

Amicus Curiae Briefs Education Law

Athletics/ Title IX

Case: *Cook v. Colgate University*

Court: U.S. Court of Appeals for the Second Circuit, 1993

Amicus Brief: National Women's Law Center

Case: Colgate, a private university, has a male varsity ice hockey team and a female club ice hockey team. Due to Colgate's continuing failure to upgrade the club team to one of varsity status, plaintiffs, all former members of Colgate's women's club ice hockey team, brought an action alleging that Colgate's failure to provide a comparable ice hockey program to male and female students violated Title IX of the Education Amendments of 1972, as well as the Fifth and Fourteenth Amendments to the Constitution. Colgate argued that its compliance with Title IX should be measured by its overall athletic program and not by a sport-to-sport comparison. The District Court agreed that the disparate treatment of the teams violated Title IX and ordered Colgate to elevate its women's club ice hockey team to varsity status and to provide equal funding and benefits to its men's and women's ice hockey programs.

Amicus Brief: This brief argues that the Court should uphold the lower court's decision because Title IX requires Colgate to institute a varsity ice hockey program for women due to the fact that it offers one for males, women have historically been limited in their athletic opportunities, and there is adequate interest to support a women's varsity team.

CWEALF: CWEALF has demonstrated a long history of fighting for gender equality and has specifically been involved in Title IX issues. CWEALF joins this brief in an effort to mandate that the university meet its Title IX obligation and support men's and women's athletics equally.

Holding: Colgate appealed the District Court's ruling. It argued that the action had become moot because that year's ice hockey season had ended and all of the plaintiffs were graduating before the end of that academic year. The Court of Appeals for the Second Circuit stated that they agreed with Colgate that the controversy was moot, vacated the judgment of the District Court, and remanded with instructions to dismiss the action.

Case: *Cohen v. Brown University*

Court: United States Court of Appeals for the First Circuit, 1996

Amicus Brief: National Women's Law Center

Case: Brown University appealed a decision requiring it to add four additional varsity sports for women. This appeal followed a ruling by the United States District Court in Providence that Brown discriminated against women in its intercollegiate athletic program. Brown is attacking the longstanding test for Title IX compliance in this area that was adopted by the federal agency charged with enforcing Title IX. Under this test, an institution may comply with Title IX in any of the following three ways: (1) by providing participation opportunities to both sexes in numbers substantially proportionate to their enrollment; (2) by demonstrating a history and continuing practice of program expansion for the underrepresented sex; or (3) by fully and effectively accommodating the athletic interest and abilities of the underreported sex. Brown

argues that men are more interested in playing sports that are women and, therefore, the three-part test discriminates against men.

Amicus Brief: The brief argues that Congress's intent in enacting Title IX was to remedy sex discrimination in intercollegiate athletics. A success by Brown would halt the progress that has been made toward expanding women's athletic opportunities. The brief also challenges Brown's assertion that men are more interested in sports than women and defends the three-part test, arguing that the test is entitled to substantial deference as it is an agency's interpretation of its own policy. The brief further argues that the three-prong test is not unconstitutional for it seeks to remedy past discrimination in the area of intercollegiate athletics.

CWEALF: CWEALF joined the brief because CWEALF recognizes the value that playing sports has for women and girls. CWEALF strongly believes that any weakening of Title IX enforcement will have a detrimental effect on equal athletic opportunities for female students.

Holding: The First Circuit rejected Brown's appeal but gave the University latitude in determining how to comply.

Case: *Klinger v. Department of Corrections*

Court: United States Court of Appeals for the Eighth Circuit, 1997

Amicus Brief: The National Women's Law Center

Case: The female prisoners incarcerated at the Nebraska Center for Women (NCW), brought a 1983 action alleging that the Nebraska Department of Correctional Services (DCS) violated their rights under the equal protection clause as well as under Title IX of the Education Amendments by failing to provide equal educational opportunities for male and female Nebraska prisoners. The prisoners also claimed that defendants violated their right of meaningful access to the courts by failing to provide them with an adequate law library. On appeal, the Court reversed the District Court's finding of an equal protection violation and remanded the case to the District Court, which issued three opinions. The Court of Appeals for the Eighth Circuit affirmed the District's judgment in favor of defendants on plaintiff's Title IX claim, reversed the District Court's judgment in favor of plaintiffs on the access-to-courts claim, and vacate the award of attorney's fees and expenses.

Amicus Brief: This brief first argues that the Court has misapplied the Court's gender-based equal protection jurisprudence by adopting a similarly situated test as a threshold to further review under the Equal Protection Clause. The similarly situated analysis has been used in conjunction with the heightened scrutiny test, not as a substitute for it. This analysis subverts the purpose of heightened scrutiny. Additionally, the Eighth Circuit Court ignored controlling Supreme Court precedent by requiring an additional showing of an intent to discriminate in a facial discrimination case. A showing of intentional discrimination is only necessary when a facially neutral law is challenged as having a disparate impact on a protected group.

CWEALF: CWEALF joined this brief because it believes in equal treatment of both men and women. In this case, men and women were treated differently in a situation where the women had no recourse. CWEALF hopes to encourage equal treatment for both sexes and discourage sexism.

Holding: The Court of Appeals for the Eighth Circuit affirmed the District Court's judgment in favor of defendants on plaintiff's Title IX claim, reversed the District Court's judgment in favor of plaintiffs on the access-to-courts claim, and vacated the award of attorney's fees and expenses.

Case: *Boucher v. Syracuse University*

Court: United States Court of Appeals for the Second Circuit, 1999.

Amicus Brief: National Women's Law Center

Case: Female athletes filed suit against Syracuse in 1995, seeking greater participation opportunities for women athletes. At the time, Syracuse had not added a team for women since 1982 despite very large gaps in women's athletic participation compared to women's enrollment. In a ruling for Syracuse, the District Court found that the University met the three-part test for participation opportunities, specifically finding that the University met the second prong of the test for women's expansion. The plaintiffs appealed.

Amicus Brief: The brief argues that the Court misapplied the second prong of the three-part test for participation opportunities and set a precedent that could be harmful in future Title IX litigation. By crediting the University with program expansion even though it added no women's teams between 1982 and 1995, the Court departed from other findings of Title IX violations based on similar history. Furthermore, the Court counted increases in the size of existing teams as program expansion without inquiring into whether those additional participants had a meaningful opportunity to play. The Court also permitted the University to avoid liability based on improvements it made to its program after the plaintiffs filed suit. The brief argues that, if this becomes the standard, then there will be no incentive for schools to bring themselves into compliance with the law.

CWEALF: CWEALF has worked to ensure that schools offer female student athletes the same athletic opportunities offered to their male peers. Because of this belief, CWEALF joined in the brief to advocate for proper enforcement of Title IX.

Holding: The Second Circuit affirmed and dismissed in part. The Court dismissed the accommodation claim after holding that it was moot to the extent that it sought the implementation of a varsity women's lacrosse team. The Second Circuit held that the District Court should have certified present and future female softball players as a subclass of plaintiffs, rather than merely excluding them from certified class. The Court also held that the District Court erred in raising and resolving a claim not asserted by students and that the students did not raise a broader claim on behalf of all current and future female students interested in varsity athletics at university generally.

Case: *Cureton v. NCAA*

Court: United States Court of Appeals for the Third Circuit, 1999

Amicus Brief: National Women's Law Center

Case: Four African American student-athletes filed a class action against the NCAA, alleging that they were unlawfully denied educational opportunities as freshmen through the operation of initial eligibility rules by the NCAA. They are specifically challenging "proposition 16" which includes a minimum test score requirement that they claim has an unjustified disparate impact on African Americans.

Amicus Brief: The brief explains that the NCAA should be subject to Title IX, Title VI, and Section 504, and, therefore, the NCAA is prohibited from discriminating on the basis of sex, race/national origin, or disability in its governance of intercollegiate athletics.

CWEALF: CWEALF joined in the brief because of its belief that the NCAA must be subject to other civil rights laws, such as Title VI, section 504, and Title IX, in order to prohibit discrimination.

Holding: The Third Circuit affirmed the lower court's decision in holding that the NCAA is not subject to Title VI in cases alleging disparate impact on the basis of race, color, or national origin.

Case: *Smith v. NCAA*

Court: United States Court of Appeals for the Third Circuit, On remand from the Supreme Court of the United States, 2001

Amicus Brief: National Women's Law Center

Case: Smith alleges that the NCAA violated Title IX by granting a disproportionate number of waivers of eligibility requirements under NCAA bylaws to male student-athletes. Smith was denied the waiver of eligibility to continue to play Division One basketball at a graduate level.

CWEALF contributed to the amicus brief filed in this case for its original appearance before the Third Circuit. The case is currently back in the Third Circuit, after the Supreme Court's decision that dues from member schools alone are not enough to subject the NCAA to Title IX. The Third Circuit handed down a decision in *Cureton v. NCAA* that held that the NCAA is not subject to Title VI. Thus, the main issue presented in this case is whether *Cureton* is controlling.

Amicus Brief: The brief states that the NCAA is subject to Title IX and is prohibited from discriminating on the basis of sex in the governance of intercollegiate athletics. The NCAA is subject to Title IX because it receives federal funds in the form of grants from HHS for its National Youth Sports Programs. The NCAA is an assignee within the Title IX definition of "recipient" because member schools give the NCAA authority and control to govern their intercollegiate athletic programs. The NCAA is also a "program or activity" within the meaning of the Civil Rights Restoration Act of 1987. For these reasons, the NCAA should be subject to Title IX prohibitions on discrimination.

CWEALF: CWEALF joined in the brief because CWEALF understands how critical Title IX has been in terms of improving educational equity for girls and women, particularly in the area

of athletics. CWEALF also believes that it is vital for the authoritative voice of intercollegiate athletics—the NCAA—to abide by Title IX if women’s sports are to be truly equitable.

Holding: The Third Circuit affirmed the lower court’s decision and rejected the argument that the NCAA is covered by Title IX despite its controlling authority over member schools’ athletic programs, thus extending *Cureton* (see above) to Title IX. However, the Third Circuit remanded the case to the District Court to allow Smith to amend her complaint to include a cause of action against the NCAA on the theory that it is covered by Title IX because it receives funds from HHS for the National Youth Sports Program (NYSP). The District Court will then have to determine whether in fact the relationship between the NCAA and NYSP is sufficient to render the NCAA a recipient of the federal funds that HHS provides for the NYSP.

Case: *Brentwood Academy v. Tennessee Secondary Schools Athletic Association*

Court: Supreme Court of the United States, 2001

Amicus Brief: National Women’s Law Center

Case: The Tennessee Secondary Schools Athletic Association (hereinafter “TSSAA”) is a non-profit organization to which public and private schools must join in order for TSSAA interscholastic sports among the schools. While no school is forced to join, TSSAA is the only athletics-regulating body, so most of the schools in the state join for practical purposes. The voting membership for TSSAA is made up of the administrators of member schools. The schools also must pay dues to TSSAA, and TSSAA receives revenue earned at members’ games. TSSAA has been given statutory authority over these athletic programs. In 1997, TSSAA suspended plaintiff Brentwood Academy for “recruiting” athletes by writing to them and informing them of its spring training. Brentwood sued TSSAA in federal court, claiming that TSSAA was a state actor. The District Court found TSSAA to be a state actor under § 1983 and the Fourteenth Amendment because the State had delegated authority over high school athletics to TSSAA and because of the relationship between public schools and TSSAA. The Sixth Circuit reversed, holding that TSSAA was not engaging in any traditional or exclusive public function or responding to state compulsion. The Supreme Court granted certiorari in order to resolve a conflict between the Circuit courts.

Amicus Brief: The brief argues that, under dictum from *National Collegiate Athletic Association v. Tarkanian*, TSSAA is a state actor for its membership is made up, overwhelmingly, of public schools within one State—Tennessee. When looking at several factors, such as the TSSAA leadership, its composition, the source of its revenues, its exertion of control over public school athletic events, and its authority over public school athletic administration, the nexus between the TSSAA and the states appears sufficient to consider TSSAA a state actor. This nexus is further established by the State legislature’s recognition of TSSAA as a state athletic authority. The brief points out that considering TSSAA a state actor would make it subject to non-discrimination obligations which, in turn, benefits girls and minority students by giving them the option to participate in athletics programs.

CWEALF: CWEALF joined the brief because of its belief that athletic associations that have authority over and receive funds from public school programs should be obligated to refrain from discrimination. Only by recognizing these associations as state actors is that obligation enforceable under federal law. CWEALF believes that athletic associations need to be motivated by legal duties to provide girls with the same athletic opportunities traditionally given boys.

Holding: The Supreme Court reversed the decision of the Sixth Circuit and held that TSSAA was a state actor and, as such, was subject to suit in federal court under § 1983 and the Fourteenth Amendment. In coming to this decision, the Court found that the officials of public schools were acting in their official capacities when serving on the board of TSSAA. The Court also found the State government and TSSAA to be officially entwined, especially by the appointment of State officials to the governing body of TSSAA. On remand, the Sixth Circuit held that the District Court erred in granting TSSAA's motion for summary judgment and that the regulation prohibiting recruitment must be reviewed under intermediate scrutiny as a content-neutral speech regulation.

Case: *Communities for Equity v. Michigan High School Athletic Association*

Court: United States Court of Appeals for the Sixth Circuit, 2003

Amicus Brief: American Association of University Women

Case: The original case was filed by students' parents and Communities for Equity against the statewide high school athletic organization for MHSAA's gender-biased practices in allocating money for sports and determining which sports would be played competitively, where the sports would be played, on what dates competitions would be held, and at what time of the year the sports could be played. After finding that MHSAA was subject to Title IX, the District Court determined that the practices of which the plaintiffs complained violated their rights under Title IX. The Court then accepted a compliance plan offered by the defendants that proposed several different options. The defendants then instituted one of the options and the plaintiffs filed a motion for reconsideration of that compliance plan. The Court only looked to the plan as a whole, as opposed to the real actions of schools under MHSAA's administration. The Court found the plan to be roughly equitable on its face. The Court refused to delve deeper into the effects the defendants' compliance plan would have on specific sports or specific schools. In finding the plan was roughly equitable, the Court, in essence, stated that MHSAA had done enough. The plaintiffs appealed to the Sixth Circuit.

Amicus Brief: The brief argues that, under *Brentwood Academy v. TSSAA* (see above), MHSAA is a state actor and, thereby, subject to § 1983 claims based on violations of the Equal Protection Clause. The brief also argues that MHSAA is liable under Title IX, as that statute is read in light of legislative history revealing that federal resources should not be used to support discriminatory practices. This is due, in part, to the fact that MHSAA exercises controlling authority over the school athletic programs receiving federal funds for educational use.

CWEALF: CWEALF joined the brief because of its commitment to Title IX issues. CWEALF believes that participation in athletic programs helps to boost girls' self-esteem, which in turn makes them more confident in other endeavors. Permitting athletic associations to slide under the radar of Title IX because they operate as state or education programs in fact but not in name serves only to frustrate the goal of ending discrimination in educational programs, both those that are athletic and academic in nature.

Holding: The case is pending in the Sixth Circuit.

Sexual Harassment/Title IX

Case: *Rowinsky v. Bryan Independent School District*

Court: United States Supreme Court (on Petition for Certiorari from the Fifth Circuit), 1996

Brief: NOW Legal Defense and Education Fund

Case: Janet was subjected to sexual harassment by male eighth grade students both while on the bus and in the classroom. Most of the harassment was physical in nature and included the male students grabbing Janet in the genital and breast area. Numerous complaints eventually led to the male students being suspended for a few days, but the harassing behavior continued when they returned. The bus driver who ignored the harassment was replaced with someone new who took no action to prevent it. Janet's mother removed her from the bus. Eventually, the administration refused to take any other action, believing what had been done was sufficient and claiming that the actions aimed at Janet were not assaults. Janet's mother brought suit against the school district in District Court, claiming a violation of Title IX. Her claim was dismissed after a finding by the District Court that the school did not punish sexually harassment aimed at girls differently than it punished sexual harassment aimed at boys. The Fifth Circuit affirmed the dismissal after holding that a school could not be liable under Title IX for peer sexual harassment since the students at the school were not the individuals receiving Title IX funding.

Brief: The brief argues that certiorari should be granted in order to, among other reasons, resolve a Circuit Court split regarding Title IX's coverage. The brief argues that schools should be liable for their failure to respond to alleged peer sexual harassment, and that this failure to respond equates to intentional discrimination. Furthermore, the brief argues that permitting schools to ignore peer sexual harassment undermines the enforcement of anti-discrimination statutes (such as Title IX), for, under the Fifth Circuit's decision, tolerance of peer sexual harassment is permitted so long as the school is equally tolerant of harassment towards male students as it is of harassment towards female students. This is squarely at odds with the policy behind Title IX—ending sexual discrimination, including sexual harassment, in schools.

CWEALF: CWEALF joins the brief because it believes that sexual harassment in schools, including peer to peer harassment, creates a barrier to student learning and equal education opportunities. CWEALF also believes that unless school districts are held accountable for peer sexual harassment, the schools will have little motivation to step in and prevent such harassment.

Holding: The Supreme Court denied the plaintiff's petition for certiorari. However, the Court did grant certiorari around this same time to *Davis v. Monroe County Board of Education* (see below), which held that schools could be liable for peer sexual harassment so long as other factors are met.

Case: *Bruneau v. South Kortright School District*

Court: The Second Circuit Court of Appeals, 1998

Brief: NOW Legal Defense and Education Fund

Case: Bruneau alleged that, while she was an eleven-year old sixth grader, she and other female students were subjected to verbal and physical harassment of a sexual nature, and were thereby subjected to a hostile educational environment in violation of Title IX. The behavior involved included continual name-calling with terms derisive of women and physical behavior of both a sexual and non-sexual, violent and non-violent nature. Several complaints were made to

school faculty and administration and were met with some, though minimal and ineffective remedies by the school. Bruneau's mother eventually pulled her out of the school. Bruneau brought suit in District Court, alleging that the school violated Title IX for failing to take appropriate actions to remedy the situation. Bruneau also filed a § 1983 claim against the defendants for violating her Equal Protection Rights. The Court granted summary judgement for the defendants on the § 1983 claim, finding that the Title IX claim subsumed it. The jury found for the defendants on the Title IX claim, and Bruneau appealed both decisions.

Amicus Brief: The brief, focussing on the Title IX claim, argues that agency principles should be extended to encompass schools' liability under Title IX. This would mean that the school would have liability for the teacher's failure to take appropriate action even if the school itself did not receive actual notice of the harassment until some later date. The brief also argues that the school should be charged with constructive notice of the behavior of the students for which it takes responsibility and that any action taken by the schools to remedy the situation needs to be prompt in order for it to have a real effect on the harassment.

CWEALF: CWEALF joined the brief because CWEALF believes it is critical that sexual harassment cases brought under Title IX be held to the same standard for liability as those brought under Title VII, both so that the law is clear and so that schools have an impetus to stop the peer harassment of their students.

Holding: The Second Circuit affirmed the dismissal of the § 1983 claim, finding that a student's right to be free from peer sexual harassment at school was not the product of a clear legal duty imposed on school officials at the time of the harassing behavior. Furthermore, the Court found that Title IX provided a sufficient remedy, making any claim under § 1983 subsumed by Title IX. The Second Circuit also held that, in light of the Supreme Court decision in *Gebser v. Lago Vista* (see below), actual notice as opposed to constructive notice was required to hold a school liable for peer sexual harassment. Furthermore, the Second Circuit held that inclusion of the word "prompt" in a jury charge was unnecessary so long as the jury was told to determine whether the action was appropriate, as the jury was charged in this case. Therefore, the Second Circuit affirmed the decision.

Case: *Davis v. Monroe County Board of Education*

Court: United States Supreme Court, 1999

Brief: NOW Legal Defense and Education Fund

Case: Davis brought suit against the school district under Title IX, alleging that her fifth-grade daughter had been a victim of peer-sexual harassment. She requested monetary and injunctive relief. The District Court dismissed the case, holding that student-on-student sexual harassment was not grounds for which Title IX provided a cause of action. The Eleventh Circuit, sitting en banc, affirmed. The only question certified for review is whether Title IX prohibits peer sexual harassment. The standard of liability for such harassment is not at issue.

Amicus Brief (on Petition for Writ of Certiorari): The brief argues that peer sexual harassment most often creates a hostile environment for female students, leading to a decline in students' grades, reduced class participation and, sometimes, withdrawal from the educational program. To refuse relief, injunctive and monetary, for this type of harassment is to allow school officials to stand by and condone such action with their silence. The brief explains that the lower

court was incorrect in assuming that the school had only two choices: to suspend the student creating the hostile environment or to ignore the harassment. Instead, the brief outlines several alternative responses, including education, training, and counseling. The brief further argues that making schools responsible for student-on student sexual harassment will force schools to comply with anti-discrimination laws and will help to protect the rights of both the victims and the perpetrators.

Amicus Brief (on Writ of Certiorari): The brief argues that sexual harassment committed by a peer can be extremely harmful both emotionally and educationally and undermines a basic purpose of the educational system, much in the same way as sexual harassment committed by a teacher. This has been recognized by the Office of Civil Rights of the Department of Education, as evidenced by its guidance reports published in the Federal Register. By ignoring harassment, schools intensify the harm by effectively telling young women to suffer in silence. Furthermore, through their disregard for peer sexual harassment, schools teach both victims and perpetrators that this type of harassment is normal and is an acceptable way of interacting with others in a working environment.

CWEALF: CWEALF joined the brief because of its belief that sexual harassment should not be tolerated, regardless of the identity of the perpetrator. School officials are in the best position to respond to claims of sexual harassment. By holding them responsible when they ignore this duty, schools will be more likely to act to stop peer sexual harassment when first becoming aware of its occurrence.

Holding: The Court determined that, as in *Gebser v. Lago Vista Independent School District* (see below), where a school acts with complete indifference to claims of sexual harassment, that indifference acts as a violation of Title IX, regardless of whether the harassment complained of was perpetrated by a teacher or a fellow student. As such, the Court held that a recipient (of Title IX funding) intentionally violates Title IX and is subject to a private damages action where the recipient is deliberately indifferent to known acts of student-on-student discrimination. The Court limited this liability to situations in which the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs. The Court left the manner in which a school chose to respond to complaints of harassment to the discretion of school officials. The Court further held that a claim was not actionable as “harassment” unless the behavior complained of rose to the level where it effectively denied the victim the benefits of an educational program or activity within the scope of Title IX.

Case: *Murrell v. School District No. 1*

Court: United States Court of Appeals for the Tenth Circuit, 1999

Brief: NOW Legal Defense and Education Fund

Case: Jones, who attended George Washington High School, was born with cerebral palsy, was deaf in one year, and had the functional intelligence of a first grader. When her mother enrolled her in the school, she notified the school that Jones had been sexually assaulted at her previous school and believed that, due to her disability, she was prone to such harassment. Jones was placed in the same class as John Doe, a special education student who was known to exhibit sexually inappropriate behavior. Even though the school was well aware of Doe’s behavior, they gave him unsupervised access to much of the school via his position of “janitorial assistant.” On several occasions Doe sexually assaulted Jones, often with the teacher’s awareness. On several

occasions the teachers at the school deliberately hid this information from Jones' mother. Jones' mother learned about the assaults after the trauma of them caused Jones to leave the school and be placed in a psychiatric facility. Jones' mother informed the school, including the principal, but the school failed to respond to, or investigate the allegations. When, finally, a meeting was scheduled between the school, Jones, Doe, and both students' parents, the principal failed to take any action against Doe and instead suspended Jones. Jones filed suit against the school for violations of Title IX, but the Court granted the school district's motion to dismiss, holding that Title IX did not cover student on student sexual harassment.

Amicus Brief: The brief argues that workplace standards regarding sexual harassment should be applied to Title IX, thereby recognizing a cause of action for peer-harassment in school, especially where the school was aware of the harassment but failed to take appropriate action. By failing to respond to complaints of peer harassment, schools deny harassed students, which are disproportionately female, access to education opportunities. Because students are effectively denied this equal access, the school is in violation of Title IX.

CWEALF: CWEALF joined the brief because CWEALF believes it is critical that sexual harassment cases brought under Title IX be held to the same standard for liability as those brought under Title VII. Young women who are harassed in their schools are increasingly uncomfortable in those settings. Those feelings of discomfort and alienation effectively deny those young women access to the educational opportunities that are being offered. Without access, equality of education, the aim of Title IX, does not exist.

Holding: The Tenth Circuit, looking to the Supreme Court's recent decision in *Davis v. Monroe County Board of Education* (see above), held that the school could be liable for peer harassment so long as "a school official who possessed the requisite control over the situation had actual knowledge of, and was deliberately indifferent to, the alleged harassment." Having found that adequate allegations were made in the case to reach this standard, the Tenth Circuit remanded the case to the District Court for a trial on the merits. The Court, however, held that there was no §1983 claim against the school for depriving Jones of Equal Protection Rights under the Fourteenth Amendment for there was no school policy that deprived her of her rights. However, in so far as the individual principals and teachers deprived her of her rights, a § 1983 claim could be actionable against them.

Case: *Reed v. Edelwich*

Court: The Second Circuit Court of Appeals, July 1996

Brief: Connecticut Women's Education and Legal Fund

Case: Plaintiff Reed brought suit against Manchester Community-Technical College and Assistant Professor Edelwich, alleging that he sexually harassed her in violation of 42 U.S.C. sec 1983 and 20 U.S.C. sec 1681. Reed also brought suit against the President of MCTC alleging that he violated Title IX by his actions in response to her complaint. The United States District Court of Connecticut granted partial summary judgment for the defendants and dismissed Reed's Title IX claims. The Court held that Title IX applied only to educational institutions and not individual defendants. Reed conceded this issue and only appealed the federal claim under section 1983.

Amicus Brief: The brief states that the District Court should have held MCTC liable under Title IX for quid pro quo sexual harassment of a student by one of its professors and that the Court should look to Title VII cases to determine the appropriate standard. Under traditional agency principles MCTC should be held liable for the hostile educational environment; that the evidence supports such a finding; and the MCTC's response to Reed's allegations was not adequate. While MCTC did take action against Edelwich it does not appear that Reed's charges of sexual harassment were ever fully addressed.

Holding: The judge decided not to grant the plaintiff's interlocutory appeal thus the amicus brief was suspended. The case was settled.

Case: *Gebser v. Lago Vista Independent School District*

Court: The Supreme Court of the United States, 1998

Brief: National Women's Law Center

Case: Gebser, when an eighth-grade student in the defendant's school district, joined a high school book discussion group led by the defendant's employee, Frank Waldrop. During the group's meetings, Waldrop often would make sexually suggestive comments to the students. When Gebser entered high school, she was assigned to Waldrop's class for two semesters. In these classes, and when Waldrop and Gebser were in the classroom alone, Waldrop continued to make sexually suggestive remarks, and directed many of them toward Gebser. That spring, Waldrop initiated sexual contact with Gebser in her home, and the two engaged in sexual intercourse numerous times during the school year, over the summer, and during the following school year and often during school hours, though not on school property. Gebser never reported the conduct, and the district had no published grievance procedure for reporting sexual harassment. Waldrop had been cited for offensive comments by other parents and was told by the school principal to watch his classroom conversation. The sexual nature of Gebser's and Waldrop's relationship became clear after a police officer found the two engaging in sexual intercourse. Waldrop was immediately fired and his teaching license was revoked. Gebser sued Lago Vista for Title IX violations. The District Court granted judgment in favor of the school district, holding that Title IX was geared toward ending policies of discrimination, not acts of individual employees, and that the school district needed to have actual notice of those gender-biased policies. The Appellate Court affirmed, holding that the school district could not be strictly liable for the teacher's actions and refusing to imbue the school with constructive notice upon a finding that the evidence did not suggest the school should have known what Waldrop had been doing.

Amicus Brief: The brief argues that, consistent with the Office of Civil Rights' interpretation of Title IX, legal principles of agency should be applied to the teacher-school district relationship, meaning that if a teacher acted either with apparent authority (apparent to the third-party student) or actual authority given to him/her by the school in order to carry out his/her harassment, then the schools should be liable for that harassment. Likewise, the school should be liable where it knew or should have known of the harassment but failed to take prompt and appropriate action. By failing to provide channels for reporting and responding to claims of sexual harassment, the school can be said to have had constructive notice of harassment since such harassment is generally foreseeable in school settings.

CWEALF: CWEALF, which has worked to end discrimination against women and girls in the workplace and in educational institutions, believes that to accomplish its goal supervising powers must be held accountable for the actions of their employees. Only by holding schools liable for harassment perpetrated by their teachers will schools have a fiscal incentive for complying with Title IX and encouraging their employees to comply as well.

Holding: The Court held that in order for the school district to be liable for teachers' actions of sexual harassment, the school had to have actual notice of the harassment. As such, the Court held that the school district could not be liable for actions committed by teachers under a theory of agency unless the school had actual notice and was deliberately indifferent to the harassment.

Case: *Canty v. Old Rochester Regional School District*

Court: United States Court of Appeals for the First Circuit, 1999

Brief: National Women's Law Center

Case: Canty was sexually assaulted by a junior high school teacher for approximately two years. Although the school officials were informed of the assaults from the time at which they began, the school officials permitted the teacher to remain employed and to continue sexually assaulting Canty. Canty filed suit in District Court, requesting damages under both Title IX and § 1983. The District Court held that a Title IX claim preempted a claim under § 1983, but certified the question for immediate appeal to the First Circuit.

Amicus Brief: The brief argues that there is no express or implied indication that Congress intended to preclude § 1983 claims when enacting Title IX. In fact, Title IX was modeled on Title VI, a statute that has been used in conjunction with § 1983 claims. To read preclusion into Title IX would be to leave many girls and women with no recourse for violations of their constitutional rights, especially because there can exist a constitutional violation where no Title IX violation has occurred. That a remedy may be found for some actions under one statute but not under the other supports the view that Canty's substantive due process claim is wholly distinct from her Title IX claim. Because the claims are based on two different rights, one should not preclude the other.

CWEALF: CWEALF joined in the brief because of its belief that women and girls should be able to obtain full relief for discriminatory practices. CWEALF believes that women should not be placed in a position where they have to trade constitutional protections for statutory ones.

Holding: The case settled prior to oral argument.

Case: *Gleason v. Board of Trustees of Salem State College*

Court: United States Court of Appeals, First Circuit, August 2000

Brief: National Women's Law Center

Case: Plaintiff Gleason, a student at Salem State College, alleged that a professor sexually harassed her and that, although she filed a formal complaint with the appropriate college office, no proper action was taken. In her complaint, Gleason requested damages under both Title IX and § 1983. The District Court dismissed her § 1983 claim holding that Title IX precluded such a claim from being brought.

Amicus Brief: The brief argues that the § 1983 claim, based on an alleged violation of Gleason's constitutional rights, and a Title IX claim are wholly different from each other and, thus, the § 1983 claim cannot be precluded by Title IX. This is evidenced by, in part, the fact that there can exist a constitutional violation where no violation of Title IX has occurred. Furthermore, the relief afforded by the statutes differ. The brief also argues that there is no express or implied indication that Congress intended to preclude § 1983 claims when enacting Title IX. In fact, Title IX was modeled on Title VI, a statute that has been used in conjunction with § 1983 claims. To read preclusion into Title IX would be to leave many girls and women with no recourse for violations of their constitutional rights.

CWEALF: CWEALF joined in the brief because of its belief that women and girls should be able to obtain full relief for discriminatory practices. CWEALF believes that women should not be placed in a position where they have to trade constitutional protections for statutory ones.

Holding: The case was settled prior to oral argument.

Case: *Litman v. George Mason University* (open)

Court: The United States Court of Appeals for the Fourth Circuit, 2001

Brief: National Women's Law Center

Case: Plaintiff Litman filed a sexual harassment complaint against one of her professors at George Mason University (GMU) in 1996. Two professors then filed charges against Litman. Litman was found guilty at a GMU hearing and was expelled. In 1997 Litman filed a complaint in the United States District Court for the Eastern District of Virginia alleging that GMU and some of its professors discriminated and retaliated against her on the basis of sex in violation of Title IX. The District Court found that section 5 of the Fourteenth Amendment did not authorize Congress to abrogate sovereign immunity under Title IX. The Court denied the motion to dismiss and the Fourth Circuit affirmed the District Court decision. Litman appealed.

Amicus Brief: The brief solely addresses the retaliation issue. The brief argues that *Alexander v. Sandoval* (holding that there exists no private right of action to sue for disparate impact discrimination under the regulations of Title VI of the Civil Rights Act of 1964) does not apply to Title IX. Assuming, in the alternative, that *Sandoval* does apply to Title IX, the brief argues that a private right of action for retaliation is not barred. The brief also explains the public policy reasons for permitting such a claim.

CWEALF: CWEALF joined in the brief because its dedication to Title IX enforcement, not just in regards to equity in sports, but in regards to equity in all areas of education.

Holding: The case is scheduled for oral argument on September 22, 2003 on the issue of whether Title IX provides a private right of action for retaliation.
