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Paying for Sex--When is a School District Liable for Teacher-Student Sexual Harassment Under Title IX?

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CASE COMMENT

PAYING FOR SEX—WHEN IS A SCHOOL DISTRICT LIABLE FOR TEACHER-STUDENT SEXUAL HARASSMENT UNDER TITLE IX?

Gebser v. Lago Vista Independent School District, 118 S. Ct. 1989 (1998)

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Gebser, a high school student, had a sexual relationship with a teacher employed by Respondent Lago Vista Independent School District.[1] Gebser did not report the relationship to school officials.[2] The sexual relationship continued for approximately one year until a police officer discovered the teacher and Gebser having sex and arrested the teacher.[3] Respondent immediately fired the teacher.[4]

Petitioners, Gebser and her mother, filed suit against the teacher and against the school district seeking, among other things, monetary damages for the violation of Title IX.[5] Title IX provides that "[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving [f]ederal financial assistance."[6] The United States District Court for the Western District of Texas granted summary judgment in favor of the respondent.[7] The Fifth Circuit Court of Appeals affirmed.[8] The United States Supreme Court granted certiorari and HELD, a school district cannot be held liable for damages under Title IX unless an official

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* This Case Comment is dedicated to my inspiration and the one true constant in my life, my daughter Brielle.

1. *See* Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989, 1993 (1998).
2. *See id.*
3. *See id.*
4. *See id.*
5. *See id.*
6. 20 U.S.C. § 1681(a).
7. *See Gebser*, 118 S. Ct. at 1993. The case was filed in state court and then removed to federal court. The state law claims against the teacher were remanded to state court and are not relevant to the discussion at hand. *See id.*
8. *See* Doe v. Lago Vista Indep. Sch. Dist., 106 F.3d 1223, 1224 (5th Cir. 1997). The Fifth Circuit noted that it had recently rejected strict liability in teacher-student sexual harassment cases. *See id.* at 1225. The court then rejected a vicarious liability standard. *See id.* at 1226. The court reasoned that such a standard would lead to liability in virtually every teacher-student sexual harassment case. *See id.* The court did not consider a constructive notice standard because Doe did not pursue such a theory. *See id.* at 1225.

who has authority to address the discrimination and institute corrective measures has actual knowledge and fails to take appropriate action.[9]

In *Franklin v. Gwinnett County Public Schools*,[10] the Supreme Court considered the issue of whether monetary damages were available in an implied right of action under Title IX.[11] Petitioner Franklin, a high school student, was repeatedly harassed by a teacher employed by the Gwinnett County School District.[12] Franklin alleged that the school district was aware of the harassment, did nothing to stop it, and discouraged her from pressing charges.[13]

The school district argued that damages should not be available because, among other reasons, Title IX was enacted under Congress's spending clause power.[14] The school district contended that monetary damages have traditionally not been available under spending clause statutes for unintentional discrimination and that this limitation of available remedies should likewise extend to intentional violations.[15] The *Franklin* Court rejected this argument, explaining that the reasoning for disallowing monetary damages for unintentional violations does not exist

9. *See Gebser*, 118 S. Ct. at 1999.

10. 503 U.S. 60 (1992).

11. *See id.* at 62-63. The Court had previously held that Title IX contains an implied private right of action. *See* Cannon v. University of Chicago, 441 U.S. 677, 717 (1979).

12. *See Franklin*, 503 U.S. at 63. In addition, the teacher coerced Franklin into having sex. *See id.*

13. *See id.* at 63-64.

14. *See id.* at 74.

15. *See id.* The Supreme Court previously concluded that compensatory relief is not available as a private remedy for unintentional past violations of spending clause statutes. *See* Guardians Ass'n v. Civil Serv. Comm'n of New York, 463 U.S. 582, 602-03 (1983). In *Guardians*, the Supreme Court was considering a class action by minority members of a city police department for compensatory relief under Title VI. *See id.* at 585. Title VI forbids recipients of federal funds from discriminating on the basis of race in the administration of their programs or activities. *See id.* at 584 n.1 (quoting 42 U.S.C. § 2000(d) (1994)). The minority police officers alleged that written exams administered by the police department to make entry-level appointments were racially discriminatory. *See id.* at 585. Title VI was passed pursuant to Congress's spending clause power. *See id.* at 598. The Supreme Court reasoned that spending clause statutes involved something akin to a contractual relationship between the government and the recipient of federal funds. *See id.* at 596. The recipient weighs the benefits and burdens of accepting federal money. *See id.* The Court noted that in a typical case, the federal government ensures that the recipient satisfies the conditions of the grant and the recipient knows what its obligations will be. *See id.* The Supreme Court then reasoned that when a recipient intentionally discriminates, there is no question of what the recipient's obligations were and that it was aware of those obligations. *See id.* at 597. However, when the discrimination is unintentional, it is not clear what the recipient's obligations were and definitely not obvious that the recipient was aware that it was violating the statute. *See id.* at 598. In cases of unintentional discrimination, therefore, the Supreme Court concluded that monetary relief should not be available. *See id.*

when there is intentional discrimination.[16] The Court then concluded that monetary damages are available for actions brought to enforce Title IX when there has been an intentional violation.[17]

Rosa H. v. San Elizario Independent School District,[18] a Fifth Circuit Court of Appeals case, involved a student's sustained sexual relationship with a school's karate instructor.[19] The girl's mother sued the school district for violating Title IX.[20] The Fifth Circuit held that a school district could only be liable for teacher-student sexual harassment if the district knew about, and was indifferent to, the harassment.[21]

The Fifth Circuit's holding hinged on two essential factors. First, the

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16. *See Franklin*, 503 U.S. at 74. The Court explained that a recipient of federal funds, in a case involving unintentional discrimination, lacks notice that it will be liable for monetary damages. *See id.* However, there is no notice problem when intentional discrimination is alleged. *See id.* at 75.

17. *See id.* at 76. The *Franklin* Court relied on the presumption previously established that when a statute provides a right to sue for a violation of one's rights, a federal court may use any available remedy to right the wrong. *See id.* at 66. However, Justice Scalia, in his concurring opinion, reasoned that when a court judicially implies a private right of action, the court could also imply categorical limitations on the scope of the remedies available under that action. *See id.* at 77 (Scalia, J., concurring). Justice Scalia went on to write that "[t]o require, with respect to a right that is not consciously and intentionally created, that any limitation of remedies must be express, is to provide, in effect, that the most questionable of private rights will also be the most expansively remediable." *Id.* at 78 (Scalia, J., concurring). This language from Justice Scalia, in which two other justices joined, sheds light on the proposition that the *Franklin* Court did not intend to create expansive school district liability under Title IX, a proposition that was important to the ultimate holding in *Gebser*.

18. 106 F.3d 648 (5th Cir. 1997).

19. *See id.* at 650. There was conflicting evidence concerning how much information school officials had regarding an inappropriate relationship between the instructor and the student. *See id.* at 651. A social worker employed by the district might have seen the instructor kiss the student in the school parking lot. *See id.* at 650. The student alleged she told the school counselor about the relationship, which the counselor denied. *See id.* at 651. There was also a meeting amongst the school counselor, principal, student and the student's mother in which the mother expressed concerns about inappropriate conduct by the teacher toward the student. *See id.*

20. *See id.* at 651. She also brought an action against the school district under 42 U.S.C. § 1983 as well as Title IX and 1983 claims against the karate instructor. *See id.* All claims, except the Title IX action against the school district, were dismissed by the trial court and were not under review by the Fifth District. *See id.* The school district argued that it could not be liable under Title IX unless it engaged in intentional discrimination. *See id.* at 652. The trial court instructed the jury that the school district could be liable under a negligence theory. *See id.* The instruction was: "Title IX places on San Elizario Independent School District a duty not to act negligently toward its students. If you find from a preponderance of the evidence that San Elizario Independent School District acted negligently in failing to take prompt, effective, remedial action with respect to what it knew or should have known, then it violated Title IX." *Id.* The Fifth Circuit disagreed with this instruction. *See id.* at 660.

21. *See id.* at 660. For liability to attach to the school district, the court required that a school official, who had supervisory power over the offending teacher and the authority to end the abuse, had to have actual knowledge and fail to respond appropriately. *See id.*

court reasoned that Title IX, as a spending clause statute, should not generate liability on the part of the school district unless the district, as a recipient of federal funds, agreed to assume the liability.[22] The school district could not have agreed to assume liability unless it knew of the violation.[23]

The Fifth Circuit also rested its holding and its rejection of agency principles on the fact that, while Title VII refers to the agents of employers, Title IX makes no such reference.[24] Rather, Title IX imposes liability based only on the acts of the recipients of federal funds.[25]

Soon after *Rosa*, the Seventh Circuit Court of Appeals also considered the standard of liability for school districts under Title IX in *Smith v. Metropolitan School District Perry Township*.[26] Appellant, a high school teacher and swim coach, had sexual intercourse with appellee Smith, his student assistant and a senior at the school.[27] Smith told no one about the sexual relationship until after it was over, and no one ever witnessed the two engaging in intercourse.[28] Largely agreeing with the Fifth Circuit's decision in *Rosa*,[29] the Seventh Circuit held that a school district is liable under Title IX for teacher-student sexual harassment only if an official of the school district who had supervisory authority over the teacher and the power to take action actually knew of the harassment and failed to respond.[30]

The court reasoned that agency principles should not be read into Title IX for three reasons. First, the court explained that other decisions that

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22. *See id.* at 654.

23. *See id.* The Court reasoned that the school district, when it accepted federal funds, agreed not to discriminate on the basis of sex but thought it unlikely that the district agreed to be liable whenever its teachers discriminate on the basis of sex. *See id.* The court, therefore, rejected liability based on agency principles because this would create liability for school districts anytime a teacher sexually harassed or abused a student. *See id.* at 655.

24. *See id.* at 654.

25. *See id.*

26. 128 F.3d 1014, 1018 (7th Cir. 1997).

27. *See id.* at 1017. The student's parents, John and Sharon Smith, were also appellees. *See id.* at 1014. In the text, the student is referred to as "Smith." Smith did not resist the teacher's advances. *See id.* at 1017. The two had intercourse approximately twice a week during Smith's senior year, almost always on school property. *See id.*

28. *See id.* at 1017. The summer after Smith graduated, she told her parents about the relationship and together they reported it to the police and school officials. The school suspended the teacher two days later, demanding his resignation. The school then recommended to the State Board of Education that the appellant's teaching license be revoked. Two years later Smith and her parents filed suit against the school district alleging sexual discrimination under Title IX. The school district moved for summary judgment, which was denied by the district court. The school district then requested, and received, an interlocutory appeal on the issue of school district liability under Title IX. *See id.* at 1017-18.

29. *See supra* text accompanying notes 22-25.

30. *See Smith*, 128 F.3d at 1034 (quoting *Rosa*, 106 F.3d at 660).

extended agency principles to Title IX misconstrued the Supreme Court's quote of *Meritor Savings Bank v. Vinson* in *Franklin*.[31] *Meritor* applied agency principles to Title VII.[32] The *Franklin* Court's reference to *Meritor* was the principle support relied upon by various circuit courts when holding that Title VII agency principles applied should also apply in actions brought under Title IX.[33] In *Smith*, the Seventh Circuit noted that *Franklin* did not even consider the standard for school district liability under Title IX, much less apply agency principles to Title IX.[34] Second, the court explained that, unlike Title VII, Title IX made no reference to agency principles.[35] Whereas Title VII defines "employer" to include any agents of the employer, Title IX defines "program or activity" to mean the operations of a school system and to include only those who have administrative control of the school.[36] Third, the constitutional source of the statutes is different.[37] Whereas Title VII was passed pursuant to Congress's commerce clause power, Title IX was enacted pursuant to the spending clause power.[38] Spending clause statutes allow monetary damages only for intentional discrimination.[39]

In the instant case, the Supreme Court considered, for the first time, the standard for school district liability under Title IX.[40] The Court held that a school district is not liable under Title IX for teacher-student sexual harassment unless a school official who has authority to institute corrective measures has actual notice of, and is deliberately indifferent to, the

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31. *See id.* at 1022. The *Franklin* Court had reasoned "[u]nquestionably, Title IX placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex, and 'when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor "discriminates" on the basis of sex.' Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986). We believe the same rule should apply when a teacher sexually harasses and abuses a student." Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 75 (1992).

32. *See Meritor*, 477 U.S. at 72.

33. *See, e.g.*, Kracunas v. Iona College, 119 F.3d 80, 86 (2d Cir. 1997); Doe v. Claiborne County Bd. of Educ., 103 F.3d 495, 514 (6th Cir. 1996); Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463, 469 (8th Cir. 1996).

34. *See Smith*, 128 F.3d at 1022. The Seventh Circuit explained that, although the *Franklin* Court referred to the Title VII decision in *Meritor* to conclude that sexual harassment is intentional discrimination, the *Franklin* Court never referred to *Meritor's* or any other Title VII case's discussion on the standard for institutional liability. *See id.* The Seventh Circuit further noted that the standard for school district liability based on a teacher's actions was not an issue before the *Franklin* Court because liability resulted from the district's intentional discrimination. *See id.*

35. *See id.* at 1023 (quoting Floyd v. Waiters, 831 F. Supp. 867, 876 (M.D. Ga. 1993)).

36. *See id.* at 1023-24.

37. *See id.* at 1028.

38. *See id.*

39. *See id.* Adopting agency principles for Title IX would allow for liability based on negligence and, in some cases, would lead to strict liability. The court reasoned that this could not be tolerated since it would be inconsistent with spending clause jurisprudence. *See id.* at 1028-29.

40. *See* Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989, 1995 (1998).

teacher's misconduct.[41]

The *Gebser* Court noted that petitioners sought to rely on *Franklin's* reference to *Meritor* to support their argument that Title VII agency principles should define the standard of school district liability under Title IX.[42] Specifically, petitioners argued that *Franklin*'s comparison of teacher-student sexual harassment with *Meritor's* supervisor-employee harassment dictated that agency principles applied in *Meritor* to define institutional liability under Title VII should also apply in a Title IX action.[43] However, the *Gebser* Court clarified that *Franklin*'s reference to *Meritor* was made only to put forth the general idea that sexual harassment constitutes sex discrimination under Title IX.[44] The Court also briefly noted that Title IX made no mention of an educational institution's agents.[45] Therefore, the Court reasoned that Title IX does not call for the application of agency principles.[46]

The Court next considered legislative history and concluded that applying agency principles would frustrate the purposes of Title IX.[47] The Court began with the general proposition that Congress did not intend for a recipient of federal funding to be subject to unlimited liability where the recipient was unaware of sex discrimination.[48] The Court explained that Title IX conditioned the awarding of federal funds on the recipient's promise not to discriminate, essentially creating a contractual relationship between the government and the recipient of federal funds.[49] The Court reasoned that Congress clearly did not intend that a school district be held liable for unintentional sex discrimination since this would expose the district to liability when it was not aware that it was violating the contract.[50]

In addition, the Court looked to the express means of enforcement included in Title IX as a reason for its holding.[51] Title IX authorizes agencies that disburse federal funding to suspend or terminate that funding if the recipient discriminates on the basis of sex.[52] However, an agency cannot take action until it has notified the district of its violation and

41. *See id.* at 1993.
42. *See id.* at 1995; *see also supra* note 31.
43. *See Gebser*, 118 S. Ct. at 1995.
44. *See id.*
45. *See id.* at 1996.
46. *See id.*
47. *See id.* at 1997.
48. *See id.*
49. *See id.*
50. *See id.* at 1998.
51. *See id.*
52. *See id.*

afforded it a chance to come into compliance.[53] Therefore, the Court concluded that it would be unwise to assume Congress intended an implied enforcement scheme that permits substantial liability without regard to a school district's notice of a violation when the express means of enforcement requires such notice.[54]

The Supreme Court's decision in *Gebser* serves to clarify confusion among the circuit courts on the standard of school district liability under Title IX.[55] While more circuit courts had concluded that agency principles do apply to Title IX, the Supreme Court's reasoning, and that found in *Rosa* and *Smith*, is more extensive and more sound.[56] Most of the courts that had concluded that agency principles should govern the standard of liability under Title IX had relied almost exclusively on the Supreme Court's quotation of *Meritor* in its *Franklin* decision and the subsequent assumption that the Supreme Court thereby meant to extend Title VII agency principles to Title IX.[57] Without this assumption, the support for finding agency principles relevant to Title IX becomes very weak.[58]

Gebser, *Smith*, and *Rosa*, in contrast to the cases applying agency principles to Title IX, contained much more detailed analysis. All three

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53. *See id.* (quoting 20 U.S.C. § 1682 (1994)). The Court reasoned that a primary purpose for requiring notice and an opportunity to comply was to avoid diverting funding from public education where a school district is unaware of its violation and is willing to take corrective action. The Court explained that allowing damages to attach along agency principles would be in conflict with this purpose. *See id.* at 1999.

54. *See id.*

55. *See* Smith v. Metropolitan Sch. Dist. Perry Township, 128 F.3d 1014, 1026 n.11 (1996) (noting that courts which have considered the issue of a school district's liability under Title IX for teacher-student sexual harassment are hopelessly at odds); Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463, 468 (8th Cir. 1996) (noting that courts which have considered the issue of school district liability under Title IX have failed to reach a consensus).

56. *See Smith*, 128 F.3d at 1024 n.8 (noting that although four circuits have applied agency principles to Title IX, the reasoning of these circuits is limited and conclusory).

57. *See supra* note 31 and accompanying text.

58. *See supra* note 31. Another primary argument relied on by courts applying agency principles to Title IX is the policy guidance issued by the Department of Education's Office of Civil Rights (OCR) on March 13, 1997. *See Smith*, 128 F.3d at 1033. The OCR policy guidance stated that agency principles govern school district liability under Title IX. The Seventh Circuit in *Smith* considered the role of the OCR's policy guidance in the court's decision regarding the standard of liability under Title IX. The court reasoned that the policy guidance failed to consider the spending clause source of Title IX or the differences between Title IX and Title VII. In addition, the OCR failed to consider the financial impact its policy guidance would have on school districts. The Seventh Circuit, therefore, concluded that the policy guidance was poorly reasoned, providing no rationale for applying agency principles to Title IX. The court then explained that the OCR policy guidance was neither a regulation nor an interpretation of regulations passed by the Department of Education or OCR. Therefore, for the above reasons, the Seventh Circuit ultimately concluded that it could not defer to the OCR's policy guidance. *See id.*

focused on the differences in the language of Title IX and Title VII.[59] The fact that Congress made no reference to the agents of a school district in its definition of a program or activity under Title IX was considered highly indicative that Congress did not intend to hold a school district liable for the actions of its agents absent actual knowledge.[60] The circuit courts applying agency principles to Title IX did not satisfactorily address this distinction.[61]

In addition, the fact that Title IX was passed pursuant to Congress's spending clause power supports the position that an actual notice standard applies to Title IX.[62] The Supreme Court has always required that institutions intentionally discriminate before those institutions will be held liable under a spending clause statute forbidding discrimination.[63] This has always been the standard under Title VI, another spending clause statute.[64] There is no reason why the standard of liability for a school district under Title IX should be any different.[65] Moreover, the *Gebser* Court reasoned that the express means of enforcing Title IX required actual notice, and that implying a much more expansive liability for an implied private cause of action, in the absence of clear congressional intent, would be unwise.[66]

There also are sound policy reasons for requiring an actual notice and deliberate indifference standard for school district liability under Title IX. Because agency principles would make a school district liable in virtually every instance in which a teacher sexually abuses or harasses a student,[67] some school districts might choose to refuse federal funding rather than risk such expansive liability.[68] As the Seventh Circuit explained, Congress did not intend to burden school districts with potentially unlimited liability just because the district accepted federal funding.[69] If agency principles were applied to Title IX, a school district could never know with any

59. *See Gebser*, 118 S. Ct. at 1996; *Smith*, 128 F.3d at 1023-27; Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648, 654 (5th Cir. 1997).

60. *See Smith*, 128 F.3d at 1027.

61. *See id.* at 1025.

62. *See id.* at 1028.

63. *See id.*

64. *See supra* note 15. Title IX was patterned after Title VI. *See Gebser*, 118 S. Ct. at 1997. Both forbid recipients of federal funds from discriminating in the administration of their programs. Title VI forbids racial discrimination while Title IX forbids discrimination on the basis of sex. Aside from this difference, the two statutes are worded virtually identically. *See id.* Under Title VI, the standard of institutional liability has always been intentional discrimination. *See supra* note 15.

65. *See Smith*, 128 F.3d at 1031-32 (quoting Guardians Assoc. v. Civil Serv. Comm'n. of New York, 463 U.S. 582, 596 (1983)).

66. *See Gebser*, 118 S. Ct. at 1999.

67. *See Rosa*, 106 F.3d at 655.

68. *See Smith*, 128 F.3d at 1032.

69. *See id.* (quoting *Rosa*, 106 F.3d at 656).

certainty the conditions that attached to its acceptance of federal funds.[70] This would deprive the school district a meaningful opportunity to engage in a cost-benefit analysis regarding accepting federal funds.[71] Since astronomical damages could attach to the sexual abuse or molestation of young children, the Seventh Circuit concluded that holding school districts liable under agency principles could financially cripple public education.[72]

Justice Stevens, in his dissent in *Gebser*, expressed concern that an actual notice standard will be an incentive for school districts to stick their heads in the sand to insulate themselves from acquiring knowledge of discrimination and thereby avoid liability.[73] However, as the Fifth Circuit noted, it would be foolish for school districts to take this approach because they would still face the threat of liability under 42 U.S.C. § 1983.[74] The *Gebser* Court also dealt with this concern by indicating that their holding did not affect any remedies under state law that a victim of discrimination may have against the school district or the teacher in his individual capacity.[75] In any case, this hypothetical concern should not be the impetus to expand liability under Title IX when doing so appears unreasonable.

The Supreme Court, in *Gebser*, interpreted for the first time the standard of school district liability for teacher-student sexual harassment under Title IX.[76] In doing so, the Court cleared up a myriad of confusion among the circuit courts.[77] The Supreme Court followed the better reasoning of the circuits that had held agency principles inapplicable to Title IX.[78] This decision gives school districts a clear indication of what the

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70. *See id.* (quoting *Guardians*, 463 U.S. at 596).

71. *See id.*

72. *See id.* The Seventh Circuit also explained that there is no sound policy reason to hold school districts strictly liable for the sexually discriminatory practices of its teachers. *See id.* at 1030 (quoting Canutillo Indep. Sch. Dist. v. Leija, 101 F.3d 393, 399 (5th Cir. 1996)). The court reasoned that strict liability attached to product manufacturers for two reasons. *See id.* at 1030-31. First, product manufacturers are better able to spread the risk of large verdicts among its customers by simply raising the prices of its products. *See id.* at 1030 (quoting *Canutillo*, 101 F.3d at 399). But a school district cannot do this, for its "products" are its students. *See id.* Second, product manufacturers are in a better position than consumers to search for and discover product and design defects. *See id.* at 1031 (quoting *Canutillo*, 101 F.3d at 399). This logic, however, does not apply to school districts. *See id.*

73. *See Gebser*, 118 S. Ct. at 2004 (Stevens, J., dissenting).

74. *See Rosa*, 106 F.3d at 658. The Fifth Circuit also noted that it would be immoral for a school district to take this approach. *See id.* It must be remembered that school districts are public entities and, as such, they are subject to the pressures of public opinion from the community they purport to serve.

75. *See Gebser*, 118 S. Ct. at 2000.

76. *See supra* note 40 and accompanying text.

77. *See supra* note 55 and accompanying text.

78. *See supra* note 56 and accompanying text.

conditions are for accepting federal funds.[79] It will allow schools to continue to focus on their primary task of educating children rather than policing the relationships between teachers and students.[80]

79. *See supra* notes 72-73 and accompanying text.
80. *See generally supra* note 73.