

# Case at a Glance

Enacted in 1871, 42 U.S.C. § 1983 has long served as a vehicle for federal courts to review state actors' violations of federally protected constitutional rights. In 1972, Congress enacted Title IX of the Education Amendments, prohibiting sex discrimination in education. Petitioners, the Fitzgeralds, invoked both laws against a school district charged with sex discrimination. The lower courts ruled that Title IX precludes the petitioners' claims under 42 U.S.C. § 1983. The Supreme Court will resolve a split in the circuits on this question.



## What Remedies are Available for Sex Discrimination in Schools?

by Martha F. Davis

PREVIEW of United States Supreme Court Cases, pages 164–166. © 2008 American Bar Association.

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### ISSUE

Did Congress intend Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), to preclude the use of 42 U.S.C. § 1983 to present claims of unconstitutional sex discrimination in schools?

### FACTS

Five-year-old Jacqueline Fitzgerald was subjected to repeated sexual harassment by a third-grade schoolmate who rode with her on the same school bus. Six months after the harassment began, she informed her parents about it, and they immediately contacted the school's principal. The principal initiated an investigation and made efforts to identify the perpetrator and resolve the issue. However, the principal refused to accede to the parents' requests that an adult monitor be placed on the bus, or that the school assign the perpetrator to a different bus. Unsatisfied with the principal's response, the Fitzgeralds sued the school district alleging violations of Title IX, Massachusetts state law, and, relying on § 1983, the U.S. Constitution.

When liability for peer harassment is alleged against an educational institution, the Supreme Court has required proof of the school's "deliberate indifference" in order to sustain liability under Title IX. The district court in this case acknowledged the severity of the harassment. However, it concluded that the petitioners had not met the "deliberate indifference" standard. Further, the lower court dismissed the constitutional equal protection claim, opining that it was entirely pre-empted by Title IX.

On appeal, the First Circuit Court of Appeals affirmed. The petitioner sought Supreme Court review solely on the question of whether Title IX precluded the plaintiff's reliance on 42 U.S.C. § 1983 to allege violations of the U.S. Constitution's Equal Protection Clause arising from the same facts. The Court granted certiorari to resolve a split in the circuits on this issue.

### CASE ANALYSIS

The petitioners frame the question here as one of congressional intent, i.e., whether Congress intended through Title IX to preclude constitu-

*FITZGERALD V. BARNSTABLE  
SCHOOL COMMITTEE*  
DOCKET NO. 07-1125

ARGUMENT DATE:  
DECEMBER 2, 2008  
FROM: THE FIRST CIRCUIT



tional claims for sex discrimination arising from the same facts. The petitioners note that there is no explicit statement in the language or in the legislative history of Title IX that evinces such a preclusive intent. In fact, they argue, Title IX was intended to strengthen remedies against sex discrimination, not eliminate them. Further, they assert, Congress must have understood that the remedies would coexist, since case law at the time allowed parallel claims under Section 1983 and Title VI, a race discrimination statute that served as the model for Title IX. Indeed, Title IX's private cause of action is not explicit in the statute, but was implied by the Court in *Cannon v. University of Chicago*, 441 U.S. 677 (1979). This omission from the statutory scheme suggests that Congress did not intend to supplant Section 1983, but expected it to continue to be available as a vehicle for enforcement of Title IX's provisions.

Petitioners also distinguish their use of Section 1983 from those cases in which the Court has found preclusion. In earlier cases such as *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981), and *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113 (2005), petitioners note, Congress had created new statutory rights with specially tailored remedies. For example, in *Sea Clammers*, the plaintiffs used Section 1983 to challenge a county's compliance with the Federal Water Pollution Control Act, which provided its own enforcement scheme. In *Abrams*, the plaintiff used Section 1983 to seek enforcement of the federal Communications Act and Telecommunications Act. In both of these cases, plaintiffs invoked Section 1983 to directly enforce the federal laws and to make an "end run" around the limitations of the statutory enforcement schemes. In

contrast, the petitioners here are using Section 1983 to vindicate pre-existing constitutional equal protection rights, not to simply enforce the substantive provisions of Title IX while avoiding its enforcement scheme.

The petitioners add that there are many significant differences between the protections offered by Section 1983 and Title IX. Notably (given the facts here) in *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999), the Supreme Court held that peer sexual harassment is actionable under Title IX only when the school district has displayed "deliberate indifference." The Supreme Court has not, however, considered whether a similarly high standard would be appropriate in constitutional sex discrimination cases involving similar facts. Such differences, petitioners argue, suggest that these provisions can, and should, coexist.

The petitioners' position is supported by several amicus participants, including the American Civil Liberties Union and the American Bar Association. It is interesting that the conservative Pacific Legal Foundation (PLF) also supports the petitioners. In its first few pages, the PLF brief concurs with the petitioners' argument that there is no evidence of congressional intent to preclude the pursuit of relief under both Title IX and Section 1983. Then, in a demonstration of free association, the second part of the PLF brief argues that the sort of erroneous conclusion reached by the lower courts in this case is typical of the erroneous conclusions that courts have also reached in applying Title IX in sports contexts.

The respondents begin their briefing by essentially arguing that certiorari should be dismissed as improvident-ly granted. The respondents first

acknowledge that the Supreme Court has not applied Title IX's deliberate indifference standard to constitutional claims. However, the respondents then go on to argue that the same standard should apply, and that the district court's finding of no deliberate indifference under Title IX should bar the Fitzgeralds from relitigating the issue under Section 1983. Respondents further allege that the Section 1983 claim was not properly pleaded.

After exhausting these arguments, respondents join issue with the plaintiffs by claiming that Title IX is a "comprehensive remedial scheme" that "precludes virtually identical Section 1983 claims." To the extent that the two provisions differ, particularly in their remedial sections, respondents argue that it demonstrates that Congress deliberately intended to craft a separate, preclusive remedy in Title IX.

Respondents are supported by an amicus brief filed by the National School Boards Association. The Association emphasizes the unique nature of peer harassment, where school administrators may be held responsible for behavior that is initiated by a private individual acting without any school authority. They argue that Title IX's scheme, combined with the on-the-ground responses of school administrators, is the preferable way to address these behaviors, and that allowing constitutional litigation would disrupt longstanding principles of limiting government liability for private acts of discrimination.

## SIGNIFICANCE

Though this case has received relatively little notice, it is quite significant both because of its practical effect on Title IX and because of its implications for other areas of civil rights litigation.

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First, as a practical matter, litigants often pair Title IX and Section 1983 claims because the two provisions offer different standards for liability and different types of relief. As mentioned above, Title IX requires a showing of “deliberate indifference” to establish liability for peer sexual harassment, while the Supreme Court has not ruled on whether such a high standard applies as a constitutional matter and has instead applied a lower, “gross negligence” standard. Similarly Title IX permits suit against educational institutions, not individuals. Section 1983, on the other hand, is brought against “state actors,” including individuals. Section 1983 provides for punitive damages that are not available under Title IX. If companion claims under Section 1983 are no longer available as a result of the Supreme Court’s ruling in this case, it may discourage some Title IX suits that otherwise would have been brought, and it will force all litigants to conform more tightly to the contours of Title IX.

Second, a ruling that a statute, Title IX, precludes a Section 1983 claim, would seem to turn the Supremacy Clause on its head by allowing Congress to cut back on constitutional rights through statutory enactment. Such a ruling would have immediate impacts on Title VI and those aspects of Title VII and the Americans with Disabilities Act involving state actors. It would, of course, build on some of the Supreme Court’s recent opinions giving Congress expansive preemptive powers, such as *Riegel v. Medtronic*, 2008 WL 440744 (U.S.) (Medical Device Amendments of 1976 permit pre-emption of state tort law)—but would go considerably beyond those prior opinions by precluding constitutional rights even without a congressional state-

ment of express pre-emption. An irony is that if Congress had included such a statement of express pre-emption in Title IX—stating, for example, that “this Act is intended to supersede any Constitutional remedies”—it would have put the Supremacy Clause issue in even starker relief.

It is notable that, a conservative legal group such as the Pacific Legal Foundation has taken a position based on the plain language of Title IX against the preclusion of Section 1983 claims. This appeal for adherence to the statutory language should resonate with the more conservative members of the Court. As the peer sexual harassment case of *Davis v. Monroe County* demonstrates, where the conservative and liberal wings of the Court part ways is over whether peer harassment should be actionable at all. Given the narrow question presented it seems unlikely that the Court can stretch the *Fitzgerald* case to address the existence of a constitutional claim for peer sexual harassment, but a later appeal could well raise it. Justice Kennedy’s position in *Davis*, where he dissented from the majority’s ruling upholding a peer sexual harassment claim under Title IX, may portend his rejection of such a claim under the Equal Protection Clause as well. In other words, even if the Fitzgeralds win this battle and are permitted to pursue their Section 1983 claim for the time being, they and their supporters may be concerned about whether they have enough votes on the current Supreme Court to win the war.

## ATTORNEYS FOR THE PARTIES

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## AMICUS BRIEFS

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**In Support of Barnstable School Committee**  
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