

SUPREME COURT OF NEW JERSEY
Docket No.: 090230

IN THE MATTER OF RUTGERS,
THE STATE UNIVERSITY OF
NEW JERSEY,

Petitioner-Appellant,

And

AFSCME LOCAL 888, AMERICAN
FEDERATION OF STATE,
COUNTY AND MUNICIPAL
EMPLOYEES, AFL-CIO,

Respondent-Appellee.

On Petition for Certification from the
Superior Court of New Jersey,
Appellate Division
Docket No. A-0277-23

Sat Below:

Hon. Lisa Perez Friscia, J.A.D.

Hon. Stanley L. Bergman, Jr. J.A.D.

Civil Action

THE NEW JERSEY EDUCATION ASSOCIATION'S
BRIEF AMICUS CURIAE AND MOTION PURSUANT TO RULE 1:13-9

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PRELIMINARY STATEMENT

The New Jersey Education Association (“NJEA”) submits this memorandum of law for leave to appear as *Amicus Curiae*, and in support of the affirmance of the decision of the Appellate Division, that the arbitration of sexual harassment claims for public employees is not preempted by Title IX grievance procedures.

As the workplace representative of some 190,000 public school employees whose membership is predominantly female, the NJEA is a staunch proponent of ending sexual harassment and discrimination in the work place. Title IX and its grievance procedures serve the vital goal of ensuring that the plague of sexual harassment and discrimination in our nation’s universities and schools does not go unaddressed by those institutions. The creation in recent years of a set of complaint procedures that is more receptive to the grievances of victims, and ensures that their complaints are investigated and appropriately addressed is a necessary and salutary step. But Title IX grievance procedures do not need to be observed at the expense of our federal and state government’s longstanding commitment to the arbitration of labor disputes – there is simply no evidence of any conflict that would warrant sacrificing such important workplace rights.

Arbitration of employee discipline is one of the most important, if not the single most important forms of consideration provided in the compact between management and labor that helps ensure “labor peace.” Far from being the enemy

of a successful policy of eradicating sexual harassment, arbitration of discipline in workplace sexual harassment claims helps ensure confidence in the outcomes of employee discipline, upholding the legitimacy of those outcomes. At a time when the procedures surrounding Title IX grievance proceedings has been fraught with repeated revision and political controversy, the age-tested method of labor arbitration is the ally of both employer and employee alike.

Nor is there any reason why arbitration of these claims would undermine Title IX regulations, which concern a separate question – how to ensure that institutions are appropriately supportive and reactive towards the complaints of victims. Subjecting the resulting disciplinary determinations to an arbitration proceeding does not compromise that goal, and in many ways strengthens it.

As we explain in our succinct discussion which follows, it would be detrimental for this Court to conclude that combatting sexual harassment in higher education is necessarily to the exclusion of upholding labor contracts that provide for arbitration of discipline. The message sent by such a decision would be harmful not only to workers' rights, but the goals of Title IX as well, whose effectiveness depends on its perceived legitimacy and fairness. We respectfully submit there is no basis to carve out a "Title IX" exception to a collective negotiation agreement's arbitration provision. For the reasons discussed within, the decision of the Appellate Division should be upheld in full.

**IDENTITY OF THE NJEA, ISSUES TO BE ADDRESSED, PUBLIC
INTEREST, AND EXPERTISE OF THE NJEA**

The NJEA brings this Motion for Leave to be Admitted as *Amicus Curiae*.

Pursuant to R. 1:13-9(c), NJEA's proposed *amicus curiae* brief is attached in the Argument set forth below. The application is governed by R. 1:13-9:

An application for leave to appear as *amicus curiae* in any court shall be made by motion in the cause stating with specificity the identity of the applicant, the issue intended to be addressed, the nature of the public interest therein and the nature of the applicant's special interest, involvement or expertise in respect thereof. The court shall grant the motion if it is satisfied under all the circumstances that the motion is timely, the applicant's participation will assist in the resolution of an issue of public importance, and no party to the litigation will be unduly prejudiced thereby.

The NJEA is New Jersey's largest statewide public sector union, serving as the parent organization of the local collective negotiation representatives for the overwhelming majority of our state's public school employees. The some 190,000 NJEA members include those employed in both professional and support staff capacities, as well as retirees, all of whom are (or for retirees, were) represented under Collective Negotiations Agreements that call for arbitration of workplace discipline. The NJEA protects the professional and economic interests of its members in all areas of their rights as employees. Since 1853, the NJEA has been instrumental in advocating for the interests of its members and in formulating

policy and legislation concerning public education and higher education.

This case intimately affects NJEA members, for whom the ability to arbitrate workplace discipline is seen as one of the most visible and important benefits of collective negotiation. At the same time, combatting sexual harassment and sex discrimination is also a vital goal of the NJEA and its members.

However, in its wisdom and experience in handling workplace arbitration, the NJEA does not find the important policy goal of combatting sexual harassment and sex discrimination to be compromised by permitting labor arbitration of employee discipline arising from such claims. Protecting the due process rights of those accused of discrimination and harassment ensures workplace stability and greater trust in outcomes, without significantly hampering employers in their need to discipline employees. Sexual harassment and discrimination allegations comprise serious forms of misconduct – once such allegations are established, arbitrators are, far and wide, likely to uphold the discipline imposed by employers. As we also discuss, the public policy against harassment and discrimination limits the discretion of arbitrators to stray from the required outcomes in these cases.

The issue to be addressed in this application is why this Court should not find labor arbitration provisions of collective bargaining and negotiation agreements to be preempted by regulations that call for certain procedures in Title

IX grievance proceedings. Not only is there no reason to find a conflict between the Title IX statutes and regulations and collective negotiation, but precluding arbitration of discipline for employees accused of sex discrimination and sexual harassment would undermine a pillar of workplace stability without justification. It would constitute a solution to a problem that does not exist. It would not only undermine employees' collective workplace rights, but also weaken the mission of Title IX itself, by potentially delegitimizing the outcomes in Title IX matters.

The public interest addressed by the NJEA is the interest in ensuring that an important public policy favoring arbitration workplace disputes is upheld.

The NJEA also has a special interest and expertise in this matter. For over eighty years,¹ NJEA has served as *amicus curiae* in matters involving the protection of economic and professional rights of its members, which are intimately affected by upholding workplace agreements to arbitrate disciplinary matters. Here, the facts and issues presented are of substantial concern to the NJEA and its members, as discussed above.

As noted, the Court must consider whether NJEA's motion to participate as *Amicus Curiae* is timely, will assist in the resolution of an issue of public importance, and will not unduly prejudice any party to the litigation. Applying

¹ See Greenway v. Bd. of Educ., 129 N.J.L. 46 (1942).

these criteria, it is clear that the NJEA's motion to participate as *Amicus Curiae* should be granted. First, the NJEA's application is timely filed. Second, the NJEA's presence as *amicus* will assist the Court as it is uniquely suited to provide insight into the issues raised in this matter from its institutional experience. Third, and finally, no party will be prejudiced because this application does not raise considerations of due process or notice.

For the above reasons, the NJEA respectfully requests that this Court grant participation in this matter as an *Amicus Curiae* by way of submission of the instant brief.

LEGAL ARGUMENT

Title IX Grievance Procedures do not Preempt Labor Arbitration of Workplace Sexual Harassment and Discrimination Claims

This matter presents a discrete question of federal preemption, a subject that is well familiar to the Court, and one that has been thoroughly briefed by the parties. We will not repeat those arguments at length here, but will focus on highlighting certain points for consideration. Above all, we hope to raise an important interest at stake in this Petition – the right to arbitrate employment disputes concerning discipline of public employees. This Court has previously emphasized the importance of the grievance and arbitration proceedings in collectively negotiated agreements for public employees, and said the following:

the stability of labor relations, ‘industrial peace’ as it is termed in the private sector, depends largely on collective negotiations agreements. And the heart of any such agreement is the grievance and arbitration procedure...arbitration rights and remedies must be effective if we are to preserve labor peace. Otherwise, the resultant agreements and the incorporated arbitration remedies would become meaningless. State v. Int’l Fedn. of Prof’l & Tech. Eng’rs, Local 195 v. NJDOC, 169 N.J. 505, 537-38 (2001).

New Jersey has long upheld the federal and state policy favoring arbitration of labor disputes, noting “arbitration is a stabilizing influence only as it serves as a vehicle for handling *any and all disputes* that arise under the agreement.” Jersey Cent. Power & Light Co. v. IBEW, 38 N.J. 95, 105 (1962) (emphasis added)

(citing the “United Steelworkers Trilogy” United States Supreme Court cases that upheld the right for collectively negotiated arbitration rights). See United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1962). Here, the Petitioner seeks to carve out a gaping exception to the normal arbitrability of employment discipline that is neither warranted or necessary. The NJEA respectfully submits the decision below must be affirmed.

As this Court is aware, “Pre-emption is not to be lightly presumed...the case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and nonetheless decided to...tolerate whatever tension there [is] between them.” Hager v. M&K Constr., 246 N.J. 1, 29 (2021) (citations omitted). As both Respondents have demonstrated, the Department of Education was well aware of the existence of labor arbitration and its interplay with the Title IX grievance procedures it promulgated. The relevant rulemaking shows the Department contemplated that Title IX grievance procedures would coexist with labor arbitration. For example, the notice and comment on the regulations discussed at length the ability to choose the standard of proof in Title IX proceedings to

harmonize that standard with those called for by a CBA grievance procedures. See, e.g. 85 FR 30376 – 30379 ²

In promulgating the rules at issue in this matter, the DOE discussed collective bargaining in connection to Title IX grievances and confirmed that “The Department has never impeded a recipient’s ability to provide parties with additional rights as long as the recipient fulfills its obligations under Title IX.” 85 FR 30442. Although Petitioner argues the regulations have preemptive force here (Pb11), in the ultimate sense, the question boils down to whether labor arbitration somehow compromises Title IX statutory obligations - but this cannot be claimed here. Rutgers met its obligation by following the Title IX grievance procedures, and by responding to sexual-harassment in a manner that provided due process rights for the victim. Adding just cause arbitration for the accused as a post-termination procedure does not violate Title IX, or its regulations.

In the context of these regulations, nothing about labor arbitration stands as an “obstacle to the accomplishment of a federal objective,” a necessary prerequisite to federal preemption. Hager, supra, 246 N.J. at 30. Petitioners’ arguments for preemption fall into two categories, but in all events fail to articulate

² That issue was raised in this case, but we submit does not help Petitioner, who claims that a different standard of proof would be applied in this matter if it is sent to arbitration. (Pb14). But Petitioner does not address to what extent this is the result of its own failure or refusal to bargain for the desired standard of proof, or its failure to harmonize its own Title IX grievance process.

any conflict with Title IX. In the first category, the Petitioner argues that aspects of the Title IX regulations that provide for equal opportunity for all parties in processing a sexual harassment *grievance* are violated because a subsequent *disciplinary arbitration* does not provide such equal opportunities for victims to participate in arbitration. (Pb13-14). Petitioner claims disciplinary arbitration undermines Title IX regulations because in disciplinary arbitration, the Title IX grievant does not examine witnesses and present evidence, review the evidence in the arbitration, pick the arbitrator, or even receive notice of the arbitration – instead the employer does. (Pb14). In the second category, Petitioner claims that Title IX is violated because the arbitrator in a disciplinary arbitration is not required to receive Title IX training or consider the goals of Title IX. (Pb14). But these claims do not add up.³

Petitioner cannot point to any reason why Title IX would be violated, if after the completion of the mandatory sexual harassment grievance process, the arbitration proceeding for the employee facing discipline excludes the sexual harassment grievant as a party.⁴ As we discuss within, it is not correct that the

³ Petitioner argues elsewhere that arbitration is a “collateral attack” on the disciplinary decision, but does not argue collateral estoppel should apply, and with good reason – the issue of whether “just cause” for termination or discipline exists is not covered by the Title IX procedure.

⁴ In reality, the victim’s voice is sure to feature prominently in any arbitration, where they will almost certainly be called as a witness, and where the employer imposing discipling will adopt a position that is likely to align with the victim.

arbitrator is not bound to implement public policy such as is embodied under Title IX. Nor does Petitioner offer any basis why the arbitrator should receive the same training as university officials who handle the *grievance process*, a separate proceeding intended to be receptive towards the victim and avoid discouraging victims from presenting claims. See e.g., 85 FR 30084 (discussing the role of training in correcting school responses “infected by bias, prejudice or stereotypes”). Petitioner conflates requirements to create a fair and responsive grievance process with a right for the victim to be involved in the final stages of the disciplinary process – a notion not warranted by Title IX.

Under the regulations that are *sub judice*, the 2020 Title IX regulations, once the sexual harassment grievant has been provided a supportive environment for presenting a grievance, and a complaint proceeding that guarantees due process rights, Title IX’s goal of ensuring that educational institutions take action to protect their community from sexual harassment and discrimination has been accomplished. See 38 U.S.C. 1681. The 2020 regulations that governed this incident applied the Gebser-Davis framework.⁵ 85 FR 30091-92; See Gebser v. Lago Vista Ind. Sch. Dist., 524 U.S. 274, 289-90 (1998) (a school is not subject to a potential damages lawsuit for violation of Title IX until it has been put on notice

⁵ Although amended under the Biden administration and now once again on their way out, the regulations at all times have drawn their justification from the Gebser-Davis framework.

of discrimination and exhibited “deliberate indifference”); Davis v. Monroe County BOE, 526 U.S. 629, 648-49 (1999) (further articulating same standard).

As the notice and comment to the 2020 regulations discussed, once the Gebser-Davis framework is applied, “any disciplinary sanction decision rests within the discretion of the recipient, and the Department’s concern under Title IX is to mandate [remedies]...designed to restore or preserve the victim’s educational access.” 85 FR 30092. The Davis court rejected the claim that the Title IX “deliberate indifference” standard created a right for victims to make “particular remedial demands.” Id. at 648. Consistent with the Davis-Gebser framework that underpins them, Title IX regulations do not contain any provision stating that complainants have a right to be involved in the final stages of disciplinary action resulting from a compliant Title IX grievance proceeding. There is no reason to imply such an expansive preemptive effect under these regulations.

More generally, there is no basis to suspect that arbitration of employee discipline for sexual harassment in employment would result in outcomes that violate Title IX. Arbitration awards must follow public policy. N.J. Tpk. Auth. v. N.J. Tpk. Supervisors Ass’n, 143 N.J. 185, 198-99 (1996). For that reason, this Court has long upheld arbitration of employee discipline in the context of workplace sexual harassment, rejecting as unlikely “the potential for inconsistent resolutions of workplace sexual harassment disputes.” Id. at 198. This is why it is

not correct when Petitioner argues that an arbitrator here “would not need to consider the purposes and goals of Title IX – on the contrary, such public policy must be applied here. (Pb14). Moreover, it is unlikely a typical employee discipline or discharge for sexual harassment will be overturned in arbitration. Numerous empirical studies confirm that the majority of sexual harassers are not returned to the workplace by labor arbitration.⁶

In the unlikely event that an arbitrator fails to follow public policy, the arbitrator’s award will be vacated. An arbitrator may not construe an agreement to arbitrate in a manner that contradicts “well-defined and dominant public policy concerning sexual harassment in the workplace.” Stroehmann Bakeries, Inc. v. Local 776, Int’l Brotherhood of Teamsters, 969 F.2d 1436, 1441-42 (3rd Cir. 1992). For example, in the Stroehmann Bakeries matter, the Third Circuit affirmed the vacation of an arbitration award that reinstated a worker accused of a harrowing allegation of sexual harassment that involved physical assault, finding a violation of public policy, because the arbitrator had not determined the harassment did not occur. Id. at 1442. The Third Circuit also affirmed that vacation of the award was

⁶ Stacy A. Hickox & Michelle Kaminski, Measuring Arbitration’s Effectiveness in Addressing Workplace Harassment, 36 Hofstra Lab. & Emp. L.J. 293, 334 (Spring 2019) (citing figures that the majority of accused sexual harassments are not returned to the workplace and even fewer are exonerated from all discipline); Ann C. Hodges, Strategies for Combatting Sexual Harassment: The Role of Labor Unions, 15 Tex. J. Women & L. 183, 202 (Spring 2006)(citing numerous studies that confirm most harassers are not reinstated).

necessary because of unacceptable bias displayed by the arbitrator against the victim. Id. at 1446.

Finally, given the expansive and literal preemptive effect that Petitioner attributes to the agency regulations governing Title IX grievances, it is important to observe just how much, and how often, those regulations have changed in recent years. See Loper Bright Enters. v. Raimondo, 603 U.S. 369, 402 (2024) (federal regulations do not receive automatic deference as authoritative interpretation of a statute). The constant revision of the instant Title IX regulations shows the problem with granting them expansive preemptive effect where there is no specific aspect of the regulation that would require arbitration to be restrained.

The regulations that are *sub judice* were promulgated in 2020, only to later be amended by a rulemaking in prior presidential administration, effective 2024. See 89 FR 33474. Now, with a new presidential administration, the Department has announced that it will yet again return to the 2020 regulations.⁷ Prior to the rulemaking activity over the past five years, other Title IX grievance procedures were created in a withdrawn 2011 “Dear Colleague” letter of the Department that

⁷ See <https://www.ed.gov/about/news/press-release/us-department-of-education-enforce-2020-title-ix-rule-protecting-women>

was criticized for failing to afford accused sufficient due process rights.⁸ The 2011 Dear Colleague letter prompted lawsuits from accused individuals who claimed their due process rights had been violated, in particular for being deprived of the opportunity to cross-examine their accusers, a procedure that became recognized in the Title IX regulations. See e.g., Doe v. Univ. of the Scis., 961 F.3d 203, 213-15 (3rd Cir. 2020). It is reasonable to expect continued fine tuning of the procedures to address sexual harassment on campus.

We do not suggest that the current Title IX regulations are somehow invalidated because they often change. Complaint procedures that combat sexual assault, harassment and discrimination in school and university settings must be upheld, and protected from any true encroachment on the goals of Title IX. However, the legal theory is not supported that Title IX complaint procedures must be exactly replicated in a post-termination arbitration, even where there is nothing in the regulations that creates a specific and tangible conflict with labor arbitration. Under Petitioner's theory of preemption, for any arbitration to be allowed, CBAs would need to be renegotiated, and arbitrators re-trained as often as every four years to mirror the regulatory changes, even if the Department did not intend to affect union contracts. That result cannot be correct.

⁸ See Manning Peeler, Seeking Clarity in the Title IX Confusion: Cross-Examination Requirements in Title IX Hearings Under Due Process, 10 Wake Forest J.L. Pol'y 351, 352 (2020).

Set against the extensive revision of on-campus Title IX grievance procedures, arbitrating employee discipline for sexual harassment after the initial grievance process should be seen in a positive light. Unfortunately, we fear that many will perceive (whether rightly or wrongly) that these cases are political. Permitting the accused employee to arbitrate discipline connected to allegations of sexual harassment before a neutral arbitrator helps instill confidence in the outcomes for all employees. In short, it gives those outcomes further legitimacy. The alternative is also dismal: creating an expansive exception to the arbitrability of employee discipline, thereby undermining an important collective right. Where workers have negotiated for just cause protections in a collective negotiations agreement, carving out an exception for sexual harassment threatens to render the compact between labor and management meaningless. That would only undermine employee morale and stability in the workplace.

There is also no reason to hold that arbitration proceedings are preempted by the Title IX regulations here. The frank truth is that the vast majority of discipline in this context will be upheld in arbitration, and in the unlikely event an arbitrator fails to uphold public policy, New Jersey Courts will be required to overturn errant decisions – and they will do so.

CONCLUSION

For all the reasons set forth herein, the NJEA respectfully submits the decision of the Appellate Division should be upheld.

ZAZZALI, P.C

/s/ Raymond M. Baldino

Raymond M. Baldino

Dated: June 18, 2025