” of Title IX had important ramifications for the Court’s analysis regarding the scope of remedies available under the private right of action. *Id.* at 287; see also Emily R. Rankin, Case Note, *School Law – School District Liability Under Title IX*:

conditions to receipt of federal funding pursuant to the Spending Clause, courts must carefully consider the appropriateness of monetary damages for failing to comply with that condition.⁸² With this in mind, the *Gebser* Court expressed “concerns” about permitting “a school district’s liability for a teacher’s sexual harassment [to] rest[] on principles of constructive notice or *respondeat superior*” because the school district may have been unaware of the discrimination.⁸³ Accordingly, the Court concluded that it was “sensible to assume that Congress did not envision a recipient’s liability in damages” where the recipient was unaware of the alleged Title IX violation.⁸⁴

The most important factor to the Court, however, was the nature of Title IX’s express administrative enforcement mechanism.⁸⁵ A federal agency may not commence enforcement actions under Title IX until the agency “has advised the appropriate person or persons of the failure to comply with” Title IX and “determined that compliance cannot be secured by voluntary means.”⁸⁶ Thus, the Court observed, Title IX’s “*express* system of enforcement . . . require[s] notice to the recipient and an opportunity to come into voluntary compliance.”⁸⁷ It would therefore “be unsound,” the Court reasoned, to establish a precedent whereby courts could hold a recipient of federal funding liable for violating Title IX without notice or an opportunity to cure.⁸⁸

Actual Notice Is the Requisite Standard for Teacher-Student Sexual Harassment, 34 LAND & WATER L. REV. 495, 505 (1999) (“The Court asserted that Title IX’s contractual nature ha[d] implications for the Court’s construction of available remedies.”).

82. *Gebser*, 524 U.S. at 287 (quoting *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 74–75 (1992)) (“Our central concern in that regard is with ensuring ‘that the receiving entity of federal funds [has] notice that it will be liable for a monetary award.’”).

83. *Id.* at 287.

84. *Id.* at 287–88.

85. *Id.* at 288; see *supra* Part I.C (discussing Title IX’s administrative enforcement mechanisms).

86. *Gebser*, 524 U.S. at 288.

87. *Id.* at 289.

88. *Id.* The dissent characterized the majority’s reliance on Title IX’s express administrative enforcement mechanism as “inappropriate,” stating that “[t]he fact that Congress has specified a particular administrative procedure to be followed when a subsidy is to be terminated . . . does not illuminate the question of what [a] victim of discrimination on the basis of sex must prove in order to recover damages.” *Id.* at 303–04 (Stevens, J., dissenting). The dissent argued that the majority opinion establishes an “exceedingly high standard” for Title IX plaintiffs, and “virtually ‘render[s] inutile causes of action authorized by Congress through a decision that *no* remedy is available.’” *Id.* at 304 (quoting *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 74 (1992)). Justice Ruth Bader Ginsburg filed a short dissenting opinion, focusing on the question left open by Justice Stevens’s dissent: “whether a [school] district should be relieved from damages liability if it has in place, and effectively publicizes and enforces, a policy to curtail and redress injuries caused by sexual harassment.” *Id.* at 306 (Ginsburg, J., dissenting); see also Kelly Titus, Note, *Students, Beware: Gebser v. Lago Vista Independent School District*, 60 LA. L. REV. 321, 344–45 (1999) (arguing that the *Gebser* Court should have adopted Justice Ginsburg’s approach). Two additional Supreme Court cases decided subsequent to *Gebser* are

B. The Circuit Split Over the Applicability of Gebser to Title IX Athletics Suits

1. The Eight Circuit Applies Gebser

In *Grandson v. University of Minnesota*, the Eighth Circuit concluded that a Title IX violation had not occurred because the plaintiffs failed to comply with *Gebser*'s requirements.⁸⁹ The plaintiffs in *Grandson* brought two Title IX actions against the University of Minnesota, alleging that the University's Duluth campus had discriminated against female student athletes.⁹⁰ The district court struck down the plaintiffs' Title IX monetary damages claims because the plaintiffs had not satisfied the standards set forth in *Gebser*.⁹¹ The Eighth Circuit agreed with the district court, observing that, although the plaintiffs' first claim contained a lengthy recitation of the University's "disparities in the resources and opportunities afforded [to] the women's and men's athletic programs[.]" the complaint failed under *Gebser* because it

also worthy of mention. In *Davis v. Monroe County Board of Education*, the petitioner brought a Title IX action on behalf of her fifth-grade daughter, who was allegedly the victim of student-on-student sexual harassment, of which the school board was aware. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999). In another five-four decision, the Court held that such an action could lie under Title IX, "but only where the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities." *Id.* In its holding, the Court implicitly recognized that in Title IX suits alleging student-on-student sexual harassment a plaintiff must satisfy *Gebser*'s notice and opportunity to cure requirement in order to recover damages. See *Davis*, 526 U.S. at 679 (Kennedy, J., dissenting) (observing that the majority opinion in *Davis* "appears to adopt the *Gebser* notice standard by implication"); Heckman, *supra* note 49, at 177. The dissent in *Davis* argued that potential defendants under Title IX must "receive clear notice of the conditions attached to the federal funds." *Davis*, 526 U.S. at 655 (Kennedy, J., dissenting). The dissent observed that "Title IX does not by its terms create any private cause of action whatsoever, much less define the circumstances in which money damages are available." *Id.* at 656. In *Jackson v. Birmingham Board of Education*, the Supreme Court addressed the applicability of the *Gebser* notice requirement to Title IX claim based on retaliation. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 171 (2005). In *Jackson*, the plaintiff, a basketball coach at Ensley High School, was removed from his position as coach after he complained to his supervisors that the girls basketball team was being discriminated against on the basis of gender. *Id.* at 171–72. Jackson filed a suit under Title IX alleging that the Board had retaliated against him because of his complaints. *Id.* at 171. In yet another five-four decision, the Court held that Title IX contains a private right of action to bring a retaliation claim. *Id.* at 171. The Court further reasoned that the *Gebser* notice requirement should not apply to Title IX retaliation suits because applying this requirement in the retaliation context would enable "recipients . . . to avoid such notice by retaliating against all those who dare complain," thereby "subvert[ing]" Title IX's statutory enforcement mechanism. *Id.* at 181–84. The dissent contended that the majority's finding of a right of action for retaliatory conduct under Title IX was "contrary to the plain terms of Title IX, because retaliatory conduct is not discrimination on the basis of sex." *Id.* at 185 (Thomas, J., dissenting) ("Congress must speak with a clear voice when it imposes liability on the States through its spending power.").

89. 272 F.3d 568 (8th Cir. 2001).

90. *Id.* at 570–71. The plaintiffs sought injunctive relief and monetary relief. *Id.* at 570.

91. *Id.* at 573 (noting that the court also denied plaintiff's claim for injunctive relief for lack of standing because they did not play a varsity sport and had not exhausted their NCAA remedies).

lacked the other components of a successful allegation, including prior notice, deliberate indifference by the University, and an opportunity to rectify the alleged discrimination.⁹² As a result, the Eighth Circuit held that the trial court had not abused its discretion in denying the plaintiffs leave to amend their complaint.⁹³

With regard to the second action, the plaintiff argued that *Gebser's* notice requirement was satisfied because the University had already received numerous complaints “about the level of funding for women’s athletics and the lack of women’s varsity teams.”⁹⁴ The Eighth Circuit disagreed, reasoning that “[a] vigorous public debate on these issues d[id] not demonstrate that [the University] knew of systemic non-compliance.”⁹⁵ Thus, the Eighth Circuit concluded that the district court properly dismissed the second action because the plaintiff failed to demonstrate that she provided the requisite notice to a proper university official.⁹⁶

2. *The Fifth and Ninth Circuits Distinguish Gebser*

In *Pederson v. Louisiana State University*, the Fifth Circuit considered eight consolidated appeals alleging that Louisiana State University (LSU) “discriminated against women under Title IX in the provision of facilities and teams for intercollegiate athletic competition.”⁹⁷ LSU relied on *Gebser* and argued that in order to find intentional discrimination, a showing that LSU was aware that it was not effectively accommodating its female student-athletes was required.⁹⁸

The Fifth Circuit rejected application of the *Gebser* notice requirement in the Title IX athletic-opportunity context.⁹⁹ The court reasoned that the issue in *Gebser* was whether a school district should be held vicariously liable for the discriminatory conduct of one of its teachers.¹⁰⁰ In the case before it, the Fifth Circuit held that it was not an employee that was discriminating but “the institution itself.”¹⁰¹ As a result, whether LSU had notice of the discrimination was irrelevant; rather, the appropriate test was whether LSU had intended to discriminate against women based on their sex through the provision of unequal athletic opportunities.¹⁰² The court found intentional discrimination in

92. *Id.* at 575.

93. *Id.* (noting that the plaintiffs had alleged in a “cursory fashion” that the University “intentionally violated Title IX by knowingly and deliberately discriminating”).

94. *Id.*

95. *Id.*

96. *Id.* at 576.

97. 213 F.3d 858, 864 (5th Cir. 2000).

98. *Id.* at 882.

99. *Id.* (emphasis added).

100. *Id.*

101. *Id.*

102. *Id.*

LSU's violation of Title IX because LSU's failure to provide equal athletic opportunities was the result of "paternalism" and "stereotypical assumptions" with respect to the abilities and interests of its female students.¹⁰³ The Ninth Circuit came to a similar conclusion in *Mansourian v. Regents of the University of California*.¹⁰⁴ In *Mansourian*, three female wrestlers enrolled at the University of California, Davis (UCD) so that they could participate in UCD's wrestling program, which permitted female participation.¹⁰⁵ At the time of their enrollment, UCD's wrestling program only permitted women wrestlers to compete against other women, using "international freestyle rules."¹⁰⁶ Subsequently, UCD eliminated the women's wrestling program, but, after many complaints, agreed to allow female participation, conditioned on the women's ability to "beat male wrestlers in their weight class, using men's collegiate wrestling rules."¹⁰⁷ The new rules impeded female participation, resulting in the women losing their varsity status, scholarships, and other benefits associated with varsity status.¹⁰⁸ The female students filed a lawsuit under Title IX.¹⁰⁹ The district court granted summary judgment in favor of UCD, concluding that the plaintiffs had failed to satisfy the *Gebser* pre-litigation notice and opportunity to cure requirement.¹¹⁰

The Ninth Circuit disagreed, holding that *Gebser* is not applicable in cases that involve discrimination based on an official policy of the federal funding recipient.¹¹¹ The Ninth Circuit found that "[a]thletic programs that fail effectively to accommodate students of both sexes [] represent 'official policy of the recipient entity.'"¹¹² Therefore, the court held that *Gebser* did not apply.¹¹³

The Ninth Circuit also concluded that *Gebser*'s requirements were redundant in the context of Title IX lawsuits alleging unequal athletic opportunities because universities track athletic gender-equity data and certify Title IX

103. *Id.* at 880.

104. 602 F.3d 957, 957 (9th Cir. 2010).

105. *Id.* at 961.

106. *Id.* at 962 (noting that the University did not have a separate wrestling team for women, but allowed women to participate on the men's team).

107. *Id.*

108. *Id.* These benefits include: "training, coaching, and laundry services; academic tutoring; insurance; and access to varsity facilities and equipment." *Id.*

109. *Id.*

110. *Id.* at 966.

111. *Id.* at 967 (quoting *Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274, 290 (1998)) (noting that *Gebser* is only applicable "when the alleged Title IX violation consists of an institution's deliberate indifference to acts that 'do not involve official policy of the recipient entity.'").

112. *Id.* at 968 (quoting *Gebser*, 524 U.S. at 290). For the author's criticism of this argument, see *infra* Part III.A.

113. *Mansourian*, 602 F.3d at 968.

compliance.¹¹⁴ Moreover, the Ninth Circuit noted that the Equity in Athletics Disclosure Act (EADA)¹¹⁵ requires federally funded universities to report “the number of undergraduates and athletes, broken down by sex, as well as sex-segregated data on operating expenses, coaches salaries, athletic scholarships, recruiting expenditures, and revenues.”¹¹⁶ In light of these requirements, the court reasoned that applying the *Gebser* notice requirement would not provide universities with information of which they were not already aware.¹¹⁷

III. LAW AND POLICY SUPPORT APPLICATION OF *GEBSER* TO TITLE IX ATHLETICS SUITS

The Fifth Circuit in *Pederson* and the Ninth Circuit¹¹⁸ in *Mansourian* missed a valuable opportunity to further Congress’s goal in enacting Title IX. Instead,

114. *Id.* (quoting 34 C.F.R. § 106.4) (discussing federal regulations that “require funding recipients to evaluate their policies and certify, as a condition for receiving funds, that they are ‘tak[ing] whatever remedial action is necessary . . . to eliminate . . . discrimination.’”). Accordingly, the Ninth Circuit reasoned that universities have an “affirmative obligation to ensure compliance with at least one prong of the three-part . . . test.” *Id.*; see *supra* notes 36–42 and accompanying text (discussing the three-part test).

115. Equity in Athletics Disclosure Act, 20 U.S.C. § 1092(g) (2006).

116. *Mansourian*, 602 F.3d at 968.

117. *Id.* (noting that this was a case of first impression for the Ninth Circuit). The Ninth Circuit cited approvingly the Fifth Circuit’s decision in the *Pederson* case. *Id.* (citing *Pederson v. La. State Univ.*, 213 F.3d 858, 882 (5th Cir. 2000)). The court, however, voiced strong disagreement with the Eighth Circuit’s ruling in *Grandson*, noting that “[t]he Eighth Circuit . . . has assumed, without any analysis, that *Gebser*’s notice requirement applies equally to Title IX cases where plaintiffs allege discrimination in the administration of an athletic program.” *Id.* at 968–69 (citing *Grandson v. Univ. of Minn.*, 272 F.3d 568 (8th Cir. 2001)). The Ninth Circuit further contended that “it is far from clear that *Grandson* is controlling even in the Eighth Circuit” because “the Eighth Circuit reached the merits of a later Title IX athletics case without mentioning *Grandson*.” *Id.* at 969 (citing *Chalenor v. Univ. of N.D.*, 291 F.3d 1042 (8th Cir. 2002)). This claim with respect to *Grandson* is a bit of a reach. Unlike *Grandson*, there is no express indication that the district court in *Chalenor* considered the applicability of *Gebser* to the plaintiffs’ Title IX claims or that the University pressed such an argument before the district court. See *Chalenor v. Univ. of N.D.*, 142 F. Supp. 2d 1154 (D.N.D. 2000). Because an issue can only be reviewed on appeal if it has been “pressed or passed upon” by the district court, *United States v. Williams*, 504 U.S. 36, 40 (1992), it is likely that the Eighth Circuit in *Chalenor* did not address *Grandson* for jurisdictional reasons, and not because it lacked precedential value.

118. Public figures critical of the Ninth Circuit have labeled it as an “activist court,” with mocking terms such as the “Ninth Circus” and the “nutty Ninth.” John Schwartz, *‘Liberal’ Reputation Precedes Ninth Circuit Court*, N.Y. TIMES, April 24, 2010 at A33. Whether the decision from the Ninth Circuit merits these nicknames is debatable; however, the Ninth Circuit’s most vocal critics can point to at least one fact to support their assessment: from 1999 to 2008, the Ninth Circuit was second only to the Federal Circuit with respect to the percentage of cases reversed (80 percent) relative to cases reviewed by the Supreme Court. Roy E. Hofer, *Supreme Court Reversal Rates: Evaluating the Federal Courts of Appeals*, LANDSLIDE (Jan./Feb. 2010), http://www.americanbar.org/content/dam/aba/migrated/intelprop/magazine/LandslideJan2010_Hofer.authcheckdam.pdf. Consistent with this documented trend, the reasoning by the Ninth

the circuits misapplied *Gebser* and disregarded previous jurisprudence on the Spending Clause.

A. *The Misapplication of Gebser*

The Supreme Court's reasoning in *Gebser* deserves attention. However, neither the Fifth Circuit in *Pederson* nor the Ninth Circuit in *Mansourian* adequately discussed the Supreme Court's reasoning.¹¹⁹ As the Court noted in *Gebser*, the private right of action under Title IX is judicially—not congressionally—created.¹²⁰ Accordingly, there is no clear expression of congressional intent with respect to the scope of the Title IX private right of action.¹²¹ Applying the *Gebser* notice and opportunity to cure requirements to Title IX athletics lawsuits would mitigate the effects of the legislating-from-the-bench approach the Supreme Court undertook in *Cannon* when it created Title IX's private right of action.¹²²

Circuit in *Mansourian* has strong potential to open the Ninth Circuit to further criticism, and potential reversal.

119. Compare *Pederson*, 213 F.3d 858, and *Mansourian*, 602 F.3d 957, with *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998).

120. *Gebser*, 524 U.S. at 283–84. See Kristen Safier, Comment, *A Request for Congressional Action: Deconstructing the Supreme Court's (In)Activism in Gebser v. Lago Vista Independent School District*, 118 *S. Ct. 1989* (1998) and Davis v. Monroe County Board of Education, 119 *S. Ct. 1661* (1999), 68 *U. CIN. L. REV.* 1309, 1316–19 (2000) (discussing the majority and dissenting opinions in *Gebser*).

121. *Gebser*, 524 U.S. at 284. See Sara A. Peckham, Casenotes, *Title IX Standards in Teacher-Student Sexual Harassment: What Are We Teaching the Teachers?* – *Gebser v. Lago Vista Independent School District*, 32 *CREIGHTON L. REV.* 1805, 1812–14 (1999) (discussing the *Gebser* majority's analysis of the scope of Title IX's private right of action).

122. *Gebser*, 524 U.S. at 277, 292–93. This is not to say that a Title IX private right of action should not exist. Clearly, the Supreme Court's holding in *Cannon* is the law and should be regarded as such. Nonetheless, Justice Powell criticized the *Cannon* majority's finding of an implied private right of action as essentially amounting to legislating from the bench:

In sum, I believe the need both to restrain courts that too readily have created private causes of action, and to encourage Congress to confront its obligation to resolve crucial policy questions created by the legislation it enacts, has become compelling . . . [W]e should not condone the implication of any private action from a federal statute absent the most compelling evidence that Congress in fact intended such an action to exist. Where a statutory scheme expressly provides for an alternative mechanism for enforcing the rights and duties created, I would be especially reluctant ever to permit a federal court to volunteer its services for enforcement purposes.

Cannon, 441 U.S. at 749 (Powell, J., dissenting); see also Craig Nadeau, Comment: *Respecting Congress's Express Intent: Correcting the Split Allowing Unions an Implied Private Right of Action Under LMRDA Section 501*, 59 *CATH. U. L. REV.* 821, 829–30 (2010) (discussing Justice Powell's dissent in *Cannon*). Applying the *Gebser* pre-litigation notice and opportunity to cure requirement to Title IX suits can be viewed as a compromise. Since a reasonable argument can be made that the Supreme Court created the Title IX private right of action “absent the most compelling evidence that Congress in fact intended such an action to exist,” plaintiffs should at least be required to satisfy the *Gebser* standard before bringing a Title IX athletics suit pursuant to that judicially created right of action. *Cannon*, 441 U.S. at 749 (Powell, J., dissenting).

Moreover, as the Court noted in *Gebser*, the sole enforcement proceeding expressly included in Title IX and its implementing regulations cannot be initiated without first giving “notice to the recipient and an opportunity to come into voluntary compliance.”¹²³ This fact led the *Gebser* Court to conclude that, compared to the express enforcement mechanism, “it would be unsound” to hold that “a judicially implied system of enforcement permits substantial liability without regard to the recipient’s knowledge or its corrective actions upon receiving notice.”¹²⁴ The Ninth and Fifth Circuits failed to explain why this powerful analysis would not apply equally to Title IX athletics lawsuits.¹²⁵ By holding that pre-litigation notice and opportunity to cure are not required in Title IX athletic lawsuits, *Mansourian* and *Pederson* are inconsistent with the express Title IX enforcement mechanism.¹²⁶

B. The Importance of the Spending Clause

Mansourian and *Pederson* do not acknowledge that Congress enacted Title IX pursuant to its Spending Clause power.¹²⁷ This is an important omission because, as the Supreme Court stated in *Gebser*, private actions for damages under statutes enacted pursuant to the Spending Clause are “examine[d] closely.”¹²⁸ Furthermore, the contractual nature of legislation enacted pursuant to the Spending Clause supports the conclusion that *Gebser* should apply to

123. *Gebser*, 524 U.S. at 288–89; see also Anne-Marie Harris & Kenneth B. Grooms, *A New Lesson Plan for Educational Institutions: Expanded Rules Governing Liability Under Title IX of the Education Amendments of 1972 for Student and Faculty Sexual Harassment*, 8 AM. U. J. GENDER SOC. POLICY & L. 575, 584 (2000) (discussing Title IX’s “complex administrative enforcement scheme”).

124. *Gebser*, 524 U.S. at 288–89; see also Ivan E. Bodensteiner, *Peer Harassment—Interference with an Equal Educational Opportunity in Elementary and Secondary Schools*, 79 NEB. L. REV. 1, 31 (2000) (noting that the *Gebser* Court “looked to the express administrative remedy found in Title IX, requiring notice to an appropriate person and an opportunity to rectify any violation, for guidance in fashioning the implied damage remedy”).

125. See generally *Mansourian v. Regents of the Univ. of Cal.*, 602 F.3d 957, 966–69 (9th Cir. 2010) (holding that no notice is required in athletics suits under Title IX); *Pederson v. La. State Univ.*, 213 F.3d 858, 876–82 (5th Cir. 2000) (discussing Title IX).

126. See *Gebser*, 524 U.S. at 288 (noting that Title IX’s express enforcement mechanism requires notice); *supra* Part I.C (discussing Title IX’s enforcement mechanism); see also Janet Philibosian, Comment, *Homework Assignment: The Proper Interpretation of the Standard for Institutional Liability if We Are to Protect Students in Cases of Sexual Harassment by Teachers*, 33 SW. U. L. REV. 95, 107 (2003) (quoting *Gebser*, 524 U.S. at 288) (describing how the *Gebser* Court found Title IX’s express means of enforcement to be an “‘important clue’ that Congress did not intend to allow recovery in damages based solely on legal principles of respondeat superior or constructive notice”).

127. See *Gebser*, 524 U.S. at 287; see also *supra* Part I.B (discussing the Spending Clause and its application to Title IX).

128. *Gebser*, 524 U.S. at 287; see also Philibosian, *supra* note 126, at 107 (noting that the *Gebser* Court was concerned with holding grantees liable for unintentional violations of a condition under the Spending Clause without first providing them notice of the violation).

Title IX athletics lawsuits.¹²⁹ First, logically, it would be quite a leap to argue that any university that receives federal funds “voluntarily and knowingly accepts” a risk that it could be sued for unequal provision of intercollegiate athletic opportunities without any knowledge that such discrimination was occurring.¹³⁰ Moreover, Congress has not “unambiguously”¹³¹ set forth such a risk in Title IX, since the statute is silent on the existence of a private right of action.¹³²

C. The Ninth Circuit’s Unsupported Assertions Regarding Intercollegiate Athletics

In addition to misapplying *Gebser*, the Ninth Circuit in *Mansourian* made broad assumptions regarding the role that universities play in their intercollegiate sports. For example, the Ninth Circuit reasoned that *Gebser* was inapplicable because gender discrimination in athletic opportunities at the intercollegiate level will *always* be caused by an “official policy of the recipient entity.”¹³³ The Ninth Circuit did not cite any legal, statistical, or anecdotal evidence for this broad assertion.¹³⁴ Furthermore, this reasoning is problematic as evidence from reported cases indicates situations in which *individual actors* have made decisions regarding allocation of funding between men’s and women’s teams¹³⁵ or the number of roster slots that would be available for male and female athletes.¹³⁶ The Ninth Circuit’s broad language, however, forecloses the possibility that the discrimination could occur without being the “official policy” of the university.¹³⁷

The Ninth Circuit’s argument that a notice requirement would be “superfluous” because of Title IX’s compliance certification requirements and gender equity data requirements¹³⁸ is similarly problematic. In reaching its

129. See *supra* note 122 for a discussion regarding why applying *Gebser* is arguably a compromise to those who do not believe that Title IX should contain a private right of action.

130. See *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

131. *Id.*

132. *Gebser*, 524 U.S. at 283–84 (citing *Cannon v. Univ. of Chi.*, 441 U.S. 677, 716–17 (1979)).

133. *Mansourian v. Regents of the Univ. of Cal.*, 602 F.3d 957, 968 (quoting *Gebser*, 524 U.S. at 290).

134. *Mansourian*, 602 F.3d at 968.

135. See, e.g., *Choike v. Slippery Rock Univ. of Pa. of the State Sys. of Higher Educ.*, No. 06-622, 2006 WL 2060576, at *1 (W.D. Pa. July 21, 2006) (noting that one university employee, the Athletic Director, was “responsible for managing the Athletic Department’s . . . budget, fund-raising and revenue efforts”).

136. See, e.g., *Biediger v. Quinnipiac Univ.*, 728 F. Supp. 2d 62, 65 (D. Conn. 2010) (noting that only two university employees oversaw the “roster target system”); *Choike*, 2006 WL 2060576, at *1 (noting that the Athletic Director was “responsible for . . . oversee[ing] compliance with Title IX”).

137. See discussion at *supra* notes 111–13 and accompanying text.

138. See *Mansourian*, 602 F.3d at 968.

holding, the court does not address the possibility that the university employee responsible for certifying compliance with Title IX or reporting related data may not have the “authority to address the alleged discrimination and to institute corrective measures on the [university’s] behalf.”¹³⁹ Thus, the Court’s implicit holding that Title IX and the EADA reporting requirements obviate the need for a pre-litigation notice requirement¹⁴⁰ fails to address the “opportunity to cure” prong of *Gebser*.¹⁴¹

D. Expanding the Eighth Circuit’s Reasoning:¹⁴² Sound Policy Counsels in Favor of Applying Gebser to Title IX Athletics Lawsuits

As *Gebser* discusses, and the absence of an express private right to monetary damages in Title IX indicates, Congress’s goal when enacting Title IX was not to provide a monetary damages remedy to individuals who have been discriminated against in violation of Title IX.¹⁴³ Rather, Title IX seeks to protect individuals from discrimination on the basis of sex *in the first place*.¹⁴⁴ Applying *Gebser*’s requirements in athletics lawsuits would facilitate this goal by letting institutions dictate how to bring themselves into compliance with Title IX, rather than forcing them to expend resources on litigation.¹⁴⁵ In fact, failing to apply *Gebser* to Title IX athletics lawsuits could undermine the statute’s primary purpose. If courts do not require plaintiffs to satisfy *Gebser* before pursuing a Title IX suit, university resources, which are already limited, will be funneled away from university programs aimed at promoting gender equity and channelled toward defending an endless number of lawsuits.¹⁴⁶

139. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998).

140. *Mansourian*, 602 F.3d at 968.

141. *Gebser*, 524 U.S. at 277, 288–90.

142. As noted *supra* note 117, the Ninth Circuit criticized the Eighth Circuit for reaching its holding by “assum[ing], without analysis” that *Gebser* applies to Title IX athletics cases. See *Mansourian*, 602 F.3d at 968–69 (citing *Grandson v. Univ. of Minn.*, 272 F.3d 568, 275 (8th Cir. 2001)). The Ninth Circuit’s characterization of the Eighth Circuit’s decision in *Grandson* is accurate; the Eighth Circuit opinion, although correct in its holding, is void of adequate analysis. *Mansourian*, 602 F.3d at 968–69 (citing *Grandson*, 272 F.3d at 575–76).

143. *Gebser*, 524 U.S. at 287 (citing *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979)).

144. *Id.*; see also Anita M. Moorman & Lisa P. Masteralexis, *An Examination of the Legal Framework Between Title VII and Title IX Sexual Harassment Claims in Athletics and Sport Settings: Emerging Challenges for Athletics Personnel and Sports Managers*, 18 J. LEGAL ASPECTS SPORT 1, 1 (2008) (noting that Congress “acted to prevent sex discrimination in educational settings when it passed Title IX” (emphasis added)).

145. *Gebser*, 524 U.S. at 288–89.

146. *Id.* at 289. Justice Kennedy made a similar argument in his dissent in *Davis v. Monroe County Board of Education*, 526 U.S. 629, 657–58 (1999) (Kennedy, J., dissenting). Justice Kennedy contended that a private damages action should not lie against a school board in cases of student-on-student harassment: “The only certainty flowing from the majority’s decision is that scarce resources will be diverted from educating our children” *Davis*, 526 U.S. at 657 (Kennedy, J., dissenting). Later in his dissent, Justice Kennedy cited statistics reflecting the potential costs that school districts could face as a result of the majority’s holding:

There is also the potential for large and harmful damage awards because Title IX damage recoveries are not capped.¹⁴⁷

IV. CONCLUSION

Jurisprudential principles demand that *Gebser* be applied to Title IX athletics lawsuits. Not requiring pre-litigation notice and opportunity to cure in an area where Congress has been silent would be inconsistent with Title IX's express administrative enforcement mechanism. Further, the Supreme Court's Spending Clause jurisprudence supports the application of *Gebser* to Title IX athletics lawsuits. Since compliance with Title IX is a condition placed on universities as a result of their federal funding, universities should not be compelled to assume such high legal risk without any knowledge that such discrimination was occurring.

The overwhelmingly positive effect that Title IX has had with respect to promoting gender equality in intercollegiate athletics is well-documented. Applying *Gebser* to Title IX athletics lawsuits would only build on this success and allow universities to remedy allegedly discriminatory practices before spending time, money, and effort on protracted litigation. This would in turn enable universities to channel their resources and efforts to promoting gender equity in educational programs.

The cost of defending against peer sexual harassment suits alone could overwhelm many school districts [T]here are no damages caps on the judicially implied private cause of action under Title IX. As a result, school liability in one peer sexual harassment suit could approach, or even exceed, the total federal funding of many school districts. [Davis], for example, seeks damages of \$500,000 in this case Respondent school district received approximately \$679,000 in federal aid in 1992–1993 The school district sued in *Gebser* received only \$120,000 in federal funds a year Indeed, the entire 1992–1993 budget of that district was only \$ 1.6 million.

Id. at 680–81 (internal citations omitted).

147. Justice Kennedy's fears have been realized to a degree. *See, e.g.*, *Doe ex rel. A.N. v. E. Haven Bd. of Educ.*, 200 Fed. App'x 46, 47–49 (2d Cir. 2006) (affirming jury award of \$100,000 against a school board based on a student-on-student sexual harassment claim brought under Title IX); *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 258–64 (6th Cir. 2000) (affirming jury award of \$220,000 against a school district based on a student-on-student sexual harassment claim brought under Title IX); *see also* Rebecca A. Oleksy, Comment, *Student-on-Student Sexual Harassment: Preventing a National Problem on a Local Level*, 32 SETON HALL L. REV. 230, 261 (2001) (arguing that “[b]y capping monetary damages, a school board could [] use some of the school's money, which would have otherwise been awarded to the plaintiff, to implement effective training programs aimed at preventing sexual harassment”).

