

If You've Been Kissed, Who Do You Tell? Notice of Sexual Harassment Under a Title IX Claim [*Baynard v. Malone*, 268 F.3d 228 (4th Cir. 2001)]

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*Schoolchildren have a constitutional right to personal security and to bodily integrity. This right . . . includes the right to be free from sexual abuse at the hands of public school employees.*¹

I. INTRODUCTION

When teacher Mary Kay LeTourneau's sexual relationship with a thirteen-year-old student became public,² she introduced America to the most frequent subject of lawsuits in the educational system, sexual harassment.³ Even the United States Supreme Court agreed that sexual harassment of students in schools "is an all too common aspect of the educational experience."⁴ However, *Baynard v. Malone*⁵ denied the liability of a school board when a teacher sexually harassed or abused a student even though the principal knew or should have known that the teacher was a risk to students.⁶

The Supreme Court laid out the framework for holding school districts liable when a teacher sexually harasses a student in *Gebser v. Lago Vista Independent School District*.⁷ The Court said that the district must have actual, rather than constructive, notice;⁸ the notice must be given to an official with "authority to institute corrective measures;"⁹ and the plaintiff must prove that the district failed to re-

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1. *Massey v. Akron City Bd. of Educ.*, 82 F. Supp. 2d 735, 745 (N.D. Ohio 2000).
2. Ronald K. Fitten & Nancy Bartley, *Ex-Teacher Pleads Guilty in Rape of Boy*, SEATTLE TIMES, Aug. 7, 1997, at B1.
3. Emily Wax, *Supreme Court Won't Hear Virginia Sex Abuse Case*, WASHINGTON POST, March 26, 2002, at B02.
4. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998).
5. 268 F.3d 228 (4th Cir. 2001), *cert. denied*, 122 S. Ct. 1357 (2002) (*United States Reports* citation was not available at time of publication).
6. *Id.* at 238.
7. 524 U.S. at 277.
8. *Id.*
9. *Id.*

spond.¹⁰ In setting out this framework, the Court failed to provide guidance on who might be the appropriate official.¹¹

In *Malone*, the Fourth Circuit Court of Appeals tried to determine who might be an appropriate official by deciding who was not.¹² The court excluded the school principal from the category of appropriate officials because she did not have the requisite “authority to suspend, reassign, or terminate” employees.¹³

The Fourth Circuit erred when it determined that a school principal could not be an appropriate official with authority to institute corrective measures. The court’s decision ignored the Supreme Court’s implication in *Davis v. Monroe County Board of Education*¹⁴ that a school principal could be the appropriate official if sufficient notice had been given, and the district had responded to the notice with deliberate indifference.¹⁵ Furthermore, the court failed to use the broader *Gebser* standard in determining school district liability, favoring instead a more narrow definition adopted from the Fifth Circuit.¹⁶ This comment will explore the standards that qualify an individual as an appropriate official with the authority to institute corrective measures and, specifically, whether a school principal can constitute an appropriate official.¹⁷

II. CASE DESCRIPTION

Catherine Malone served as building principal at Charles Barrett Elementary School.¹⁸ In March 1990, Steven Leckie, a student at Barrett Elementary fifteen years earlier, reported to Malone that his teacher, Craig Lawson, had molested him while he was a student.¹⁹ Leckie also stated that Lawson was a pedophile and recommended that Malone pay attention if Lawson was spending extra time with a student, particularly if he was transporting a student home from school.²⁰ After Malone requested confirmation of Leckie’s allegations, Leckie’s mother called the next day to corroborate her son’s report.²¹ Malone did not report this information to anyone and con-

10. *Id.*

11. *Floyd v. Waiters*, 171 F.3d 1264, 1265 (11th Cir. 1999); *Baynard v. Lawson*, 112 F. Supp. 2d 524, 532 (E.D. Va. 2000).

12. *See Baynard v. Malone*, 268 F.3d 228, 239 (4th Cir. 2001).

13. *Id.*

14. 526 U.S. 629 (1999).

15. *See id.* at 654.

16. *See Malone*, 268 F.3d at 237 (adopting language used in *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 660 (5th Cir. 1997)).

17. Both actual notice and deliberate indifference are required for school district liability, but will not be specifically addressed within the context of this comment.

18. *Malone*, 268 F.3d at 233.

19. *Id.*

20. *Baynard v. Lawson*, 112 F. Supp. 2d 524, 525-26 (E.D. Va. 2000).

21. *Id.* at 526.

ducted no further investigation of Leckie's allegations.²² Later that spring, an unidentified parent reported to Malone that Lawson "had sexually molested a student."²³ Malone did not obtain any other information from this parent and again did nothing with the information.²⁴

Jackson Baynard transferred to Barrett Elementary in the fall of 1990 and began attending the sixth grade in Lawson's class.²⁵ Baynard's mother shared concerns with Lawson about her son's transition from private to public school and that "[t]he Baynard family was in crisis at [that] time."²⁶ Lawson promised to "take a special interest" in his new student.²⁷

In November, the school librarian entered Lawson's classroom early one morning and saw Baynard sitting on Lawson's lap; their faces were close together and Lawson had one arm around Baynard.²⁸ When Lawson saw the librarian, he jumped up and Baynard fell to the floor.²⁹ The librarian perceived Lawson's behavior as "inappropriate" and quickly left the classroom.³⁰ She reported her observation to Malone, noting that she believed what she saw was "inappropriate."³¹ When Malone spoke with Lawson about the report, Lawson apparently explained that what the librarian had observed was a fatherly chat between the two.³² Malone admonished Lawson that he was too physical with students, but she attributed the physical closeness between the student and teacher to Baynard rather than to the teacher.³³ Lawson promised to talk with Baynard about behaving appropriately.³⁴

Sometime after this incident and prior to Christmas, another teacher approached Malone and reported that a neighbor told the teacher "that Lawson abused children."³⁵ Malone replied that she could not ask the teacher to keep this quiet because the information was already "out in the neighborhood."³⁶ Malone testified that it was this report that raised her suspicions.³⁷

22. *Id.*

23. *Malone*, 268 F.3d at 233.

24. *Id.*

25. *Id.*

26. Brief for Appellee Jackson Baynard at 17, *Malone* (No. 00-2340(1)). Part of the crisis was that Baynard's father was unemployed and an alcoholic. *Id.*

27. *Id.*

28. *Malone*, 268 F.3d at 233.

29. *Id.*

30. Brief for Appellee Jackson Baynard at 7, *Malone* (No. 00-2340(1)).

31. *Baynard v. Lawson*, 112 F. Supp. 2d 524, 526 (E.D. Va. 2000).

32. *Malone*, 268 F.3d at 233.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Baynard v. Lawson*, 112 F. Supp. 2d 524, 526 (E.D. Va. 2000).

In January 1991, Malone reported the allegations made months earlier by Leckie and the rumors reported by the teacher to the district's personnel director, Otto Beckhoff.³⁸ She did not report the incident between Baynard and Lawson witnessed by the school librarian.³⁹ Beckhoff investigated the report immediately and instructed Malone to supervise Lawson more closely.⁴⁰ Malone responded by walking through the halls more frequently and making a point to stop by Lawson's classroom.⁴¹

Beckhoff contacted one of Lawson's previous employers as well as Child Protective Services (CPS).⁴² CPS declined to investigate because the only specific allegations were made by Leckie, who was an adult by the time the abuse was reported.⁴³ After completing his own interviews, Beckhoff reached the conclusion that Lawson probably had abused Leckie.⁴⁴ He then contacted the police.⁴⁵ The police conducted an evaluation and agreed that Lawson probably had abused Leckie;⁴⁶ however, Leckie refused to fully cooperate, so the police closed the investigation due to lack of evidence.⁴⁷ Lawson resigned shortly thereafter, but was allowed to complete the school year at Barrett Elementary.⁴⁸

Years later, Baynard came forward with information that Lawson molested him from the time he began attending Barrett Elementary until his freshman year in college.⁴⁹ He alleged that the abuse took place in a number of locations, including school, at Lawson's home, and on camping trips with Lawson.⁵⁰ After Baynard came forward, Lawson was arrested and convicted.⁵¹ Baynard filed suit in April 1999 under Title IX, alleging that officials of the Alexandria City School Board (ACSB) failed to protect Baynard from Lawson's discrimination.⁵² He alleged that school officials failed to timely begin an investigation, and that the investigation was inadequate.⁵³ He also alleged that the defendants failed to take affirmative steps to protect him even after the investigation ended.⁵⁴

38. *Malone*, 268 F.3d at 233.

39. *Id.*

40. *Id.* at 234.

41. *Id.*

42. *Id.*

43. *Id.*

44. Brief for Appellee Jackson Baynard at 15, *Malone* (No. 00-2340(1)).

45. *Malone*, 268 F.3d at 234.

46. Brief for Appellee Jackson Baynard at 16, *Malone* (No. 00-2340(1)).

47. *Malone*, 268 F.3d at 234.

48. *Baynard v. Lawson*, 112 F. Supp. 2d 524, 528 (E.D. Va. 2000).

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* See *infra* notes 66-70 and accompanying text.

53. *Lawson*, 112 F. Supp. 2d at 528.

54. *Id.*

When the case went to trial, two counts remained.⁵⁵ The defendants included ACSB, Malone, Beckoff, the assistant superintendent, Maxine Wood, and the superintendent, Paul Masem.⁵⁶ The district court entered judgments as a matter of law in favor of Beckoff and Masem.⁵⁷ After nearly two days of deliberation, the jury returned a verdict against Malone and awarded Baynard \$350,000.⁵⁸ The jury also returned a verdict against ACSB in the amount of \$700,000.⁵⁹ Both defendants separately moved for a judgment notwithstanding the verdict.⁶⁰ “The court denied Malone’s motion for judgment as a matter of law,” but granted judgment as a matter of law to the ACSB.⁶¹

III. BACKGROUND

Title IX of the Education Amendments of 1972⁶² provides that a person cannot “be subjected to discrimination under any education program or activity receiving Federal financial assistance.”⁶³ Title IX serves two purposes: the first is “to avoid the use of federal resources to support discriminatory practices”;⁶⁴ the second is “to provide individual citizens effective protection against those practices.”⁶⁵ The United States Supreme Court defined sexual harassment of a student as an act of discrimination prohibited by Title IX.⁶⁶ In *Meritor Savings Bank, FSB v. Vinson*,⁶⁷ the Court held that a supervisor’s sexual harassment of an employee was gender-based discrimination under Title VII of the Civil Rights Act of 1964.⁶⁸ The Court extended the *Meritor* definition of discrimination in *Franklin v. Gwinnett*⁶⁹ where it equated a teacher’s sexual harassment of a student with an employer’s sexual harassment of an employee.⁷⁰

While Title IX prohibits discrimination within programs, it does not contain an express cause of action.⁷¹ However, in *Cannon v. Uni-*

55. *Id.* Count I was Baynard’s Title IX discrimination claim against the ACSB. *Id.* Count II was a § 1983 claim against the principal, the personnel director, and the superintendent. *Id.*

56. *Id.*

57. Baynard v. Malone, 268 F.3d 228, 234 (4th Cir. 2001).

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. 20 U.S.C. § 1681(a) (2000).

63. *Id.*

64. Cannon v. Univ. of Chicago, 44 U.S. 677, 704 (1979).

65. *Id.*

66. Franklin v. Gwinnett, 503 U.S. 60, 75 (1992).

67. 477 U.S. 57 (1986).

68. *See id.* at 64. Title VII of the Civil Rights Act of 1964 prohibits discrimination in the workplace based on sex. 42 U.S.C. § 2000e-2(a)(1) (2000).

69. 503 U.S. 60 (1992).

70. *Id.* at 75.

71. *See Cannon v. Univ. of Chicago*, 44 U.S. 677, 683 (1979).

versity of Chicago,⁷² the United States Supreme Court determined that there was an implied private right of action when an individual suffers harm as a result of discrimination.⁷³ The Court took this conclusion a step further in *Franklin*, holding that a school district may be held liable for monetary damages under Title IX in a private action where a teacher sexually harasses a student.⁷⁴ In *Franklin*, Christine Franklin filed a complaint after a teacher forcibly kissed her, called her at home, and coerced her into having sexual intercourse with him.⁷⁵ While teachers and administrators knew about the teacher's harassment of Franklin, they encouraged her not to report it or to press charges.⁷⁶ The district court dismissed Franklin's claim "on the ground that Title IX does not authorize an award of damages."⁷⁷

The United States Supreme Court reversed the district court's ruling, concluding that Congress did not intend to restrict available remedies under Title IX.⁷⁸ The Court based this conclusion on an amendment to Title IX made after the *Cannon* decision.⁷⁹ The Court further noted that traditional remedies were inadequate in this situation and would leave the plaintiff without relief because the harassing teacher no longer taught at the school, and Franklin herself no longer attended there.⁸⁰

Since *Franklin*, courts have struggled to articulate when school districts may be held liable for a teacher's sexual abuse of a student. In *Rosa H. v. San Elizario Independent School District*,⁸¹ the Fifth Circuit Court of Appeals determined that a student may not recover damages from a school district under Title IX unless the district had actual knowledge of a substantial risk that sexual abuse would occur.⁸² Additionally, the Court found that notice of the abuse must be given to a school official who supervises the offending employee and has "the power to end the abuse."⁸³ Finally, the Court held that once the appropriate official has notice of the abuse, the district becomes liable only if it shows deliberate indifference to the risk.⁸⁴

72. *Id.*

73. *Id.* at 717.

74. *Franklin*, 503 U.S. at 76.

75. *Id.* at 63.

76. *Id.* at 64.

77. *Id.*

78. *Id.* at 73.

79. *Id.* at 72. Title IX was amended in the Rehabilitation Act of 1986, 42 U.S.C. § 2000d-7(a)(1) (2000), which withdrew states' Eleventh Amendment immunity. *Franklin*, 503 U.S. at 72.

80. *Franklin*, 503 U.S. at 76.

81. 106 F.3d 648 (5th Cir. 1997).

82. *Id.* at 650.

83. *Id.*

84. *Id.*

In *Rosa H.*, a student became sexually involved with an after-school karate instructor while attending San Elizario High School.⁸⁵ The student confided to the school counselor that she had a sexual relationship with the instructor.⁸⁶ The counselor shared this information with the school social worker, who, in turn, advised the special programs director that there might be a relationship between the student and the karate instructor.⁸⁷ When the student's mother became suspicious about the instructor's involvement with her daughter, she called a meeting with the school counselor, the principal, and her daughter.⁸⁸

The Fifth Circuit found that for a school district to have actual notice of a substantial risk that sexual harassment or abuse would occur, a plaintiff did not need to demonstrate that "a particular teacher would abuse a particular student."⁸⁹ However, the plaintiff must "demonstrate that the school district actually knew that the students faced a substantial threat of sexual harassment."⁹⁰ In determining which school official must have knowledge of the abuse before a district can be held liable, the *Rosa H.* court rejected the requirement that a school board member must have knowledge of the abuse.⁹¹ The court also rejected the designation of liability according to job titles.⁹² It further determined that the relevant school official was one whom the school board had appointed to monitor the conduct of other employees and could remedy the wrongdoing.⁹³

Shortly after the *Rosa H.* decision, the United States Supreme Court weighed in again on the issue of school district liability in *Gebser*, another case arising in the Fifth Circuit.⁹⁴ In a five to four decision, the Court held that the district could not be held liable for a teacher's sexual harassment of a high school student unless "an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct."⁹⁵

The ruling in *Gebser* involved an eighth grade student who participated in a teacher's discussion group while attending Lago Vista Independent School District.⁹⁶ The teacher and the student, Gebser,

85. *Id.*

86. *Id.* at 651.

87. *Id.*

88. *Id.*

89. *Id.* at 659.

90. *Id.*

91. *See id.*

92. *Id.* at 660.

93. *Id.*

94. *See generally* *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998).

95. *Id.*

96. *Id.*

began a sexual relationship the following year, occasionally engaging in sexual intercourse during the school day.⁹⁷ Gebser did not tell anyone about this relationship, and the relationship continued until a police officer discovered the two having sex.⁹⁸ The only notice that the district had of the teacher's inappropriate activities was complaints from parents about remarks the teacher made in class.⁹⁹

Gebser and her mother filed claims against both the teacher and the school district under Title IX.¹⁰⁰ The United States Supreme Court reasoned that recovery of damages based on principles of respondeat superior or constructive notice would "frustrate the purposes of Title IX" because there was no actual notice to a school official that a violation had occurred.¹⁰¹ Moreover, because Title IX is Spending Clause legislation, a funding recipient must have both notice of a violation plus an opportunity to address the violation before it can be held liable.¹⁰² No one in Lago Vista was even aware of the teacher's actions and thus unable to make any attempts to correct the violation.¹⁰³ As a result, the Court determined that Lago Vista could not be held liable for the teacher's activities when no one in the district was aware he was engaging in such acts.¹⁰⁴

In the dissenting opinion, Justice John Paul Stevens argued that the Court's decision in *Franklin* supported the recovery of any appropriate remedy in a sexual harassment case.¹⁰⁵ Justice Stevens also pointed out that Title IX should be given "a sweep as broad as its language."¹⁰⁶ He rejected the majority's view that agency principles do not apply to Title IX cases.¹⁰⁷ Additionally, Justice Stevens predicted that the Court's holding would allow school boards to claim immunity whenever a teacher harasses a student.¹⁰⁸ He concluded his dissent by criticizing the Court's decision to place "the school district's purse above the protection of immature high school students."¹⁰⁹

97. *Id.* at 278.

98. *Id.*

99. *Id.*

100. *Id.* at 278-79.

101. *Id.* at 285.

102. *See id.* at 285-86. When legislation grants federal funds, any condition tied to the receipt of those funds must be unambiguous. *See Pennhurst State Hospital v. Halderman*, 451 U.S. 1, 2 (1981). When a school district accepts federal funds under Title IX, a contractual relationship is formed. *Gebser*, 524 U.S. at 286. The school district agrees not to discriminate against a student based upon the student's gender in return for federal funding. *Id.*

103. *Gebser*, 524 U.S. at 291.

104. *Id.*

105. *See id.* at 294-95 (Stevens, J., dissenting).

106. *Id.* at 296 (Stevens, J., dissenting) (quoting *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982)).

107. *Id.* at 298-99 (Stevens, J., dissenting).

108. *See id.* at 300-01 (Stevens, J., dissenting).

109. *Id.* at 306 (Stevens, J., dissenting).

Justice Ruth Bader Ginsburg joined Justice Stevens' dissent, but also wrote separately, joined by Justices David Souter and Stephen Breyer.¹¹⁰ She opined that the school district should bear the burden of demonstrating that "its internal remedies were adequately publicized and likely would have provided redress without exposing the complainant to undue risk, effort, or expense."¹¹¹ In her view, a plaintiff has a responsibility to make use of a school district's policy before qualifying for damages under Title IX.¹¹²

Gebser provided a basic framework for courts to determine liability of school districts, but the definition of an appropriate official with the authority to institute corrective measures was left to later courts.¹¹³ However, the United States Supreme Court addressed the issue indirectly in *Davis*,¹¹⁴ a student-on-student harassment case brought under Title IX.¹¹⁵ The Court held that a student may have a private Title IX action for damages

only where the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities. Moreover . . . such an action will lie only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit.¹¹⁶

When the Court applied the facts of *Davis*, it reasoned that the "petitioner may be able to show both actual knowledge and deliberate indifference on the part of the Board."¹¹⁷ Yet, the board members themselves never had any actual knowledge of the harassment.¹¹⁸ The principal was the highest official with actual knowledge, and according to the Court, it was the principal's refusal to investigate that created deliberate indifference on the part of the school board.¹¹⁹

The Eleventh Circuit Court of Appeals took a different approach by using statutory definitions to determine who was an appropriate official in *Floyd v. Waiters (Floyd I)*,¹²⁰ concluding that state law controlled.¹²¹ The court's analysis began with the definition of the phrase "program or activity" from Title IX.¹²² Within 20 U.S.C. § 1687,¹²³ a program or activity is "all of the operations of . . . a local educational

110. *Id.* (Ginsburg, J., dissenting).

111. *Id.* at 307 (Ginsburg, J., dissenting).

112. *Id.*

113. *See id.* at 290.

114. *See Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 653-54 (1999).

115. *Id.* at 632.

116. *Id.* at 633.

117. *Id.* at 654.

118. *See id.* at 633-35.

119. *See id.*

120. 133 F.3d 786 (11th Cir. 1998) [hereinafter *Floyd I*].

121. *Id.* at 791.

122. *Id.*

123. 20 U.S.C. § 1687 (2000).

agency.”¹²⁴ The court then looked to 20 U.S.C. § 8801¹²⁵ to define a local education agency, finding it to be a

public board of education or other public authority *legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools . . . as are recognized in a State as an administrative agency for its public elementary or secondary schools.*¹²⁶

The court interpreted this provision to mean that state law determined the appropriate official to receive notice of a Title IX violation.¹²⁷ After reviewing Georgia law, the court concluded that local superintendents and school board members themselves could expose a district to liability.¹²⁸ The court also noted that a district employee does not constitute a school official and cannot be considered the appropriate person with actual notice of a teacher’s misconduct.¹²⁹

Conversely, in *Warren v. Reading*,¹³⁰ the Third Circuit recently rejected the application of state law and held that “a school principal who is entrusted with the responsibility and authority normally associated with that position will ordinarily be ‘an appropriate person’ under Title IX.”¹³¹ In *Warren*, a principal who supervised a fourth-grade teacher accused of molesting students was considered to be an official with authority to institute corrective measures.¹³² The federal district court stated that it “[did] not believe that the Supreme Court’s intention in *Gebser* was to exclude a school principal from the list of authorized people whose non-feasance in the face of an allegation of sexual misconduct can lead to school district liability.”¹³³ The district court further noted that *Gebser*’s discussion of a principal receiving information of sexual misconduct indicated the United States Supreme Court’s willingness to consider a principal as an appropriate authority.¹³⁴ In affirming the district court’s ruling, the Third Circuit stated that the Court’s analysis was “meaningless” if a principal cannot be the appropriate official.¹³⁵

In *Murrell v. School District No. 1*,¹³⁶ the Tenth Circuit declined to define who is an appropriate official according to job titles.¹³⁷ The

124. *Id.* at § 1687(2)(B).

125. 20 U.S.C. § 8801 (2000).

126. *Floyd I*, 133 F.3d at 791. (quoting 20 U.S.C. § 8801(19)(A) (2000) *repealed by* Pub. L. No. 107-110, § 1011(5)(C), 115 Stat. 1986 (2002)).

127. *See id.*

128. *Id.* at 793.

129. *See Floyd v. Waiters*, 171 F.3d 1264, 1265 (11th Cir. 1999).

130. 278 F.3d 163 (3d Cir. 2002) [hereinafter *Warren II*].

131. *Id.* at 171

132. *Warren v. Reading*, 82 F. Supp. 2d 395, 402 (E.D. Pa. 2000) [hereinafter *Warren I*].

133. *Id.* at 399.

134. *Id.*

135. *Warren II*, 278 F.3d at 170.

136. 186 F.3d 1238 (10th Cir. 1999).

137. *Id.* at 1247.

court held that the school principal's "knowledge may be charged to the school district" as she was the highest-ranking administrator and had control over the school environment.¹³⁸

Several federal district courts have also held that a building principal possesses the authority to institute corrective measures.¹³⁹ In *Booker v. City of Boston*,¹⁴⁰ the United States District Court for the District of Massachusetts held that school officials with the authority and the legal obligation to notify the Department of Social Services about a teacher's alleged sexual misconduct were appropriate officials to receive notice under the *Gebser* standard.¹⁴¹

In *Morlock v. West Central Education District*,¹⁴² the United States District Court for the District of Minnesota linked having the responsibility to receive sexual harassment complaints with serving as a building principal.¹⁴³ The court then reasoned that having "the power and the official responsibility to begin the process of addressing plaintiff's complaint" satisfied the notice requirements to an appropriate official in *Gebser*.¹⁴⁴ Thus, the court determined that the coordinator of the special education learning center to whom Morlock complained about sexual remarks and inappropriate and unwelcome touching was "an official with the authority to take steps to prevent sexual harassment."¹⁴⁵

IV. ANALYSIS

When Baynard's case went to trial, two counts remained.¹⁴⁶ In the first count, Baynard alleged that the school principal, the assistant superintendent, the personnel director, and the superintendent failed to adequately address the sexual abuse perpetrated by Lawson, resulting in discrimination against Baynard on the basis of sex.¹⁴⁷ In the second count, Baynard alleged that the same defendants showed deliberate indifference by not protecting the plaintiff from the teacher's abuse both before and after the investigation.¹⁴⁸

On appeal, Malone raised the issue of whether the district court erred when it denied her motion for judgment as a matter of law.¹⁴⁹

138. *Id.*

139. See *Gordon v. Ottumwa Cmty. Sch. Dist.*, 115 F. Supp. 2d 1077, 1082 (S.D. Iowa 2000); *Doe v. Sch. Admin. Dist. No. 19*, 66 F. Supp. 2d 57, 63 (D. Me. 1999).

140. No. 97-CV-12534-MEL, 2000 U.S. Dist. LEXIS 18652 (D. Mass. Dec. 12, 2000).

141. *Id.* at *10. The City of Boston was named as a defendant in this case because it employed the school officials. See generally *id.*

142. 46 F. Supp. 2d 892 (D. Minn. 1999).

143. See *id.* at 908-09.

144. *Id.* at 910.

145. *Id.* at 909.

146. See *supra* note 55.

147. *Baynard v. Lawson*, 112 F. Supp. 2d 524, 528 (E.D. Va. 2000).

148. *Id.*

149. *Baynard v. Malone*, 268 F.3d 228, 234 (4th Cir. 2001).

Baynard cross-appealed on two issues.¹⁵⁰ The first issue was whether the district court erred when it granted judgment as a matter of law to the personnel director and the superintendent.¹⁵¹ The second issue was whether the district court erred in granting judgment to the school board.¹⁵²

In determining the liability of the school district, the first sub-issue in *Baynard v. Malone* was whether a school principal's knowledge of prior allegations of abuse and the lap-sitting incident constituted actual notice of a teacher's abuse of a student.¹⁵³ The second sub-issue in *Malone* was whether the district court erred in granting judgment for the school board when it found that a school principal did not constitute a school district official with authority to institute corrective measures as required by *Gebser*.¹⁵⁴

A. Parties' Arguments

In response to Baynard's discrimination claim, Malone first argued that the evidence was insufficient to demonstrate that she knew or should have known about a risk to the students in Lawson's class.¹⁵⁵ She further denied any deliberate indifference on her part, stating that the ten-month delay between Leckie's report of Lawson's previous abuse and her report to the personnel director were too remote in time to directly link past behavior with current sexual abuse of students.¹⁵⁶ Malone contended that her inadequate response to the report of the lap-sitting incident did not make her liable because she made a good faith effort to address the concerns presented.¹⁵⁷ Finally, the principal argued that Leckie's accusations and the lap-sitting incident were not linked together, and that her failure to report these incidents did not make her liable.¹⁵⁸

Baynard countered Malone's arguments by contending that the seven different reports of Lawson's abuse provided sufficient notice that the teacher posed a risk of sexual abuse to his students.¹⁵⁹ Baynard maintained that Malone's failure to report Leckie's accusations, her failure to report the "lap-sitting incident," and her failure to monitor Lawson "in a meaningful way" after being instructed to do so constituted deliberate indifference.¹⁶⁰

150. *Id.* at 236.

151. *Id.*

152. *Id.*

153. *Id.* at 238.

154. *Id.* at 237.

155. *Id.* at 235.

156. *Baynard v. Lawson*, 112 F. Supp. 2d 524, 530 (E.D. Va. 2000).

157. *Id.*

158. *Id.*

159. Brief for Appellee Jackson Baynard at 25-26, *Malone* (No. 00-2340(1)).

160. *Id.* at 31.

With respect to ACSB's liability, Baynard contended that other courts have found school principals to be appropriate officials to receive notice because they had the ability to address misconduct of teachers.¹⁶¹ Baynard pointed out that Malone had such authority in that because she directly supervised Lawson and could have limited Lawson's interaction with students.¹⁶² She also could have notified Baynard's parents of the physical contact reported between Baynard and Lawson.¹⁶³ Baynard further argued that a policy designating the principal as the recipient of suspected child abuse reports also gave Malone authority to institute corrective measures.¹⁶⁴

ACSB asserted that the plaintiff did not show by a preponderance of the evidence that Malone had the authority to institute corrective measures against Lawson.¹⁶⁵ ACSB argued that state law did not authorize principals to institute the appropriate corrective measures discussed in the *Rosa H.* opinion.¹⁶⁶ ACSB further maintained that Baynard's argument that a conference with parents was adequate remediation was a misreading of *Gebser*.¹⁶⁷ ACSB argued that the *Gebser* opinion failed to support Baynard's contention.¹⁶⁸ Instead, ACSB asserted that *Gebser* did not find that a parent conference regarding a teacher's inappropriate classroom remarks was sufficient actual notice that the teacher was having sex with a student.¹⁶⁹ ACSB stated that the corrective measures suggested by Baynard were not found to be sufficient remedial action.¹⁷⁰

B. *Majority Opinion*

On Malone's appeal, the Fourth Circuit Court of Appeals held that a reasonable jury could have found that Malone had actual or constructive knowledge of an unreasonable risk to students and was deliberately indifferent to the risk.¹⁷¹ The court based its opinion on the facts that Malone had knowledge of Leckie's accusations of Lawson's abuse; she knew about the "lap-sitting incident"; and she believed Lawson "was very physical with his students."¹⁷² The court reasoned that a jury could have found that the evidence supported a

161. *Id.* at 39.

162. *Id.* at 40.

163. *Id.*

164. *Id.*

165. Baynard v. Lawson, 112 F. Supp. 2d 524, 531 (E.D. Va. 2000).

166. Brief of Appellee ACSB at 10, *Malone* (No. 00-2340(1)).

167. *Id.* at 12-13.

168. *Id.* at 12.

169. *Id.*

170. *Id.*

171. *Malone*, 268 F.3d at 236.

172. *Id.* at 235.

finding of risk and Malone's lack of a timely response to the evidence constituted deliberate indifference.¹⁷³

On Baynard's first issue in the cross-appeal, whether the court erred in granting judgment for the personnel director and the superintendent, the court held that no rational jury could have found either individual was deliberately indifferent to a risk of sexual abuse by the teacher.¹⁷⁴ The personnel director began an investigation immediately upon notification and instructed Malone to closely monitor Lawson.¹⁷⁵ Furthermore, the personnel director was never told about the "lap-sitting incident," but did thoroughly and adequately investigate all concerns relayed to him.¹⁷⁶ The court also concluded that the superintendent was not liable because he was not responsible for conducting the investigation, as that duty had been delegated to the personnel director.¹⁷⁷ Moreover, the court stated that the personnel director's investigation was adequate.¹⁷⁸

On Baynard's second issue on cross-appeal, whether the court erred in granting judgment for the school board, the court held that no rational jury could have found that the requirements for liability under Title IX, as set forth in *Gebser*, were satisfied.¹⁷⁹ The court stated that Malone did not have actual knowledge of Lawson's abuse of Baynard, and even if she had known, Malone did not possess the requisite authority to implement corrective measures.¹⁸⁰ The court adopted a pre-*Gebser* definition of authority to institute corrective measures, limiting it to the authority to hire, fire, suspend, or transfer teachers.¹⁸¹ The court borrowed this language from *Rosa H.* and applied Virginia law to determine the requisite powers a principal must possess to be the school district's proxy.¹⁸²

C. Dissenting Opinion

Circuit Judge M. Blane Michael concurred with the majority in three parts of the opinion, but dissented in the fourth.¹⁸³ Judge Michael disagreed with the majority's decision to affirm the district court's granting of ACSB's motion for judgment notwithstanding the verdict.¹⁸⁴ He opined that *Gebser* does not require actual knowledge

173. *Id.* at 236.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 237.

178. *Id.*

179. *Id.* at 238.

180. *Id.*

181. *Id.* at 239.

182. *See id.*

183. *Id.* (Michael, J., concurring in part and dissenting in part).

184. *Id.* (Michael, J., concurring in part and dissenting in part).

of current abuse of a student, but rather the notice element may be satisfied through “actual knowledge of at least a substantial risk of sexual abuse.”¹⁸⁵ In his view, *Gebser* did not concretely define actual knowledge, but instead defined what it is not: an official’s awareness of inappropriate remarks by a teacher.¹⁸⁶ Judge Michael believed this left the door open for a court to find that something less than “actual knowledge of current sexual abuse” could constitute actual knowledge.¹⁸⁷

Judge Michael further analyzed the policy issues at stake, noting that a requirement of actual knowledge of current abuse created an impossible standard.¹⁸⁸ Under such a standard, the school board is insulated from liability unless board members themselves intend harm.¹⁸⁹ Board members are generally not aware of day-to-day happenings within the school and are not likely to be apprised of specific allegations regarding an individual teacher’s abuse of a student, particularly in larger districts.¹⁹⁰ Judge Michael contended that the actual notice standard was inconsistent with the objectives of Title IX because it failed to prevent the abuse of students by discouraging “efforts to identify situations of potential abuse,” as districts were not liable until there was actual knowledge.¹⁹¹

Judge Michael also disagreed with the majority’s conclusion that because Malone could only recommend suspension or termination, she could not be an appropriate authority to receive notice.¹⁹² He reasoned that the “authority to institute corrective measures” prong was satisfied because Malone was the “highest ranking school official present at the school every day.”¹⁹³ Virginia law gave principals “the first line of responsibility for ensuring that the students . . . [were] safe, particularly from sexual abuse at the hands of their teachers.”¹⁹⁴ Virginia state law dictates that sexual abuse was to be reported to the principal who then reported the incidences to his or her superior, the child’s parents, and the police.¹⁹⁵ Judge Michael went on to criticize the majority’s definition of an official with authority “to institute corrective measures” as “overly narrow.”¹⁹⁶ He noted that because Malone supervised Lawson, she was in a position to take measures such

185. *Id.* at 240 (Michael, J., concurring in part and dissenting in part).

186. *Id.* (Michael, J., concurring in part and dissenting in part).

187. *Id.* at 241 (Michael, J., concurring in part and dissenting in part).

188. *Id.* at 244 (Michael, J., concurring in part and dissenting in part).

189. *Id.* (Michael, J., concurring in part and dissenting in part).

190. *Id.* (Michael, J., concurring in part and dissenting in part).

191. *Id.* at 241 (Michael, J., concurring in part and dissenting in part).

192. *Id.* at 242 (Michael, J., concurring in part and dissenting in part).

193. *Id.* (Michael, J., concurring in part and dissenting in part).

194. *Id.* at 243 (Michael, J., concurring in part and dissenting in part).

195. *Id.* (Michael, J., concurring in part and dissenting in part).

196. *Id.* (Michael, J., concurring in part and dissenting in part).

as notifying Baynard's parents, confronting Lawson with information she received, reporting Lawson's behavior to the police, and providing closer monitoring of his behavior.¹⁹⁷

D. Commentary

The Fourth Circuit Court of Appeals erred when it affirmed judgment notwithstanding the verdict in favor of the ACSB in *Baynard v. Malone*. When the court determined that the *Gebser* requirements¹⁹⁸ were not satisfied, it ignored implications of the United States Supreme Court's decision in *Davis*. Additionally, the *Malone* court defined an "appropriate official" too narrowly. The question to be decided was whether a school principal could be "an official with the authority to institute corrective measures."¹⁹⁹

In ruling that no rational jury could have found that Malone was an official with the authority to institute corrective measures, the *Malone* court adopted the earlier Fifth Circuit definition from *Rosa H.*, which basically excluded all school officials except the school superintendent and board members.²⁰⁰ The *Rosa H.* court specifically held that

a school district can be liable for teacher-student sexual harassment under Title IX only if a school official who had actual knowledge of the abuse was invested by the school board with the duty to supervise the employee and the power to take action that would end such abuse and failed to do so.²⁰¹

However, subsequent to *Rosa H.*, the United States Supreme Court stated the rule somewhat differently in *Gebser*, holding that damages could not be recovered "unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures . . . has actual knowledge of discrimination in the recipient's programs and fails adequately to respond."²⁰² Courts have used the language in *Gebser* interchangeably with the language used in *Rosa H.*, but the phrases used in the respective cases do not necessarily mean the same thing. The term "institute" is defined as "to set up; establish; organize; to inaugurate; initiate; start; to set in operation."²⁰³ Being able to *initiate* corrective measures is not the equivalent of having the *final* hiring, firing, or suspension authority, as the *Malone* court ruled.

197. *Id.* (Michael, J., concurring in part and dissenting in part).

198. *See supra* notes 7-10 and accompanying text.

199. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998).

200. *See Malone*, 268 F.3d at 239.

201. *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 660 (5th Cir. 1997).

202. *Gebser*, 524 U.S. at 290.

203. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 988 (2d ed. 1987).

As Baynard pointed out in his brief to the Court of Appeals, there were a number of measures other than firing, suspending, or transferring Lawson that could have been initiated by Principal Malone.²⁰⁴ Some of the corrective measures Malone could have undertaken included: limiting Lawson's student interactions, informing Baynard's parents about the physical contact between Lawson and Baynard, and more closely monitoring Lawson's activities before and after school.²⁰⁵ Because Malone had the power to employ a variety of corrective measures, a jury could have found her to be an appropriate official.

Since *Malone*, the Third Circuit in *Warren v. Reading*²⁰⁶ reinforced Baynard's contention that a principal can be the appropriate official to institute corrective measures.²⁰⁷ The *Warren* court held that a principal had "authority to investigate a teacher's misconduct" because she could pass her findings on to the school board.²⁰⁸ The Third Circuit's definition of an appropriate official is noticeably more expansive than the *Rosa H.* articulation rejected by the United States Supreme Court in *Gebser*.²⁰⁹ Had the Court intended for a more restrictive definition to apply, it surely would have used *Rosa H.*'s precise language in its opinion, rather than the more inclusive phrase "authority to institute corrective measures."²¹⁰

In *Davis*, the Court appeared to reject the idea of using state law to determine who is the appropriate official.²¹¹ However, the *Malone* court decided to derive its definition of an appropriate official from Virginia law,²¹² following reasoning similar to that used in *Floyd I*.²¹³ The *Malone* decision resulted in a determination that only those officials with the actual power to hire, fire, suspend, or transfer – board members or the school superintendent – could be appropriate officials.²¹⁴ But, requiring members of the school board to have actual notice is unrealistic, as school board members are "often unaware of

204. See Brief for Appellee Jackson Baynard at 40-41, *Malone* (No. 00-2340(1)).

205. *Id.* at 40-42.

206. 278 F.3d 163 (3d Cir. 2002).

207. *Id.* at 173.

208. *Id.*

209. Compare *id.* at 169-70, with *Massey v. Akron City Bd. of Educ.*, 82 F. Supp. 2d 735, 744 (N.D. Ohio 2000) (stating that a supervisor who possesses the authority to hire, fire, and discipline a harassing employee may impute liability to a school district).

210. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998).

211. See *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 646 (1999). Furthermore, the United States Supreme Court appeared to reject this line of reasoning when it vacated the Eleventh Circuit's decision in *Floyd I* and remanded the case back for further reconsideration in light of the *Gebser* ruling. *Floyd v. Waiters*, 525 U.S. 802, 802 (1998). The Eleventh Circuit reaffirmed its *Floyd I* decision, ignoring the Court's implication that *Floyd I* was inconsistent with *Gebser*. *Floyd v. Waiters*, 171 F.3d 1264, 1264 (11th Cir. 1999).

212. *Baynard v. Malone*, 268 F.3d 228, 239 (4th Cir. 2001).

213. See *supra* notes 120-29 and accompanying text.

214. *Malone*, 268 F.3d at 239.

the extent to which sexual harassment [is] prevalent in their districts.”²¹⁵

The *Malone* court’s holding that Malone was not an appropriate official with the requisite authority to institute corrective measures flies in the face of the United States Supreme Court’s finding in *Davis*. The *Davis* Court equated the knowledge of the principal with notice to the school board.²¹⁶ Neither the superintendent nor any board members were specifically informed about Davis’ complaints about sexual harassment, yet the Court reasoned that “in this setting, the Board exercise[d] significant control over the harasser.”²¹⁷ This control was sufficient to impute liability to the school board when the principal knew about the harassment Davis faced yet failed to respond to her complaints.²¹⁸

Like the principal in *Davis*, Malone had knowledge of the accusations of sexual harassment.²¹⁹ In fact, Malone had numerous warnings that Lawson molested students, in addition to a staff member’s eyewitness account of seemingly inappropriate teacher-student contact, yet the principal failed to conduct even a cursory investigation.²²⁰ As the building principal, Malone’s knowledge of and deliberate indifference to Lawson’s misconduct constituted the same on the part of the school board.

Consistent with the implications in *Davis*, the *Gebser* case itself has been read to support the notion that the principal could have been an appropriate person had there been actual notice and deliberate indifference.²²¹ In discussing the actual notice element, the majority in *Gebser* pointed out that the principal had “plainly insufficient” notice, suggesting that the district may have been held liable if actual notice had been given to the principal.²²² Other courts have found that a building principal is an appropriate official with authority to institute corrective measures when students alleged sexual harassment by teachers.²²³ Some courts reached this conclusion because the princi-

215. Michele Goodwin, *The End of Adolescence: Sex, Theory, & Practice: Reconciling Davis v. Monroe & the Harms Caused By Children*, 51 DEPAUL L. REV. 805, 821 (2002).

216. *See Davis*, 526 U.S. at 633-36 (1999).

217. *Id.* at 646.

218. *Id.* at 646-47.

219. *Malone*, 268 F.3d at 233.

220. *See id.* at 233.

221. *See Warren II*, 278 F.3d 163, 170 (3d Cir. 2002).

222. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 291 (1998).

223. *See Gordon v. Ottumwa Cmty. Sch. Dist.*, 115 F. Supp. 2d 1077, 1082 (S.D. Iowa 2000) (holding that the school principal had the authority to address a volunteer coordinator’s inappropriate conduct); *Booker v. City of Boston*, No. 97-CV-12534-MEL, 2000 U.S. Dist. LEXIS 18652, at *10 (D. Mass. Dec. 12, 2000) (holding that the school principal, the school system’s senior officer of equity, a special education supervisor, and a homeroom teacher had the authority and the obligation to end the conduct of a fourth grade special education teacher); *Warren I*, 82 F. Supp. 2d 395, 402 (E.D. Pa. 2000) (holding that the elementary principal had authority to institute corrective measures as explained in *Gebser*); *Doe v. Sch. Admin. Dist.* No. 19, 66 F.

pal is the highest-ranking official in the building on a day-to-day basis.²²⁴

Another court suggested that a principal becomes the appropriate official when a district designates that individual as the person to receive sexual harassment complaints because it is presumed that he or she is in a position to address the harassment.²²⁵ In Minnesota, a program coordinator was deemed the equivalent of a building principal because the coordinator had the authority to address the plaintiff's complaint when she was harassed by both a teacher and classmates.²²⁶ Virginia law designates the responsibility to receive abuse and neglect reports to the school principal.²²⁷ Following the reasoning in the Minnesota case, Principal Malone thus had the authority to act upon this information.

In addition to ignoring precedent, the *Malone* decision sends several unpalatable messages to the American public. The first message is that schoolchildren are afforded less protection from sexual harassment while attending school than adults are in the workplace. If Lawson had sexually harassed a paraeducator whom he supervised or a co-worker, the case would have been analyzed differently by the courts, and the end result may very well have been quite different.

First, if Lawson had harassed a subordinate employee, the employee would have a cause of action under Title VII.²²⁸ Title VII prohibits employers from discriminating against employees due to race, color, sex, national origin, or religion.²²⁹ Allegations of sexual harassment then fall into one of two categories: adverse personnel action, also known as quid pro quo, or hostile work environment.²³⁰ A claim of adverse personnel action includes "ultimate employment decisions such as hiring, granting leave, discharging, promoting, and compensating."²³¹ *Malone* had no facts that support this type of harassment claim, as no evidence suggested that any tangible threats were made.²³² Baynard's claim would more appropriately fall into the category of a hostile work environment. An actionable hostile work envi-

Supp. 2d 57, 63 (D. Me. 1999) (finding that both the principal and the interim superintendent had authority to institute corrective measures).

224. See *Warren II*, 278 F.3d at 172; *Murrell v. Sch. Dist. No. 1*, 186 F.3d 1238, 1247 (10th Cir. 1999).

225. See *Morlock v. W. Cent. Educ. Dist.*, 46 F. Supp. 2d 892, 908-09 (D. Minn. 1999) (noting that employees categorized as "'building principal' responsible for receiving complaints under the district's sexual harassment conduct policy" have authority to take corrective action to end such harassment).

226. See *id.*

227. VA. CODE ANN. § 22.1-279.3:1(A) (Michie 2000).

228. 42 U.S.C. § 2000e-2(a)(1) (2000); *Meritor v. Sav. Bank, FSB*, 477 U.S. 57, 72-73 (1986).

229. § 2000e-2(a)(1).

230. See 29 C.F.R. § 1604.11(a)(3) (2001).

231. *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir. 1981).

232. See generally *Baynard v. Malone*, 268 F.3d 228 (4th Cir. 2001).

ronment is defined as being severe or pervasive to the extent that the working conditions of the harassed employee are abusive.²³³ A reasonable person would most likely find being subjected to unwelcome sexual contact over a period of eight years to be severe, and thus an abusive working environment.

The United States Supreme Court has made it crystal clear in *Faragher v. City of Boca Raton*²³⁴ that, under Title VII, employers may be held liable for harassment that occurs in a hostile work environment.²³⁵ The *Faragher* Court held that “[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee.”²³⁶ According to the *Faragher* Court, the employer then assumes the burden of proving affirmative defenses to liability.²³⁷ First, the employer must show that it “exercised reasonable care to prevent and correct promptly any sexually harassing behavior.”²³⁸ The employer must also show “that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”²³⁹ If the employer is unable to adequately establish the affirmative defense, the employer may be held liable under Title VII.²⁴⁰

By analogy, Baynard’s employer, ACSB, had a policy in place that addressed sexual harassment.²⁴¹ However, the employer failed to exercise reasonable care to either prevent the harassment or to correct it. Malone, charged with the daily operation of the school to which she was assigned,²⁴² was warned about the likelihood of Lawson’s harassment on numerous occasions yet she failed to investigate for months.²⁴³ When she did finally speak to Lawson after a report from a co-worker, she minimized the concern, asked the harasser to admonish the one subjected to harassment, and failed to provide any follow-up.²⁴⁴ Even when she initiated a formal investigation ten months after the original allegation, she failed to implement adequate monitoring of Lawson.²⁴⁵ Given these facts, ACSB would likely be

233. *Meritor*, 477 U.S. at 67.

234. 524 U.S. 775 (1998).

235. *Id.* at 807.

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher*, 524 U.S. at 807.

241. *Baynard v. Malone*, 268 F.3d 228, 243 (4th Cir. 2001) (Michael, J., dissenting in part and concurring in part).

242. *See generally* VA. CODE ANN. § 22.1-293(B) (Michie 2000).

243. *See Malone*, 268 F.3d at 233-34.

244. *Id.* at 233.

245. *Id.* at 233-34.

found liable for Malone's failure to prevent or correct Lawson's sexual harassment had Baynard been a co-worker rather than a student.

Second, if Lawson had chosen to subject a co-worker whom he did not supervise to the kind of unwanted sexual attention he paid Baynard, ACSB would be liable under a negligence standard rather than one of vicarious liability.²⁴⁶ Using a negligence standard, an employer is liable if the employer or an agent of the employer has either actual or constructive knowledge of the harassment, but does not stop the harassment.²⁴⁷ Again, Malone was charged with the duty of supervising Lawson and thus was an "agent" of ACSB.²⁴⁸ In this situation, the Fourth Circuit had already found that Malone had at least constructive notice of Lawson's objectionable behavior,²⁴⁹ and that her actions constituted deliberate indifference.²⁵⁰ Because she had notice and did not respond to Lawson's harassment, her indifference would most likely impute liability to her employer in a Title VII claim.

Despite the vulnerability of schoolchildren, the *Malone* court insisted on providing children less protection under Title IX than the safeguards afforded adults in the workplace under Title VII. Consequently, children have significantly fewer defenses against abuse and harassment when compared with adult employees. Baynard's mother sought support for her son by letting Lawson know that her family was in crisis due to a job loss, alcoholism, and Baynard's transition from private to public school.²⁵¹ Lawson responded to this parental plea for help by promising to take a "special interest" in Baynard.²⁵² His interest took the form of sexual molestation, beginning within Baynard's first month in Lawson's class.²⁵³ The court's conclusion in *Malone* sends a contradictory message that, under Title IX, school districts may be off the hook for sexual abuse or harassment of schoolchildren.²⁵⁴ This discrepancy between Title VII and Title IX creates an unacceptable double standard. Surely Congress did not intend such a ludicrous result.

The court posts another untenable message with the *Malone* decision, telling the public that the legal system does not take the sexual abuse of students as seriously as it takes the funding of public

246. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 759 (1998) (noting that "an employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it").

247. *Id.*

248. See *Pleasants v. Commonwealth*, 203 S.E. 114, 116 (Va. 1974) (noting that a school board may act only through its agents and must delegate "day-to-day operations of schools" to agents and employees).

249. *Malone*, 268 F.3d at 235.

250. *Id.* at 236.

251. Brief for Appellee Jackson Baynard at 17, *Malone* (No. 00-2340(1)).

252. *Id.*

253. *Malone*, 268 F.3d at 233.

254. *Id.* at 240 (Michael, J., dissenting in part and concurring in part).

schools.²⁵⁵ The policy of protecting individuals from discrimination promised by Title IX obviously competes with the policy to protect public funds. The latter policy has been discussed at least twice by the United States Supreme Court, first in the *Gebser* majority²⁵⁶ and again in the *Davis* dissent.²⁵⁷ Both cases expressed a concern about the possibility for unlimited liability under Title IX.²⁵⁸

The Court raised three potential funding concerns. First, a school risks losing federal funds if it is found to be in violation of Title IX.²⁵⁹ Second, the cost of litigating suits “could overwhelm many school districts.”²⁶⁰ Finally, a school district could be held liable for an unlimited amount in damages.²⁶¹ The majority in *Gebser* expressed alarm that the amount of damages to be paid could exceed the amount that the district received in federal funds.²⁶² Similarly in *Davis*, Justice Anthony Kennedy’s dissent confirmed that at least some justices valued financial considerations over the harm to individual students when he wrote that “[t]he only certainty flowing from the majority’s decision is that scarce resources will be diverted from educating our children.”²⁶³ Justice Kennedy further articulated the fear of unlimited liability, contending that it “puts schools in a far worse position than businesses” when compared with the potential liability of an employer under Title VII.²⁶⁴

The *Davis* dissent and the *Gebser* majority seem to brush aside the harm done to an individual and the obligation of the educational agency to avoid the harm in the first place. The *Gebser* majority tucked a sentence in its final paragraph of the opinion that acknowledged the “extraordinary harm” that a student endures “when subjected to sexual harassment and abuse by a teacher.”²⁶⁵ The Court then diminished its acknowledgement of the injury to a student by stating that the district’s liability was at issue, rather than the harm to the student.²⁶⁶

Likewise, the *Malone* court adopted the policy of protecting the school’s pocketbook by denying that a school principal is an appropri-

255. See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 306 (1998) (Stevens, J., dissenting).

256. *Id.* at 290.

257. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 657 (1999) (Kennedy, J., dissenting).

258. *Id.* at 657 (Kennedy, J., dissenting); see *Gebser*, 524 U.S. at 290.

259. See *Gebser*, 524 U.S. at 289.

260. *Davis*, 526 U.S. at 680.

261. *Id.*

262. *Gebser*, 524 U.S. at 290.

263. *Davis*, 526 U.S. at 657 (Kennedy, J., dissenting).

264. *Id.* at 681 (Kennedy, J., dissenting). Title VII damages are limited according to the size of the employer. 42 U.S.C. § 1981a(b)(3) (2000).

265. *Gebser*, 524 U.S. at 292.

266. See *id.*

ate official to receive notice of a teacher's sexual abuse of a student. The court's reluctance to hold the school district accountable for this type of Title IX violation suggests that the policy of protecting public funds triumphed over the protection theoretically provided to individuals under Title IX. While the *Malone* decision discourages the opening of litigation floodgates feared by Justice Kennedy in *Davis*,²⁶⁷ it also forces children to bear the burden of abuse rather than imputing it to the school district that is better equipped to prevent the harm.²⁶⁸

The discussion of financial burdens in the *Davis* dissent poses a possible solution to the funding concern while holding the educational agency accountable.²⁶⁹ Title VII provides a statutory cap on the amount of damages available under a Title VII action.²⁷⁰ A similar amendment to Title IX would be one way to resolve the potential for unlimited recovery, yet still allow an individual some protection. This solution would deter courts from setting the bar so high that individual recovery is impossible. An amendment of this type would also hold the school district's arm to the fire to be vigilant in guarding against sexual abuse of students.

V. CONCLUSION

Jackson Baynard was sexually abused by his sixth grade teacher, a man both he and his family trusted.²⁷¹ When Baynard sought recourse in court for his teacher's egregious acts, a jury attempted to provide a remedy for the harm caused.²⁷² However, the district court and the appellate court opted to rebuff the jury's verdict and granted judgment notwithstanding the verdict in favor of the school district.²⁷³ The Fourth Circuit erred when it held that Principal Malone was not an official with the authority to institute corrective measures. Precedent had been set for finding that a principal could be an appropriate official, and the ordinary use of the language supports this determination.²⁷⁴ The court could have found that Malone was an appropriate official to receive notice, and thus the Fourth Circuit should not have affirmed the district court's judgment in favor of ACSB.

The Fourth Circuit Court of Appeals' finding in *Malone* makes a mockery of the United States Supreme Court's decision that Title IX

267. See *Davis*, 526 U.S. at 686 (Kennedy, J., dissenting).

268. See *Gebser*, 524 U.S. at 306 (Stevens, J., dissenting).

269. See *Davis*, 526 U.S. at 681 (Kennedy, J., dissenting).

270. 42 U.S.C. § 1981a(b)(3) (2000).

271. Brief for Appellee Jackson Baynard at 19, *Baynard v. Malone*, 268 F.3d 228 (4th Cir. 2001) (No. 00-2340(1)).

272. *Malone*, 268 F.3d at 234.

273. *Id.*

274. See *Davis*, 526 U.S. at 633-35.

violations are actionable²⁷⁵ by establishing such a high standard that, essentially, no remedy is available. But when the Court admits sexual harassment is “all too common”²⁷⁶ in the public school experience, perhaps it is time to re-examine the current practice of allowing school districts to dodge liability when teachers kiss and the students tell. Perhaps it is time to look for a better solution.

275. *Franklin v. Gwinnett*, 503 U.S. 60, 76 (1992).

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