

## *A CIRCUIT SPLIT ON TITLE IX?*

*By: Brett A. Sokolow, JD.*

*Another article was completely written and ready to go when I was contacted yesterday by a reporter, asking me to address a split between the federal circuit courts on Title IX. I was aware of one of the cases, but not the most recent. To respond to him, I first wanted to do some research, and in the process, decided to write a whole different article. Wow! Do we have a federal Circuit Court split on Title IX? Lawyers get excited about this sort of thing. The Supreme Court may get involved at some point. Conduct administrators should be interested, too. This article will introduce you to two very recent holdings which could have a significant impact on the standard of liability for colleges in monetary damages under Title IX: Williams v. Paint Valley Local School District and Sauls v. Pierce County School District. Is there a split, and if so, what might it mean?*

### *Deliberate Indifference Under Title IX*

The standards of Title IX, as you may recall from the two school Supreme Court cases of Gebser v. Lago Vista and Davis v. Monroe County, are parallel whether applied to schools or colleges. But, are the standards of Gebser and Davis parallel to each other? Not exactly. And, maybe the minor differences create a major chasm. You will recall that Gebser came first, in 1998. Gebser applied specifically to the teacher-on-student type of sexual harassment. It was the case that determined the standard of liability for schools under Title IX. You have heard it before. If officials of the institution who have authority to address sexual harassment have actual notice of harassment, they will be liable if they respond to that notice with deliberate indifference. Deliberate indifference is a common standard within the law for others types of violations, not just Title IX. Deliberate indifference is defined very simply as an intentional failure to act in a situation where remedial action is required.

When Gebser was decided, I wondered aloud at various presentations and still do, as to whether courts would ultimately embrace this standard or divide it. Would the requirement of deliberateness or the requirement of indifference achieve primacy, or would they remain coupled. Put more clearly, if a college was indifferent (failed to act), but did not do so deliberately, could there still be the potential for liability? I did and do think so, and there are some cases that have clearly focused on the indifference as more compelling than whether it was intentional or deliberate. This broadens the potential liability spectrum for colleges, if it is a real standard for measuring the failure to act.

### *The Clearly Unreasonable Standard*

When the Davis case was decided in 1999, less than a year later, Justice O'Connor again wrote the majority opinion for the Court. Davis was factually distinct from Gebser, because instead of involving a teacher and a student, Davis was about student-on-student sexual harassment. The Supreme Court applied the same liability scheme of Gebser to

Davis, holding that where the school district had actual notice, if it responded with deliberate indifference, it would be liable under Title IX for monetary damages. And, then Justice O'Connor wrote something about deliberate indifference not found in her opinion in Gebser. She wrote:

school administrators will continue to enjoy the flexibility they require in making disciplinary decisions so long as funding recipients are deemed “deliberately indifferent” to acts of student-on- student harassment only where the recipient’s response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.

This one sentence seems to potentially expand the meaning of “deliberate indifference.” It did not go without notice at the time. We discussed it in the NCHERM 2001 Whitepaper at [www.ncher.org/whitepapers.html](http://www.ncher.org/whitepapers.html), written in 2000 just after Davis was decided. Deliberate indifference is a failure to act. But, according to the Court, while a failure to act is clearly unreasonable in light of the known circumstances, by definition, so too might the actions that ARE taken be clearly unreasonable in light of the known circumstances. Justice O'Connor was telling the courts of this country that they had permission to determine whether they agreed with HOW colleges and schools responded, if a response appeared to be facially clearly unreasonable. If the response, no matter how earnest, was clearly unreasonable, liability could result.

This impacts the liability scheme we thought we understood with Gebser. Gebser was a great case for colleges. If we knew of sexual harassment, all we had to do to be in the clear was take some action--no matter how minimal—for our response to be considered adequate. If we responded, we were pretty much going to be safe. This is great law. It shielded all but the most inept from liability. Davis sounded like another story. We were going to be subject to two levels of review. First, did we respond? If not, we have trouble. If so, was our response clearly unreasonable in light of the known circumstances? If not, we're in the clear. If so, liability would result (assuming the other tests set out by Davis are also met).

The Dissent argued that reasonableness would become a question for juries, but Justice O'Connor made it clear that the majority intended this to be something judges could determine as a matter of law. She also made it clear that this was not a mere reasonableness standard. A response that is not clearly unreasonable in light of the known circumstances is different than and tighter than a reasonableness requirement. All of a sudden, maybe “deliberate” didn't matter much at all. The door to liability might have opened just a little wider, but exactly how much wider has been a question. We have been watching the courts and waiting for an answer. Do Williams or Sauls give us that answer?

Perhaps they suggest a different interpretation entirely. A question that these cases must raise is whether, without saying that they were doing so, the Supreme Court created two different liability standards, one of strict deliberate indifference for teacher-on-student cases, and a “not clearly unreasonable” standard for student-on-student sexual harassment

cases? And to add another layer, there is still more language in Davis that may be at odds with Gebser.

*Severe, Pervasive and Objectively Offensive*

In comparing Davis to Gebser, the Davis majority opinion seems to erect one additional hurdle to liability, in addition to the actual notice and deliberate indifference requirements. Justice O'Connor writes that liability can only result from harassment that is "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." This language is missing from Gebser. Does it add another layer of requirements, giving rise to even more reason to believe that Gebser and Davis establish different standards? Let's take a look and see...

*Sauls v. Pierce County School District*

This case was handed down by the 11<sup>th</sup> Circuit on February 9<sup>th</sup>, 2005. Both these cases are public school cases. Sauls is a high school case, and Williams is an elementary school case. The facts of Sauls are commonplace today--teacher engages in a sexual relationship with a student. And, if you have been following news reports, you are expecting the other shoe to drop. Beth Blythe, the teacher, was having a sexual relationship with her student, Dustin Sauls. The media has noted a spike in female teacher-male student relationships. Unlike the well-publicized Letourneau case, Sauls lacks the bizarrely compelling "have kids, get-out-of-jail and get married" happy ending of that case. This one is more like the "Dawson's Creek" version. In Sauls, the teacher provided drugs to Sauls, and most of the sexual activity took place on school property, though it should be noted that Sauls was 16, and therefore of legal age. And they say Michael Jackson is the strangest case this year. I think not.

The Sauls case is really straightforward. Each allegation about Blythe's relationships with students was immediately investigated by the school district when rumors were reported, but because the male students were willing participants, they denied the existence of a relationship. When further evidence was provided, the Assistant Superintendent immediately took action, and notified the police and school board. Blythe resigned and surrendered her teaching certificate. The school district was in no way deliberately indifferent. In so ruling, the 11<sup>th</sup> Circuit declared that the district court had reached the right result, but by using the wrong standard. It viewed the Davis standard, applicable to student-on-student cases, as more stringent than the Gebser standard, because it added the requirement that for liability to exist, the harassment must have been "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." Teacher-on-student claims, the court said, lack this requirement.

So, is the 11<sup>th</sup> Circuit right that there are two different standards? Ultimately, that is not my judgment call to make. We will have to see if other circuits adopt the construction of the 11<sup>th</sup>, and this may ultimately require clarification by the Supreme Court. If I were

asked to offer an educated guess, I do not think there are two different standards. I think the 11<sup>th</sup> Circuit got it wrong. Here's why.

First, there is every indication in Davis that the Court intended to adopt the liability standard of Gebser, and no indication that they intended to create two standards. If they intended that, they would likely have said so. In the language of Justice O'Connor in Davis, "[W]e consider here whether the misconduct identified in *Gebser*—deliberate indifference to known acts of harassment—amounts to an intentional violation of Title IX, capable of supporting a private damages action, when the harasser is a student rather than a teacher. We conclude that, in certain limited circumstances, it does."

Second, why would you make it harder to make out a student-on-student case than a teacher-on-student case? There is no apparent reason that the Court would have wanted to do this. Third, and most compelling, is that the 11<sup>th</sup> Circuit gives no reason for why it believes there are separate standards. The only case it cites in support is its own decision in Hawkins v. Sarasota County Sch. Bd., from 2003. Bafflingly enough, *Hawkins* is a student-on-student case. The court actually found that the conduct of the harasser in *Hawkins* was not sufficiently severe, pervasive and objectively offensive, despite an opinion that includes a litany in which the harassing young student fondled and groped at least three female students, and rubbed himself lasciviously against them. The *Hawkins* court excused this activity with a variant of the "boys will be boys" argument, stating that we must account for the ages of the students in deciding the context. Obviously, these judges have other issues. They live in an alternate universe than I do. Sexual assault is sexual assault. Age is not relevant. Similar conduct was actually enough for the Supreme Court in Davis. This holding is warped, and shows a fundamental disconnect between these judges and how highly sexualized the world as become, even for second graders. To wit, the description of the events, from the opinion:

The three girls testified that not long after he joined the class, John Doe would cross his hands, gesture to his genitals, and tell Jane Doe I, Jane Doe II, and Jane Doe III to "suck it." In the lunchroom, he would hold two fingers up. One of the girls testified that although she did not know what this meant, she was told by other children that it meant "meet me in bed in two seconds." In the lunchroom, he also said that he wanted to "suck [the girls'] breasts till the milk came out," that he wanted [the girls] to "suck the juice from his penis," and that "he wanted [the girls] to have sex with him." On other occasions, he referred to one or all of the girls as "sexy baby" and stated that "you have a bun, and I have a hot dog, and I want to eat them both." At the playground, he would chase the girls and try (sometimes successfully) to touch them on their chests, and (unsuccessfully) to kiss them. At the bus stop, he also would try to grab Jane Doe III and look up her skirt. He would also jump onto her and rub his body on hers. The girls stated that this conduct took place over a period of several months. While none of the girls' grades appeared to suffer, two of them said that on four or five occasions they faked being sick in order not to go to school. Their parents testified that they cried more frequently, appeared anxious, and were reluctant to go to school.

In Sauls, I think the 11<sup>th</sup> Circuit misreads Davis. I think teacher-on-student Gebser cases carry a severe, pervasive, and objectively offensive requirement. I think all Title IX cases do. I think Davis sets out the standard for all Title IX cases. Where a teacher sexually harasses a student, the likelihood of that type of harassment depriving the victim of educational opportunities or benefits is high. Where student-on-student harassment takes place, there is less automatic likelihood that the harassment will be severe enough to effect a discrimination (that's what the severity requirement means—not all harassment rises to the level of discrimination. The harassment must be sufficient to cause a deprivation of rights on the basis of gender in order for it to be actionable).

This is clear from the actual language of Davis. “The fact that it was a teacher who engaged in harassment in *Franklin* and *Gebser* is relevant. The relationship between the harasser and the victim necessarily affects the extent to which the misconduct can be said to breach Title IX’s guarantee of equal access to educational benefits and to have a systemic effect on a program or activity. Peer harassment, in particular, is less likely to satisfy these requirements than is teacher-student harassment.” Therefore, we must be sure in all cases that the evidence shows a deprivation by a preponderance of the evidence, regardless of who is doing what to whom.

Interestingly, the *Williams* case, to be discussed below, says there are not two different standards, but it is referring to the two interpretations of deliberate indifference, not to the fact that Davis appears to contain a severe, pervasive and objectively offensive requirement on the severity of the harassment that Gebser does not. So, in the strictest sense, there is no circuit split. Two circuits have not disagreed on the same point.

#### *Williams v. Paint Valley Local School District*

The Williams decision was published exactly one month after Sauls, on March 9<sup>th</sup>, 2005, by the 6<sup>th</sup> Circuit. This case involved the inappropriate touching of a male student, Casey Williams, by a teacher, Harry Arnold. Casey was in fourth grade. Five other male classmates were also molested.

Williams sued the school district on a number of claims. Only the Title IX and companion §1983 action survived Paint Valley’s motion for summary judgment. The case went to a jury trial, which returned a verdict in favor of the school district. At issue on the appeal were jury instructions that were used to inform the jury of the proper Title IX standard. Williams contended that there were two standards, one for student-on-student cases, from Davis, and one for teacher-on-student cases, from Gebser. He argued that the trial court gave instructions based on Davis, when they should have been based on Gebser. The 6<sup>th</sup> Circuit took the appeal, and held that Gebser and Davis created one standard, not two. The jury instructions were upheld in favor of Paint Valley. The standard of deliberate indifference can be met by a failure to act, or by a response that is clearly unreasonable in light of the known circumstances.

#### Summary

Williams and Sauls are just a weird confluence of two cases that both deal with whether Gebser and Davis created two different standards. But, they address two different areas of those standards, rather than directly disagreeing with each other. Is anything different for colleges after these two cases? Only time will tell. If you are located in the 11<sup>th</sup> Circuit right now, it would seem the court believes that there are different standards for severity, depending on who does what to whom. That is the law of your jurisdiction until Sauls is reversed or overturned. Does it change what we do on our campuses? If we are responding appropriately to all credible allegations of sexual harassment, that is the best we can do, and all the courts expect of us.

*All information offered is the opinion of the author, and is not given as legal advice. Reliance on this information is at the sole risk of the reader.*

*Brett A. Sokolow, JD, is President of the National Center for Higher Education Risk Management (NCHERM) in Malvern, Pennsylvania. Mr. Sokolow serves ten colleges as outside counsel, and has served as a consultant to over 650 colleges and universities. Mr. Sokolow holds memberships to the National Association of Student Personnel Administrators (NASPA), the Association for Student Judicial Affairs (ASJA), the American College Personnel Association (ACPA), where he is Vice President for Education of the Commission for Student Conduct and Legal Issues. He is a member of the Council on Law in Higher Education (CLHE), where he also serves as a member of the Board of Trustees. He is Editor Emeritus of the Report on Campus Safety and Student Development. Mr. Sokolow has authored ten books and dozens of articles on campus security, Clery Act compliance, student conduct, risk management, problem drinking, and sexual misconduct. [www.ncherm.org](http://www.ncherm.org)*