

Amicus Curiae Briefs Education Law

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 sexual 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 judgment 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, focusing 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.