Title IX in the Supreme Court: Foundations and Open Questions

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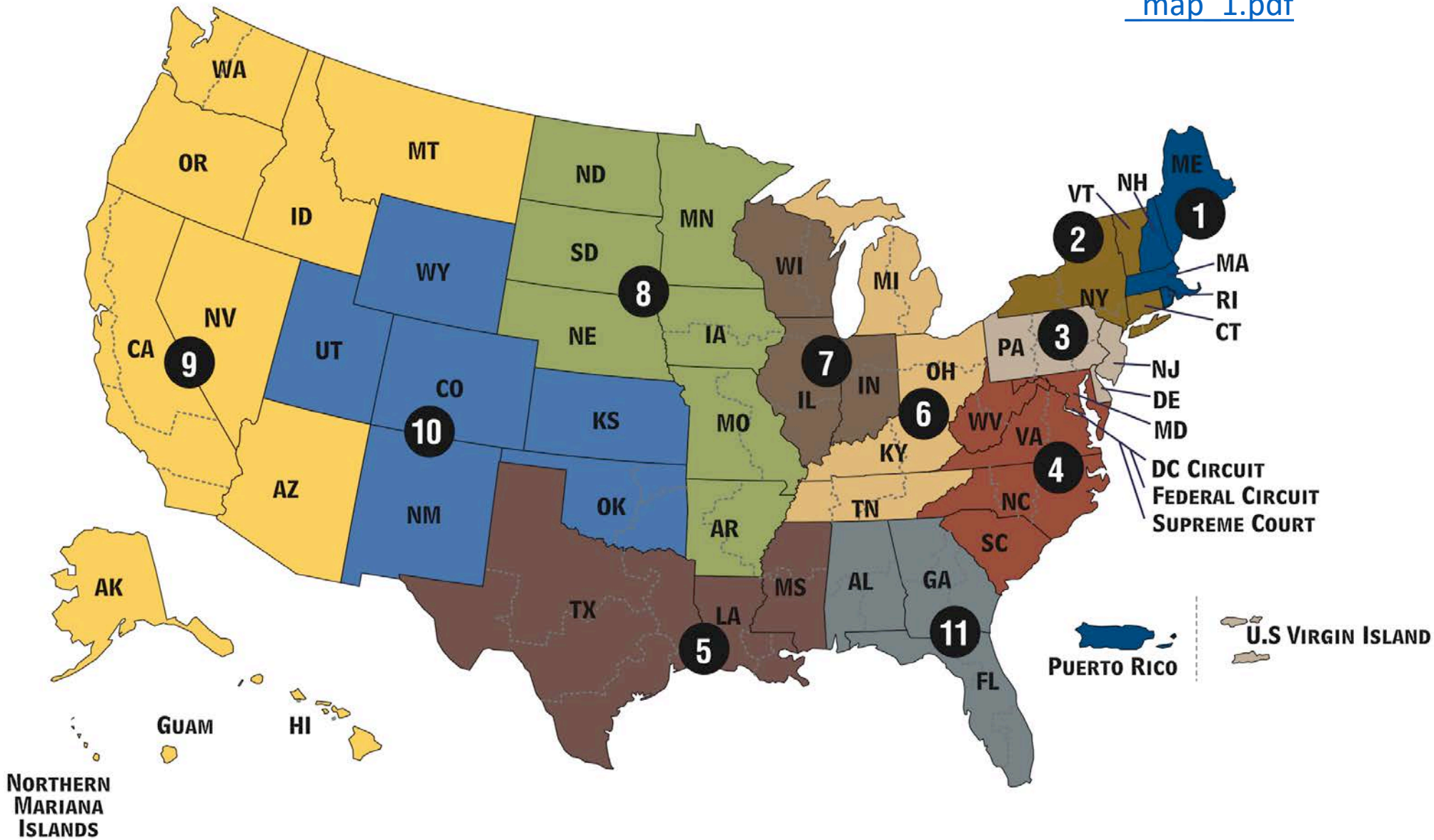
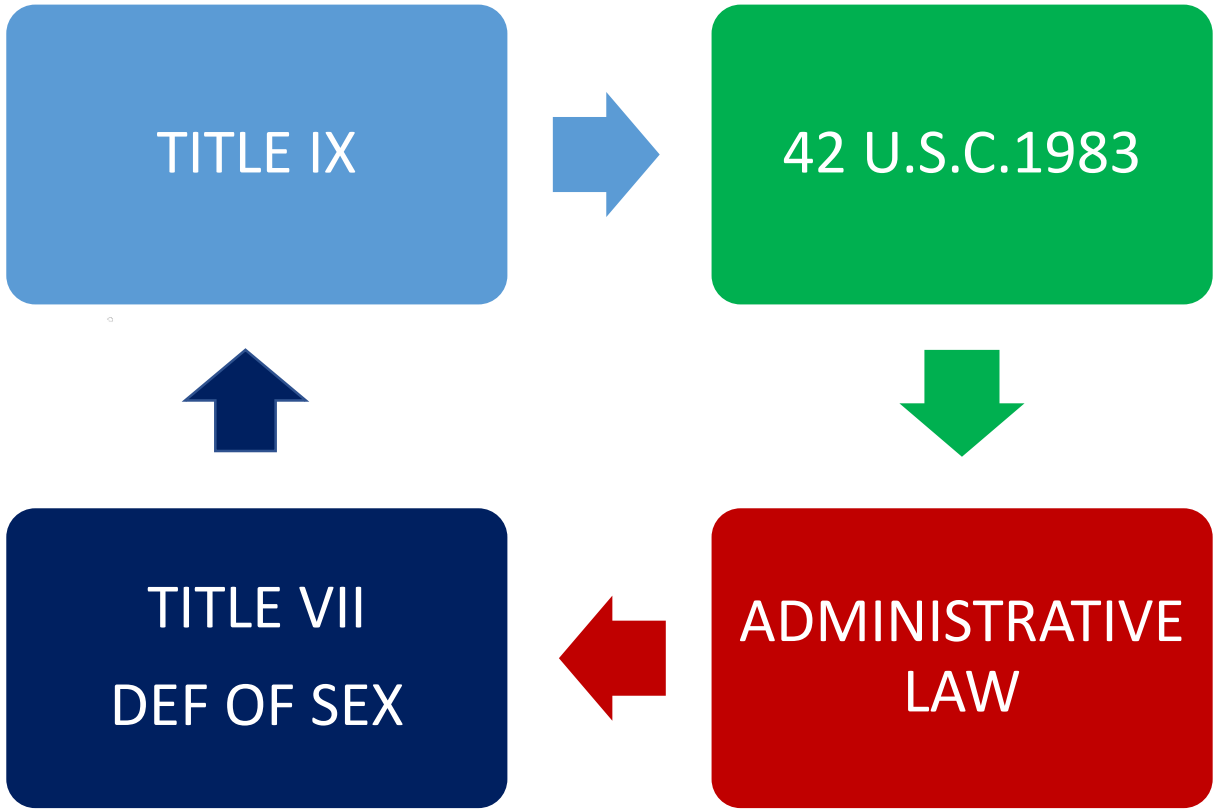
Geographic Boundaries

of United States Courts of Appeals and United States District Courts

https://www.uscourts.gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf



Supreme Court Foundations



Terms & Meaning

- USC = United States Code = Laws made by Congress (school-house rock)
- CFR = Code of Federal Regulations = Rules made by Federal Agencies = carry the force of law // Guidance, policy docs ≠ carry the force of law. (Congress delegates authority to Agencies via Enacting Statute)
- Fed. Reg. = Federal Register = where the government publishes Executive Branch Documents (agency documents & (rules, guidance, notices) executive orders) = operated by NARA (National Archives & Records Administration. https://www.federalregister.gov/
- SPCT = United States Supreme Court
- OG = Original
- IPCOA = Implied Private Cause of Action

Title IX Overview

Title IX Enabling Statute

20 U.S. Code CHAPTER 38— DISCRIMINATION BASED ON SEX OR BLINDNESS

U.S. Code | Notes

prev | next

Cornell Law School – Legal Information Institute - https://www.law.cornell.edu/uscode/text/20/chapter-38

Title IX - 1681

(a) Prohibition against discrimination; exceptions No person in the United States 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 Federal financial assistance, except that:

(1)Classes of educational institutions subject to prohibition
(2)Educational institutions commencing planned change in admissions
(3)Educational institutions of religious organizations with contrary religious tenets
(4)Educational institutions training individuals for military services or merchant marine
(5)Public educational institutions with traditional and continuing admissions policy
(6)Social fraternities or sororities; voluntary youth service organizations
(7)Boy or Girl conferences
(8)Father-son or mother-daughter activities at educational institutions
(9)Institution of higher education scholarship awards in "beauty" pageants

(b)Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance

(c)"Educational institution" defined

(Pub. L. 92–318, title IX, § 901, June 23, 1972, 86 Stat. 373; Pub. L. 93–568, § 3(a), Dec. 31, 1974, 88 Stat. 1862; Pub. L. 94–482, title IV, § 412(a), Oct. 12, 1976, 90 Stat. 2234; Pub. L. 96–88, title III, § 301(a)(1), title V, § 507, Oct. 17, 1979, 93 Stat. 677, 692; Pub. L. 99–514, § 2, Oct. 22, 1986, 100 Stat. 2095.)

Title VI of the Civil Rights Act of 1964

§2000d. Prohibition against exclusion from participation in, denial of benefits of, and discrimination under federally assisted programs on ground of race color, or national origin

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

(Pub. L. 88–352, title VI, §601, July 2, 1964, 78 Stat. 252.)

42 U.S.C. § 2000d

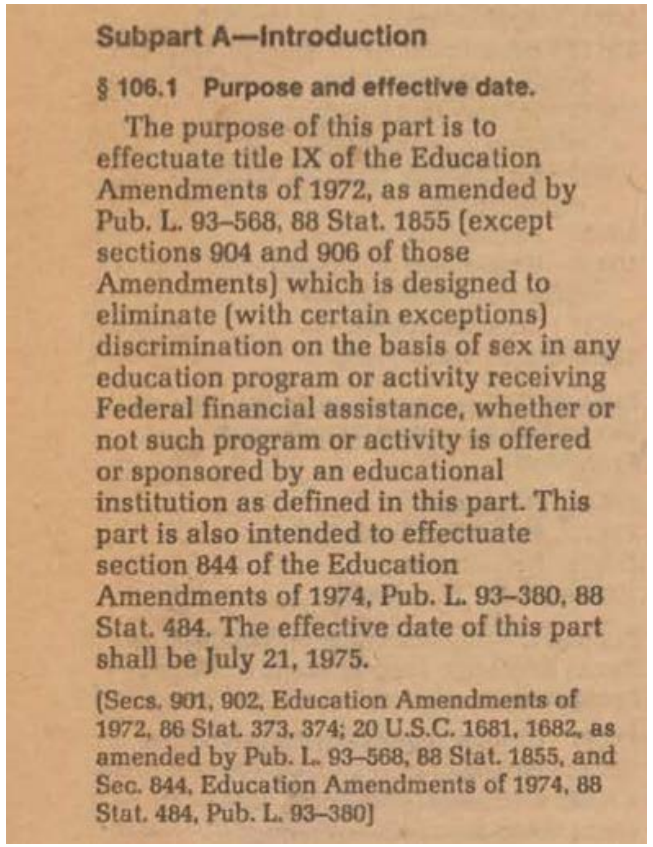
Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: Provided, however, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

(Pub. L. 92–318, title IX, §902, June 23, 1972, 86 Stat. 374.)

Title IX § 1682 =Regulatory Approval by POTUS Amended to DOJ AG via EO 12250 on Nov. 2, 1980

Original Title IX Regulations

- NPRM – June 1974 = 39 Fed. Reg. 22228 (1974)
- Almost 10,000 formal responses
- June 4, 1975 = Final Title IX Regulations issued (40 Fed. Reg. 24128 (1975) Also sent to Congress for 45 day review (OG CRA)
- Resolutions of Disapproval filed in both chambers. Neither were passed.
- Regulations went into effect on July 21, 1975.
- Multiple bills introduced in congress to prohibit the application of Title IX to employees: S. 2146, § 2(1), 94th Cong., 1st Sess. (1975) & S. 2657, 94th Cong., 2d Sess. (1976)

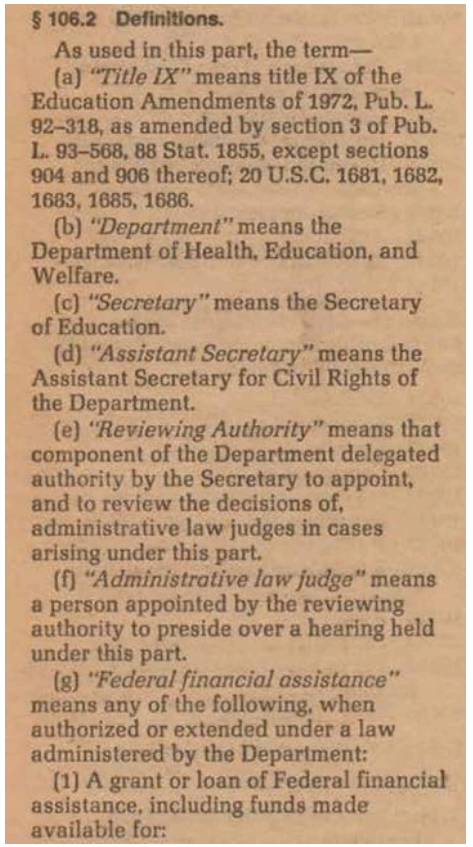


Subpart A—Introduction

§ 106.1 Purpose and effective date.

The purpose of this part is to effectuate title IX of the Education Amendments of 1972, as amended by Pub. L. 93–568, 88 Stat. 1855 (except sections 904 and 906 of those Amendments) which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in this part. This part is also intended to effectuate section 844 of the Education Amendments of 1974, Pub. L. 93–380, 88 Stat. 484. The effective date of this part shall be July 21, 1975.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682, as amended by Pub. L. 93–568, 88 Stat. 1855, and Sec. 844, Education Amendments of 1974, 88 Stat. 484, Pub. L. 93–380)



§ 106.2 Definitions.

As used in this part, the term—

(a) *"Title IX"* means title IX of the Education Amendments of 1972, Pub. L. 92–318, as amended by section 3 of Pub. L. 93–568, 88 Stat. 1855, except sections 904 and 906 thereof; 20 U.S.C. 1681, 1682, 1683, 1685, 1686.

(b) *"Department"* means the Department of Health, Education, and Welfare.

(c) *"Secretary"* means the Secretary of Education.

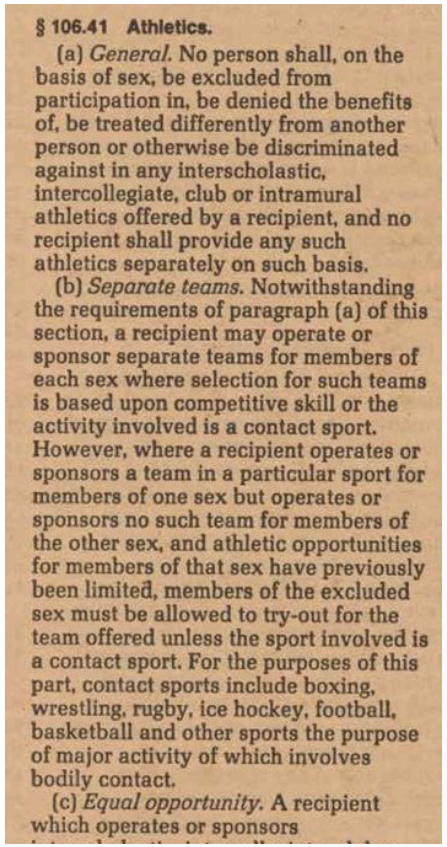
(d) *"Assistant Secretary"* means the Assistant Secretary for Civil Rights of the Department.

(e) *"Reviewing Authority"* means that component of the Department delegated authority by the Secretary to appoint, and to review the decisions of, administrative law judges in cases arising under this part.

(f) *"Administrative law judge"* means a person appointed by the reviewing authority to preside over a hearing held under this part.

(g) *"Federal financial assistance"* means any of the following, when authorized or extended under a law administered by the Department:

(1) A grant or loan of Federal financial assistance, including funds made available for:



§ 106.41 Athletics.

(a) *General.* No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

(b) *Separate teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose of major activity of which involves bodily contact.

(c) *Equal opportunity.* A recipient which operates or sponsors

What the OG Regs looked like

https://biotech.law.lsu.edu/blog/45-FR-30955.pdf Scans of Title IX in the OG Fed. Reg.

Title IX & The SPCT

SPCT has commented on Title IX 29 times

Case timeline 1978 – 2013

Three types of cases: Who can sue, What they can sue for, What Remedies are available?

Key Title IX SPCT cases

- Cannon v. Univ. of Chicago, 441 U.S. 677
- N. Haven Bd. Of Educ. v. Bell, 456 U.S. 512
- Grove City College v. Bell, 456 U.S. 555
- Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60
- Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274
- Davis v. Monroe County Bd. Of Educ., 526 U.S. 629
- Jackson v. Birmingham Bd. Of Educ., 544 U.S. 167
- Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246

Case Review Method

- Parties
- Facts
- Dispute
- Analysis
- Holding
- Takeaway

Cannon v. Univ. of Chicago, 441 U.S. 677 (1979)

Cannon – Facts & Dispute

Female student rejected admission to Private Medical Schools.

Excluded from participation b/c of her sex &

Schools received federal funding.

Does Title IX contain an Implied Private cause of action (IPCOA)?

IPCOA Analysis

- Cort v Ash, 422 U.S. 66 (1975)

(1) Whether the statute was enacted for the benefit of a special class of which the plaintiff is a member?

(2) Whether there is any indication of legislative intent to create a private remedy?

(3) Whether implication of such a remedy is consistent with the underlying purposes of the legislative scheme?

(4) Whether implying a federal remedy is inappropriate because the subject matter involves an area basically of concern to the States.

School's Argument

Invading college autonomy

Burdensome litigation

Congress didn't write this down.

Cannon v. Univ. of Chicago, 441 U.S. 677

Ct. Holding: SPCT Disagrees with DCT/7CA & Reverses – Title IX does contain an Implied right to bring a private action in court.

Takeaway

- Statutory Interpretation = Plain Language, Legislative History, Past Judicial Interpretations
- Relation to & Reliance on Title VI
- Presumption of Congressional understanding of the law
- “When Congress intends private litigants to have a cause of action to support their statutory rights, the far better course is for it to specify as much when it creates those rights.”

N. Haven Bd. Of Educ. v. Bell, 456 U.S. 512 (1982)

Indiana Senator Birch Bayh in 1971.

Credit...Charles Bennett/Associated Press

North Haven Facts

School Boards of Education challenging the DOE.

North Haven School Board & Trumbull School Board

School boards of education are challenging the validity of the departments 1975 regulations Subpart E that prohibit discrimination on the basis of gender regarding employment.

Title IX Regulations – Subpart E

§ 106.51 Employment.

(a) *General.* (1) No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient which receives or benefits from Federal financial assistance.

(2) A recipient shall make all employment decisions in any education program or activity operated by such recipient in a nondiscriminatory manner

(d) *Pregnancy leave.* In the case of a recipient which does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom a a justification for a leave of absence without pay for a reasonable period of time, at the conclusion of which the employee shall be reinstated to the status which she held when the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.

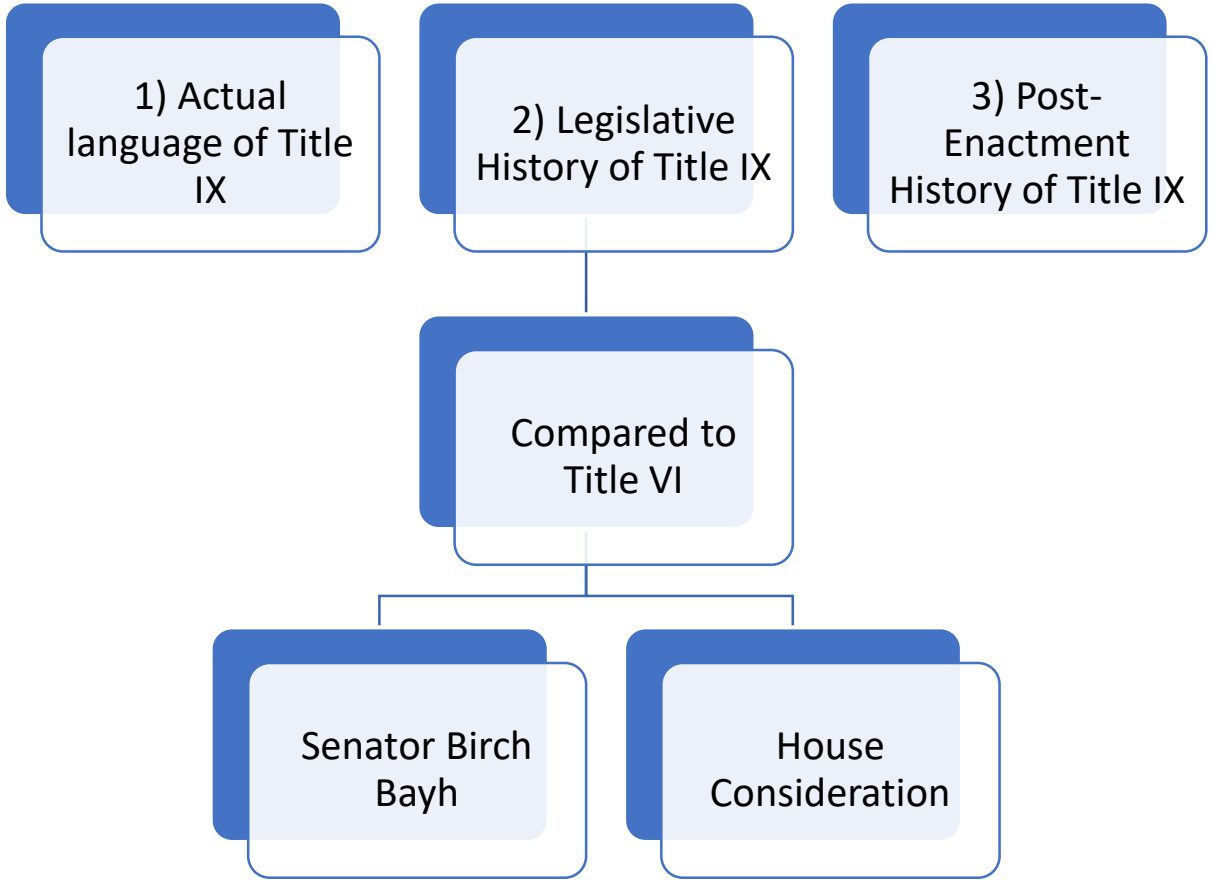
(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

Complaint → Court

North Haven – Maternity Leave

Trumbull –Job Assignment, working conditions, failure to renew contract

North Haven Analysis



North Haven Holdings

Employees are covered under regulations

Regulations are valid

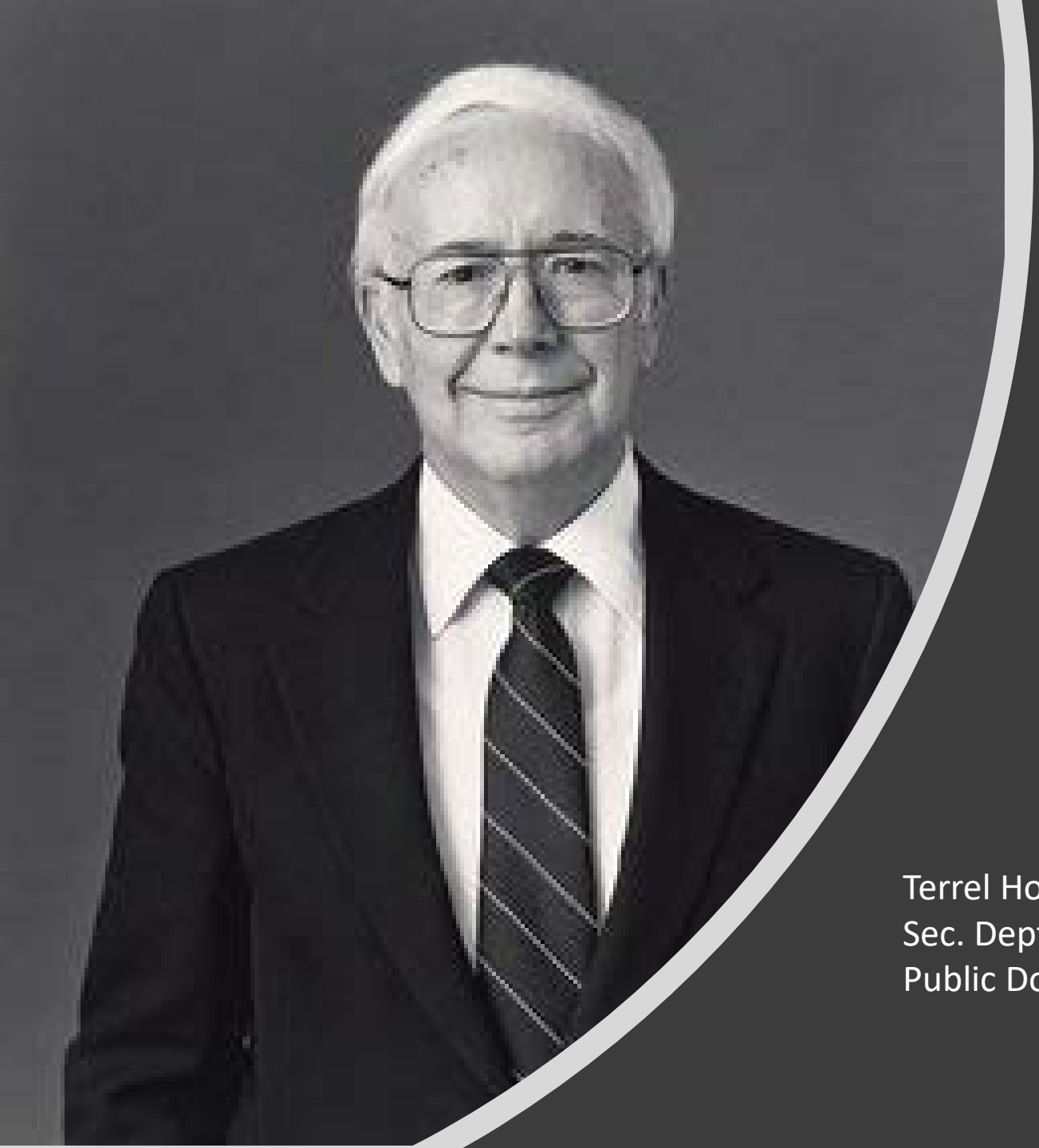
Title IX only applies to the program it specially funds (overturned)

Termination of funds allowed

North Haven Takeaway

Title IX applies to employees at FFR

"The meaning and applicability of Title VI are useful guides in construing Title IX, therefore, only to the extent that the language and history of Title IX do not suggest a contrary interpretation."



Grove City College v. Bell, 456 U.S. 555 (1984)

Terrel Howard Bell –
Sec. Dept. of Education 1981 -1985
Public Domain (Congress Photo)

President Ronald Reagan is flanked by Education Secretary Terrel Bell, left, White House Policy director, during a meeting in the Cabinet Room in Washington, Feb. 23, 1984 where they discussed school discipline.
Credit…AP-1984/STF

Grove City College v. Bell, 456 U.S. 555

Grove City college is a Private, Coeducational, Liberal Arts

GCC has enrolled students who receive Basic Education Opportunity Grants (BEOG's).

DOE declares GCC an RFF. Demands AOC

- 34 CFR 106.4 (198

DOE began to initiate proceedings to declare college & students ineligible to receive the BEOG's.

Grove City Dispute

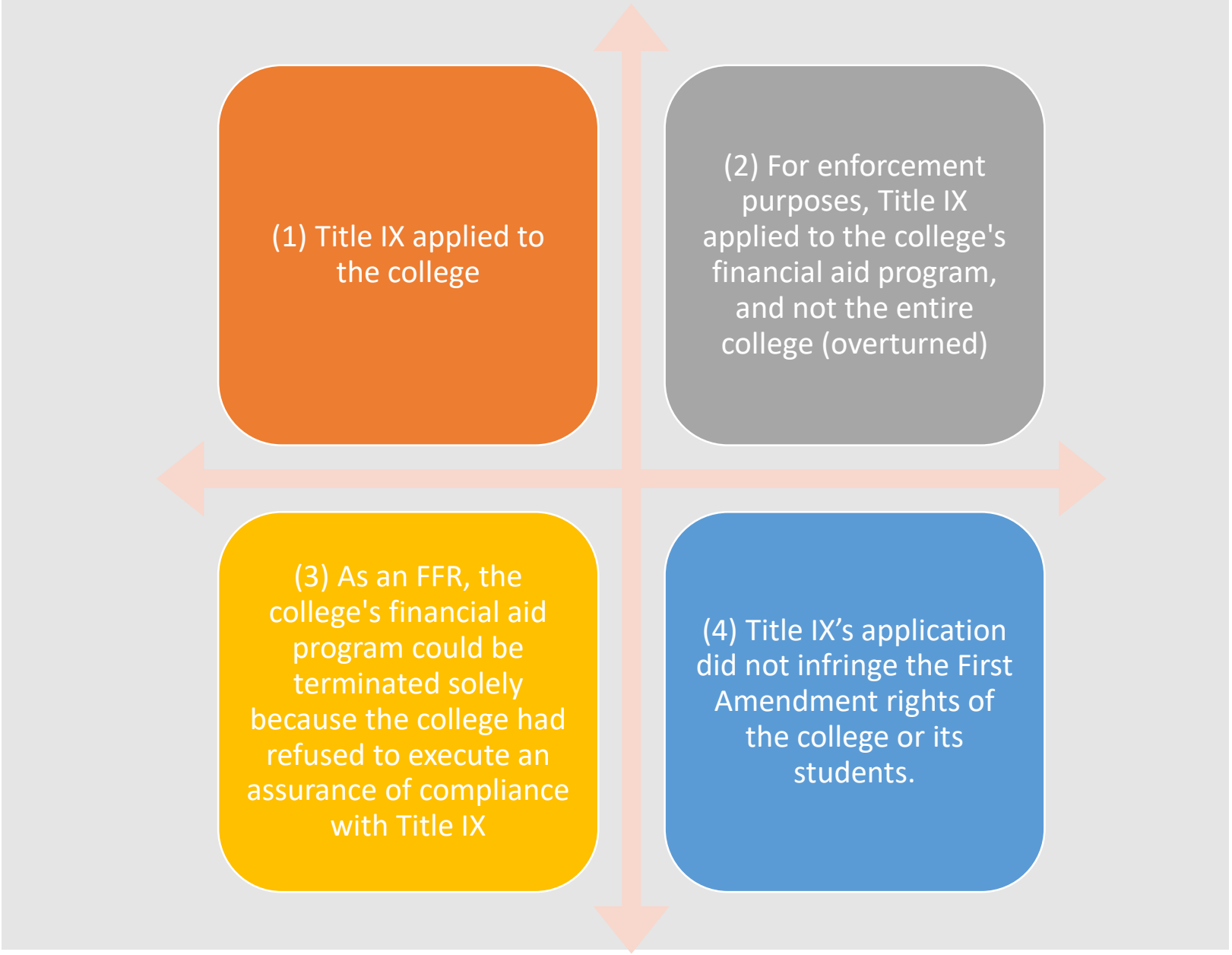
- 1) Neither the school or educational programs or activities receive federal financial assistance, even with student that use BEOGs. = Direct v Indirect federal aid argument.
- 2) What educational program or activity counts as receiving federal assistance through grants to some students?
- 3) May the Department terminate federal assistance to the Student financial aid program for not signing the AOC before there is any finding of actual discrimination?
- 4) Does the conditioning of federal funds on AOC infringe 1st amend?

Grove City Analysis

- 1) Language of statue + Nature of BEOG
- 2) Title IX only applies to the program that receives FFA.
- 3) Title VI Regulations & Ct. History + Congressional Intent
- 4) Reasonable & unambiguous conditions to FFA

Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981)

Grove City Holdings



Grove City Takeaways

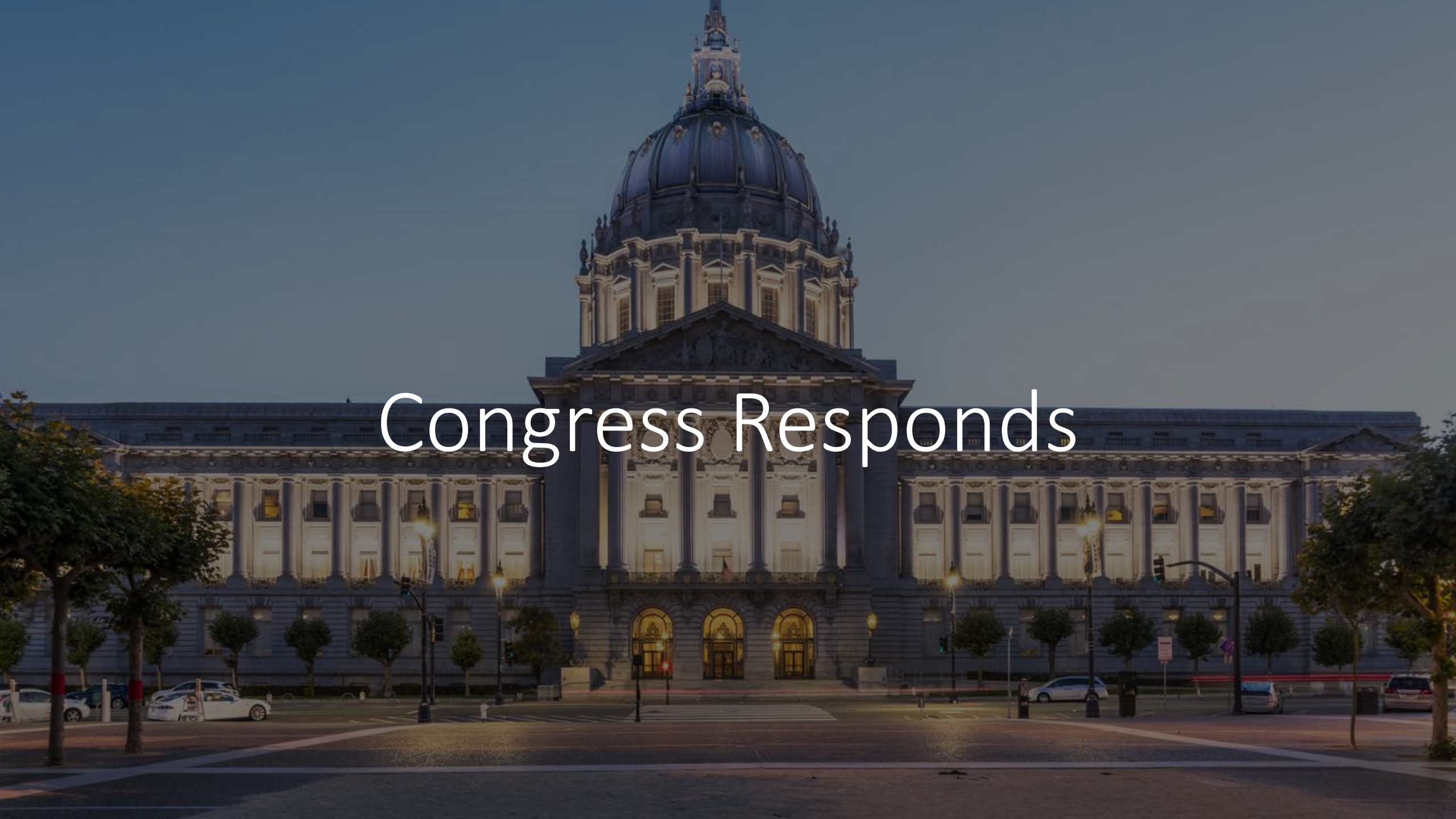
If federal aid reaches an education entity, it becomes an FFR.

Public & Private

Direct & Indirect

Reliance on Title VI

Spending Power legislation = Contract with States. Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981)



Congress Responds

Civil Rights Remedies Equalization Amendment of 1986

(a) General provision

(1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], title IX of the Education Amendments of 1972 [20 U.S.C. 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C. 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

(2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

(b) Effective date

The provisions of subsection (a) shall take effect with respect to violations that occur in whole or in part after October 21, 1986.

(Pub. L. 99–506, title X, §1003, Oct. 21, 1986, 100 Stat. 1845.)

The Civil Rights Restoration Act of 1987, 102 Stat. 28 (March 22, 1988)

Public Law 100–259
100th Congress

An Act

To restore the broad scope of coverage and to clarify the application of title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and title VI of the Civil Rights Act of 1964.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "Civil Rights Restoration Act of 1987".

FINDINGS OF CONGRESS

SEC. 2. The Congress finds that—

(1) certain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and title VI of the Civil Rights Act of 1964; and

(2) legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered.

"INTERPRETATION OF 'PROGRAM OR ACTIVITY'

"SEC. 908. For the purposes of this title, the term 'program or activity' and 'program' mean all of the operations of—

"(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

"(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the

"(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

"(B) a local educational agency (as defined in section 198(a)(10) of the Elementary and Secondary Education Act of 1965), system of vocational education, or other school system;

"(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—

"(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

"(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

"(B) the entire plant or other comparable, geographically

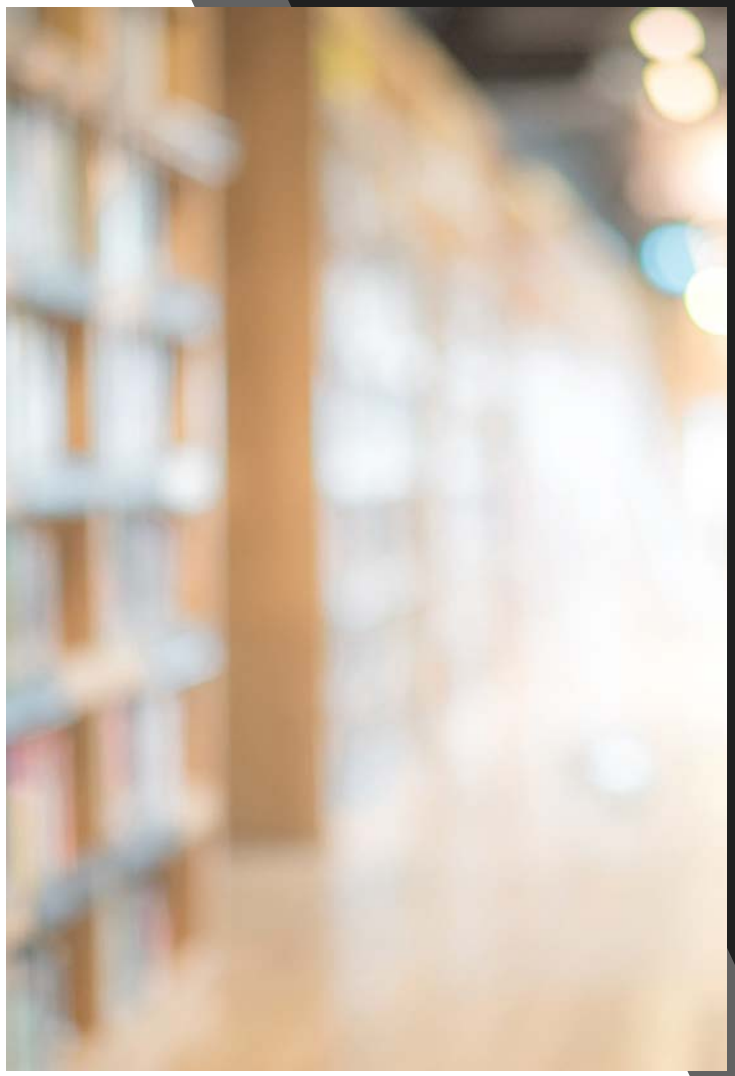
private organization, or sole proprietorship; or

"(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance, except that such term does not include any operation of an entity which is controlled by a religious organization if the application of section 901 to such operation would not be consistent with the religious tenets of such organization.".

(b) Notwithstanding any provision of this Act or any amendment adopted thereto:

Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992)



- Christine Franklin is a student in the Gwinnett County Public School System in Gwinnett County, GA. Andrew Hill is an employee of High School.

- Allegations:1) sexual harassment & coerced sexual assault against teacher & 2) School knew of this and additional allegations against teacher, 3) School dropped investigation for teacher resignation.

- Dispute: Whether the implied right of action under Title IX, recognized in Cannon, supports a claim for monetary damages?

School Board Argument Against Damages

- 1) Traditional Presumption for broad relief has eroded. Bell v. Hood, 327 U.S. 678 (1946)
- 2) Violates Separation of Powers
- 3) Spending Clause negates Traditional Presumption of broad damages
- 4) Link to Title VII -> Backpay & Prospective Relief only acceptable remedy.

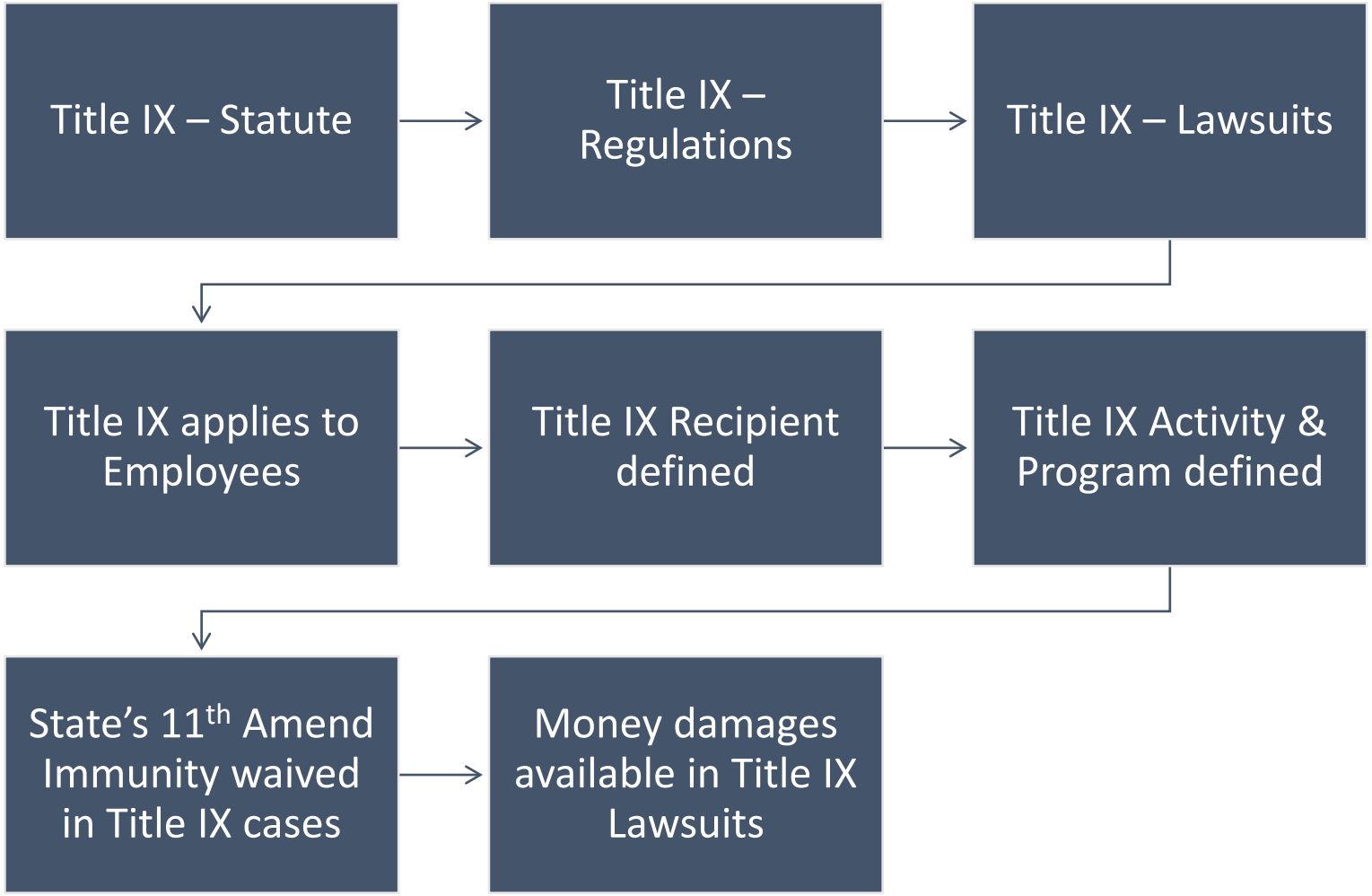
Franklin Analysis

- Congressional Intent & Legislative History.
- Traditional Presumption = presumed availability of all appropriate remedies unless congress has expressly indicated otherwise. General Rule stands. = Applied in Social Security context. Deckert v. Independence Shares Corp., 311 U.S. 282 (1940)
- Reliance on Title VI
- Congress passes two statutes that show intent: 42 U.S.C. 2000d-7 & Civil Rights Restoration Act.
- Discretion to award relief does not expand judicial power
- Backpay & prospective relief do nothing for Franklin.

Franklin Holding

Money Damages are available in successful Title IX actions.

Title IX- Review as of 1993



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

ALIDA STAR GEBSER

LAGO VISTA INDEPENDENT SCHOOL DISTRICT

Gebser Facts

Frank Waldrop = Teacher

Middle school

- Sexually suggestive comments at large

High School

Directed sexually suggestive comments
Alone in classroom
Kissed her at her home
Sexual relationship // never on school property
January 1993

Gebser Dispute

The question in this case is when a school district may be held liable in damages in an implied right of action under Title IX for the sexual harassment of a student by one of the district's teachers.

Gebser pushes 2 Title VII theories:

Respondent Superior (62 Fed. Reg. 12034, 12039 (1997))	Constructive Notice (knew or should have known)

Respondent Superior Standard

Hold a school liable when a teacher is "'aided in carrying out the sexual harassment of students by his or her position of authority with the institution,'" irrespective of whether school district officials had any knowledge of the harassment and irrespective of their response upon becoming aware.

Gebser Analysis

- Silent Text
- Turn to Congressional Intent
- Compare Title IX & Title VI
  - Contractual
  - Aimed at prohibiting discrimination in FFP.
- Contrast those to Title VII
  - Outright Prohibition
  - Aimed at compensating victims

- Title IX Administrative Enforcement requires Actual Notice.

Gebser Deliberate Indifference Holding

- “We think, moreover, that the response must amount to deliberate indifference to discrimination.”
- Damages remedy requires: An **Appropriate person** have **Actual Knowledge** & **fails to adequately respond**.
- App. Person: an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf
- Actual Knowledge: Not constructive knowledge or should have known standard.

The principal only had knowledge of inappropriate comments made in class, Fired when discovered sexual relationship.

Gebser's Additional Holding

Department of Education regulations require each funding recipient to:

- Adopt and publish grievance procedures providing for prompt and equitable resolution of discrimination complaints, 34 CFR 106.8(b) (1997)
- Notify students and others "that it does not discriminate on the basis of sex in the educational programs or activities which it operates," § 106.9(a). (1997)

Failure $\not\equiv$ Actual Notice, Deliberate Indifference, OR Title IX Discrimination

Gebser Takeaway

Teacher on student may lead to Money damages

Supreme Court defers to Title IX Regulatory enforcement scheme in creating the Judicial enforcement elements.

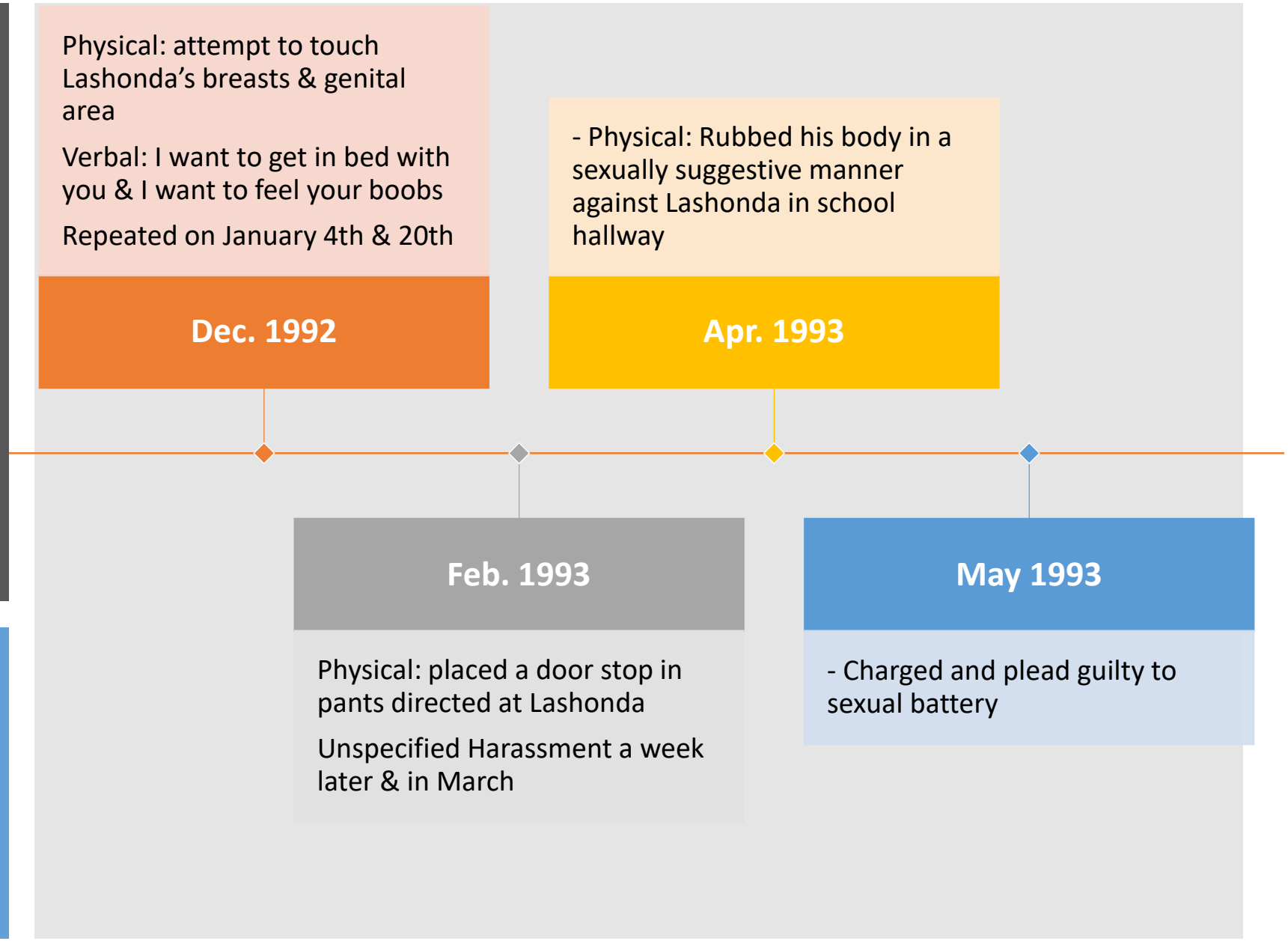
Turns away from Title VII

No Actual Notice when respondent is the Appropriate Official.

Davis v. Monroe County Bd. Of Education, 526 U.S. 629 (1999)

Verna Williams, attorney for LaShonda Davis, meets reporters outside the Supreme Court Tuesday after arguing her sexual harassment case. Davis' parents (left) look on. (Ron Edmonds — AP)

Davis – Harassment Timeline



Davis – Facts

Lashonda's grades fell

Suicide note

Don't know how much longer I can keep him off me

Other student assaulted and harassed by same student

Teacher Reply to Mother: Principal will be informed

Teacher Reply to Student: If the Principal wants you, he'll call you.

Principal Reply to Mother: "I guess I'll just have to threaten him a little bit harder"

Discipline // Interim Measures

Verna L. Williams, Davis's lawyer, told the justices yesterday that Title IX should be read broadly to allow lawsuits against indifferent school districts if they fail to stop harassment or other sex discrimination that interferes with a child's ability to get equal educational opportunities.

But Williams had trouble explaining how judges could assess the seriousness of sexual harassment among children and how not to make schools liable for the ordinary teasing that seems a part of every child's school experience.

"I'm sure schoolchildren nationwide tease each other," Justice Sandra Day O'Connor said. "Is every one of those incidents going to lead to a lawsuit?"

Justice Stephen G. Breyer said he was concerned about taking a problem away from schoolteachers, administrators and psychologists -- who presumably would be the best at solving a particular incident -- and putting it in the hands of lawyers and judges. "What's worrying is the gearing up of the great legal mechanism," Breyer said.

Justice Anthony M. Kennedy said he was concerned about creating "a federal code of conduct" in every classroom in the country.

Deputy solicitor general Barbara D. Underwood, representing the Justice Department and siding with the Davis family, emphasized that routine teasing would not be covered and that the harassment would have to be so severe that it would prevent a child from learning and getting educational benefits guaranteed by federal law.

But W. Warren Plowden Jr., representing the Monroe County Board of Education, urged the justices not "to open the courthouse door" to all manner of complaints, saying the potential for litigation and costs to schools is enormous.

Justices Hear Case Over School Harassment

By Joan Biskupic

Washington Post Staff Writer

Wednesday, January 13, 1999; Page A4

Davis Dispute

Whether the misconduct identified in *Gebser* -- deliberate indifference to known acts of harassment -- amounts to an intentional violation of Title IX, capable of supporting a private damages action, when the harasser is a student rather than a teacher.

Davis Analysis

Plain Language = control over harasser & environment harassment occurs in.

If not Direct Discrimination, then Deliberate Indifference

“cause [students] to undergo" harassment or "make them liable or vulnerable"

During school in classroom

March 1993 NSBA publication

Clearly unreasonable in light of the known circumstances

Davis Holding

- Title IX's IPCOA does encompass student-student harassment.
- Determining whether Gender oriented conduct rises to the level of actionable harassment "depends on a Constellation of surrounding circumstances, expectations, and relationships." = Age, number involved,
- Unlikely that Single instance would suffice for Deliberate Indifference
- Our holding does not mean that recipients can avoid liability only by purging their schools of actionable peer harassment or that administrators must engage

Elements of Davis Title IX Liability

1) Respondent is a Federal Funding Recipient
2) Appropriate Official has
3) Actual Knowledge of misconduct
4) That is so Severe, Pervasive, and Objectively Offensive
5) That it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school &,
6) Recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.

7) Damages liability is limited to circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs. Only then can the recipient be said to "expose" its students to harassment or "cause" them to undergo it "under" the recipient's programs.

No Title IX Liability

- Damages are not available for simple acts of teasing and name-calling among school children, however, even where these comments target differences in gender. Rather, in the context of student-on-student harassment, damages are available only where the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect.

Davis Liability Example

The most obvious example of student-on-student sexual harassment capable of triggering a damages claim would thus involve the overt, physical deprivation of access to school resources. Consider, for example, a case in which male students physically threaten their female peers every day, successfully preventing the female students from using a particular school resource -- an athletic field or a computer lab, for instance. District administrators are well aware of the daily ritual, yet they deliberately ignore requests for aid from the female students wishing to use the resource. The district's knowing refusal to take any action in response to such behavior would fly in the face of Title IX's core principles, and such deliberate indifference may appropriately be subject to claims for monetary damages.

School Administrator Flexibility

- School administrators will continue to enjoy the flexibility they require so long as funding recipients are deemed "deliberately indifferent" to acts of student-on-student harassment only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances. The dissent consistently mischaracterizes this standard to require funding recipients to "remedy" peer harassment, *post* at 5, 10, 16, 30, and to "ensure that . . . students conform their conduct to" certain rules, *post* at 13. Title IX imposes no such requirements. On the contrary, the recipient must merely respond to known peer harassment in a manner that is not clearly unreasonable.

Jackson v. Birmingham Bd. Of Educ., 544 U.S. 167 (2005)

Roderick Jackson

Birmingham Board of Education

Ensley High School basketball coach at press conference in front of Ensley High School after getting a favorable decision from the US Supreme Court on a discrimination case Tuesday March 29, 2005..... AP Photo/Joe Songer/The Birmingham News

Facts

- Jackson discovered unequal access to equipment funding in boys & girls basketball programs.
- Complained to supervisors in Dec. 2000
- Removed as Coach in May 2001

Jackson's Dispute

- 1) Statutory Interpretation
- 2) Indirect Victim
- 3) No Notice

Jackson Analysis

- Retaliation = Intentional discrimination on the basis of sex
- Court does not rely on Title IX regulations at all
- Broad language // Title VI + no same victim requirement
- Schools have been on notice about intentional discrimination

Jackson Holding

- Title IX's private right of action encompasses claims of retaliation against an individual because he has complained about sex discrimination.

Jackson Takeaway – Protection from Retaliation / Example

- Accordingly, if a principal sexually harasses a student, and a teacher complains to the school board, but the school board is indifferent, the board would likely be liable for a Title IX violation.
- But if Title IX's private right of action does not encompass retaliation claims, the teacher would have no recourse if he were subsequently fired for speaking out. Without protection from retaliation, individuals who witness discrimination would likely not report it, indifference claims would be short circuited, and the underlying discrimination would go unremedied.

Jackson Takeaway – Importance of Employee Reporting

- Moreover, teachers and coaches such as Jackson are often in the best position to vindicate the rights of their students because they are better able to identify discrimination and bring it to the attention of administrators. Indeed, sometimes adult employees are "'the only effective adversar[ies]'" of discrimination in schools.

Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246 (2009)

Fitzgerald - Harassment

KINDERGARTEN FEMALE

BULLIED INTO EXPOSING HERSELF ON SCHOOL BUS

PRINCIPAL NOTIFIED AND INVESTIGATED

PRINCIPAL SUGGESTED DIFFERENT BUS FOR FITZ // EMPTY ROWS B/W PARTIES

When there is a case of peer-on-peer sexual harassment, does Title IX preclude an action under 42 USC 1983 (deprivation of civil rights claim) for unconstitutional gender discrimination?

Fitzgerald Analysis

- Congressional Intent -> Exclusive Remedial Scheme?

1) Primary emphasis is placed on the nature & extent of remedial scheme.

2) Comparison of rights and protections b/w statute & constitution

Middlesex County Sewerage Authority v. National Sea Clammers Assn., 453 U.S. 1 (1981)

- Sufficiently Comprehensive?

- Title IX reaches federal funding recipients (public & non public), does not reach school officials, teachers.

- Equal protection clause reaches state actors

- 1983 equal protection may reach individuals, municipalities, other state entities

Fitzgerald outcome

Title IX does not provide comprehensive and exclusive coverage

Implied Private Cause of Action history

No preclusion or substitution intended

Key Title IX SPCT cases

- Cannon v. Univ. of Chicago, 441 U.S. 677 – Implied Private Cause of Action
- N. Haven Bd. Of Educ. v. Bell, 456 U.S. 512 – Authority to regulate Employees
- Grove City College v. Bell, 456 U.S. 555 – Scope of program or activity receiving federal funds
- Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 – Money Damages Available
- Gesber v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 – Deliberate Indifference, Teacher on Student
- Davis v. Monroe County Bd. Of Educ., 526 U.S. 629 – Deliberate Indifference, Student on Student
- Jackson v. Birmingham Bd. Of Educ., 544 U.S. 167 – Retaliation Prohibited
- Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246 – Title IX does not Preclude 42 USC 1983 claims

42 U.S.C. 1983 – Deprivation of Civil Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 USC 1983 → State Actors (Public Institutions)
Monroe v Pape, 365 US 167 (1961)
(Unlawful Police Search)
Monell v Dept. of social services, 436 U.S. 658 (1978)
(female employees forced to take unpaid leave)

- 1) Deprived of a constitutional right (Liberty / Property)
- 2) by a state official acting under the color of law.
- 11th Amend – 1) Waived 2) Abrogated by statute 3) Ex Parte Young exception– Prospective Relief
- 3 Causes of Action
  1) Substantive Due Process Violation (bars certain arbitrary gov. actions "regardless of the fairness of the procedures used to to implement them.")
  2) Procedural Due Process Violation (guarantee of a fair procedure)
  3) Equal Protection Violation (Equal treatment under the laws)

42 USC 1983 – Key Cases

Behavior Discipline

Goss v. Lopez, 419 U.S. 565 (1975)

Balancing Test

Mathews v. Eldridge, 424 U.S. 319 (1976)

Academic Discipline

University of Missouri v. Horowitz, 435 U.S. 78 (1978)

Goss v Lopez, 419 U.S. 565 (1975)

- Nine students suspended // Disciplinary Reasons
- Some students suspended w/o hearing or evidence on record indicating they were not bystanders.
- Ohio Rev. Code Ann. 3313.48 & 3313.64 (1972 & 1973) & 3321.04 (1972).
- Property (state law) Board of Regents v. Roth, 408 U.S. 564 (1972)
- Liberty interest (reputation) Wisconsin v. Constantineau, 400 U.S. 433 (1971)
- 10 day suspension is not de minimis

Goss Student Due Process Holding

Students facing temporary suspension have interests qualifying for protection of the Due Process Clause, and due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.

We hold only that, in being given an opportunity to explain his version of the facts at this discussion, the student first be told what he is accused of doing and what the basis of the accusation is.

Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures.

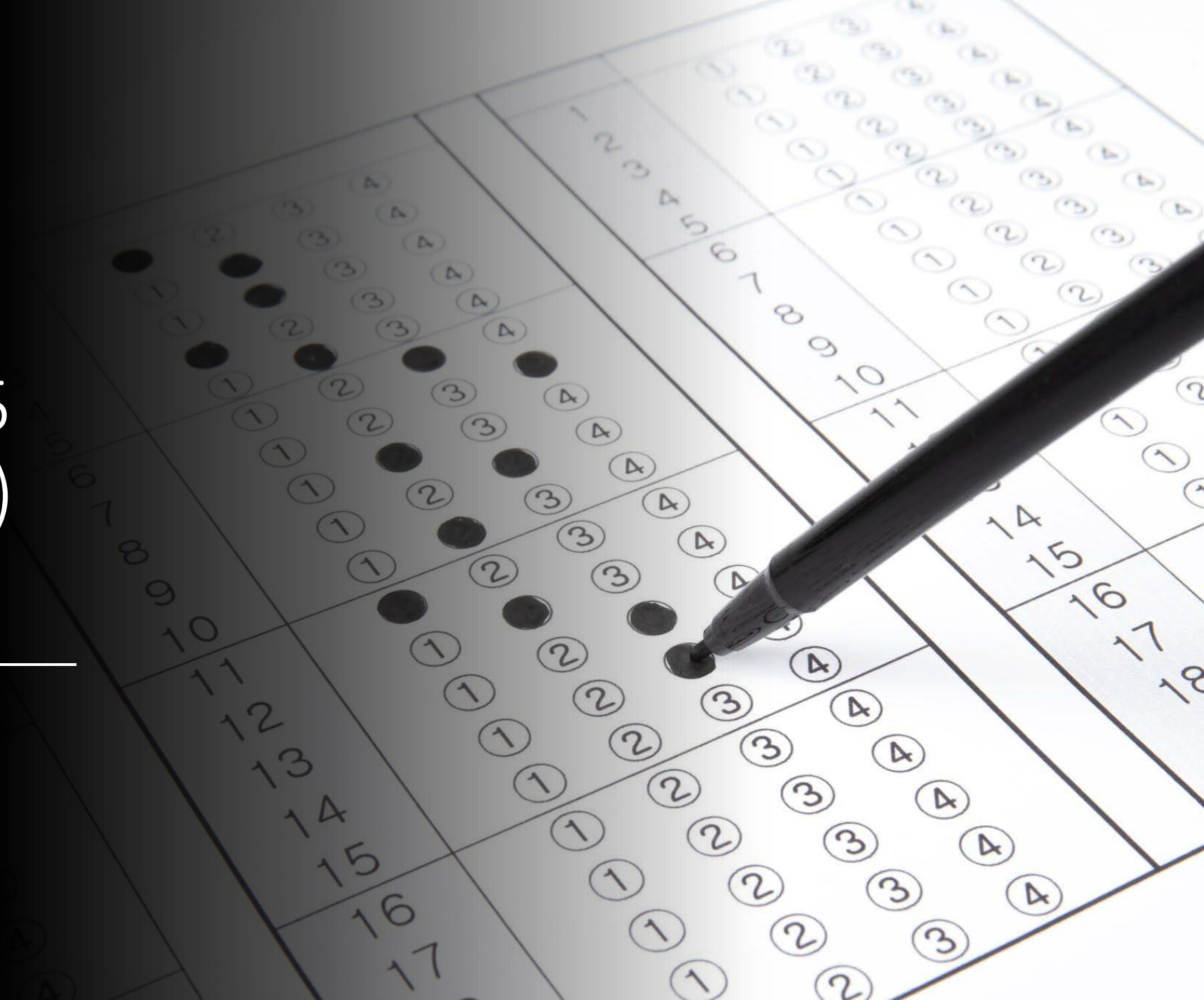
Each of the suspensions involved here to have occurred without a hearing, either before or after the suspension, and that each suspension was therefore invalid and the statute unconstitutional insofar as it permits such suspensions without notice or hearing.

Mathews v. Eldridge, 424 U.S. 319 (1976)

- What Process is Due Balancing Test:

1) "First, the private interest that will be affected by the official action;
2) Second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and
3) Finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

University of Missouri v. Horowitz, 435 U.S. 78 (1978)

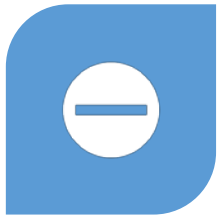


Horowitz Facts

MEDICAL SCHOOL STUDENT

ACADEMIC PERFORMANCE ISSUES

ALLOWED TO PROCEED ON ACADEMIC PROBATION



BOARD RECOMMEND SHE NOT BE CLEARED TO GRADUATE

GIVEN SET OF EXAMS AS APPEAL

BOARD & DEAN REAFFIRMED NO GRADUATION

APPEALED TO PROVOST

PROVOST APPROVES ORDER

Horowitz - Holding

Assuming an interest

School gave student all the process minimally required.

“The need for flexibility is well illustrated by the significant difference between the failure of a student to meet academic standards and the violation by a student of valid rules of conduct. This difference calls for far less stringent procedural requirements in the case of an academic dismissal.”

Administrative Law

Judicial Review of Agency Action

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title [concerning formal rulemaking[86] and adjudicatory proceedings] or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.[87]

Scope of Judicial Review

Judicial deference is the degree to which a court will uphold and respect the validity of an agency's interpretation of a statutory provision during judicial review of the agency's decisions. The amount of deference that an agency interpretation of its own statute will receive from a reviewing court "has been understood to vary with the circumstances." United States v. Mead Corp., 533 U.S. 218, 228, 236-37 (2001).

1) Factual Issues – Substantial Evidence via Universal Camera

2) Policy Issue - (mixed fact & law) – Arbitrary & Capricious via State Farm (reasoned decision making)

3) Legal Issues –

Constitutional Challenge = De Novo standard of Review

Agency Statute & (force of law) = Chevron Deference

1) Is statute clear? If so, apply clear language of statute.

2) If not, defer to agency interpretation if it is reasonable.

Arbitrary & Capricious Review

- Motor Vehicle Manufacturers Association v. State Farm Auto Mutual Insurance Co., 463 U.S. 29, 42-44 (1983)
- "If the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Id. at 43
- Hard Look Review
- Reasoned decision making, adequate explanation, facts tied to the justification, considered less restrictive alternatives.

Transgender activist Aimee Stephens outside the US Supreme Court in Washington, DC, on October 8, 2019. *Saul Loeb/AFP via Getty Images*

Title VII - Transgender

- Issue is unsettled in Title IX
- Title VII is often paralleled to Title IX (replaced Title VI)
- Price Waterhouse v Hopkins
- R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission
- 6th Circuit held Funeral Home violated Title VII in two ways:

1) Stephen's failure to conform to sex based stereotypes
2) Stephen's transgender/transitioning status.

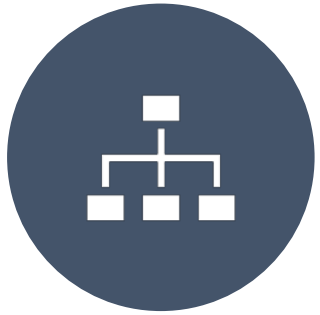
Kadel v UNC

The Court will now consider Defendants' alternative request that this action be stayed pending the Supreme Court's resolution of *Harris Funeral Homes*, 139 S. Ct. 1599 (2019). (*See* ECF Nos. 31 at 17–18; 37 at 6 n.1.) As acknowledged above, *Harris* could have a significant effect on this case. *See Hickey v. Baxter*, 833 F.2d 1005 (4th Cir. 1987) (unpublished table decision) (affirming district court's discretionary stay pending Supreme Court resolution of relevant issues). Nevertheless, "[o]nly in rare circumstances will a litigant in one cause be

Supreme Court Takeaways

EVOLUTION

EXPANSION



RELATION

SOLVING

- If you would like to use this presentation for Title IX Training purposes after August 13, 2020 please contact the Stetson Law Center for Excellence in Higher Education Law & Policy.

Title IX in the Supreme Court: Foundations and Open Questions

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Thank You, Be sure to register for part 2!