Special Education Legal Rights Strategies and Resources

Reed Martin, J.D.

Ninth Circuit Court of Appeals Agrees With Our Analysis of Student's Rights Under Supreme Court Decisions in "Gebser" and "Davis"

Reese v. Jefferson Sch. Dist

We have written extensively, on our website and in our publications about the United States Supreme Court rulings in Gebser v. Lago Vista Ind. Sch. Dist. in 1998 and in Davis v. Monroe County Schools in 1999

Those two cases give powerful legal rights to students who are being denied access to what they are entitled to in school. They give powerful legal strategies for parents and parent advocates to use to secure services. And they give powerful rights if the parent has to go to court, including money damages.

We wrote, starting in 1998, about how to use the "Gebser" approach in your letters to school districts and to your state education agency, and we have received many comments from parents and parent advocates about the positive results.

This "Gebser" approach is not just for a parent who plans to sue their school for damages. It is an approach for any parent who is having a disagreement with their school and wants to know how best to approach that school to get what their child needs.

A case raising the issues in Gebser and Davis has recently been decided by the Ninth Circuit Court of Appeals (the highest level of court below the U.S. Supreme Court). The Ninth Circuit's analysis of these two landmark cases squares absolutely with what we have been reporting for almost two years.

The significance is that these cases put schools on notice of how a parent might sue an individual or a school district for money damages under federal education statutes.

Equally important, these cases put parents on notice of what they have to prove when they are contesting the actions, or inaction, of a school district.

Parents have been suing for damages against school districts for almost the entire time we have had Section 504 and the IDEA. But almost all of those cases have failed. There has not, until Gebser and Davis, been a federally recognized damage standard.

The Reese v. Jefferson Sch. Dist. case out of the Ninth Circuit, just like Gebser and Davis, deals with Title IX (prohibiting schools from discrimination solely on the basis of gender) which

absolutely parallels the procedural rights of students with disabilities under Section 504 and the Americans with Disabilities Act. The cases, procedures and standards established under Title IX are equally applicable to our students with disabilities, as shown in references to Section 504 when the Supreme Court described these rights.

These cases show how parents should approach school districts when they want to complain about services to their child.

The claim in Reese, was discrimination on the basis of gender, denying a student what other students were given access to.

The Ninth Circuit repeated the elements that are necessary to show that a wrong had been committed.

First, the parent would have to show that the school district exercises substantial control over both the person committing the discriminatory act and the context in which the discrimination occurs. In Davis it was another student in a classroom. In Reese, it was other students off school campus but in a school-sponsored event. In Gebser it was a teacher, off school campus and not in a school-sponsored event.

The Second requirement is that the discrimination is not just one single action but rather is "so severe, pervasive and objectively offensive that it can be said to deprive the victim of access to the educational opportunities or benefits provided by the school." Although parents do not often characterize their complaint about what the school is doing, or failing to do, to their child, in that kind of language, let this writer assure you that 90% of the complaints parents make do fit that exactly. For example, "the school won't let any students with autism participate in extracurricular activities" or "my school will not let any student who has modifications on their tests get a regular high school diploma" totally fits that standard.

Third, some official in the school district has to have "actual knowledge" of the discrimination. We have written repeatedly that the parent must make a written complaint so that there is no argument whether the school knew about this. Further, the Reese decision says, just as we have urged for the past two years, the complaint has to be made to an official in the school "who at a minimum has authority to address the alleged discrimination and to institute corrective measures" on behalf of the school district. So don't "tell" the teacher about it. "Write" the Superintendent of Schools, with a copy to the director of special education.

Hopefully these steps will lead to a resolution. But if they do not, the Fourth element of this Supreme Court standard makes clear that if the school district's response, or lack of response, "is clearly unreasonable in light of the known circumstances" then the parent could sue the district. The Supreme Court said that the school could be sued for "intentional discrimination" against your child. How do you prove intentional discrimination? The Supreme Court said that if you notify an official of the school district and they are "deliberately indifferent" and do nothing, or if they do find something out but "refuse to act on their knowledge," then they are intentionally discriminating and the school district and/or that individual could be liable for money damages.

As we have written before, the availability of money damages is not what we want. We want school personnel to be quickly and fairly responsive to parent and student complaints. The fact

that they may be liable for money damages should accomplish that goal of making them responsive.

Our experience with "Gebser" letters of complaint has shown that to be the case. Don't fail to use this powerful advocacy strategy. Notify the proper person, in writing, stating that your child is being discriminated against, and stating that the discrimination is denying them access to what other children receive in that school district.

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Special Education Law

DAMAGE STANDARD

Reed talks a lot about the recent Supreme Court decision that has set up the standard for suing for damages. The recent case is Gebser v. Lago Vista Independent School Dist, 118 S. Ct. 1989 (1998). This case, decided at the end of June, 1998, dealt with a parent's claim for damages against a school district under Title IX of the Elementary and Secondary Education Act of 1972.

Title IX prohibits a denial of rights in regard to any program or activity of the school district solely on the basis of gender if that school district is a recipient of federal financial assistance.

I am sure this sounds familiar. It is the exact language of Section 504 which prohibits discrimination in any program or activity solely on the basis of disability if the school receives federal financial assistance and Section 504 uses the same remedies as Title IX.

Justice O'Connor, who wrote the decision for the majority in Gebser, stated that the receipt of federal financial assistance requires a contractual promise not to discriminate and that creates certain duties in the school district.

This Gebser decision indicates from the Supreme Court, for the first time, what parents need to put in letters to their school officials to truly put them "on notice" of discrimination against a student and to trigger the school officials' duty to act.

A failure to act by a school official who has been put on notice in this way may result in a finding that they have intentionally discriminated against a student with disabilities with the possibility of an award of money damages. Many of you have asked for a sample letter to use but the letter makes little sense unless you know how to fit it to the facts of your particular complaint, how to choose the right official to send it to, and then how to respond to what your school district will likely say.

We have taken great care to explain this important Gebser case in seven and one-half pages of our Fall, 1998 STRATEGIES newsletter. We explain what Justice O'Connor required to be said to a school district official and how to decide what official to send the notice to. If you do not know why each item is important and just add a few sentences to a letter of yours complaining to the school district, then the strength of the Gebser remedy may be lost.

Further, that STRATEGIES newsletter details what Justice Ginsburg says the school district's obvious responses are going to be and then we explain what the Supreme Court indicates you can show in reply. If you want to read the Gebser decision you can go to the home page of our website (reedmartin.com) and click on to the findlaw site and read the entire decision. If you want to read a follow up case to Gebser, click on to the Davis decision which the Supreme Court decided in May, 1999, and which adds even more strength to Gebser and to determining the right school official to send the letter to.

We detail the Davis case in three and one-half pages of our Spring-Summer STRATEGIES

newsletter, in two and one-half pages of our Summer 1999 Special Education Rights Update and in our Summer 1999 Special Education Rights Update Audiotape.

We have received very good results using this approach and hope it will be successful for you, too.

Reed's Fall'98 Issue of STRATEGIES newsletter gives a complete explanation of the decision, what the school board would agrue, what a parent has to prove, damage claims for retaliation and the damage standard.

click here **for details**

This information is educational and not intended to be legal advice.
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Reed Martin, J.D. (Reed's bio)

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The website where you get real answers to your questions with strategies to secure you

Update On Another Damage Award Against School Personnel For Harassment of a Special Education Stud

In Kendall v. West Haven Dept. of Educ. (Conn. Sup. Ct. 2000) a special education student was repeatedly attacked by another special education student. As we have described such violations on this website before, the special education student was the subject of a campaign of harassment and bullying by the other student. It was not the "typical high school kid stuff" that the Supreme Court had said often happens once in regard to a child, and does not usually produce court action if it only happened once. But this harassment was frequent enough to seem to meet the "severe and pervasive" standard that the Supreme Court warned against.

The student mentioned the attacks to his parents and they suggested contacting a school official. The student told the assistant principal about it and she apparently

Readers of this website will know that the Supreme Court cases of Gebser (1998) and Davis (1999) finally defined what a parent needed to prove to get damages from a school district. The key is to prove that the school was acting "intentionally" in discriminating against the child or parents, and we have often described the ten elements the Supreme Court requires to make that showing.

This writer's favorite element is that if the school district just fails to respond to a complaint, they can be found to be "deliberately indifferent" and that is interpreted as intentional discrimination. The parents can then go for money damages. In this writer's 30-plus years of experience, that is what it takes to make schools change their behavior, to start paying attention to parents and to start complying with the law.

The Ninth Circuit Court of Appeals was the first Appeals Court to apply these Supreme Court cases, in a California case, Reese v. Jefferson School District (2000) which we featured on this website.

Now a Federal District Court also in the Ninth Circuit (in Hawaii) has adopted the Gebser / Davis standard.

The Nahales claim their six year old daughter, Amber, who is autistic, was denied appropriate services and that the state has been unresponsive. The parents made a claim for the services, for the emotional distress they have suffered in trying to get the services, for the lost wages for the hours required to fight the system, and for punitive damages because the school personnel were acting intentionally.

The state education agency confidently responded that the Nahales could not sue because there is a six year old class action lawsuit against the State Department of Education, the Felix case, that basically covers all the special education students in the state.

But the Federal District Court judge ruled last week that the Nahales could go ahead with their lawsuit. The judge said the Felix suit covers systemic problems for about 11,000 students with special needs, but individual parents can now go forward with individual complaints.

An article in the Honolulu Star-Bulletin quoted attorney Shelby Anne Floyd, as an attorney for the Felix class-action, stating how significant the ruling is -- noting that you can seek damages when school personnel are deliberately indifferent, and that you can get punitive damages as well as actual damages.

Stanley Levin, an attorney for the Nahales family, was quoted as stating that the judge's action would allow suits for damages and emotional distress if it can be shown that the action by the state personnel was intentional.

And "Gebser," "Davis" and "Reese" are the way to prove intentional discrimination.

The Hawaii schools superintendent recognized that this ruling accurately stated the law. But the Hawaii State House Education Chairman disagreed. He was quoted as opposing this because it might open up a lot of litigation... "People sometimes sue just because they're mad."

With the history of the last several years in Hawaii the parents have every right to be mad, but whether the parents are mad or not, if the state is deliberately indifferent to the parents' complaints, the parents can definitely sue.

10 Steps in Making A SuccessComplaint as Described in the Supreme Court Cases of Gebser & Davis

Reed Martin, J.D.

Taken from Reed's manual ADVANCED ADVOCACY STRATEGIES ARE YOU READY TO PLAY HARDBALL? Using Your School's And State's Violations Of Section 504 And The ADA To Get Your Child The Program They Need Under IDEA, Section 504 Or The ADA

The ten steps in making a successful complaint, as described in the Supreme Court cases of Gebser v. Lago Vista Indep. Sch. Dist. (1998) and Davis v. Monroe County Sch. Dist. (1999) are:

One to show that you have notified a school person about the problem (we would suggest the notification be in writing-- so that you can prove the date of notification, the person who was notified, and what they were notified about).

Two, you indicate that the school district (or state education agency) is a recipient of federal financial assistance.

Three, you show that the person you complained to has the authority to investigate your complaint and has the authority to correct the wrong when they investigate.

Four, you state what the discriminatory activity against the child was (or is, if it is still continuing).

Five, you state that the school district exercises control over the site where the discrimination occurred (or is still occurring) and state that the school district exercises control over the personnel who committed the discriminatory acts (or continues to commit them).

Six, you explain that the discrimination was not a single act but was severe and pervasive.

Seven, you show that the discrimination excluded the student from continuing their participation in school, or denied the student the benefits of what the other students in school have access to.

Eight, you indicate to the degree that you can, what you would like the school to stop doing wrong and/or what you would like the school to start doing right to stop this harm or to remediate its effects on the child.

Nine, you indicate that the school district or state education agency does not have the required "grievance procedures" available to you under Section 504 (even if your child is on an IEP under the IDEA) that would allow you the "prompt and equitable resolution" of your complaint, with the result that the discrimination continued to harm the child.

Ten, you state that if the recipient of your complaint letter does not investigate, or that if the recipient of your complaint letter does investigate but takes no corrective action based on their findings, or takes action but it is ineffective in ending the discrimination, that you are entitled to claim that it shows deliberate indifference to the discrimination which can make the individual liable in a suit for money damages.

What to Do When the School Discriminates Against Your Child

How to File a Discrimination Complaint with the US Department of Education, Office for Civil Rights & What to Expect

An Action Kit for Students, Parents & Community Groups

What types of claims does the Office for Civil Rights (OCR) handle?

OCR handles complaints against schools receiving federal funding of education discrimination based upon:

- Race/color
- National origin
- Disability
- Age
- Sex[1]

How do I file a claim?

You must submit a Discrimination Complaint Form or letter within 180 days of the incident that includes:

- A description of the discriminatory act.
- A description of the discrimination victims.
- Name and location of the school.
- Your name and address.

Do I need to be the victim of the discrimination to file a complaint?

No. Anyone can file a complaint, but in order for OCR to pursue the complaint the victim must be willing to cooperate.

How will OCR proceed after I file my complaint?

Consent Form

Upon receiving your complaint, OCR will send you a consent form explaining OCR's the process. You must sign and return this consent form within 30 days.

Complaint Evaluation

In order to proceed, OCR must determine:

- if the complaint is timely.
- if OCR has authority to handle the claim.
- if another agency has already made a binding decision.
- if the person harmed by the discrimination is willing to cooperate.

Complaint Resolution

OCR uses three tools to resolve complaints:

1. Resolution Between Parties
2. Agreements for Corrective Action
3. Enforcement

Resolution Between the Parties

Both parties must agree to this process. OCR will explain the legal standards and possible remedies. You and the school negotiate the agreement. OCR will not monitor the agreement or ensure compliance. If the school does not comply with this agreement, the complainant can file another complaint.

Agreements for Corrective Action

If either you or the school chooses not to engage in Resolution Between the Parties or if you cannot come to an agreement, OCR should continue to investigate until they identify an appropriate resolution.

OCR should interview you, the victims, and school personnel. However, OCR cannot require people who do not work for the school to provide information. All interviews and document requests should be documented in the case file.

[1] OCR has jurisdiction over violations of:
Title VI of the Civil Rights Act of 1964
Title IX of the Education Amendments of 1972
Section 504 of the Rehabilitation Act of 1973
Title II of the American's with Disabilities Act of 1990.
The Age Discrimination Act of 1975.

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OCR will likely try to negotiate an agreement with the school to resolve the situation. OCR should consult with you to make sure the agreement meets your interests.

The written agreement is binding and must include:

- Specific acts or steps the school will take to resolve the problem.
- Specific Timetable.

Enforcement

If negotiation fails, the school is unwilling to cooperate in the investigation, or the school fails to comply with the negotiated agreement, OCR will issue a Violation Letter of Findings. This letter will include:

Each issue, the findings of fact for each, and any explanation or analysis necessary.

A conclusion for each issue that includes the relevant facts, regulations and legal standards.

Notice of the time limit on OCR's settlement process and the consequences of failure to achieve a voluntary settlement.

If after issuing the Letter of Findings, the school refuses to negotiate or is unable to come to an acceptable agreement, OCR may initiate enforcement in one of two ways:

1. Initiate administrative proceedings to suspend, terminate, or refuse to grant or continue financial assistance to the school.
2. Refer the case to Department of Justice.

How often will OCR update me on the status of the case?

OCR should communicate with you and the school no less than every 60 days.

How will I know when my complaint has been resolved?

When cases are resolved either through Resolution Between the Parties or by an OCR negotiated Agreement for Corrective Action, OCR should issue a complaint resolution letter. This letter will explain the basis of the complaint, OCR's authority to handle the complaint, factual information and analysis, and why OCR thinks the complaint has been resolved.

OCR can decide a case is resolved if:

- The complaint has been investigated by another agency and the resolution of the complaint meets OCR standards.
- OCR determines that the evidence is insufficient to support a finding of a violation.
- The complainant withdraws the complaint.
- OCR obtains information indicating that the complaint allegations have already been resolved.

Contacting OCR

OCR National Headquarters
US Dept. of Education
Office for Civil Rights
Mary E. Switzer Building
330 C Street, SW
Washington, DC 20202
Telephone: 202-205-5413
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Email: OCR@ed.gov

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Eastern Division
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SAMPLE LETTER

(This letter is typically sent to the Principal and carbon copied to all other people within the school system who have knowledge of the discrimination/harassment and those who are in positions of authority who have the ability to intervene.)

Dear Mr._____,

I have made several attempts to discuss with you and other school staff my concerns about the discrimination and verbal and physical harassments that are happening to my (daughter/son)_____ at _____school name_____).

This harassment continues to disrupt the ability for my (daughter/son) to receive their education without disruption. I am notifying you as a representative of the school district which receives federal financial assistance that there must be a plan put in place to stop this harassment and to ensure my child's safety and well-being at school.

As you are aware my (daughter/son) has a disability and is eligible to receive services under and (IEP or 504) plan. I am attaching a detailed account of the incidents that have happened and my attempts to resolve the issue. Please contact me with information regarding possible solutions to this situation and/or a time and date to meet. If you do not have the authority to make decisions that will ensure that this harassment stops so that my (daughter/son) can receive their education without harassment, please forward this to the person in your system who does have that authority.

This is an attempt to resolve this issue in the quickest, least adversarial way possible. I appreciate your prompt response.

Sincerely,

Parent Name

cc:

attachment: List of harassment incidents