No. 97-843

In the Supreme Court of the United States

OCTOBER TERM, 1998

AURELIA DAVIS, AS NEXT FRIEND OF LASHONDA D., PETITIONER

v.

MONROE COUNTY BOARD OF EDUCATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

SETH P. WAXMAN
Solicitor General
Counsel of Record

BILL LANN LEE
Acting Assistant Attorney General

BARBARA D. UNDERWOOD
Deputy Solicitor General

BETH S. BRINKMANN
Assistant to the Solicitor General

DENNIS J. DIMSEY
LINDA F. THOME
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, provides that "[n]o 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."

The question presented is:

Whether a school board can be liable under Title IX for responding with deliberate indifference to a student's repeated complaints about severe and pervasive sexual harassment by another student in the course of the school's education programs and activities.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, regulations and rule:

In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 97-843

AURELIA DAVIS, AS NEXT FRIEND OF LASHONDA D., PETITIONER

v.

MONROE COUNTY BOARD OF EDUCATION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

The United States Department of Education administers federal financial assistance to education programs and activities and is authorized by Congress to effectuate Title IX in those programs and activities. 20 U.S.C. 1682. Pursuant to that authority, the Department, through its Office for Civil Rights (OCR), has promulgated regulations effectuating Title IX, 34 C.F.R. Pt. 106, and policy guidance on the prohibition of sexual harassment under Title IX, 62 Fed. Reg. 12,034 (1997). The Department of Justice, through its Civil Rights Division, coordinates the implementation and enforcement of Title IX by the Department of Education and other executive agencies. Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (1980); 28 C.F.R. 0.51 (1998).

The Department of Justice also may enforce Title IX in federal court in cases referred to it by the Department of Education. At the Court's invitation, the United States filed a brief at the petition stage of this case. The United States also participated as amicus curiae in the court of appeals before the panel and the en banc court.

STATEMENT

1. a. Petitioner filed this action alleging, *inter alia*, a violation of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, and seeking damages and injunctive relief on behalf of her daughter, LaShonda D., against respondent Monroe County Board of Education.[1] Petitioner alleges that the Board of Education, a recipient of federal financial assistance, responded with deliberate indifference to repeated complaints made by her and her daughter (then a fifth-grade student in a school administered by respondent) about severe sexual harassment of her daughter over a period of more than five months by a male classmate, G.F. Petitioner alleges that respondent's deliberate indifference to the complaints of sexual harassment perpetuated an intimidating, hostile, offensive, and abusive school environment that limited her daughter's ability to participate in and to benefit from the education program, in violation of respondent's obligations under Title IX. Pet. App. 93a-101a.

Petitioner alleges that G.F. harassed her daughter on at least eight separate occasions at school and during school hours, between December 17, 1992, and May 19,

[1] Petitioner's Title IX claims against two individual school officials, her race discrimination claim under 42 U.S.C. 1981, and her various claims under 42 U.S.C. 1983 were rejected below and are not before this Court. See Pet. App. 2a-3a & n.3.

1993.[2] School officials were informed about each of those incidents by petitioner, her daughter, or both. Pet. App. 95a-97a. G.F. repeatedly attempted to touch LaShonda's breasts and vaginal area. On one occasion, G.F. rubbed his body against LaShonda in a sexually suggestive manner. *Id.* at 96a. On another occasion, G.F. put a door stop in his pants and behaved in a sexually suggestive manner toward LaShonda. *Ibid.* G.F. also directed vulgar comments to LaShonda, indicating a desire to have sexual contact with her. *Id.* at 95a-96a. After an incident on May 19, LaShonda told petitioner that she "didn't know how much longer she could keep him off her." *Id.* at 97a. As a result of that incident, G.F. was charged with and pled guilty to sexual battery. *Ibid.*

After each incident, LaShonda reported G.F.'s behavior to one or more of her teachers; she complained to at least three different teachers at the school that G.F. was sexually harassing her in classes or activities under their supervision. Pet. App. 96a-97a. Petitioner also complained to at least two of her daughter's teachers, and was assured that the school principal had been notified about the sexual harassment. *Ibid.* At one point, LaShonda and other girls who had been sexually harassed by G.F. wanted to go as a group to speak to the principal about the harassment, but their teacher told them, "If he wants you, he'll call you." *Id.* at 96a. On or about May 19, petitioner and her daughter spoke directly to the principal to see what action would be taken about the sexual harassment, but the principal merely stated: "I guess I'll have to threaten him (G.F.)

---

[2] Because petitioner's complaint was dismissed for failure to state a claim, the allegations of the complaint must be taken as true. *Scheuer* v. *Rhodes*, 416 U.S. 232, 236 (1974).

a little bit harder." *Id.* at 97a. During that conversation, the principal asked LaShonda "why she was the only one complaining." *Ibid.*

Petitioner alleges that school officials did not discipline G.F. at any time during the period in which he was harassing LaShonda, despite LaShonda's and petitioner's repeated complaints. Pet. App. 97a. G.F. was not suspended for this conduct, kept away from LaShonda, or reprimanded in any other way. *Ibid.* Moreover, school officials refused even to take minimal measures to keep G.F. away from LaShonda during a substantial part of that time. For example, LaShonda's assigned classroom seat was next to G.F. and, although LaShonda asked several times to be moved to a different seat so that she could prevent contact with G.F., she was not permitted to do so for over three months. *Ibid.*

During this entire period, the Board of Education had no policy regarding sexual harassment and had not given its employees any training or other guidance on how to respond to complaints from students about sexual harassment. Pet. App. 98a.

As a result of respondent's inaction in response to the complaints about the continuing sexual harassment, a hostile educational environment persisted at the school, and LaShonda's ability to attend school and to perform her studies and activities was impeded. Pet. App. 97a. Her ability to concentrate on her school work was affected by her constant efforts to fend off G.F.'s sexual harassment, and her grades dropped. *Ibid.* In April 1993, LaShonda's father discovered a suicide note she had written. *Ibid.*

Petitioner alleges that respondent engaged in deliberate indifference and intentional discrimination against LaShonda that warrants money damages and

equitable relief. Petitioner specifically alleges that respondent, in its "failure to have a policy concerning sexual harassment of students and in [its] failure to respond to the complaints of this student, was willfully and deliberately indifferent." Pet. App. 98a. She alleges that "[t]he deliberate indifference [of respondent] to the unwelcome sexual advances of a student upon LaShonda created an intimidating, hostile, offensive and abus[ive] school environment in violation of Title IX." *Id.* at 100a. Respondent's "failure to take action resulted in extreme emotional damage to LaShonda." *Id.* at 100a-101a. Petitioner asserts that, "[h]ad [the school principal] intervened as was necessary, the injury to LaShonda would have been mitigated and the situation would have been ended." *Id.* at 100a. In addition to damages, petitioner sought an injunction requiring respondent "to institute a policy providing guidance for employees in the event of sexual harassment of students by fellow students," and enjoining respondent "from discriminating against female students by failing to respond to complaints of sexual harassment." *Id.* at 102a.

b. The district court dismissed petitioner's complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief could be granted. Pet. App. 82a-90a. The court recognized that Title IX is enforceable through an implied cause of action, *id.* at 88a (citing *Franklin* v. *Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992)), but ruled that "sexually harassing behavior of a fellow fifth grader is not part of a school program or activity." Pet. App. 88a. In the court's view, petitioner had not alleged "that the Board or an employee of the Board had any role in the harassment," and therefore "any harm to LaShonda

was not proximately caused by a federally-funded educational provider." *Id.* at 88a-89a.

2. a. A divided panel of the Eleventh Circuit reversed the district court's dismissal of the Title IX claim and remanded for further proceedings. Pet. App. 62a-81a. The panel noted that, fairly construed, petitioner's complaint alleged that harm to LaShonda was proximately caused by the school officials' "failure to take action to stop the offensive acts of those over whom the officials exercised control," *id.* at 75a, thereby discriminating against LaShonda and denying her the benefits of the education program on the basis of her sex, *id.* at 66a. The panel concluded that "Title IX encompasses a claim for damages due to a sexually hostile educational environment created by a fellow student or students when the supervising authorities knowingly fail to act to eliminate the harassment." *Id.* at 73a-74a (citing *Franklin*, 503 U.S. at 74-75). In such circumstances, "the harassed student has 'be[en] denied the benefits of, or be[en] subjected to discrimination under' that educational program in violation of Title IX." Pet. App. 75a (internal quotation marks and brackets in original).

One panel member dissented, arguing that Title IX did not apply because petitioner did not allege that respondent or any of its employees had committed an act of harassment against LaShonda. Pet. App. 80a.

b. The Eleventh Circuit granted rehearing en banc, vacated the panel's opinion, and affirmed the district court's judgment dismissing the complaint. Pet. App. 91a-92a, 1a-45a. The en banc majority construed petitioner's complaint to allege that LaShonda had been subjected to hostile environment sexual harassment, that one teacher knew of at least four instances of harassment, that at least two other teachers and the

principal each knew of at least two incidents of harassment, and that respondent took no action except to threaten G.F. with disciplinary action. *Id.* at 6a-7a & n.6. But it concluded that Title IX does not impose upon school officials any obligation "to take measures sufficient to prevent a *non-employee* from discriminating" on the basis of sex against a student. *Id.* at 22a. The en banc court characterized petitioner's claim as "seeking direct liability of the Board for the wrongdoing of a student." *Id.* at 10a. The en banc court reasoned that Congress enacted Title IX under its Spending Clause power and that Title IX gave educational institutions that receive federal funds notice that "they must prevent their employees from themselves engaging in intentional gender discrimination," *id.* at 21a, but not that they could be liable for failing to prevent one student from sexually harassing another, *id.* at 19a.[3]

Four members of the court dissented, Pet. App. 46a-61a, arguing that the plain language of Title IX makes it clear that "liability hinges upon whether the grant recipient maintained an educational environment that excluded any person from participating, denied them benefits, or subjected them to discrimination," because of sex, *id.* at 47a. The dissent noted that this construction of the statute is supported by the interpretation of the Department of Education, Office for Civil Rights

---

[3] The author of the opinion for the en banc court, Judge Tjoflat, included two sections that were not joined by any other member of the court: a discussion of the due process rights of alleged harassers and possible suits by disciplined harassers, Pet. App. 22a-29a (Part III.B), and a discussion of the possible number of lawsuits involving harassment by fellow students, *id.* at 30a-32a (Part III.C). See *Id.* at 33a; *id.* at 36a & n.1 (opinion of Carnes, J., concurring specially).

(OCR), an agency charged with enforcing Title IX, which states:

> [A] school's failure to respond to the existence of a hostile environment within its own programs or activities permits an atmosphere of sexual discrimination to permeate the educational program and results in discrimination prohibited by Title IX. . . . Thus, Title IX does not make a school responsible for the actions of harassing students, but rather for its *own* discrimination in failing to remedy it once the school has notice.

Id. at 48a (quoting Sexual Harassment Guidance, 62 Fed. Reg. 12,034, 12,039-12,040 (1997)). The dissent disagreed with the majority's reliance on the absence of a discussion of student-on-student harassment in the legislative history of Title IX because a failure to mention it in congressional debate "does not mean that it was not encompassed within Congress's broad intent of preventing students from being 'subjected to discrimination' in federally funded educational programs." Pet. App. 50a. The dissent pointed out that, under the majority's narrow interpretation, the cause of action under Title IX recognized by the Court in *Franklin* would not be supported because it also was not mentioned during congressional debate. *Ibid.* The dissent also reasoned that sufficient notice was provided to fund recipients to satisfy the Spending Clause prerequisite for damages under Title IX, because the plain meaning of the statute "unequivocally imposes liability on grant recipients for maintaining an educational environment in which students are subjected to discrimination." *Id.* at 51a. Here, where petitioner alleges that at least three teachers and the school principal had actual knowledge of the harassment and

took no meaningful action to end it, the dissenters believed that the district court's dismissal of the Title IX claims against the Board should have been reversed. *Id*. at 61a.

SUMMARY OF ARGUMENT

The court of appeals' ruling completely forecloses a private right of action under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, whether for damages or equitable relief, for a school district's failure to respond to known sexual harassment of a student by another student. Such a categorical exclusion is inconsistent with this Court's decision in *Gebser* v. *Lago Vista Independent School District*, 118 S. Ct. 1989 (1998), and with the plain meaning of the statute.

The lower courts erred in dismissing petitioner's Title IX claims. In *Gebser*, this Court held that a school district receiving federal financial assistance may be held liable in a private action for damages under Title IX as a result of sexual harassment of a student by a teacher if "an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs" and responds with deliberate indifference. 118 S. Ct. at 1999. Under *Gebser*, a recipient's liability for damages in those circumstances is imposed not for the actions of the employee, based upon agency principles, but for the recipient's own refusal to remedy the hostile environment created by sexual harassment. That standard is equally applicable to a recipient's refusal to remedy a hostile environment created by repeated instances of sexual harassment of a student by another student. Because petitioner alleged that her daughter was subjected to repeated instances of sexual harass-

ment at school, that the school's principal and at least three teachers had actual knowledge of the harassment, and that they responded to her complaints with deliberate indifference, she has stated a claim for damages under *Gebser*.

Moreover, to the extent petitioner seeks equitable relief rather than damages, she may be entitled to relief even if her proof fails to meet the *Gebser* standard. The requirement of actual knowledge and deliberate indifference responds to concerns about subjecting a fund recipient to potential liability for money damages where the recipient is unaware of the discrimination in its programs and would be willing to institute prompt corrective measures. Because equitable relief does not present the same concerns, petitioner may establish a violation of Title IX and entitlement to equitable relief if she can show that LaShonda was subjected to a hostile environment in the school's programs or activities, respondent's officials knew or should have known of the harassment, and they failed to take prompt, appropriate corrective action. See Department of Education, Office for Civil Rights, Sexual Harassment Guidance, 62 Fed. Reg. 12,034, 12,039 (1997). The equitable relief petitioner seeks—an injunction requiring respondent to institute a policy providing guidance to its employees in the handling of sexual harassment complaints about fellow students, and prohibiting respondent from continuing to discriminate by failing to respond to sexual harassment complaints—requires nothing more of respondent than is already required by the statute and the Department of Education's longstanding Title IX regulations. Respondent could be required by the Department of Education to take such actions to bring itself into compliance with the statute and regulations as part of the statutorily-mandated

administrative effort to obtain compliance through voluntary means, 20 U.S.C. 1682, in order to avoid the ultimate filing of an administrative action to terminate federal financial assistance. Petitioner should likewise be able to obtain equitable relief in the private right of action that has been judicially implied.

ARGUMENT

PETITIONER HAS STATED A CLAIM UNDER TITLE IX FOR BOTH DAMAGES AND EQUITABLE RELIEF

A. Title IX, As Construed By This Court In *Gebser*, Provides An Implied Private Right Of Action For Damages Based On A Fund Recipient's Deliberate Indifference To Repeated Complaints About Severe And Pervasive Sexual Harassment Of A Student By Another Student In The Recipient's Education Programs And Activities.

1. Title IX provides that "[n]o 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." 20 U.S.C. 1681. The "discrimination" prohibited by Title IX includes sexual harassment. *Gebser*, 118 S. Ct. at 1995 (citing *Oncale* v. *Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998, 1002-1003 (1998)); *Franklin* v. *Gwinnett County Pub. Schs.*, 503 U.S. 60, 75 (1992). An employee is "subjected to discrimination under" a federally funded education program in violation of Title IX if she is "forced to work under more adverse conditions" than male employees. *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 521 (1982); cf. *Harris* v. *Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) ("disparate treatment of men and women in employment * * * includes requiring people to work in a discriminatorily hostile or abusive en-

vironment"). Similarly, when a student is forced to attend school in a hostile or intimidating environment caused by pervasive sexual harassment known to the recipient, and that hostile educational environment adversely affects the student's ability to participate fully in or benefit from the education program in which the student is enrolled, the student is "excluded from participation in" and "denied the benefits of" the education program, and is "subjected to discrimination under" the program, and this is so whether the harasser is a teacher or a fellow student.

In *Gebser*, this Court addressed the circumstances in which an educational institution receiving federal funds may be held liable for damages in an implied private right of action under Title IX as a result of sexual harassment of a student by a teacher. The Court concluded that damages could be recovered in such a case only when "an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs" and responds with deliberate indifference. 118 S. Ct. at 1999. The Court reasoned that, because Title IX's express remedial scheme for permitting termination of the federal funds received by a school through administrative enforcement is predicated on notice and an opportunity for the recipient to rectify a violation, Congress did not intend to subject recipients of federal financial assistance to damages liability in a private action when the recipient "was unaware of discrimination in its programs and is willing to institute prompt corrective measures." *Ibid.*

The *Gebser* Court's ruling about the educational institution's potential liability for damages did not depend upon the harasser's status as an employee. In

fact, the Court expressly rejected arguments that liability for damages could be based on agency principles of respondeat superior or constructive notice that result from the employer-employee relationship. 118 S. Ct. at 1995, 1997. Rather, the Court emphasized that the educational institution's liability for damages rests on its own "official decision * * * not to remedy the violation," not on the independent actions of its harassing employees. *Id*. at 1999.

It follows from that analysis that when school officials know that severe or pervasive sexual harassment of a student is occurring in their education programs or activities, their decision not to exercise their authority to remedy the harassment perpetuates a hostile educational environment and they may be held liable in damages for that violation of Title IX, whether the student's harasser is a school employee or another student. In either case, the school officials are ultimately responsible for providing the benefits of the education programs and activities to all students without subjecting them to discrimination or exclusion on the basis of sex. In either case, the school officials have the authority to institute corrective measures, whether by disciplining, reassigning, excluding, or otherwise inducing a change in the behavior of the offender, or by offering the victim an alternative assignment. In either case, the official decision not to remedy the hostile educational environment means that the student is required to attend school in a discriminatorily hostile or abusive environment. This is particularly so in the case of elementary and secondary students who are subject to compulsory attendance laws, and frequently have no choice about what school they attend. Thus, when school officials respond with deliberate indifference to a known sexually hostile or

abusive environment in an education program or activity, they subject the harassed student to that environment in violation of Title IX, whether the harasser is a school employee or another student.

The identity of the harasser as a student rather than a teacher is irrelevant to the theory of liability set forth in *Gebser*. Indeed, the identity of the harasser may not always be known, as when a student finds an unrelenting barrage of sexually denigrating graffiti on his or her locker or athletic equipment, or finds sexually explicit cartoons referring to the student posted daily on the school walls. The harassed student may suffer the same impairment of educational opportunity, and the school officials may manifest the same deliberate indifference to the student's plight, whether the harassers are fellow students or school employees.

The court of appeals erroneously interpreted petitioner's claim as "seeking direct liability of the Board for the wrongdoing of a student," Pet. App. 10a, and concluded that, unlike *Franklin* v. *Gwinnett County Public Schools*, *supra*, which it interpreted as holding a school district liable for the actions of its employee, *id.* at 9a-10a, the school district could not be held liable in this case because the harassing student was not an employee, *id.* at 22a. But Title IX focuses on the relationship between the student and the education program or activity operated by the Title IX recipient, not on the identity of the harasser. See *Gebser*, 118 S. Ct. at 1999-2000; cf. *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57, 66 (1986) (citing *Rogers* v. *EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972)). The statute holds the recipient responsible not for the acts of the harassing individuals, but for its "own actions and inaction in the face of its knowledge that the harassment was occurring." *Doe* v. *Univ. of*

Illinois, 138 F.3d 653, 662 (7th Cir. 1998), petition for cert. pending, No. 98-126.[4] Thus, the Department of Education's Title IX Sexual Harassment Guidance makes clear that "Title IX does not make a school responsible for the actions of harassing students, but rather for its own discrimination in failing to remedy it once the school has notice." 62 Fed. Reg. at 12,040; see also *Doe*, 138 F.3d at 667 (noting that Guidance reflects longstanding policy of Department of Education as demonstrated by official Letters of Finding dating back to 1989 (copies filed in court of appeals below)).

Differences between students and teachers may of course be relevant to determining an institution's liability in damages for its failure to respond adequately to incidents of sexual harassment. The words or actions of a child may not have the same meaning and impact as the words or actions of an adult teacher. Thus, the identity of the harasser and the social context in which the incident occurs may be relevant to determining whether the harassment is sufficiently severe, persistent, or pervasive to constitute actionable harassment. See *Oncale*, 118 S. Ct. at 1002-1003.[5] Similarly, because schools' means of controlling the actions of employees

---

[4] As Judge Easterbrook has observed, "failure to protect pupils from private aggression is a species of discrimination. This is the original meaning of equal protection of the laws." *Doe*, 138 F.3d at 678 (statement respecting the denial of rehearing en banc).

[5] As the initial panel below emphasized, "a hostile environment in an educational setting is not created by a simple childish behavior or by an offensive utterance, comment, or vulgarity." Pet. App. 76a. The panel recognized that a hostile educational environment is created only "'when the [educational environment] is permeated with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's [environment] and create an abusive

differ from their means of controlling the actions of students, the harasser's status in relation to the school may be relevant in determining whether officials' response to harassment was deliberately indifferent.[6] Thus, although such issues will need to be resolved on a case-by-case basis, differences between students and employees do not justify the court of appeals' rule that, as a categorical matter, an educational institution has no obligation under Title IX to respond to complaints of sexual harassment because the harasser is another student.

2. The court of appeals erred in ruling that a school district cannot be held responsible under Title IX for failing to respond to harassment of one student by another because, in the court of appeals' view, Title IX gave recipients of federal funds notice only that "they must prevent their employees from themselves engaging in intentional gender discrimination," Pet. App. 21a,

---

environment.'" *Id.* at 76a-77a (citing *Harris* v. *Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993), quoting *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57, 67 (1986)) (citation omitted).

Nor does every interaction between students occur "under [the] education program or activity receiving Federal financial assistance." 20 U.S.C. 1681. A recipient's liability for failing to respond appropriately is limited to student-on-student sexual harassment that "takes place while the students are involved in school activities or otherwise under the supervision of school employees." *Doe* v. *Univ. of Illinois*, 138 F.3d 653, 661 (7th Cir. 1998), petition for cert. pending, No. 98-126.

[6] As the Seventh Circuit explained in *Doe*, 138 F.3d at 667-668, school officials who learn of sexual harassment must choose "from a range of responses," and "it should be enough to avoid Title IX liability if school officials investigate aggressively all complaints of sexual harassment and respond consistently and meaningfully when those complaints are found to have merit." See 62 Fed. Reg. at 12,042.

and not that fund recipients could be liable for failing to prevent one student from sexually harassing another, *ibid.* The court's rationale for distinguishing between the two situations was based on its view that a fund recipient is directly liable as an employer for its employees' discrimination, but that a recipient cannot be held directly liable for a student's wrongdoing. *Id.* at 10a. That distinction cannot, however, survive *Gebser*'s explanation that a fund recipient can be held responsible for harassment by teachers not because of vicarious responsibility for the acts of employees but only because of its inaction in response to known sexual harassment of one of its students. Thus, following *Gebser*, there is no support for the distinction drawn by the court of appeals.

Moreover, the antidiscrimination mandate of Title IX is clear, and it provides fund recipients with ample notice of their obligations under the statute. In this respect, Title IX stands in sharp contrast with the merely precatory language that was held insufficient to impose an obligation on fund recipients in *Pennhurst State School and Hospital* v. *Halderman*, 451 U.S. 1, 17 (1981). Cf. *School Bd. of Nassau County* v. *Arline*, 480 U.S. 273, 286 n.15 (1987) (noting that "[t]he contrast between the congressional preference at issue in *Pennhurst* and the antidiscrimination mandate of § 504 [of the Rehabilitation Act of 1973, 29 U.S.C. 794] could not be more stark"). As *Gebser* recognized, Title IX put fund recipients on notice that, as a condition of federal funding, they must respond appropriately to known sexual harassment of students in their programs and activities that excludes students from participating in, or denies them the benefits of, those education programs and activities. As this Court observed in *Bennett* v. *Kentucky Department of Education*, 470

U.S. 656, 666, 669-670 (1985), the government's failure to "prospectively resolve every possible ambiguity concerning particular applications" of the statutory requirements of a federal funding education program did not undermine the adequacy of notice given to a funding recipient concerning its statutory obligations, particularly because "grant recipients had an opportunity to seek clarification of the program requirements." And, as the Seventh Circuit correctly ruled, prior to *Gebser*:

> If, as alleged, school * * * officials knew about the [student-on-student] harassment and intentionally failed, and indeed flatly refused in some instances, to take steps to address it, then the plea that the institution was not "on notice" that such failure could subject it to Title IX liability rings hollow.

Doe, 138 F.3d at 663.

In any event, *Gebser*'s requirement that, for purposes of recovering damages, a plaintiff must prove not only that a recipient knew of the sexual harassment, but also was deliberately indifferent to it, ensures that a recipient is liable for monetary damages only for its own deliberate perpetuation of discrimination prohibited by statute.

3. Petitioner's allegations meet the *Gebser* standard. Petitioner alleges that her daughter was subjected to repeated incidents of sexual harassment by another student while at school, Pet. App. 95a-97a, that three teachers and the principal of the school had actual knowledge of the harassment, *id.* 96a-98a, that the harassment occurred while the students were "under the supervision of teachers," *id.* at 96a, that the principal "was responsible for supervising discipline of the students in his school," *id.* at 98a, and that respon-

dent responded with deliberate indifference to her complaints, *id.* at 100a. Thus, the complaint fairly alleges that "official[s] of the recipient entity with authority to take corrective action to end the discrimination" had actual knowledge of the harassment and failed to act to stop it. *Gebser*, 118 S. Ct. at 1999. Thus, the lower courts erred in dismissing petitioner's complaint.

B. Petitioner's Allegations Need Not Meet The *Gebser* Standard To Support A Claim For Equitable Relief

Even if petitioner's proof on remand fails to meet the *Gebser* standard of actual knowledge and deliberate indifference, petitioner may nonetheless be able to establish an entitlement to equitable relief for a Title IX violation under a less demanding standard. Unlike the plaintiff in *Gebser*, who sought only damages, petitioner here also sought an injunction ordering respondent "to institute a policy providing guidance for employees in the event of sexual harassment of students by fellow students" and enjoining respondent "from discriminating against female students by failing to respond to complaints of sexual harassment." Pet. App. 102a. Entry of the injunction would, in essence, command respondent to comply with existing legal obligations under the federal statute and regulations; therefore, it does not raise the same concerns as did a potential award of damages in *Gebser*.

Injunctive and other equitable relief has been available in a private action under Title IX, without the showing of actual knowledge and deliberate indifference required by *Gebser* as a prerequisite for damages, since this Court first recognized a private right of action in 1979. *Cannon* v. *Univ. of Chicago*, 441 U.S. 677, 705 & n.38, 710 n.44, 711-712 (1979); see *Gebser*, 118

S. Ct. at 1997-1998 (citing same). Unlike damages, equitable relief does not raise the Court's "central concern" under the Spending Clause[7] that a federal fund recipient be on notice of its exposure to liability for a monetary award. *Gebser*, 118 S. Ct. at 1998 (discussing central concern underlying *Pennhurst*, *Franklin*, and *Guardians Ass'n* v. *Civil Serv. Comm'n*, 463 U.S. 582 (1983)). And unlike damages for past violations, equitable relief that is a condition on future funding can be avoided by the recipient by withdrawing from the federal funding program.

Moreover, this distinction between the standard for damages and the standard for injunctive relief is consistent with the analysis, set forth in *Gebser*, that the express statutory scheme for administrative enforce-

---

[7] Although *Franklin* left open the question whether Title IX was enacted exclusively pursuant to the Spending Clause, 503 U.S. at 75 n.8, other decisions of this Court reflect the view that Title IX (like Title VI and Section 504 of the Rehabilitation Act, which are similar federal funding statutes with nondiscrimination conditions) was enacted pursuant to Section 5 of the Fourteenth Amendment. See *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 732 (1982) (assuming that Title IX is Section 5 legislation); *Cannon* v. *Univ. of Chicago*, 441 U.S. 677, 686 n.7 (1979) (noting Congress's reference to its enforcement responsibilities under the Fourteenth Amendment as justification for including Titles VI and IX in the amendment to the Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C. 1988); cf. *Welch* v. *Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 472 n.2 (1987) (Section 504); *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 244 n.4 (1985) (Section 504); *United Steelworkers* v. *Weber*, 443 U.S. 193, 206 n.6 (1979)(contrasting Title VI with Title VII, which was "not intended to incorporate and particularize the commands of the Fifth and Fourteenth Amendments"); *United States* v. *Fordice*, 505 U.S. 717, 732 n.7 (1992) (in context of dismantling former dual system of higher education, protections of Title VI extend no further than the Fourteenth Amendment).

ment provides guidance for inferring congressional intent with regard to the implied private right of action. Title IX expressly creates an enforcement mechanism that anticipates and encourages resort to equitable remedies before the recipient has manifested the extreme intransigence that warrants resort to the ultimate administrative sanction of terminating federal funds.

The administrative enforcement scheme created by Congress begins with notice to the recipient of its violation. 20 U.S.C. 1682.[8] An agency can take further action only after it determines that "compliance cannot be secured by voluntary means." *Ibid.* An agency's efforts to obtain compliance by voluntary means may

---

[8] The Department of Education's standard for establishing a violation of Title IX in a sexual harassment case involving student-on-student harassment requires a showing that:

> (i) a hostile environment exists in the school's programs or activities, (ii) the school knows or should have known of the harassment, and (iii) the school fails to take immediate and appropriate corrective action.

62 Fed. Reg. at 12,039; *id.* at 12,037 ("[C]onstructive notice is applicable only if a school ignores or fails to recognize overt or obvious problems of sexual harassment. Constructive notice does not require a school to predict aberrant behavior.") When school officials know or should know that a sexually hostile environment exists in their education programs or activities, their failure to exercise their authority to take appropriate corrective action subjects the victim to discrimination, and may deny her the benefits of its education programs and activities in violation of Title IX. That rationale is consistent with the Department's longstanding investigative guidance on racial harassment. See 59 Fed. Reg. 11,448-11,454 (1994); *id.* at 11,449. Although, under *Gebser*, a damages award would not be appropriate without proof of actual knowledge and deliberate indifference, equitable relief may be warranted for the reasons discussed in this brief.

include a variety of equitable solutions. The Department of Education's longstanding regulations, promulgated pursuant to express authority delegated by Congress to effectuate Title IX (see 20 U.S.C. 1682),[9] provide that administrative compliance efforts may include conditioning a recipient's continued funding on its providing equitable relief to a victim of discrimination. 34 C.F.R. 106.3. The Court in *Gebser* expressly recognized the availability of such equitable relief under the administrative scheme. 118 S. Ct. at 1998 (citing 34 C.F.R. 106.3, as well as *North Haven*, 456 U.S. at 518, where agency conditioned continued funding on reinstatement of employee who had been subjected to sex discrimination). In fact, the Department of Education's regulations require that each potential recipient submit to the Department, along with its application for federal financial assistance, an "assurance of compliance" stating that its education programs and activities will be operated in compliance with the Department's regulations and that it will commit itself to, *inter alia*, "take whatever remedial action is necessary in accordance with § 106.3(a) to

---

[9] Pursuant to Section 431(d)(1) of the General Education Provisions Act, as added by Education Amendments of 1974, Pub. L. No. 93-380, § 509(a)(2), 88 Stat. 567, 20 U.S.C. 1232(d)(1) (1970 & Supp. IV 1974), these regulations were submitted to Congress when they were issued on June 4, 1975, by the Department of Health, Education, and Welfare, 40 Fed. Reg. 24,128 (1975), and did not become effective until 45 days later, after Congress failed to exercise its authority to disapprove them during that period, see 45 C.F.R. Pt. 86 (1975); see also *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 531-532 (1982). Because of this unique history, the Court has accorded the Title IX regulations particular deference as an interpretation of the statute. See *Grove City College* v. *Bell*, 465 U.S. 555, 567-568 (1984).

eliminate existing discrimination on the basis of sex or to eliminate the effects of past discrimination." 34 C.F.R. 106.4(a). Such equitable relief may also include, in the case of a sexually hostile environment created by the sexual harassment of a student by a teacher, "the offending teacher's resignation and the district's institution of a grievance procedure for sexual harassment complaints." *Gebser*, 118 S. Ct. at 1998 (noting that, in *Franklin*, 503 U.S. at 64 n.3, the Department of Education had identified a Title IX violation but concluded that the recipient had come into compliance when the offending teacher resigned and the recipient instituted a sexual harassment grievance procedure).[10]

---

[10] The Department of Education's regulations require that federal fund recipients notify students, parents, and employees of the Title IX prohibition against sex discrimination in its education programs and activities, 34 C.F.R. 106.9(a), and "adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints" alleging any violation of Title IX or the regulations, 34 C.F.R. 106.8(b). Recipients also must designate a Title IX coordinator to handle complaints and investigations and identify that person to all students and employees as the person to whom questions about Title IX should be referred. 34 C.F.R. 106.8(a), 106.9(a). Although violation of the grievance procedure regulations "does not itself constitute 'discrimination' under Title IX," *Gebser*, 118 S. Ct. at 2000, and would not satisfy the requirements for a damages award, evidence of such a violation, as alleged by petitioner in this case, Pet. App. 98a, could warrant injunctive relief in a private action if it was shown that it contributed to the plaintiff's injury. The Department of Education has detailed the features of an effective nondiscrimination policy and grievance process, 62 Fed. Reg. at 12,044-12,045, and has emphasized that they provide schools with not only an effective means of responding to sexual harassment, but also "an excellent mechanism to be used in their efforts to prevent

Only after such efforts at achieving compliance through voluntary and equitable solutions have failed, can an agency commence administrative action to terminate federal funding. 20 U.S.C. 1682. In addition, before taking action to terminate, or refuse to grant or continue, federal financial assistance, the agency must afford the recipient an opportunity for a hearing and the agency must make an express finding on the record of the recipient's failure to comply with the relevant statutory or implementing regulatory requirement. *Ibid*.

Thus, it is clear that, under the administrative enforcement scheme, a violation of Title IX may trigger an obligation on the part of the recipient to take remedial action before the recipient has demonstrated the extreme intransigence required to terminate funding, *i.e.*, the showing that the *Gebser* Court analogized to deliberate indifference. See 118 S. Ct. at 1999. A plaintiff in a private enforcement action should likewise be entitled to equitable relief without a showing of deliberate indifference. As this Court recognized in *Cannon*, 441 U.S. at 705-706, because of the limited government resources available for the enforcement of Title IX, "[t]he award of individual relief to a private litigant who has prosecuted her own suit is not only sensible but is also fully consistent with—and in some

---

sexual harassment before it occurs," *id*. at 12,038.

By contrast, evidence that a fund recipient has in place an effective and adequately publicized policy and grievance procedure may constitute an affirmative defense in a Title IX suit if the recipient establishes that the plaintiff suffered avoidable harm because she unreasonably failed to avail herself of the preventive and remedial measures. See *Gebser*, 118 S. Ct. at 2007 (Ginsburg, J., joined by Souter, Breyer, JJ., dissenting).

cases even necessary to—the orderly enforcement of the statute." See also *id.* at 706-708 & nn. 41, 42.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
BILL LANN LEE
Acting Assistant Attorney General
BARBARA D. UNDERWOOD
Deputy Solicitor General
BETH S. BRINKMANN
Assistant to the Solicitor General
DENNIS J. DIMSEY
LINDA F. THOME
Attorneys

NOVEMBER 1998