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SUMMARY:

. . . Title IX involves more than the controversy over ensuring the equal participation of male and female students in intercollegiate athletics. . . . Sexual harassment of students, particularly where the perpetrators are teachers, is, to quote Justice O’Conner “an all too common aspect of the educational experience.” . . . This comment proposes to examine federal and state court decisions that apply the *Gebser* standard using a catalog analysis . . . the conclusions are: (1) that there are generalized and particularized appropriate officials; (2) that there are three types of conduct litigated --: simple sexual, simple nonsexual, and sexual . . . and (3) there is a deliberate indifference continuum Second, the proposal seeks to create a recent guidebook to Title IX from an administrative, procedural, and investigative perspective and attempt to provide practical guidance to educational actors. . . .

HIGHLIGHT: The position of this paper is that a practical handbook will help combat sexual assault by enabling educational actors to effectively utilize a powerful federal statute and auxiliary administrative scheme. . . . This was the best way to heed Atticus Finch’s advice, “every lawyer gets at least one case in his lifetime that affects him personally . . . try fighting with your head for a change.”

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**A PRACTICAL HANDBOOK FOR UNDERSTANDING SEXUAL HARASSMENT UNDER
TITLE IX**

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I. INTRODUCTION¹

For many legal commentators, including judges, Title IX's prohibition, "[n]o person in the United States shall, on the basis of sex . . . be subjected to discrimination under any education program or activity receiving federal financial assistance,"² refers only to the controversial legal prohibition of female sex discrimination in collegiate sports.³

But Title IX involves more than the controversy over ensuring the equal participation of male and female students in intercollegiate athletics or the question of what male sports remain besides football.⁴ Title IX's legal ramifications extend to almost every aspect the of education process: admissions, scholarships, registration in specific courses, access to student housing, education related employment,⁵ recruiting practices,⁶ and, more recently, the sexual harassment of students.⁷

¹ Many of the cases cited in this comment were found using an excellent *American Law Reports* article. See Thomas Keefe, *Right of Action Under Title IX of Education Amendments (20 U.S.C.A. § 1681) Against School or School District For Sexual Harassment of Student by Teacher or Other School District Employee*, 197 A.L.R. Fed. 289 (2005) [hereinafter Keefe].

² 20 U.S.C. § 1681(a) (2005) [hereinafter "Title IX" or "the statute"].

³ During oral argument for *Gebser*, Scalia commented, "I thought [Title IX] was mainly directed at educational programs that allow sports for boys, no sports for girls, that sort of thing. That is discrimination under the program." Transcript of Oral Argument at 21, *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 1998 WL 146703 [hereinafter *Gebser Transcript*]; See also 34 C.F.R. § 106.41: Athletics (2005) ("No person shall, on the basis of sex, [...] be discriminated against in any interscholastic, intercollegiate, club or intramural athletics" (106.41 is the central regulation implementing Title IX to cover intercollegiate athletics);

⁴ Jody Leder, Title IX, *Sex Discrimination, and Intercollegiate Athletics: A Legal Overview*, CONGRESSIONAL RESEARCH SERVICE, Library of Congress, Order Code RL 31709 (2003) (noting critics' argument that Title IX results in reverse discrimination against less-popular male sports such as wrestling or gymnastics)[hereinafter Leder]; See, e.g., *National Wrestling Coaches Ass'n v. Dep't of Educ.*, 263 F. Supp. 2d 82 (2003) (D.C. 2003)(wrestling association sued claiming discrimination under Title IX when colleges cut men's wrestling teams).

⁵ Leder, *supra* note 4, at 7.

⁶ See, e.g., *Simpson v. University of Colorado*, 372 F.Supp. 2d 1229 (D. Colo. 2005) (involving a sex discrimination claim against the University of Colorado football team for their recruiting practices).

⁷ Some commentators and, indeed, even former-Chief Justice Rehnquist question whether Title IX's bar against discrimination on the basis of sex encompasses sexual harassment at all. See Audio Recording of Oral Argument: *Gebser*, available at <http://www.oyez.org/oyez/audio/1107/argument-ra.smil>. After calling the *Gebser* case, Rehnquist is heard to quip, "There is not a *word* in this next case of discrimination. It is just about sexual harassment as a federal offense all by itself." (emphasis in original). As pointed out by the counsel for the petitioner in *Gebser*, this view is probably inconsistent with the

Sexual harassment⁸ of students, particularly where the perpetrators are educators,⁹ is, to quote Justice O’Conner writing for the court in *Gebser v. Lago Vista Independent School District*, “an all too common aspect of the educational experience.”¹⁰ In the hotly debated¹¹ *Gebser* decision, the Supreme Court addressed the issue of how Title IX protects students from sexual harassment and its devastating affects¹² on students by creating a legal prerequisites to bringing a private action for sexual harassment under Title IX.

This comment proposes to examine federal and state court decisions that apply the *Gebser* standard using catalog analysis.¹³ The goal¹⁴ is twofold. First, the proposal seeks to draw basic analytical conclusions from a catalog analysis of each prong as

court’s decision in earlier precedent. See *Franklin v. Gwinnett Pub. Sch.*, 503 U.S. 60, 76 (1992) [hereinafter *Franklin*].

⁸ “Sexual harassment” refers to all types of sexual violations of autonomy, including sexual abuse and rape.

⁹ Title IX also applies to sexual discrimination perpetuated by students. *Davis v. Monroe Brd. of Educ.*, 526 U.S. 629 (1999) (essentially making students constructive agents of the school if *Gebser* satisfied) [hereinafter *Davis*].

¹⁰ *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998).

¹¹ See, e.g., William A. Kaplin, *A Typology and Critique of Title IX Sexual Harassment Law After Gebser and Davis*, 26 J.C. & U.L. 615, 623 (2000) (arguing that the policy rationales behind Title IX do not support the creation of a heightened standard of notice like *Gebser*’s and that there is no good policy or purposive reason why Title VII’s [a federal statute governing employee discrimination] agency rules should not govern Title IX litigation in regards to notice) [hereinafter *Kaplin*].

¹² See *Davis*, 526 U.S. at 634 (explaining that student in that case, LaShonda Davis, formerly a student with high grades, suffered a drop in grades and eventually contemplated suicide as a consequence of sexual harassment by another student); See also *Rosa v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648 (5th Cir. 1997) (noting that consequence of student’s sexual relationship with school karate instructor led student to suicidal thoughts and committal at psychiatric hospital) [hereinafter *Rosa*].

¹³ “Catalog analysis” means identifying and listing specific factors in the opinions either: (1) leading to liability or (2) not leading to liability; and then categorizing them in an intuitive way based on analytical conclusions. Each of the three major prongs of the *Gebser* standard – appropriate officials, actual notice, and deliberate indifference will receive an individual catalog analysis. See, *infra* § III, IV, & V for more information on the three prongs.

¹⁴ The position of this paper is that a practical handbook will help combat sexual assault by enabling educational actors to effectively utilize a powerful federal statute and auxiliary administrative scheme. In a way this is the overarching goal of this work. As an advocate for survivors of sexual abuse, the author believed that this was the best way to heed Atticus Finch’s advice, “[E]very lawyer gets at least one case in his lifetime that affects him personally . . . [t]ry fighting with your head for a change.” Harper Lee, *TO KILL A MOCKINGBIRD* 84 (Warner 1960).

applied by courts.¹⁵ In brief, the conclusions are: (1) that there are generalized and particularized appropriate officials; (2) that there are three types of conduct litigated – simple sexual, simple nonsexual, and sexual suggesting a likelihood of discrimination; and (3) there is a deliberate indifference continuum where schools exhibit adequate conduct to avoid liability through certain administrative and procedural actions. Second, the proposal seeks to create a recent guidebook¹⁶ to Title IX from an administrative, procedural, and investigative perspective and attempt to provide practical guidance to educational actors¹⁷—primarily administrators, students, teachers, and parents—based on the catalog analysis.

But first, this paper will rehearse the historical and structural issues of Title IX leading up to the *Gebser* opinion, followed by a brief analytical summary of how plaintiffs’ lawyers should make out a *prima facie* case of sexual harassment.

A. THE BACKGROUND & HISTORY OF THE SUPREME COURT’S APPROACH TO TITLE IX

To understand sexual harassment under Title IX requires a prerequisite understanding of the design of Title IX, which is administrative in design. Title IX provides express statutory language granting enforcement and administrative remedial power to the Department of Education’s (DOE) Office of Civil Rights (OCR).¹⁸ Since federal funds such as student loans, federal grants, or federal contracts are tied to Title IX compliance,¹⁹ the ultimate administrative remedy against a non-complying school would be suspension or elimination of government funding.²⁰ However, the OCR hardly ever pursues this outcome, focusing more on a mediatory approach whereby the

¹⁵ These subsidiary conclusions are set forth more fully § III.A, IV.A, and V.A

¹⁶ Some have already made such guidebooks, but such books are now outdated. *See, infra* note 22.

¹⁷ I use the term “educational actors” to mean any individuals whose actions affect the educational process: teachers, professors, deans, department chairs, parents, complaining and non-complaining students, administrative officials in the Department of Education, and even police investigators.

¹⁸ Gary L. Galemore, *Title IX and Sex Discrimination in Education: An Overview*, CONGRESSIONAL RESEARCH SERVICE, Library of Congress, Order Code RS20710 at 2 (2003) [hereinafter *Galemore*].

¹⁹ 20 U.S.C. § 1681(a) (2005).

²⁰ 20 U.S.C. § 1682 (2005).

institution with the law to the complainant's satisfaction.²¹ In fact, the OCR does not have the power to disperse or remove federal Title IX funds.²²

On its face, the administrative scheme of Title IX has serious drawbacks from the equitable perspective of compensating injured students. One major problem with this administrative approach is “[a]lthough the federal government ... may terminate funding on the basis of sex bias, no educational institutions have lost funding for this reason.”²³ Another drawback is that once the school comes into compliance with Title IX, any inquiry by the OCR ends since Title IX's language provides an opportunity for voluntary compliance.²⁴ Furthermore, a school could simply cancel its receipt of federal funds,²⁵ thus removing a critical jurisdictional element and preventing federal regulation altogether.²⁶ Thus, it is unsurprising that no schools have ever lost funding as a consequence of OCR compliance procedures as non-complying schools, particularly in sexual harassment cases, will simply come into compliance through their own voluntary administrative procedures.²⁷ Thus, an unfortunate result of Title IX enforcement under the statute's administrative scheme, as it stands without judicial interpretation, is that it leaves open the possibility that an injured student will be left without a sense of atonement—either from a monetary or an equitable-injunctive perspective.

²¹ Galemore, *supra* note 18, at 2.

²² *Id.* The OCR may only refer the case to the Department of Justice, which may then bring suit. Nancy S. Layman, *SEXUAL HARASSMENT IN AMERICAN SECONDARY SCHOOLS: A LEGAL GUIDE FOR ADMINISTRATORS, TEACHERS, AND STUDENTS* 83 (Contemporary Research Press 1993) [hereinafter Layman].

²³ Galemore, *supra* note 18, at 2 (emphasis added) (discussing the major myth that the OCR controls funds and may terminate on its own accord))

²⁴ 20 U.S.C. § 1682(2) (2005).

²⁵ See *Franklin*, 503 U.S. at 65. Note that this possibility is not too far removed from reality as the federal government provides about 8% of a given school's funding. See <http://www.greatschools.net>.

²⁶ Ostensibly, Congress based passage of Title IX on the Spending Clause of the Constitution. See *Davis* 526 U.S. at 640. However, the court has, in dicta, suggested that the Spending Clause may not be the only source of Congress' power to create Title IX. See *Franklin*, 503 U.S. at 76 n.8 (discussing Petitioner's Brief arguing that Congress passed Title IX on the basis of Section 5 of the Fourteenth Amendment in addition to the Spending Power).

²⁷ See *Franklin*, 503 U.S. at 64 n.3 (noting that DOE dismissed student's complaint when offending teacher resigned and school initiated grievance procedure).

However, in *Cannon v. University of Chicago*,²⁸ the Supreme Court responded to this problem by interpreting Title IX to allow private legal actions by plaintiffs, which the court found “implied” in Title IX’s statutory language and legislative history.²⁹ *Cannon*, however, only extended to equitable relief³⁰. Prior to *Cannon*, only the OCR could enforce Title IX through administrative procedures such as compliance reviews and investigations.³¹

Later, in *Franklin v. Gwinnett County Public Schools*,³² the Supreme Court further extended the implied private action to include the ability to seek monetary damages under Title IX for intentional discrimination by a school district.³³ *Franklin* involved the repeated sexual assault of a female student by a coach. The student reported the assault to administrative officials, who took no action, and even sought to persuade Franklin, a 10th grader repeatedly harassed and coerced into sex, to not bring suit.³⁴ The facts of *Franklin* show why an implied right of action is arguably necessary under Title IX, because the OCR terminated its investigation of the high school after the school initiated a grievance procedure and fired the offending coach.³⁵ Writing for the court, Justice White rejected the Eleventh Circuit’s decision that Franklin could not seek damages because Title IX’s implied action encompassed only equitable relief,³⁶ holding instead that in the case of “intentional discrimination,” a private action for money

²⁸ *Cannon v. University of Chicago*, 441 U.S. 677 (1979) (holding that a woman denied admission to two medical schools because of her sex could initiate a private action for *injunctive* relief) [hereinafter *Cannon*].

²⁹ *Cannon*, 441 U.S. 677, 709 (“not only the words and history of Title IX, but also its subject matter and underlying purposes counsel implication of a cause of action in favor of private victims of discrimination”).

³⁰ *Id.* at 723 n.12.

³¹ Augustus B Cochran, *SEXUAL HARASSMENT AND THE LAW* 149 (UP of Kansas 2004).

³² *Franklin*, 503 U.S. 60 (1992).

³³ *Id.* at 74.

³⁴ *Id.* at 60 (citing the complaint of the petitioner).

³⁵ *Id.* at 65, n.3.

³⁶ The *Franklin* court’s analysis also shows how the issue of implied private rights of action go to the very heart of the judicial power. Justice White’s opinion had to address arguments that allowing damages under an implied right violated the separation of powers since the Court was encroaching on the legislative and executive branches. *Franklin* 503 U.S. at 66.

damages exists.³⁷

In deciding the case, the *Franklin* court did not have to address a significant issue, what the court dubbed the “notice problem.”³⁸ For causes of action emanating from statutes based on Congress’ spending power, as Title IX does, the court previously emphasized the need for Congress to provide unambiguous notice of the terms of the legislative grant to recipients of the funds.³⁹ In the case of Title IX, the “terms” would be to not discriminate on the basis of sex⁴⁰ and to comply with other administrative provisions set forth in the *Code of Federal Regulations*.⁴¹ For the court, *Franklin* was an easy decision because there was no issue of notice to the school district; the school had actual notice of the sexual abuse by the perpetrator in that case and intentionally chose not to act.⁴²

However, in buttressing this argument concerning the non-issue of notice in *Franklin*, the court relied on employment law under Title VII⁴³ to find that sexual harassment was a form of sexual discrimination.⁴⁴ Since employment law under Title VII typically relies on principles of *respondeat superior* that impute liability on an employer regardless of notice,⁴⁵ *Franklin’s* reliance of on *Meritor* presented several questions: (1) what *type* of notice was sufficient for Title IX liability?;⁴⁶ (2) did the court’s

³⁷ *Franklin*, 503 U.S. at 74.

³⁸ *Id.*

³⁹ *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

⁴⁰ 20 U.S.C. § 1681 (2005).

⁴¹ 34 C.F.R. § 106 (2005).

⁴² *Franklin*, 503 U.S. at 74 (“The point of not permitting monetary damages for an unintentional violation is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award.”).

⁴³ 42 U.S.C. § 2000(e) (2005) [hereinafter Title VII].

⁴⁴ The court cited an employment law case, *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986), finding sexual harassment was a form of discrimination for the purposes of Title VII and finding that Congress intended for the courts to rely on agency principles in determining whether an employer had notice of sexual harassment but declining to answer the notice question definitively. See *Franklin* supra, note 42 at 72. Post-*Franklin* commentators used *Franklin’s Meritor* dictum to support every legal theory of notice for liability under Title IX. See, *infra* notes 51-56 and accompanying text.

⁴⁵ See *Meritor*, 477 U.S. at 72.

⁴⁶ *Gebser*, 524 U.S. at 274.

reliance on employment law, specifically its citation of *Meritor*, in deciding *Franklin* mean that the court was incorporating into Title IX all of employment law's case law under Title VII?⁴⁷ The Supreme Court in *Gebser* attempted to provide an answer to both of these questions.⁴⁸

B. POSSIBLE THEORIES OF LIABILITY UNDER TITLE IX

In deciding what level of notice to apply under the statute, the *Gebser* court had to choose between five competing notice standards that federal district and appellate courts used to determine a school's liability post-*Franklin*.⁴⁹ First, there was a strict liability approach, which was the general rule under Title VII at the time,⁵⁰ and which federal district courts used to find school districts liable.⁵¹ Under this approach, if the harassment occurred, then the school district would be liable.

The second standard used before *Gebser* was a *respondeat superior* or vicarious liability standard based on traditional agency principles,⁵² which the Sixth Circuit

⁴⁷ Justice Ginsburg asked during oral argument, "one thing to do is to say, we'll [sic] do this the same way as Title VII, so we'll incorporate the Title VII case law and the Title VII statutory revisions, but you say no [why not?]." See *Gebser Transcript* at 12.

⁴⁸ *Gebser*, 524 U.S. at 274.

⁴⁹ Sometimes, courts simply mixed parts of each of these general standards, especially in regards to the "agency" and "intentional discrimination" standards. See *Rosa*, 106 F.3d at 653 ("Courts sometimes conflate these theories.").

⁵⁰ Charles V. Dale, *Sexual Harassment and Violence Against Women: Developments in Federal Law*, Congressional Research Service, Library of Congress, Order Code 98-34 A at 10 (2002); this is also the approach intended by the EEOC originally. See *Meritor*, 477 U.S. at 72 (citing 29 C.F.R. § 1604.11(c) (1985) *rev'd* 29 C.F.R. § 1604.11(c) (2005)).

⁵¹ *Bolon v. Rolla Pub. Sch.*, 917 F.Supp. 1423, 1427 (E.D. Mo. 1996) (basing its decision for strict liability on several reasons: first, the Supreme Court previously gave Title IX "a sweep as broad as its language" (citation omitted); second, Title IX' demanded assurance per 34 C.F.R. § 106.4 from schools that they were in compliance; third, from a risk allocation standpoint, schools were better at bearing the risk of harm; fourth, any standard besides strict liability would frustrate the purpose of the statute and create arbitrary line-drawing problems; fifth, knowledge requirements were not well adapted to combat sexual abuse since such abuse typically occurs in secret and since knowledge requirements would create a disincentive from discovery of abuse) [hereinafter *Bolon*]; *Leiju v. Canutillo Indep. Sch. Dist.*, 887 F.Supp. 947 (W.D. Tex. 1995).

⁵² *Doe v. Clairborne*, 103 F.3d 495 (6th Cir. 1996); *Doe v. Petaluma City Sch. Dist.*, 830 F.Supp 1560, 1575 (N.D. Cal 1993) (interpreting *Franklin* to suggest a *respondeat superior* standard, imputing liability on the school district through the teacher-agent relationship).

adopted in *Doe v. Claiborne County*.⁵³ This standard, too, is closely associated with employment law.⁵⁴ Here, the only way to find a school district liable would be if the agency relationship aided a perpetrating teacher in committing the harassment.⁵⁵ As for the third standard, it focused on an “intentional discrimination” approach, which one federal court adopted⁵⁶ and which Justice Rehnquist⁵⁷ apparently favored. This approach asks whether the school established a policy of discriminating on the basis of sex.⁵⁸ Fourthly, there was a basic negligence approach—a, “knew of should have known standard” followed by the Seventh Circuit, albeit in an unpublished opinion.⁵⁹ Finally, there was an “actual notice” standard put forth by the Fifth Circuit in the watershed case *Rosa v. San Elizario Independent School District*.⁶⁰

In *Rosa*, the Fifth Circuit set forth a standard whereby a school district would be liable for a teacher’s sexual harassment of a student only if a supervisory official⁶¹ of the “school district actually knew that there was a substantial risk that sexual abuse would occur.”⁶² In addition to this “supervisory official” prong,⁶³ the *Rosa* court added a

⁵³ 103 F.3d 495 (1996) (relying on *Franklin’s* citation of *Meritor*, a Title VII case, and also an OCR report suggesting agency principles of Title VII should apply to Title IX).

⁵⁴ See *Meritor*, 477 U.S. at 74; See also, *Patricia H. v. Berkeley Unif. Sch. Dist.*, 830 F.Supp. 1288 (N.D. Cal. 1993) ([Franklin acknowledged that] “a student should have the same protection in school that an employee has in the workplace.”) [hereinafter *Patricia*]; See also Dale *supra* 50, at 3 (discussing the EEOC’s *Policy Guidance on Sexual Harassment*, available at <http://www.eeoc.gov/policy/docs/harassment.html#2>).

⁵⁵ Cf. Restatement (Second) of Agency § 219(2)(d)(1958) (cited, but rejected, by the Fifth Circuit in *Doe v. Lago Vista Independent School District*, 105 F.3d 1223, 1225 (1997)).

⁵⁶ Dale, *supra* note 50, at 32 n.132 (citing *RLR v. Prague Pub. Sch. Dist.*, 838 F.Supp. 1526 (W.D.Okla 1993) (rejecting student’s Title IX claim for failure to show policy or custom of discrimination by school district)).

⁵⁷ See, *supra* note 7.

⁵⁸ Dale *supra* note 50, at 32.

⁵⁹ Dale *supra* note 50, at 31 n.131 (citing *Deborah O. v. Lake Cent. Sch. Corp.*, 1995 U.S. App. LEXIS 19194, *10 (noting that plaintiff “failed to demonstrate that the School Corporation knew about or should have known about the sexual activities” perpetrated by the teacher)); See also Restatement (Second) of Agency § 219(2)(b)(1958).

⁶⁰ 106 F.3d 648 (1997) (though a pre-Gebser case, *Rosa* is still an extremely influential decision in applying the Gebser standard).

⁶¹ *Id.* at 659-660.

⁶² *Id.* at 652-653.

⁶³ The court rephrased *Rosa’s* supervisory official in *Gebser* to be the “appropriate official” prong probably

“deliberate indifference”⁶⁴ prong to their actual notice standard to help determine what conduct constituted sufficient actualization for liability.⁶⁵ Essentially, the Fifth Circuit combined the “intentional discrimination” approach,⁶⁶ via the deliberate indifference prong, with a heightened constructive notice standard, via the supervisory official prong, to create its “actual” notice standard.⁶⁷ From this historical and precedential context, *Gebser* emerged.

C. THE GEBSER STANDARD FOR TITLE IX LIABILITY

In *Gebser* the Supreme Court, in a 5-4 decision, adopted the *Rosa* approach of actual notice.⁶⁸ The issue in *Gebser* was whether an 8th grade student, who had been sexually assaulted by her teacher, could seek compensatory damages against the school district under a constructive notice or agency theory of liability.⁶⁹ Despite not implementing a formal policy against sexual harassment of students by teachers, the court rejected the constructive notice and agency arguments, reasoning that the reference in *Franklin* to *Meritor* and Title VII, and the agency law associated with them, was merely persuasive authority to affirm that sexual harassment was a form of sexual discrimination.⁷⁰ The court pointed to textual,⁷¹ structural,⁷² and practical financial

because of the statute’s use of the words “appropriate official.” 20 U.S.C. § 1682(2) (2005), *Gebser* 524, U.S. at 274.

⁶⁴ In support of this deliberate indifference prong, the *Rosa* court relied on *Farmer v. Brennan*, 511 U.S. 825 (1970) (finding that liability for prison officials under Eighth Amendment involved a deliberate indifference standard). Thus, it is strange that under Title IX, the focus is on Title VII and not penal law as the *Rosa* test developed out of penal law.

⁶⁵ *Rosa*, 106 F.3d at 650.

⁶⁶ See, *supra* note 54 and accompanying text.

⁶⁷ The actual notice standard is by no means actual in the strictest sense. *Rosa*, 106 F.3d at 660 (rejecting a “[r]eading [of] *Franklin* to impose liability only where the board itself knows of a student’s sexual harassment.”).

⁶⁸ *Gebser*, 524 at 288.

⁶⁹ *Id.* at 282 (the student relying on *Franklin*’s citation of *Meritor* and Title VII).

⁷⁰ *Gebser*, 524 U.S. at 283; See also, *supra* note 7.

⁷¹ “Title VII . . . explicitly defines ‘employer’ to include ‘any agent.’ *Id.* at 283.

⁷² “[I]t does not appear that Congress contemplated unlimited recovery [in Title VII].” *Gebser*, 524 U.S. at 286.

differences⁷³ between Title VII and Title IX that cut against using a standard based on agency principles for Title IX.

Writing for the court and applying these reasons, Justice O’Conner held that in order for a school district to be held liable, an official with “minimum . . . authority to institute corrective measures” must have “actual notice of [and] deliberate indifference to the teacher’s misconduct.”⁷⁴

Though the opinion implies that a school district’s Title IX administrator is an example of an official with such minimum authority,⁷⁵ the Supreme Court, unfortunately, has not provided much guidance⁷⁶ as to who constitutes an appropriate official.⁷⁷

II. PROCEDURAL ISSUES IN STATING A PRIMA FACIE CASE

When bringing a claim under the statute, a plaintiff must satisfy certain procedural requirements borrowed from sexual harassment litigation under Title VII.⁷⁸ First, a plaintiff must be a current⁷⁹ or former⁸⁰ student,⁸¹ and the plaintiff may only sue an

⁷³ “[A]n award of damages in a particular case might well exceed a recipient’s level of federal funding.” *Gebser*, 524 U.S. at 292.

⁷⁴ *Id.* at 274. Justice O’Conner apparently believes that the *Gebser* standard is a “constructive intentional discrimination standard” in the sense that if a court finds that an educational institution is deliberately indifferent with actual notice, then they have adopted a constructive policy of intentional discrimination. (quotations mine); See Transcript of Oral Argument at 8, *Davis*, 1999 WL 20710 (U.S.), 67 USLW 3523 (quoting Justice O’Conner describing what the *Gebser* rule required as: “[*Gebser*] required the intentional action of the school district.”) [hereinafter *Davis Transcript*].

⁷⁵ *Id.* at 274.

⁷⁶ See also *Davis* 526 U.S. 629, 650 (1999) (affirming *Gebser*’s standard but *once again* analogizing to employment law to find that deliberate indifference by a school district for even student-on-student sexual harassment if indifference was “severe, pervasive, and objectively offensive” creates Title IX liability)(citing a “hostile environment” sexual harassment action under Title VII, *Oncale v. Sundowner Offshore Serv.*, 523 U.S. 75 (1998)).

⁷⁷ *But see, infra* § III.A.

⁷⁸ See *Bracey v. Buchanan*, 55. F.Supp. 2d 416, 420 (E.D. Va. 1999) (pro se litigant’s suit dismissed because complaint stated mere dissatisfaction with the outcome of university’s investigation process) [hereinafter *Bracey*].

⁷⁹ *Romeo Cmty. Sch. v. U.S. Dept. of Health, Educ. & Welfare*, 600 F.2d 581 (6th Cir.) *cert. denied*, 444 U.S. 972 (1979).

⁸⁰ *Kraft v. Yeshiva Univ.*, 2001 WL 1191003 (S.D.N.Y.) (former doctoral candidate established prima facie case) [hereinafter *Kraft*]. However, in *Kraft* the student’s status as a former student was a consequence of the harassment.

⁸¹ *But see Alston v. N.C. A&T State Univ.*, 304 F.Supp. 2d 774 (M.D.N.C. 2004) (where female campus police officer’s Title IX sexual harassment suit survived 12b6 motion against university) [hereinafter

educational institution.⁸² Though the claim must be brought against an educational institution, the claim need not occur *at* an educational institution necessarily.⁸³ For suits against teachers in their individual capacity, plaintiffs should use 42 U.S.C. 1983, but note that there are preclusion issues involved when a plaintiff pleads both a Title IX and a § 1983 claim.⁸⁴

Second, a plaintiff must allege that a school official subjected them to *quid pro quo*,⁸⁵ hostile environment,⁸⁶ or retaliation⁸⁷ sexual harassment, constituting something more than merely unprofessional conduct⁸⁸ after examining the totality of the

Alston]. Typically though, employee cases will involve preclusion by Title VII. See, *infra* note 117.

⁸²Note that state and federal laws will allow a claim by a student against an offending teacher or against a school official individually. *Bracey*, 55 F.Supp. at 419 (“it is impossible to bring a Title IX action against an individual”) (citing *Kinman v. Omaha Pub. Sch. Dist.*, 171 F.3d 607 (8th Cir. 1999) [hereinafter *Kinman*]); *But see* Keefe at §2 (noting that a §1983 claim may preclude a Title IX private action claim); *See also Bolon*, 917 F.Supp at 1423 (arguing teacher’s sexual harassment violated student’s right of privacy pursuant to Ninth and Fourteenth Amendments and 42 U.S.C. § 1983); *See generally*, Robin C. Miller, Annotation, *Liability Under State Law Claims, of Public and Private Schools and Institutions of Higher Learning For Teacher’s, Other Employee’s, or Student’s Sexual Relationship With, or Sexual Harassment or Abuse of, Student*, 86 A.L.R. 5th 1 (2005).

⁸³ *Crandell v. New York Coll. of Osteopathic Med.*, 87 F.Supp. 2d 304, 316 n.126 (S.D.N.Y 2000) (rejecting defendants’ argument that *Davis* spatially limited Title IX’s application) [hereinafter *Crandell*]; *See also, infra* note 210.

⁸⁴ Keefe at § 2[b] (discussing cases where § 1983 precluded and did not preclude the court from addressing Title IX liability).

⁸⁵ *Gallant v. Board of Trustees of Cal. State Univ.*, 997 F.Supp 1231, 1233 n.2 (N.D. Cal 1998) (defining *quid pro quo* as, “where a school employee explicitly or implicitly conditions a student’s participation in an education program or activity or bases an educational decision on the student’s submission to unwelcome sexual conduct”)(citations omitted)) [hereinafter *Gallant*].

⁸⁶ *Id.* at 1233 (describing the hostile environment claim as subjecting a student to unwelcome sexual advances of a sufficiently severe and pervasive nature that creates an “abusive educational environment”).

⁸⁷ *Jackson v. Birmingham Brd. of Educ.*, 125 S. Ct. 1497, 1502 (2005) (formally incorporating retaliation claims into Title IX implied private action since retaliation is “intentional” and therefore like *Franklin*) (Thomas, J., dissenting with Scalia, J., Rehnquist, J., and Kennedy, J.) [hereinafter *Jackson*]. It is likely that *Gebser*, but neither *Davis* nor *Jackson*, will survive O’Conner’s retirement from the court, which is unfortunate, because retaliation claims were well-established under Title IX litigation in lower federal courts; *See, e.g.*, *Johnson v. Galen Health Inst.* 267 F.Supp. 2d 679 (W.D. Ky. 2003) (allowing retaliation claim) [hereinafter *Johnson*]. Thus, for this reason, and because the doctrine’s legal contours under Title IX are still somewhat rough, this paper only discusses hostile environment and *quid pro quo* claims.

⁸⁸ *Gallant*, 997 F.Supp. 2d at 1235 (though a pre-*Gebser* case applying Title VII principles explicitly, *Gallant* held that few, isolated comments about teacher’s sex-life and single kiss on student’s cheek were not sufficient to constitute sexual harassment under statute since no unreasonable interference with student’s education as student continued to go to the school).

circumstances.⁸⁹ Further, generally speaking, Title IX protects against sex *discrimination* based on “gender stereotypes”⁹⁰ and not sexual *attitudes* or sexual *orientation*.⁹¹ However, one California district court⁹² found that student-on-student harassment⁹³ based on perceived sexual orientation sufficed in stating a claim for relief. In addition, the statute does not cover harassing conduct inflicted on both sexes by a school official.⁹⁴ Thus, in stating a claim, gender—who the victim is biologically—must be the motivating cause of the harassment.⁹⁵

A. HOSTILE ENVIRONMENT CLAIMS UNDER TITLE IX

When deciding motions to dismiss or summary judgment per the *Gebser* line of cases under this sexual harassment *quid pro quo*-hostile environment-retaliation trichotomy, the federal courts emphasize at least one of five general factors to conclude

⁸⁹ *Crandell*, 87 F.Supp. 2d at 319 (finding sufficient *cumulative* hostile environment claim where med student alleged several instances of sex harassment by numerous professors, doctors, and residents, though defendants argued that some instances by themselves did not state a claim).

⁹⁰ Courts define “gender stereotypes” as including a “failure to conform to stereotypical [male or female] characteristics.” *Theno v. Tonganoxie Unif. Sch. Dist.*, 2005 U.S. Dist. LEXIS 23924, *10 (S.D.N.Y.) [hereinafter *Theno*].

⁹¹ *Cf. Howell v. North Cent. Coll.*, 320 F.Supp. 2d 717, 722 (N.D. Ill. 2004) (distinguishing between “gender stereotype” discrimination, which does satisfy Title IX, and sexual orientation and attitudinal discrimination, which are not protected, in case where student alleged her heterosexuality caused lesbian teammates and coach to target her for harassment) [hereinafter *Howell*]; *But cf. Oncale* 523 U.S. 75, 82 (1998) (holding that same-sex harassment was actionable under Title VII, cited in *Davis* approvingly by the Supreme Court supporting Title IX action for student-on-student harassment, and cited by Justice Rehnquist at oral argument in *Gebser* when arguing for intentional discrimination standard) [hereinafter *Oncale*]; *See, supra* note 7.

⁹² *Ray v. Antioch Unif. Sch. Dist.*, 107 F.Supp. 2d 1165 (N.D. Cal. 2000). But, the *Ray* court admitted, “[p]laintiff’s complaint makes no specific characterization of the harassing conduct as ‘sexual’ ...” *Id.* at 1170; *See also Theno* at *13 (in a sad student-on-student same-sex harassment bullying case, noting the distinction between gender stereotypes and *social* stereotypes, and how only the former are actionable).

⁹³ In student-on-student harassment cases, courts seem more willing to disregard subtle distinctions between failing to conform to gender stereotypes (actionable) and social attitudes (not actionable). *See, supra* notes 91 & 92.

⁹⁴ This is the so-called “bisexual harasser,” which both Title VII and Title IX do not reach. *See Dale supra* note 50, at 15. Do note that harassers may be of the same sex as the plaintiff, so long as the school employee bases their harassment on gender. *See Howell*, 320 F.Supp. 2d at 721 (citing *Oncale*, 523 U.S. at 1002).

⁹⁵ *Cockerham v. Stockes Brd. of Edu.*, 302 F.Supp. 2d 490 (M.D.N.C. 2004) (where male student’s teacher forced student to wear pink sign asking, “Will you go out with me?”, court found that the harassment was not based on sex).

whether the alleged harassment states a prima facie case: pervasiveness, severity, identity, power disparity, and consent. The first three of these factors relate more to hostile environment claims while the last two factors relate more to *quid pro quo* claims.⁹⁶

First, regarding the pervasiveness factor, courts applying Title IX generally require that the alleged harassment occur repeatedly.⁹⁷ However, as the Second Circuit noted in *Hayut v. State University of New York*,⁹⁸ courts do not have a particular quantifiable threshold. Thus, a claim alleging that a professor consistently referred to a student as “Lewinsky” both in and outside class or a claim where a student underwent years of harassment,⁹⁹ stated a claim; whereas, a claim that a professor’s single kiss,¹⁰⁰ isolated offensive comments, or insinuation that the professor was open to a sexual relationship¹⁰¹ constituted a hostile environment, did not.

Closely related to pervasiveness is the severity factor. Here, courts look at whether the alleged conduct by the school official was sufficiently extreme. As Dale notes, under Title VII, repeated touching and continuous sexual demands will suffice to state a hostile environment claim, while single incidents and sparse off-color comments will not.¹⁰² Thus, examples of sufficiently severe conduct by a school official are:

⁹⁶ It is critical to realize the distinction between *quid pro quo* and hostile environment claims. See *Johnson* 267 F.Supp. 2d at 689 (dismissing plaintiff’s *quid pro quo* claim and applying different actual notice tests for each type of claim); This is especially true in light of the suggestion by one court that stating one, but not the other, may lead to a waiver of the other, non-stated claim. *Klemenic v. Ohio State Univ.*, 10 F.Supp. 2d 911, 915 (S.D. Ohio 1998) (noting defendant’s waiver argument, but rejecting opportunity to decide) [hereinafter *Klemenic*].

⁹⁷ See, *supra* note 86 and accompanying text (defining hostile environment using the term “pervasive”).

⁹⁸ 352 F.3d 733 (2003) (noting there was no “mathematical equation” in determining whether plaintiff met their prima facie burden).

⁹⁹ “[The] harassment continued for years.” Theno at *13.

¹⁰⁰ See *Gallant*, 997 F.Supp. at 1235; See also *Johnson*, 267 F.Supp. 2d at 682 (inappropriate, sexual class-comments by instructor were insufficient to state a hostile environment claim).

¹⁰¹ *Shelton v. Columbia Univ.*, 2005 U.S. Dist. LEXIS 26480, *16 (S.D.N.Y.) (holding that plaintiff failed to state a claim when student alleged that professor told him he was good looking and indicated a willingness to engage in a sexual relationship) [hereinafter *Shelton*].

¹⁰² Dale, *supra* note 50, at 11 (discussing Title VII hostile environment claims). This distinction drawn by Dale under Title VII does not necessarily “fit” under Title IX.

repeatedly fondling a student¹⁰³ or announcing in class that the student would become the teacher's "mistress" and later putting an arm around her.¹⁰⁴ But, referring to "boobies" and "dick" in class do not state a hostile environment claim.¹⁰⁵ When rejecting claims based on a lack of severity, courts often grasp for analytical straws, using hyper-legalistic¹⁰⁶ and perverse¹⁰⁷ reasoning.

Third, although the Supreme Court in *Davis* suggested, "the identity of the perpetrator is simply irrelevant under the language of the statute,"¹⁰⁸ the identity of the offending school official is a factor lower federal courts examine in analyzing a hostile environment claim, depending on the circumstances. For instance, the employment function of the school official was relevant to at least two courts. Thus, in *Frazier v. Fairhaven School Committee*, where a female school official peeped into a bathroom stall which a female student occupied, the court reasoned that because the school official was the discipline matron, the official's actions, "did not exceed her mandate."¹⁰⁹

B. QUID PRO QUO CLAIMS AND HIGHER EDUCATION

This identity factor shows a major distinction between cases involving secondary

¹⁰³ *Johnson*, 267 F.Supp. 2d at 686 (citing *Massey v. Akron City Brd. of Edu.* 82 F.Supp. 2d 735 (N.D. Ohio 2000) (where defendant molested multiple students, telephoned students, and called them at homes).

¹⁰⁴ *Flores v. Saulpaugh* 115 F.Supp. 2d 319, 320 (N.D.N.Y. 2000) [hereinafter *Flores*].

¹⁰⁵ *Johnson*, 267 F.Supp. 2d at 682.

¹⁰⁶ See *Gallant*, 997 F.Supp. at 1234 (reasoning that since most serious harassment by Dean happened prior to plaintiff becoming a student, plaintiff did not state a claim, despite the harassment itself perhaps motivating matriculation).

¹⁰⁷ See *Johnson*, 267 F.Supp. 2d at 687 (reasoning that because student did not stop going to class, there was no clear interference on her education, when the whole purpose of the act is to promote education). A textual analysis of Title IX shows the flaws of such reasoning. *Davis Transcript* at *22 (Scalia notes, ". . . [W]hy does it have to deprive someone of the ability to get an education? That's not what the statute says. That's a separate basis for violation; that is, 'be denied the benefits of.' All it says is, be 'subjected to discrimination under'. . . . I don't know why you insist that it be so severe that the person can't even learn.").

¹⁰⁸ *Davis*, 526 U.S. at 637 (quoting dissenting judge below, Barkett).

¹⁰⁹ *Frazier*, 276 F.3d at 67. This reasoning resembles the agency standard – "within the scope of the agent's employment" – mentioned, rejected by the Supreme Court in *Gebser supra*. Here, however, the court is using the standard to find the school district *not* liable; See also, *Simms v. Christina Sch. Dist.*, 2004 WL 344015, *2 (Del. Super. Ct.) (where residential assistant who abused special education student had hygiene counseling responsibilities) [hereinafter *Simms*].

education and post-secondary education, which segues into analyzing factors associated with *quid pro quo* claims.¹¹⁰ When a plaintiff is a higher education student, courts are stricter in their analysis of a claim's sufficiency. This is because courts accept that higher education students may consent to sexual relations with school officials.¹¹¹ However, courts take into account "power disparity" between the student and the school official as an obvious factor in trumping any claim that a student consented to harassment.¹¹² Illustrating these factors is *Kraft v. Yeshiva*.¹¹³ There, a doctoral student, who ended a relationship with the director of the doctoral program, stated a *quid pro quo* claim after dismissal from his doctoral program.¹¹⁴

C. THE PROCEDURAL LIMITS & STRENGTHS OF TITLE IX

Title IX contains a few other procedural limitations outlined by the courts. The primary limitation besides the actual notice standard involves a student's graduation from an educational institution. Under the statute, the student's graduation serves as a mootness¹¹⁵ defense or a *de facto* statute of limitations since an action exists only if the

¹¹⁰ As Dale argues, the use of the distinction between hostile environment and *quid pro quo* claims as an analytical tool is weakening under Title VII. Dale suggests, "[a]s in *Ellerth*, the *Faragher* Supreme Court largely abandoned the legal distinction between *quid pro quo* and hostile environment harassment." Dale, *supra* 50 at 25. Courts are already adopting the *Ellerth* terminology. *Burlington Ind. Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) [hereinafter *Ellerth* and *Faragher* respectively]; See *Johnson* 267 F.Supp. 2d at 685 (discussing "tangible" harm when analyzing claim).

¹¹¹ See *Frederick v. Simpson Coll.* 149 F.Supp. 2d 826, 836 n.11 (S.D. Iowa 2001) ("A college or university does not assume the same paternalistic role over its students as elementary and secondary schools") [hereinafter *Frederick*]; *Cf. Kraft* at * 1; Of course, there may be university policies or state laws forbidding such unprofessional behavior. Indeed, if one accepts the doctrine of *in loco parentis*, such behavior is incestuous.

¹¹² "The correct inquiry is whether [the] conduct indicated that the sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary." *Meritor*, 477 U.S. at 68. "; See also *Waters v. Metropolitan State Univ.*, 91 F.Supp. 2d 1287, 1291 (D. Minn. 2000) (noting the distinction between a real "relationship" and "mere acquiescence").

¹¹³ *Kraft* at *6.

¹¹⁴ *Id.*

¹¹⁵ See *Crandell* 87 F.Supp. 2d at 322 (noting that mootness doctrine applies only when the relief is prospective and does not apply to monetary damages); See also *Hankinson v. Thomas Sch. Dist.* 2005 U.S. Dist. 25576, *4(11th Cir.) (noting that the fact that a coach was no longer employed as a coach made her claim for injunctive relief lack standing).

harassment occurred while the plaintiff was a student.¹¹⁶ Thus, for example, a medical student's post-graduate residency harassment claims applied only under Title VII and not Title IX.¹¹⁷

As for procedural strengths under Title IX, there is no requirement that plaintiffs exhaust administrative remedies with the OCR before filing a private right of action,¹¹⁸ nor is there a limit on normal damages.¹¹⁹ Though, there are practical and jurisprudential limits on liability.¹²⁰ Further, as discussed below, some Federal Circuits are more favorable towards plaintiffs in interpreting the "actual notice" standard than others.¹²¹

III. APPROPRIATE OFFICIALS: PRONG ONE

A. CATALOG OF THE APPROPRIATE OFFICIAL PRONG

Title IX under *Gebser* requires that before a student may sue a school district for teacher-on-student sexual harassment, an appropriate school official must have actual

¹¹⁶ See *Gallant*, 997 F.Supp. 1231 (N.D. Cal. 1998) (though a Pre-*Gebser* decision, court dismissed since most serious harassment occurred prior to matriculation); See also *Burtner v. Hiram Coll.* 9 F.Supp. 2d 852 (N.D. Ohio 1998) (school district found to not have notice until student filed complaint on the day of her graduation).

¹¹⁷ *Crandell*, 87 F.Supp. 2d at 307; See also, *Hankinson*, at *9 (holding that ability to bring claim under Title VII precluded plaintiff from asserting Title IX claim); *Delgado v. Stegall* 367 F.2d 668, 670 (7th Cir. 2004) (noting that part-time student employees not precluded from Title IX claim by Titled VII) [hereinafter *Delgado*].

¹¹⁸ *Cannon*, 441 U.S. at 708. This is contrary to Title VII and IDEA actions.

¹¹⁹ *Gebser*, 524 U.S. at 286; Most courts hold that there is a limit on *punitive* damages. See e.g., *Booker v. City of Boston*, 2000 WL 1868180 *4 (D.Mass. 2000) (rejecting the contrary position of *Canty v. Old Rochester Reg'l Sch. Dist.*, 54 F.Supp. 2d 66, 70 (D, Mass. 1999), a case in the same district where the court allowed punitive damages under Title IX) [hereinafter *Booker*].

¹²⁰ See *Rosa*, 106 F.3d at 661 (recognizing practical jurisprudential limit on damages by confining damages to only those acts of intentional discrimination by the school). Further, the school's total funding may be less than the amount of damages sought. This was the case in *Gebser* where the school's budget was \$120,000. *Gebser*, 524 U.S. at 290.

¹²¹ See *Baynard v. Malone*, 268 F.3d 228, 238 (4th Cir. 2001) (admitting that the school official "should have been aware of the potential for abuse" but was still not aware under *Gebser's* standard) [hereinafter *Baynard*]; this opinion, though claiming to follow the *Gebser* approach is a criticized "minority view." *Rasnick v. Dickenson Sch. Brd.*, 333 F.Supp. 2d 560, 566 (W.D. Va. 2004) (district judge in 4th Circuit suggested the "proper interpretation" of *Gebser* was a "substantial risk" analysis in determining what is "actual" notice); See also, Robin K. Carlson, *If You Have Been Kissed, Who Do You Tell? Notice of Sexual Harassment Under a Title IX Claim*, 42 WASHburn L.J., 185 (2002) (criticizing the *Baynard* decision).

notice of the harassing conduct.¹²² In fleshing out just who is an appropriate official, the federal courts focus on the power and authority of officials. The court will examine the oversight and supervisory abilities of the official, including the ability to immediately address the problem with concrete action, especially firing the individual perpetrator.¹²³ Thus, a central question courts ask is whether or not the school official who received notice was a “policy-maker”¹²⁴ in the sense that the school district designated the official to receive complaints.¹²⁵ Although, due to jurisdictional variance¹²⁶ in interpreting *Gebser*, a clear delineation of which officials are appropriate¹²⁷ is impossible, catalog analysis show in *Catalogs One and Two* provide a general framework of officials federal courts usually find to be “appropriate” or “supervisory.”¹²⁸ The catalog reveals that there are two types of officials: general appropriate and particular appropriate officials.

¹²² *Gebser* 524 U.S. at 274.

¹²³ See *Murrell v. School Dist. No. 1*, 186 F.3d 1238, 1247 (10th Cir. 1999) (emphasizing ability to halt known abuse) [hereinafter *Murrell*].

¹²⁴ *P.H. v. School Dist. of Kansas City*, 265 F.3d 653 (8th Cir. 2001) (finding “policymaking officials” had no notice of sexual abuse by teacher) [hereinafter *Kansas City*].

¹²⁵ *Cf. Jones v. Indiana Sch., Dist.*, 2005 U.S. Dist. LEXIS 24856, *34 (W.D. Pa.) (“The [defendant] has not argued that the people to whom Plaintiffs complained were not designated to receive such complaints.”) [hereinafter *Jones*].

¹²⁶ Some federal circuits – specifically the Fourth and the Eleventh—accept that *state law* may define who is an appropriate official because state law often defines who may fire a teacher or who has executive power in a school district. See *Baynard* 268 F.3d at 239 (noting that in Virginia, only the school district, and not the principal, may “hire, fire, transfer, or suspend teachers” and therefore a principal was not an appropriate official); See also, *Floyd v. Waiters* 133 F.3d 786, 792 (11th Cir. 2000) (citing a Georgia statute, O.C.G.A. § 20-2-109, which states that a superintendent is the “executive officer of the local board of education,” to find that only a superintendent or the school board was an appropriate official in Georgia) [hereinafter *Floyd*]. This presents an interesting question with regard to what affect a State Supreme Court’s interpretations of such statutes have on determining who is an appropriate official. For instance, would the superintendent have to have contractual power on behalf of the board since Title IX, as a spending clause case, is a “contract”? See e.g., *State Bd. of Educ. v. Elbert Bd. of Educ.* 146 S.E.2d 344 (Ga. Ct. App. 1965) (holding that superintendents in Georgia may not contractually obligate board to debt without consent of school board). Thus, if the state law, as interpreted by a court (either federal or state would suffice apparently though the federal court appears to have the ultimate say based on a reading of *Floyd*), says that there is no other official that is appropriate besides the school board, then the federal court is left with the highest standard of notice (notice to the school board), which the *Rosa* court explicitly rejected. See, *supra* note 60. .

¹²⁷ Courts usually refrain from merely listing job titles of who is appropriate. *Murrell*, 186 F.3d at 1247 (“We decline simply to name job titles that would or would not adequately satisfy [the appropriate official standard]”).

¹²⁸ See, *supra* § I.B and the discussion of *Rosa*, note 60.

General appropriate officials are those officials who are appropriate irrespective of the status of the harasser. Particular officials are those officials who are appropriate depending on who the harasser is¹²⁹ and depending on their respective designation of authority from a general appropriate official.¹³⁰

Catalog 1: Appropriate Officials	
<p><i>General Appropriate Officials</i></p> <p>Title IX Coordinator¹³¹</p> <p>Superintendents¹³²</p> <p>Principals (including acting)¹³³</p> <p>Grievance Officers¹³⁴</p> <p>School Board (Members?)¹³⁵</p> <p>State Law¹³⁶</p>	<p><i>Particular¹³⁷ Appropriate Officials</i></p> <p>Athletic Directors (for coaches)¹³⁸</p> <p>Department Chairs (for faculty)¹³⁹</p> <p>Deans & Associate Deans¹⁴⁰</p> <p>Other “Policy Makers”¹⁴¹</p>

¹²⁹ Though no court has ever made a distinction between generalized and particularized appropriate officials, the distinction clearly manifests from the case law. For the purposes of whether or not an official is an appropriate official, the identity of the perpetrator *is* relevant.

¹³⁰ See, *infra* note 142

¹³¹ Each educational institution must have a Title IX coordinator as mandated by the *Code of Federal Regulations*. 34 C.F.R. § 106.8(a) (2005). *Gebser* implied that a district’s Title IX coordinator was an “appropriate official”. *Gebser* at 524 U.S. at 278 (noting that principal “did not report the parent’s complaint to Lago Vista’s superintendent, who was the district’s Title IX coordinator”).

¹³² See, *supra* note 126.

¹³³ See *Jackson* 125 S. Ct. at 1508 (“if a principal sexually harasses a student, and a teacher complains to the school board, but the school board is indifferent, the board would likely be liable”); See also *Warren v. Reading Sch. Dist.*, 278 F.3d 163, 170 (3rd Cir. 2002) (arguing *Gebser* and *Davis* imply that principals are appropriate officials and summarizing other cases) [hereinafter *Warren*]; for a finding of liability based on an acting principal, see *Morlock v. West Central*. 46 F.Supp. 2d 892 (D. Minn. 1999).

¹³⁴ *Burtner*, 9 F. Supp. 2d at 857 (suggesting but not holding that a grievance officer may be an appropriate official).

¹³⁵ *Floyd*, 133 F.3d at 732. But *Warren* asks an important question: would a majority of the board have to know about the sexual harassment or merely a single board member? *Warren*, 278 F.3d at 169; only one court has ever had a factual scenario where school board members knew of complaints of inappropriate conduct, but at the time of the case, one was no longer on the board. The other initially approved of the relationship (he was also the father of one student involved). *R.L.R. v. Prague Pub. Sch. Dist.*, 838 F.Supp. 1526, 1528 (W.D. Olka. 1993).

¹³⁶ Worries about “federalizing education law” are unfounded in the Eleventh and Fourth Circuits. See *Davis Transcript* at 48 (asking court not to “federalize[] school discipline.”). See, *supra* note 126.

¹³⁷ See, *supra* note 129.

¹³⁸ Though no case has ever held that an athletic director was an appropriate official, some authority suggests the possibility that an athletic director is appropriate if the perpetrator is a coach. *Cf. Murrell*,

Catalog 2: Non-Appropriate Officials

142

- The Perpetrator¹⁴³
- Other Students¹⁴⁴
- Teachers¹⁴⁵ / Professors¹⁴⁶
- Counselors¹⁴⁷
- Coaches¹⁴⁸
- Remote Administrative Officials¹⁴⁹

186 F.3d 1249; *Turner v. McQuarter*, 79 F.Supp. 2d 911, 915 (N.D. Ill. 1999) [hereinafter *Turner*]; *Klemencic* 10 F.Supp. 2d at 913 See, *infra* note 142.

¹³⁹ *Frederick*, 149 F.Supp. 2d at 837 (“[B]oth of these officials [,the assistant dean and a department chair,] of Simpson College qualify as an appropriate person for the purposes of Title IX liability.”) .

¹⁴⁰ *Id.*

¹⁴¹ *Kansas City*, 265 F.3d at 653 (quoting the district court below: “[T]he record is devoid of evidence that policymakers with the KCS D had actual knowledge of . . . sexual misconduct.”).

¹⁴² School officials may delegate their Title IX appropriate official status. *Cf. Warren*, 278 F.3d at 174 (suggesting that, with school district approval, an appropriate official could transfer their investigative authority for liability purposes to an official that is non-appropriate).

¹⁴³ As the court in *Turner* noted, the perpetrator’s knowledge of his own conduct is not a sufficient proxy of the educational institution for the plaintiff to establish liability. 79 F.Supp. 2d at 916.

¹⁴⁴ *Cf. Sherman v. Helms*, 80 F.Supp. 2d 1365, 1367 (M.D. Ga. 2000) (where apparently other students who complained about inappropriate sexual comments of janitor knew that assaulted student “may have [had] a problem” with janitor who raped student; this occurred after the principal had held a school conference on the need for students to report sexual harassment) [hereinafter *Sherman*]; though not argued by counsel in *Sherman*, could the principal transfer his authority to students for liability purposes? See, *supra* note 130.

¹⁴⁵ Only one case suggests teachers may be appropriate officials. *Murrell*, 186 F.3d at 1249 (“It is possible that these teachers would also meet the definition of ‘appropriate persons’ for the purposes of Title IX liability if they exercised control over the harasser and the context in which the harassment occurred.”).

¹⁴⁶ *Litman v. George Mason Univ.*, 131 F.Supp. 2d 795, 799 (4th Cir. 1999) (reasoning that since a professor was an ordinary employee of the university, though the university obligated the professor to report the harassment, the professor was not an appropriate official) [hereinafter *Litman*].

¹⁴⁷ *Warren*, 278 F.3d at 174 (holding that it was error for the district court to allow jury to consider a guidance counselor an appropriate official in instruction); *Cf. Delgado v. Stegall* 367 F.3d 668, 670 - 672 (7th Cir. 2004) (Posner, J.) (though not explicitly rejecting that a university counselor was an appropriate official, finding no actual notice in a case where student disclosed harassment to music teacher and counselor).

¹⁴⁸ While no authority explicitly suggests coaches are not appropriate officials, the analogy to teachers seems obvious. *Cf. Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 660 (5th Cir. 1997) (“bulk of employees” excluded).

¹⁴⁹ *Liu v. Striuli*, 36 F.Supp. 2d 452, 465-466 (finding that a financial aid director and director of graduate history program were not appropriate officials when student complained that modern languages professor harassed her since the administrators had no ability to oversee or police the harasser).

B. GUIDANCE FOR EDUCATIONAL ACTORS AND PRONG ONE

The catalogs under the actual notice prong provide important information to educational actors on how to protect students using Title IX . Here, the primary educational actors that can use Title IX to protect students are the students themselves, parents, teachers, administrators, and legislators.

Students

The first educational actor in any potential Title IX situation is obviously students. Here, in regards to ensuring the appropriate official has notice, the primary advice is procedural: *disclose the harassment*. Students who are being abused or who know or suspect another fellow student is the victim of abuse should tell *someone*;¹⁵⁰ ideally this disclosure will initiate an investigation. Yet, even if the person who a student discloses to is another student, there is still a benefit in the disclosure.¹⁵¹ But, obviously, the potential for, and the likelihood of, proper disclosure by a student will depend on the age of the student. Obviously, younger students should tell their parents first.¹⁵² Older students will want to talk informally with an administrative official, preferably a principal, dean, or other high-ranking administrative official. Disclosure brings misdeeds to light and increases the probability that Title IX can protect the student. However, older students, in particular, should understand that oftentimes school officials will not care,¹⁵³

¹⁵⁰ “It is often suggested that a person who is sexually harassed talk to others . . . to see whether they, too, have been harassed.” See Layman, *supra* note 22, at 158 ; See also, *infra* note 1549.

¹⁵¹ See, *supra* note 144 (discussing how inquiry of some students led administrators to find out that a janitor raped a completely different student).

¹⁵² This “parent factor” is a key distinction between Title IX and Title VII that critics, such as Kaplin, often overlook in arguing that the Supreme Court should incorporate Title VII completely into Title IX, including the much easier agency notice principles which govern Title VII. See Kaplin, *supra* note 11. As Justice Souter noted in *Faragher*, “When a person with supervisory authority discriminates in the terms and conditions of subordinates’ employment, his actions necessarily draw upon his superior position over the people who report to him, or those under them, whereas an employee generally cannot check a supervisor’s abusive conduct the same way that she might deal with abuse from a co-worker.” 524 U.S. at 803. In the student-teacher relationship, however, there is another party – the parent – which can serve as an advocate on behalf of the student, unlike under Title VII.

¹⁵³ See *Mandsager v. University of N.C. Greensboro*, 269 F.Supp. 2d 662, 670 (M.D.N.C. 2003) (where department chair dismissed student’s initial informal complaint about professor Dr. William Purkey’s sexual harassment by stating, “William will be William.”) [hereinafter *Mandsager*].

will not believe,¹⁵⁴ will blame victims,¹⁵⁵ will humiliate victims,¹⁵⁶ or, in some cases, will retaliate against victims¹⁵⁷ who disclose harassment. Sadly, these are all normal responses¹⁵⁸ to sexual abuse. Still, disclosure, generally speaking, has more benefits¹⁵⁹ than detriments.

Parents & Older Students

As for parents,¹⁶⁰ the main advice under this prong concerns, investigative, procedural, and administrative mechanisms to ensure that children disclose abuse to their parents and that ensure that the appropriate official receives notice of harassment. First, in an investigative sense, parents and, teachers as well, should understand that children are “ideal victims” for extreme cases of sexual harassment.¹⁶¹ For this reason, parents should educate their children about sexual harassment, encouraging their children to disclose such behavior to them. If a parent suspects harassment by a school employee, in addition to reporting the harassment to an administrator¹⁶² in

¹⁵⁴ See, *infra* note 226; Cf. *Alexander v. Yale*, 631 F.2d 178, 180 (2nd Cir. 1980) (noting Yale’s refusal to “consider seriously” the complaints of harassment by plaintiffs).

¹⁵⁵ See, e.g., *Alston*, 304 F.Supp. 2d 777 (supervisor asked, “what did you do to make him think you were interested in him?”); Cf. (Ann Wolbert Burgess, *Public Beliefs and Attitudes Concerning Rape*, in PRACTICAL ASPECTS OF RAPE INVESTIGATION: A MULTIDISCIPLINARY APPROACH, 3,13 (Robert R. Hazlewood & Ann Wolbert Burgess eds., 1993) (“society in general is often equally quick to find the victim at fault”).

¹⁵⁶ See *Mandsager*, 269 F.Supp. 2d at 670 (where harassing professor forced complaining philosophy student to make a presentation on sexual harassment in class after student complained to department head).

¹⁵⁷ *Litman*, 186 F.3d at 548 (where student who disclosed sexual harassment was herself charged with and found guilty of sexual harassment by university’s judicial board, expelled from the university, but later cleared of charges by district court).

¹⁵⁸ Burgess, *supra* note 155, at 13.

¹⁵⁹ Oftentimes, a benefit may be that disclosure causes other victims to come forward, forcing the institution to address harassment. See Layman, *supra* note 22, at 85 (noting that one of the first cases involving a private right of action under the statute, *Alexander v. Yale* involved four other students and a professor coming forward alleging harassment when one student filed suit) (citing *Alexander v. Yale*, 459 F.Supp. 1 (D. Conn. 1977))).

¹⁶⁰ Some advice here also applies to older students.

¹⁶¹ K.V. Lanning, *Child Molesters – A Behavioral Analysis for Law Enforcement*, in PRACTICAL ASPECTS OF RAPE INVESTIGATION: A MULTIDISCIPLINARY APPROACH, 201, 246 (Robert R. Hazlewood & Ann Wolbert Burgess eds., 1993) (noting that children are “ideal victims” because of certain characteristics of children: “naturally curious,” “easily led by adults,” “need for attention and affection,” “need to defy parents,” and “children are poor witnesses.”).

¹⁶² Often and not surprisingly, the school will claim no knowledge of misdeeds *until the parent of the*

accord with school policy,¹⁶³ she should call a meeting¹⁶⁴ with the administrator, herself, and the student. In extreme cases of child molestation, parents may want to contact police.¹⁶⁵ Further she should ask a school administrator if there have been any past complaints¹⁶⁶ about the official, documenting every discussion with an official about the harassment. In addition, she should consider asking other parents if they have had any problems with the official.¹⁶⁷ If these investigations result in no, or insufficient action by the school, procedurally, the parent should formally contact both the superintendent and the school board.¹⁶⁸ Finally, parents should also consider the administrative mechanism of filing a complaint with the OCR because anyone may file such a complaint and initiate an investigation under Title IX.¹⁶⁹

Teachers

Teachers as educational actors, due to compulsory education laws¹⁷⁰ and

student complains. Cf. *Davis* 526 U.S. at 635 (teacher denied students' request to talk with principal). So, after disclosure, filing a complaint formally or informally is the next critical step. See, e.g., *Kansas City*, 265 F.3d at 657.

¹⁶³ "Pursuant for the policies of the School District, Plaintiffs appropriately reported [the harassing student's] conduct to teachers, guidance counselors, and vice principals, who should have conveyed these reports to the building principal." See *Jones* at *34. Thus, courts reward students who follow school district policies.

¹⁶⁴ This is what the parent in *Flores* did upon learning that a teacher harassed her daughter. 115 F.Supp. 2d at 321.

¹⁶⁵ See *Hart v. Paint Valley Sch. Dist.*, 2002 WL 31951264, *1 (S.D. Ohio) (where parent reported directly to police when teacher fondled her fourth-grade child) [hereinafter *Hart*].

¹⁶⁶ *Delgado*, 367 F.3d 670 (noting that although the harassing teacher had a previous sexual harassment claim 10 years prior, the plaintiff made no use of the past complaint in her pleading).

¹⁶⁷ *Gebser*, 524 U.S. at 278 (noting that two parents complained about inappropriate comments of harassing teacher). There may of course be defamation laws that limit the extent of such discussions, but parents should know that truth is an ultimate defense to such claims.

¹⁶⁸ *Floyd*, 133 F.3d at 792 ("School superintendents and school board members are local public officials to whom letters are easily sent and who often appear at public meetings and receive constituent phone calls."); See also, *Jones* at *15 (parent tried to schedule minutes at next meeting to address harassment claim).

¹⁶⁹ A concerned parent, teacher, fellow student, or citizen may file a complaint online at <http://wdcrobcopl01.ed.gov/CFAPPS/OCR/complaintform.cfm>. Note that filing a complaint will not ensure that a court will find that an appropriate official received actual notice as this was precisely what happened in *Gebser*. But, if a school retaliates against the student or parent for filing the complaint, likely there will be a new, separate action; Cf. *Jackson*, 125 S. Ct. at 1502 (allowing coach to bring private retaliation action when school removed coach from his position).

¹⁷⁰ See, e.g., O.C.G.A. § 20-2-690.1 (2005); The Eighth Circuit rejected the argument that teachers are

mandatory reporting laws¹⁷¹ play a critical investigatory role in discovering abuse and preventing harassment. For this reason, it is absolutely imperative that non-offending teachers¹⁷² disclose their suspicions of sexual harassment or abuse to administrators.¹⁷³ Further, making even simple acts, like checking desks for harassing graffiti,¹⁷⁴ a part of weekly classroom procedure can go far in preventing harassment.¹⁷⁵

Administrators

For administrators, certain procedural, investigative, and administrative mechanisms will help administrators protect students from harm and their school from liability by using Title IX. First, procedurally and administratively, a school district should set forth student and staff policies¹⁷⁶ on sexual harassment,¹⁷⁷ establishing not only who is the district's Title IX coordinator,¹⁷⁸ but designating who is an "appropriate official" in the district's schools. Other important procedural steps are annual review of

appropriate officials because of their mandatory reporting duties under state law. *Kansas City* 265 F.3d at 662-663.

¹⁷¹ See, e.g., O.C.G.A. § 19-7-5 (2005) (requiring teachers to report sexual abuse and penalizing nondisclosure with a misdemeanor criminal punishment).

¹⁷² Offending teachers: just because statutory rape laws are not violated, there may still be significant financial and legal ramifications. See e.g., MASS. ANN. LAWS ch. 151C, §2(g) (2005) (defining sexual harassment by a teacher as an unfair educational practice); See, *supra* note 171.

¹⁷³ Hopefully, such procedural actions are part of the school district's harassment policy. Other incentives for teachers to disclose are the chance of criminal punishment. For example, in some states, non-disclosure of a reasonable suspicion of sexual harassment is a criminal offense in some states. See, *supra* note 171 and *infra* note 173. Further, legal costs for settlements, attorneys, and trials divert funds from money that could pay teacher salaries. See *Theno* at *1 (upholding \$250,000 jury verdict under Title IX); Finally, there is a moral-political issue of blameworthiness Cf. *Kansas City*, 265 F.3d 657 (where teachers knew another teacher abused student but administrator claimed no teacher ever disclosed suspicion of abuse).

¹⁷⁴ Layman, *supra* note 22, at 39 (discussing settlement in Minnesota where student recovered \$15,000 for graffiti in bathroom stall).

¹⁷⁵ Layman, *supra* note 22, at 149.

¹⁷⁶ Layman, *supra* note 22, at 122.

¹⁷⁷ The *Code of Federal Regulations* requires this for funds recipients, particularly school districts, 34 C.F.R. § 106.9 (2005); surprisingly, many schools are not complying with this administrative rule. See Dear Colleague Letter from Kenneth L. Marcus, U.S. Department of Education, to Elementary and Secondary Schools, available at http://www.ed.gov/about/offices/list/ocr/responsibilities_ix.html (last revised July 2005) ([A, 2002.] OCR [review] . . . found in several instances that recipients have not complied . . . include[ing] the failure to have and / or disseminate notice of the nondiscrimination policy"); the school may want to provide a separate policy for child molestation allegations. Cf. *Booker* at *1.

¹⁷⁸ This is also required by the *Code*. 34 C.F.R. § 106.9 (2005).

the policy and periodic training¹⁷⁹ of administrators¹⁸⁰ and faculty on how to recognize and comply with the policy.¹⁸¹ The policy should ensure an adequate reporting system that requires the principal to review all harassment complaints so that credible complaints receive a proper investigation.¹⁸² As Kaplin said, “avoiding liability should seldom be the highest value[.] . . . Gebser-Davis liability standards should become a floor for institutions and not a ceiling.”¹⁸³ It is true that failing to have a policy in place, by itself, will not lead to liability necessarily.¹⁸⁴ But, courts will reward school districts that follow their own anti-harassment policies by not attaching liability.¹⁸⁵ Further, in an investigative sense, communicating such policies to students *works* by preventing and revealing harassment.¹⁸⁶ But, from a procedural standpoint, in communicating this policy, administrators should make sure that they do not: (a) maintain the myth that Title IX only involves athletics;¹⁸⁷ and (b) present sexual harassment as merely a “women’s issue.”¹⁸⁸

¹⁷⁹ Layman, *supra* note 22, at 123.

¹⁸⁰ Layman, *supra* note 22, at 123.

¹⁸¹ For administrators, this procedural component is especially important for liability purposes. The court in *Booker*, where the designated Title IX Equity Officer failed to follow the city Child Abuse Policy, which required her to report to the state Department of Social Services (DSS), resulted in the court allowing the claim to proceed. Sadly, because the Equity Officer only consulted with the school district’s lawyer, the abuse went on for six to eight weeks. The court stipulated that the DSS would have separated the students on the same day they complained. *Booker* at *1-2. Normally, however, courts will reward consultation with counsel as evidence that the school was not deliberately indifferent. See *Frye v. Board of Educ.*, 1999 U.S. App. LEXIS 759, *5 (4th Cir) (discussing how principal met with the school board’s lawyer to consider “legal options” three days after student reported harassment as non-liability factor) [hereinafter *Frye*].

¹⁸² For serious complaints, students and the teacher should be separated that day. *Cf. Booker* at *1.

¹⁸³ Kaplin, *supra* note 11, at 18.

¹⁸⁴ *Cf. Gebser*, 524 U.S. at 278 (district had no anti-harassment policy in place); *But see Booker* at *3 (noting that all school officials “not only had the authority but the *obligation* [per school policy and state law] to . . . end [the harassment].”).

¹⁸⁵ *Cf. Kinman*, 171 F.3d at 609 (finding no deliberate indifference when school terminated harassing employee for violating school policy forbidding dating students within two years from student’s graduation). Also, as the federal courts incorporate more of Title VII’s case law, it is likely that per *Ellerth*, federal courts will allow school districts to assert anti-harassment policies as affirmative defenses. 524 U.S. 742 (1998). See also, *infra* note 210 concerning background checks.

¹⁸⁶ See, *supra* note 132; See, *supra* note 3 regarding Justice Scalia’s comment.

¹⁸⁷ Layman, *supra* note 22, at 85.

¹⁸⁸ Layman, *supra* note 22, at 85.

Legislators

Finally, legislators play an important role procedurally under the appropriate official prong. Here, to promote clarity in the law, state legislators should set forth who is an appropriate official for Title IX purposes; the most logical approach would probably be to define the principal and Title IX coordinator of a school as an appropriate officials.¹⁸⁹ Moreover, in any statute protecting a teacher's employment, the legislature should realize that depriving principals of firing power may affect Title IX liability negatively.¹⁹⁰ Legislators should leave some residual power to principals to take concrete action to end abuse and preserve the incentive to end sexual harassment in schools by avoiding federal Title IX liability.

IV. INFORMATION SUFFICIENT TO "ACTUALIZE" NOTICE: PRONG TWO

A. CATALOGING THE "ACTUAL NOTICE" (SUBSTANTIAL RISK) PRONG

In order for an appropriate official to have notice, the information the official receives must indicate that the alleged perpetrator poses a "substantial risk" of sexually harassing students.¹⁹¹ Thus, the administrator must be aware of some facts indicative of a likelihood of discrimination¹⁹² that, if left unaddressed, will materialize in sexual harassment.¹⁹³ Though this substantial risk standard is not satisfied by "simple reports of inappropriate conduct"¹⁹⁴ or the subjective fears of the student,¹⁹⁵ prior complaints,¹⁹⁶

¹⁸⁹ This seems the most consistent with *Gebser*. See, *supra* §I.B and the discussion of *Rosa*.

¹⁹⁰ See, *supra* note 126.

¹⁹¹ *Rosa*, 106 F.3d 653; though, some courts advocate a lower standard of merely knowing that student was "at risk" of harassment. See, e.g., *Frederick*, 149 F.Supp. 2d at 838. Rejecting the mere "at risk" approach, Posner articulates the standard best by suggesting the risk must be "obvious." *Delgado*, 367 F.3d at 672. See, *infra* note 193.

¹⁹² *Massey*, 82 F.Supp. 2d at 744 ("For actual notice to exist, an agent of the school must be aware of facts that indicate a likelihood of discrimination.").

¹⁹³ *Delgado* 367 F.3d at 672 ("'known' or 'obvious' risk [is one] that makes a failure to take steps against it reckless . . . [these are] risks so great that they are almost certain to materialize if nothing is done" (relying on penal case law) citations omitted)).

¹⁹⁴ "[I]t is clear that actual notice requires more than a simple report of inappropriate conduct by a teacher." *Doe v. School Dist, No. 19*, 66 F.Supp. 2d 57, 63 (D. Me. 1999). [hereinafter *Number 19*].

¹⁹⁵ *Davis v. Dekalb Sch. Dist.*, 233 F.3d 1367, 1373 (11th Cir. 2000) (Student's fear of "perceived imminent touching could not, as a matter of law, apprise Defendants to the possibility that [the teacher] was

reports,¹⁹⁷ and communications¹⁹⁸ about acts of harassment¹⁹⁹ constitute the primary means of informing administrators that an employee is at risk of harassing a student.

The phrase “actual notice” is misleading. Administrators should not fall into believing that this standard requires that they have *actual knowledge of the current abuse* of a student.²⁰⁰ Nor should administrators think that the standard requires that they have “clearly credible evidence”²⁰¹ before a court will find that they have sufficient notice, as some courts are especially lenient in finding a substantial risk.²⁰²

Catalogs three, four, and five indicate a list of factors courts look at in determining whether an official was aware of a substantial risk of sexual harassment. They reveal a distinction between different types of inappropriate conduct: simple sexual conduct, non-sexual inappropriate conduct, and sexually inappropriate conduct indicating a likelihood of discrimination. Non-sexual conduct, while not in itself establishing liability, can have a persuasive affect in establishing a claim.²⁰³ The fundamental distinction between simple sexual and sexually inappropriate conduct is the extent of the touching involved. Often, litigated simple sexual conduct involves little or no touching and only sparse sexually inappropriate comments.²⁰⁴ However, at some point, repeated

sexually molesting [students].”) [hereinafter *Dekalb*].

¹⁹⁶ *Hart* at *6 (“[T]he actual notice standard is met when an appropriate official has actual knowledge of a substantial risk of abuse to children in the school based on prior complaint of other students.”).

¹⁹⁷ *Id.* (noting that eyewitness reported she viewed teacher touching students under table).

¹⁹⁸ *Massey*, 82 F.Supp. 2d at 744 (“[The question] is whether a legally appropriate representative . . . was aware of facts – via any channel of communication – indicating a hostile environment.”).

¹⁹⁹ *Delgado*, 367 F.3d at 672 (noting *Davis* “required knowledge only of ‘acts of sexual harassment’”) (526 U.S. at 641 (1999)).

²⁰⁰ *Id. Contra, Baynard*, 268 F.3d at 238 (“Although [the school official] certainly should have been aware of the potential for such abuse . . . there is no evidence in the record to support a conclusion that Malone was in fact aware that a student was being abused.”).

²⁰¹ *Number 19*, 66 F.Supp. 2d at 63 (“The [standard] does not set the bar so high that a school district is not put on notice until it receives a clearly credible report of sexual abuse from the plaintiff-student.”)

²⁰² “While the complaints may be unsubstantiated by corroborating evidence and denied by the allegedly offending teacher, whether such complaints put the school district on notice of a substantial risk to students posed by a teacher is usually question for the jury.” *Hart* at *6 ; See also, *Massey*, 82 F.Supp. 2d at 739 (district had notice despite police department finding previous allegations of child molestation inconclusive).

²⁰³ Administrators should be just as worried about this behavior.

²⁰⁴ See, *infra* note 219 & 220.

incidental touchings²⁰⁵ yield sufficient notice of for a plaintiff to bring an action. Finally, Catalog four shows other non-sexual factors associated with a finding of substantial risk. These factors mostly relate to procedural aspects of the claim. The most important factor under Catalog four is jurisdiction.²⁰⁶

B. GUIDANCE FOR EDUCATIONAL ACTORS AND PRONG TWO

Administrators

Here, the primary advice for educational actors involves administrators, teachers, and parents. Procedurally, administrators should make certain that all teachers they employ have undergone extensive background checks, keeping in mind that, for some courts, no complaint about sexual abuse is too “old” or too insignificant to provide notice of a substantial risk of the sexual harassment of a student. Nor can administrators necessarily trust the recommendations of other schools.²⁰⁷ Thus, administrators may want to institute a policy of monitoring new teachers closely, looking for potential warning signs.²⁰⁸

From an investigative perspective, administrators should be open to receiving complaints by maintaining sensitivity for both the victim and the alleged harasser.²⁰⁹ From a day-to-day maintenance perspective, administrators with school surveillance systems should *use them* because, although sexual harassment often occurs off-campus,²¹⁰ sometimes abuse does occur on school grounds.²¹¹ Last, administrators

²⁰⁵ See, *infra* note 218.

²⁰⁶ See, *supra* note 126.

²⁰⁷ See *Shrum v. Kluck*, 249 F.3d 773, 776 (8th Cir. 2001) (molester secured positive recommendation from previous school because school feared termination without due process lawsuit) [hereinafter *Shrum*].

²⁰⁸ See, *infra* Catalogs 3 and 4.

²⁰⁹ Examples of insensitive administrators in the case law are numerous. See *Number 19*, 66 F.Supp. 2d at 60 (where, when teacher reported her suspicion that another teacher sexually abused students, administrator responded by saying that teacher “could be sued for slander”); See also *Mandsager*, 269 F.Supp. 2d at 675 (upon receiving complaint, dean noted that student would be complaining against “highly regarded” faculty member).

²¹⁰ Administrators should not mistakenly believe that because harassment occurs off-campus, they are not liable. During oral argument in *Davis*, Scalia asked counsel for respondent about off-campus

should monitor inappropriate conduct²¹² of a nonsexual nature by teachers and advise against such conduct.

Teachers

If teachers suspect sexual abuse, procedurally, teachers should make sure their complaints to administrators indicate problems of a *sexual* nature.²¹³ Additionally, teachers should understand that Title IX protects them when they make complaints through a retaliation cause of action. Though the contours of a retaliation claim under Title IX are still rough, the Supreme Court recently made clear that such claims are within Title IX's reach.²¹⁴

Parents

Finally, under this prong, the primary advice to parents is investigative. Lethargic complacency should not characterize sexual harassment complaints—not on the part of parents, students, teachers, or administrators.²¹⁵ A sad reality of the typical educational system is a lack of initial and periodic reviews of teachers' backgrounds. Sometimes, administrators may assume that a teacher's background complies with school hiring requirements.²¹⁶ If a parent seriously suspects a teacher of sexual abuse, they may want to check sex offender registries in their state. Further, busy administrators may

harassment by students to which counsel replied, "[T]here is an extent to which schools can assert jurisdiction for misbehavior that occurs off the school grounds" [in Georgia]." *Davis Transcript*, at * 41; See also *Jones*, at *39 (administrator mistakenly reasoned that school could "do-nothing" since harassment occurred in school parking lot, which was not "school grounds").

²¹¹ See *Sherman*, 80 F.Supp. 2d at 1367 (where janitor raped student by taking her to building which there were no surveillance cameras); close monitoring of sexual harassment is a factor courts use in finding no deliberate indifference. See *Dekalb*, 233 F.3d at 1375 (where administrator monitored alleged harasser closely after report).

²¹² See, *infra* Catalog 3.

²¹³ Simply reporting inappropriate conduct without a sexual complaint may not trigger an investigation at all. See, *supra* note 141 and discussion of *Kansas City* case.

²¹⁴ *Jackson*, 125 S. Ct. at 1502; *But see, supra* note 87.

²¹⁵ *Warren v. Good Reading Sch. Dist.*, 278 F.3d 163, 166 (3rd Cir. 2002) (involving principal who, after parent complained of abuse, said he was "too busy" to talk about accusations).

²¹⁶ This is particularly the case where a teacher transfer in to the school. See *Doe v. Warren Consol. Sch.*, Fed. Appx. 812, 815 (6th Cir. 2004) (administrator claimed he, "assumed that [the molester] had been properly screened").

need reminding of their obligations to protect students by persistent communication of dissatisfaction, perhaps including the filing of a criminal complaint.²¹⁷

²¹⁷ See e.g., *Hart*, at *2 (describing how school board member testified “that he was not interested in the results of [the principal’s investigation of claims that teacher fondled a student] because the parents had not felt strongly enough about the allegations to file a criminal complaint”); See also, *Gordon v. Ottumwa Comm. Sch. Dist.*, 115 F.Supp. 2d 1077, 1082 (S.D. Iowa 2000) (where parent called police to complain, noting that the “manner in which [the complaint] was reported” was a summary judgment factor).

Catalog 3: No Substantial Risk
<i>Simple Inappropriate Conduct</i>
<i>Simple Sexual</i>
<ul style="list-style-type: none"> - Incidental touching during flag football game²¹⁸ - Slap on student's thigh²¹⁹ - "Unspecified incidents of sexual harassment at other schools"²²⁰ - Wearing suggestive clothing²²¹ - Sexual comments,²²² innuendo, or insinuations²²³ unaccompanied by touching / advances
<i>Inappropriate Non-Sexual</i>
<ul style="list-style-type: none"> - Personal time with student,²²⁴ - Profanity,²²⁵ - Driving students home,²²⁶ - Gifts,²²⁷ - Taking students to house,²²⁸ - Corporal discipline²²⁹ - Assisting in cutting class²³⁰

²¹⁸ *Dekalb*, 233 F.3d at 1373 (no claim, though the court expressed concern with female student playing center).

²¹⁹ *Gorden*, 115 F.Supp. 2d at 1082 (three touchings reported, one in van on field trip on thigh was simple, while next complaint of facial slapping was not).

²²⁰ *Gonzalez v. Esparza*, 2003 WL 21834970, *3. (S.D.N.Y. 2003).

²²¹ *K.P. v. Corsey*, 228 F.Supp. 2d 547, 551 (N.J. 2002) (track coach's spandex running pants were not sufficient notice) [hereinafter *Corsey*].

²²² *Frederick*, 149 F.Supp. 2d at 829.

²²³ *Cf. Shelton* at *16 (finding no *prima facie* claim).

²²⁴ *Kansas City*, 265 F.3d at 662-663.

²²⁵ *Frederick*, 149 F.Supp. 2d at 838 n.12.

²²⁶ *Corsey*, 228 F.Supp. 2d at 551 (administrative warning about driving students in private car was to limit accident liability, not Title IX liability).

²²⁷ This applies to both student-to-teacher gifts and teacher-to-student gifts *Kansas City*, 265 F.3d at 656 (teacher-to-student); *Frederick*, 149 F.Supp. 2d at 838 ("the gift which [the student] gave [the professor] did nothing to indicate . . . sexual harassment").

²²⁸ *Hackett v. Fulton Sch. Dist.*, 238 F.Supp. 2d 1330, 1351 (N.D. Ga. 2002) (principal's negligent failure to investigate into teacher's "scholarship program" at his home that was actually an exercise in molestation did not impute notice).

²²⁹ *Doe v. Beaumont Indep. Sch. Dist.*, 8 F.Supp. 2d 596, 615 (E.D. Tex. 1998) (corporal punishment by teacher indicated only violent proclivities, not sexual abuse).

²³⁰ *Kansas City*, 265 F.3d at 656.

Catalog 4: Other Factors Indicating No Substantial Risk

- Change in student's behavior²³¹
- Previous sexual abuse of student suggesting falsity²³²
- Knowledge of same address as coach²³³
- Scope of employment responsibilities²³⁴
- Type of claim²³⁵
- Old complaints²³⁶
- Victim denials²³⁷
- Jurisdiction²³⁸

²³¹ *Cf. Simms*, at *3 (school nurse noticed change in behavior of sexually abused special education student).

²³² In a strange case of "blaming the victim," the court noted that a parent's admission during post-complaint meeting that the child was a survivor of sexual abuse undermined credibility of different complaint against a teacher. *Doe v. Beaumont Indep. Sch. Dist.*, 8 F.Supp. 2d 596, 612 (E.D. Tex. 1998).

²³³ *Turner v. McQuarter*, 79 F.Supp. 2d 911, 915 (N.D. Ill. 1999) (refusing to find actual notice where school records showed that student listed same residence address as sexually harassing coach).

²³⁴ *See, supra* note 109.

²³⁵ One court has held that *quid pro quo* and hostile environment claims require different notice burdens. *Johnson v. Galen Health. Inst.*, 267 F.Supp. 2d 679, 689 (W.D. Ky. 2003) ("notice of a tendency to create a sexually offensive environment and notice of a tendency to sexually proposition a student are very different"). Courts have not generated much discussion of this issue and probably nothing will come of it. *See, supra* note 110.

²³⁶ *P.H. v. School Dist. of Kansas City*, 265 F.3d 653, 660 (8th Cir. 2001) ("one 20-year-old complaint is not itself a sufficient basis on which to infer that the [school] had notice"); *But see Hart* at *8 (1976 and 1990 complaints showed notice).

²³⁷ *Id.*; *Contra, Doe A. v. Green*, 298 F.Supp. 2d 1025, 1033 (D. Nev. 2004) ("without citing any authority . . . Defendants . . . argue that [the student's] denials . . . about a relationship . . . negate [a finding of notice].")

²³⁸ The Fourth and Eleventh Circuits are both hostile to Title IX claims generally. *See, e.g., Hackett v. Fulton Sch. Dist.*, 238 F.Supp. 2d 1330, (N.D. Ga. 2002) (admitting that appropriate official had notice, failed to investigate the incident, but still granting school summary judgment); *See also, supra* note 126. In Georgia, plaintiffs are better off litigating in state court and hoping for no removal.

Catalog 5: Factors Indicating Substantial Risk
<u><i>Indicating Likelihood of Discrimination</i></u>
<i>Sexually Inappropriate Conduct</i>
<ul style="list-style-type: none"> - Sexual innuendo accompanied by touching²³⁹ - Inappropriate conduct coupled with sexual demands²⁴⁰ - Multiple complaints with an eyewitness²⁴¹ - Multiple sexual comments and advances²⁴² - Knowledge of possible history of pedophilia based on background checks²⁴³ - Knowledge that teacher dating a male student²⁴⁴ - Vague anonymous report that specific professor sexually harassing²⁴⁵ - Kissing,²⁴⁶ suggestive dancing,²⁴⁷ patting student's rear end²⁴⁸

V. DELIBERATE INDIFFERENCE AND ADMINISTRATORS²⁴⁹

A. CATALOGING THE DELIBERATE INDIFFERENCE PRONG

The deliberate indifference prong is the easiest way administrators may insulate their school districts from liability. In order to avoid liability under the statute, a school

²³⁹ *Morrison v. North Essex. Coll.*, 56 Mass. App. Ct. 784, 790 (2002) (where coach consistently made sexual references in conversations and eventually fondled a female student).

²⁴⁰ See, e.g., *Jennings v. University of N.C.*, 240 F.Supp. 2d 492, 496 (M.D.N.C. 2002) (where coach called students at home, made inappropriate comments and inappropriate physical contact).

²⁴¹ *Hart v. Paint Valley Local Sch. Dist.*, 2002 WL 31951264, *7 (S.D. Ohio) (two previous complaints of same type of harassment that occurred in the same manner and in the same school district, one of which involved 4 students complaining in addition to an eyewitness found sufficient).

²⁴² *Morrison*, 56 Mass. App. Ct. at 799 (coach found to be sexual predator, harassing multiple students).

²⁴³ *Massey v. Akron City Bd. of Educ.*, 82 F.Supp. 2d 735, 739-740 (N.D. Ohio 2000) (school did no background check, and ignored several reports that employee was a pedophile).

²⁴⁴ *Doe v. School Dist. No. 19*, 66 F.Supp. 2d 57, 63 (D. Me. 1999) (where principal had notice of rumors teacher dated students, and had sex with at least one male student).

²⁴⁵ *Wills v. Brown Univ.*, 184 F.3d 20, (1st Cir. 1999) (anonymous report to campus ombudsman of sexual harassment by professor sufficient when professor fondled different student one month later).

²⁴⁶ *Gorden v. Ottumwa Comm. Sch. Dist.*, 115 F.Supp. 2d at 1082 (S.D. Iowa 2000) (single report of facial kissing by teacher sufficient notice)

²⁴⁷ Cf. *Dist. No. 19*, 66 F.Supp. 2d 57, 60 (dirty dancing was one factor in rejecting dismissal as the court refrained from a specific holding because the *Gebser* standard was not extensively developed).

²⁴⁸ *Folkes v. New York Coll. of Osteopathic Med.*, 214 F.Supp. 2d 273, 285 (E.D.N.Y. 2002) (telling appropriate official that professor patted her buttocks was sufficient for student to survive summary judgment when school did not respond).

²⁴⁹ This section applies almost exclusively to administrators.

official must take objectively reasonable action²⁵⁰ to confront the complaint of sexual harassment. So long as the school official's response to a complaint is not "clearly unreasonable in light of known circumstances,"²⁵¹ a school district is not deliberately indifferent. Cataloging the prong shows that a safe *general* protocol for a school administrator to take in overseeing a sexual harassment claim is articulated in three steps: (1) *immediate confrontation and warning to the alleged harasser*, (2) *extensive investigation*, (3) *punishment or termination*.²⁵² To an extent, a court will respect an administrator's judgment about the substance of a complaint.²⁵³ For example, if an administrator, upon receiving a simple sexual conduct or non-sexual inappropriate conduct complaint,²⁵⁴ takes prompt monitoring action and notes improvement in the classroom environment, then a court should find no deliberate indifference.²⁵⁵

Deliberate Indifference Continuum

As Catalog six shows, a court's deliberate indifference analysis focuses on a continuum of responses administrators could potentially make to a complaint: (1) affirmative action to conceal sexual harassment;²⁵⁶ (2) no administrative action at all;²⁵⁷

²⁵⁰ "Individual liability thus turns on the objective legal reasonable of the defendant's actions." Doe v. Granbury Indep. Sch. Dist., 19 F.Supp. 2d 667, 670 (N.D. Tex. 1998).

²⁵¹ *Davis*, 526 U.S. at 648.

²⁵² As a general rule, if the school official initiates a temporary or permanent employment action against the harasser, the school district will not be deliberately indifferent. This brings in a termination issue involving due process for the accused. At the very least, the school should separate the student from the accused when complaints indicate a likelihood of discrimination. See, *supra* Catalog 5.

²⁵³ *Hart*, at *6 ("The district can escape liability if it can show ' . . . that [it] knew the underlying facts but believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or nonexistent") (citations omitted); Cf. Doe v. D'Agostino, 367 F.Supp. 2d. 157, 167 (D. Mass. 2005) (independent investigator concluded claims of hostile environment unsubstantiated) [hereinafter *D'Agostino*].

²⁵⁴ See, *supra* Catalog 3: No Substantial Risk & Catalog 4: Other Factors Indicating No Substantial Risk.

²⁵⁵ *D'Agostino*, 367 F.Supp 2d at 167 (noting that plaintiffs admitted in their pleadings that after complaint, situation improved, with no further incidents).

²⁵⁶ *Franklin v. Gwinnett Pub. Sch.*, 503 U.S. 60, 76 (1992); See also *Doe v. Warren Consol. Sch.*, 93 Fed. Appx. 812, 816 (6th Cir. 2004) (administrator, who was a personal friend of harasser who molested three students, told harasser on last day, "[d]on't worry about it, it's okay"); *Shrum v. Kluck*, 249 F.3d 773 (8th Cir. 2001); Cf., *Murrell v. School Dist. No. 1*, 186 F.3d 1238, 1244 (10th Cir. 1999) (teachers encouraged student not to tell mother about harassment).

²⁵⁷ See *Theno*, at *35 (reasoning deliberate indifference because, "a sufficiently significant number of school administrators essentially turned a blind eye to the harassment by ignoring, tolerating, or

(3) failing to follow grievance procedures;²⁵⁸ (4) failing to investigate adequately;²⁵⁹ (5) inadequately²⁶⁰ or (6) adequately responding to a complaint.

B. GUIDANCE FOR EDUCATIONAL ACTORS AND PRONG THREE

A court's determination that a response is adequate or clearly reasonable involves a division between administrative actions and investigatory actions.

Administratively, the school official demonstrates the "clarity" of their response through certain concrete actions, which depend on: (1) the timing of the response,²⁶¹ (2) the transparency of the response,²⁶² (3) the disclosures to, and advice received from, relevant third parties²⁶³ in regards to the response, and (4) any termination²⁶⁴ resulting

trivializing the harassment").

²⁵⁸ *Cf. Flores*, 115 F.Supp. 2d at 324 (finding deliberate indifference where administrator, failed to take any action, did not inform parent of Title IX complaint procedure, and did not notify Title IX coordinator of complaint).

²⁵⁹ Specific examples include: not investigating, partially investigating, not interviewing the victim, and not interviewing the harasser. *Number 19*, 66 F.Supp. 2d at 64 (administrator failed to investigate at all when teacher reported suspicions that another teacher was sexually abusing students); *Landon ex rel Municipi v. Oswego Unit Sch. Dist.*, 2001 WL 649560, *5 (N.D. Ill. 2001) (administrator relied on partial evidence from an inadequate video reporting system and failed to interview complaining student); *Cf. Alston*, 304 F.Supp. 2d at 777-781 (a cursory opinion, where apparently supervisor only investigated victim); *But Cf. Frye*, at *5 (immediate investigation of simple inappropriate conduct when principal heard student in office alone with coach then later, handwriting analysis of notes given to student and coach's).

²⁶⁰ In analyzing the inadequacy or unreasonableness of a response, courts look at whether the institution: took protective measures, learned the initial response to the complaint failed, acted with responses that consistently do nothing, and merely talked to the harasser. *See Jones*, at *39 (noting that school failed to assign aides to protect student from another student harasser); *Hart* at *8 n.16; *Chontos v. Rhea*, 29 F.Supp. 2d 931, 937 (N.D. Ind. 1998) (university did not follow through with threat of firing professor for another harassment).

²⁶¹ *See Hayut v. State Univ. of N.Y.*, 352 F.3d 733, 751-752 (2nd Cir. 2003) (noting how administrator's timely reaction to first complaint of student with hour-long inquiry meeting, adherence to all school procedures, notification of necessity for filing a written complaint, notification to student's academic advisor and professor's department chair, and suggestion for student to follow-up with administrator personally if dissatisfied in response all indicated a lack of indifference); *See also Leach v. Evansville-Vanderburgh Sch. Corp.*, 2000 U.S. Dist. Lexis 20541, *26-27 (S.D. Ind.) (noting that upon receiving complaint of non-sexual inappropriate conduct, principal immediately went to the harasser's office and advised not to spend time with student).

²⁶² In this context, "transparency" by an educational actor means the court examines whether the administrator disclosed complaint procedures or engaged in other forthcoming behavior. *See, supra* notes 258 & 261.

²⁶³ Courts place high value on meetings administrators initiate with legal counsel, social workers, parents and other teachers. *See e.g., Frye*, at *5 ("That same day,[the principal] alerted his superiors of the allegation and began to compile the information necessary to complete an investigation. Three school days later, [he] met with the Board's legal counsel . . . to catalogue the Board's legal options . . . should

from the response. From an investigatory stance, a school official demonstrates clear reasonableness by seeking information from multiple sources²⁶⁵ and by closely monitoring the accused harasser.²⁶⁶

Administrators, Parents, Teachers & Cooperation

With this clear-cut catalogue of factors in mind, administrators should step back and realize that due to the myriad of federal laws that apply to education, murky, seemingly “impossible” situations²⁶⁷ will confront them. Still, if administrators comport their actions in accord with this catalogue, they will significantly reduce the chances a court finds their district liable; concomitantly, they will help combat sexual harassment using Title IX by, if not preventing future abuse, at the very least, initiating the process of healing for a victim. No suggested behavior under the deliberate indifference prong mandates that students and their parents are the enemies of school officials – what the prong does emphasize is cooperation among educational actors in addressing sexual harassment. Title IX cannot turn back time. Parents must understand this axiom and, while vigorously asserting their own rights under state and federal law, cooperate with administrators when complaining. This cooperation among parents,²⁶⁸ teachers, and school officials fostered by Title IX’s case laws law depends on the leadership of school administrators. If they respond to complaints in the manner outline in catalog six, which essentially emphasizes prompt, transparent actions, then they can prevent future abuse, and avoid federal liability.

the allegations prove true. Within a week's time, [he] . . . visited [the student's] home to speak directly with her mother.”).

²⁶⁴ Courts look at both temporary and permanent terminations of the accused harasser’s employment under this prong or, at the very least, terminating the harasser’s ability to see the victim. See, e.g., *Leach* at *28 (suspension); *Kinman*, 171 F.3d at 609 (termination); *Frye* at *5 (removing student from class); *H.M. v. Jefferson Brd. of Educ.*, 719 So.2d 793, 794 (Ala. 1998) (leave)

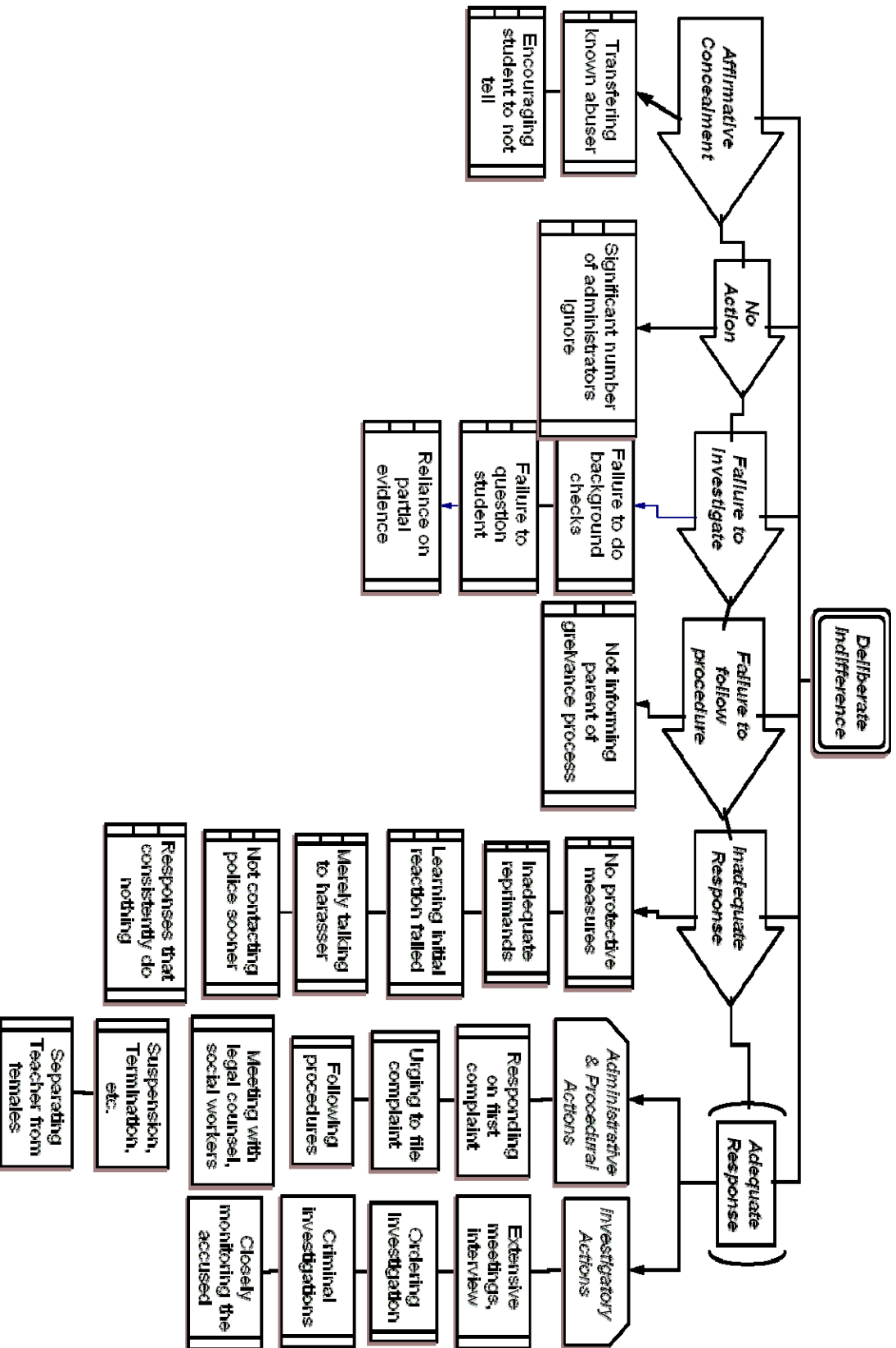
²⁶⁵ See, *supra* note 259.

²⁶⁶ See *Dekalb*, 233 F.3d at 1375; *Cf. D’Agostino*, 367 F.Supp. 2d at 167(principal sat-in on teacher’s class).

²⁶⁷ See *Jones*, at *1 (student harasser was a special education student to whom IDEA protection applies).

²⁶⁸ Parents should cooperate in preventing harassment *by their own children*. See *Davis Transcript* at *14.

Catalog 6: Deliberate Indifference



VI. CONCLUSIONS

Title IX litigation is not exclusive to disputes involving intercollegiate athletics. Though many have written on the subject of liability under Title IX's implied private right of action for sexual harassment, the literature lacked a recent,²⁶⁹ practical handbook for educational actors. The goal of this comment was to fill that void by examining each prong of the *Gebser* standard using an effective factor-based, catalogue analysis in light of the historic and procedural background of Title IX and the *Gebser* decision.

Historically, the *Gebser* decision articulated an actual notice standard, which, based on the *Rosa* decision, contained elements of an intentional discrimination and heightened constructive notice standard. Procedurally, Title IX's backdrop is the persuasive authority of Title VII, and a plaintiff states a *prima facie* case by pleading either *quid pro quo*, hostile environment, or, more recently, retaliatory sexual harassment.

Under prong one, although there is high jurisdictional variance as to what constitutes an "appropriate official," the case law allows a cataloging of generalized and particularized officials. Actors such as students, parents, and teachers under this prong should ensure that their actions foster disclosure, realizing that common negative consequences often ensue and the unique nature of child victims; complaint procedures exist under Title IX and usually at the educational institution to enable such disclosure. Accordingly, administrators should be sensitive to complainants and make sure that *Gebser's* liability standards are not "the ceiling"²⁷⁰ of their anti-harassment procedures.

Under prong two, cataloging the case law reveals the distinction between simple sexual and non-sexual inappropriate conduct, which does not provide notice of a substantial risk of sexual abuse and sexually inappropriate conduct indicating an intent

²⁶⁹ Layman's work is a good guide to Title IX, but it's coverage only extends to 1993, before *Gebser*. Layman, *supra* at note 22, at 148.

²⁷⁰ Kaplin, *supra* note 11, at 183.

to discriminate, which does. Administrators should initiate extensive background checks. Teachers should make sure to communicate complaints to administrative officials, indicating any suspicion of sexual conduct. Parents should persist if a teacher's conduct raises their suspicions.

Finally, under prong three, cataloging the case law reveals a continuum of deliberate indifference beginning with responses constituting affirmative concealment and extending all the way to adequate or clearly reasonable responses. Here, the advice to administrators is simply adhere to this continuum with objectively reasonable administrative and investigatory actions. Further, administrators should keep in mind that sometimes they may be faced with a no-win situation because of multiple obligations under federal law. Lastly, and perhaps most importantly, educational actors should cooperate with one another – Title IX's effectiveness in preventing sexual harassment depends on it.

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