



Double Exposure: The Supreme Court and Sex Discrimination Claims

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In practice, Title IX codifies many of the existing constitutional guarantees against sex discrimination.

The Supreme Court's recent decision in *Fitzgerald v. Barnstable School Committee* (2009) expands the opportunities for students and their parents to sue school boards for alleged sex discrimination. Even so, as discussed below, *Fitzgerald* should have little effect on the day-to-day operations of school systems.

This column briefly reviews the background of Title IX and sexual discrimination in schools and then reviews *Fitzgerald's* facts and holding. It concludes by reflecting on *Fitzgerald's* significance and practical effect while offering recommendations for school business officials and other education leaders in developing policies aimed at eliminating sexual discrimination.

Background of Title IX

Title IX of the Education Amendments of 1972, which prohibits discrimination based on sex in school systems that receive federal funds, is regarded as a revolutionary law that, at a minimum, served as the catalyst for the development of interscholastic and intercollegiate athletics for women.

Title IX has also been used to fight the long-term problem associated with sexual harassment of students by teachers and peers. According to Title IX, "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. . . ."

In practice, Title IX codifies many of the existing constitutional guarantees against sex discrimination. In other words, even if Title IX did not exist, the equal protection clause of the Fourteenth Amendment would prevent school boards from denying equal

educational opportunities, including in athletics, to women.

The similarities between Title IX and the equal protection clause led some courts to agree that the implied private right of action to enforce Title IX limited plaintiffs to filing suits under the Civil Rights Act of 1871—more commonly known as 42 U.S.C. § 1983—to prevent public officials from denying them their constitutionally protected rights. In other words, these courts concurred that individuals who alleged sex discrimination could file suit under Title IX but not pursuant to Section 1983. Other courts, acknowledging the differences between the Fourteenth Amendment and Title IX, allowed plaintiffs to bring both claims. Further complicating the issue was the fact that Congress never explicitly declared that private parties could sue to enforce Title IX. In *Fitzgerald*, the Supreme Court resolved this difference.

Although Title IX speaks only of enforcement by the federal government, the Supreme Court's 1979 judgment in *Cannon v. University of Chicago* expanded its reach in holding that private parties could sue on their own. Ruling in favor of an applicant who was denied admission to two private medical schools, the Court reasoned that since the applicant was a member of the class that Title IX was designed to protect and its legislative history revealed an intent to permit a private cause of action, she could file suit because her ability to do so was consistent with the law's approach insofar as the federal government was concerned with eliminating discrimination due to sex.

Since *Cannon*, the Supreme Court has resolved four cases dealing with sexual harassment of students while lower federal and state courts continue to review many such cases.

The Supreme Court first recognized the right of students to sue school boards for sexual harassment by teachers under Title IX in *Franklin v. Gwinnett County Public Schools* (1992). The Court subsequently narrowed the circumstances under which boards could be liable for teacher harassment in *Gebser v. Lago Vista Independent School District* (1998). The Court explained that boards could not be liable under Title IX for teacher sexual misconduct unless officials who, at a minimum, had the authority to institute corrective measures had actual notice of and were deliberately indifferent to the misbehavior.

Davis v. Monroe County Board of Education (1999) addressed peer-to-peer harassment. The Supreme Court specified that the ability of plaintiffs to recover damages under Title IX was limited “ . . . to circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs” (p. 646).

The Court added that, as recipients of federal financial assistance, school boards

“ . . . are properly held liable in damages only when they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school” (p. 650).

Fitzgerald v. Barnstable School Committee

The facts in *Fitzgerald* are straightforward. A female kindergarten student informed her parents that whenever she wore a dress to school, usually two to three times a week, an older male student on her school bus bullied her into lifting it up. The mother immediately called the principal to report the allegations.

In an attempt to resolve such issues when they arose, the school committee employed a prevention specialist



whose duties included responding to reports of inappropriate student behavior and instituting appropriate disciplinary measures. The principal and specialist met with the girl later on the day that her mother called.

Because officials were unable to identify the alleged perpetrator based on the child’s account, they arranged for her to observe students as they left the school bus over the next two days. The girl identified a third-grade boy as her harasser. Later that day, the principal and specialist questioned the boy, but he denied the allegations. The specialist also interviewed the bus driver and a majority of the children who regularly rode the bus but was unable to corroborate the girl’s version of the events.

Not long thereafter, the parents called the principal and informed him that their daughter provided additional details about the harassment. The child reported that, in addition to pressing her to lift her dress, the boy bullied her into pulling down her underpants and spreading her legs. The principal immediately scheduled a meeting with the parents for later in the day to discuss these charges.

By this time, at the request of the parents, the local police department launched its own investigation. A detective who specialized in juvenile matters questioned, among others, both the girl and boy. The detective found that the boy’s version of events was credible, so the police department ultimately decided that there was insufficient evidence to proceed criminally against him. Relying in part on this decision and in part on the results of the school’s own belated investigation, the principal reached a similar outcome and refused to discipline the boy any further.

As events unfolded, the parents drove their daughter to and from school. About a month after the child made her initial allegation, the principal offered to place her on a different bus or, alternatively, to leave rows of empty seats between the kindergarten students and the older children on the bus. The parents rejected these offers, maintaining that the principal’s primary suggestion to switch school buses punished their daughter rather than the boy (who continued to ride the bus).

The parents countered with their own alternatives, such as placing a

monitor on the bus or transferring the boy to a different bus. In conjunction with the principal, the school superintendent refused to make these changes in light of their investigation.

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Throughout the remainder of the school year, there were no further incidents on the school bus. Even so, the girl alleged that she had unsettling encounters with the boy, some of which were casual encounters in the hallways. The worst encounter, she claimed, was during a mixed-grade gym class when the teacher randomly required her to give him a “high five.”

As soon as these reports were made, the principal documented that they occurred and that he looked into them. Yet, the girl soon discontinued participating in gym class and began to miss school regularly. The parents then unsuccessfully filed suit as both the federal trial court in Massachusetts and the First Circuit (*Fitzgerald* 2007) agreed that school officials did not act with deliberate indifference in response to the reported harassment.

The Supreme Court agreed to hear an appeal in *Fitzgerald* (2008) to resolve the difference over whether parties could file suit under both Title IX and Section 1983.

Judicial Rationale

On further review in *Fitzgerald v. Barnstable School Committee* (2009), the Supreme Court, reversing in favor of the parents, ruled that the plaintiffs’ implied private rights of action to enforce Title IX did not prevent them from also filing Section 1983 charges. At the outset, the Court emphasized that Section 1983

claims are precluded only when Congress intended for enforcement of other statutes to be the exclusive means of pursuing specific claims, a situation that was not present in *Fitzgerald*. In the constitutional con-

text, the Court noted that congressional intent might be inferred by comparing statutory rights and the protections with those in the Constitution.

Applying this standard to Title IX, the Supreme Court refused to interpret congressional intent as precluding Section 1983 constitutional claims for harassment. Since Title IX’s enforcement mechanism is limited to administrative enforcement and an implied private right of action, the Court opined that there was no comprehensive remedial scheme. Indeed, the Court thought that the lack of an explicit private cause of action for Title IX suggested that Congress did not intend to preclude the constitutional claims.

More significantly, the Supreme Court emphasized that Title IX and the equal protection clause are not coextensive since in some instances the statute is broader. While the Fourteenth Amendment is limited to public schools and universities, the Court concluded that Title IX reaches any educational institution that receives federal funds. Further, Title IX’s standards, especially in the context of interscholastic athletics, appear to require more than the Fourteenth Amendment.

At the same time, the Supreme Court indicated that Title IX is narrower than the equal protection clause in many instances since it is limited to claims against education

institutions and does not extend to those against individuals. Similarly, Title IX explicitly exempts some activities, such as gender-based discrimination in admissions that are arguably unconstitutional when practiced by public officials. Further, in some instances, the standard for establishing liability under Title IX is significantly less than what is required for constitutional violations under Section 1983.

In concluding on a note of hope for school boards, the Supreme Court pointed out that it had not addressed the merits of the claim or even the sufficiency of the pleadings that initiated *Fitzgerald*. That is, *Fitzgerald* was limited to resolving the dispute over whether injured parties could file suit under both Title IX and Section 1983, not the child’s underlying allegations.

Reflections

Fitzgerald’s significance is twofold. More obviously, when school boards are charged with sexual discrimination, they may now have to defend against two rather than only one theory of recovery. Consequently, unless attorneys representing clients who allege that they were subjected to sexual discrimination wish to be accused of malpractice, all such claims will have to be based on both Title IX and Section 1983, an approach that is likely to result in more paperwork and more detailed litigation.

Less obviously, but more significantly, the Supreme Court signaled a shift in the substantive meaning of Title IX. Until now, the Court long emphasized, and reaffirmed in *Fitzgerald*, that since Title IX was modeled on Title VI of the Civil Rights Act of 1964, it should have been interpreted in the same way. Insofar as Title IX and Title VI were to have been interpreted in the same manner, and since Title VI is coextensive with the equal protection clause, it logically followed that Title IX was also coextensive with the equal protection clause. If so, then the issue of pre-

cluding Section 1983 actions was largely academic, meaning that since *Fitzgerald* should be limited to a narrow point of law, it should not have much of an immediate effect on school operations.

By explicitly evaluating Title IX as both narrower and broader than the Constitution, though, the Supreme Court partially repudiated its earlier precedent in raising the possibility of new Title IX claims. In this regard, advocates for gender equality have long asserted that Title IX exceeds the scope of the equal protection clause. Conversely, critics of the Title IX athletic regulations have contended that the emphasis that these rules place on gender balance was contrary to the equal protection clause. Thus, it is likely that plaintiff's attorneys on both sides of these issues will advocate new theories of liability to challenge long-settled practices.

Practically speaking, *Fitzgerald* will have little effect, at least in the short run. While attorneys will attack the actions of school boards and their officials using both Title IX and Section 1983, boards that can escape Title IX liability generally should also avoid Section 1983 liability.

While, as suggested earlier, the briefs that school board attorneys will file incident to litigation will be longer and the suits more extensive, the results will likely be the same. Of course, this could change if lower courts interpret Title IX more broadly in some contexts or allow constitutional attacks on practices that Title IX explicitly requires, such as the athletic regulations that require gender proportionality even though this topic was not directly in dispute in *Fitzgerald*.

Recommendations

School business officials and other education leaders should work with their boards to remain vigilant to ensure that their employees do not engage in sex discrimination. School business officials can assist their

boards in remaining vigilant by helping develop written policies that

- are aligned with other policies, such as codes of conduct for staff and volunteers, personnel guidelines, and student handbooks;
- prohibit sexual discrimination, such as inappropriate sexual conduct, whether verbal, physical, or any other methods, such as messages on the Internet between and among students, faculty, staff, and volunteers;
- specify that everyone associated with schools be protected by the policies, whether students, full- or part-time staff, or volunteers;
- outline sanctions for offenders up to and including expulsion or dismissal with provisions for progressive sanctions depending on the nature of the offenses;
- develop effective and well-publicized procedures by which students, faculty, staff, and volunteers can resolve sexual discrimination complaints;
- ensure that administrative action resolves complaints in a timely manner that respects both the seriousness of complaints and the due process rights of all parties;
- are included in student, faculty, staff, and volunteer handbooks so that all members of school communities are aware of their responsibilities; and
- are reviewed annually to ensure that they are up-to-date with the latest developments in federal and state law.

Conclusion

Fitzgerald appears to open school boards to double exposure to the extent that students and their parents can file suit for sexual discrimination under both Title IX and Section 1983. However, if school business officials and other education leaders remain vigilant in the fight to eliminate sexual discrimination, they are unlikely to face added risk of liability in schools.



References

- Cannon v. University of Chicago*, 441 U.S. 677 (1979).
- Civil Rights Act of 1871, 42 U.S.C. § 1983.
- Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999); *on remand*, 206 F.3d 1377 (11th Cir. 2000).
- Fitzgerald v. Barnstable School Committee*, 504 F.3d 165 (1st Cir. 2007); *cert. granted*,—U.S.—, 128 S. Ct. 2903,—L. Ed.2d—(2008); 2009 WL 128173 (2009).
- Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992); *on remand*, 969 F.2d 1022 (11th Cir. 1992).
- Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998).
- Title IX of the Education Amendments of 1972, 20 U.S.C.A. § 1681.
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