No. 96-1866

In the Supreme Court of the United States

OCTOBER TERM, 1997

ALIDA STAR GEBSER AND ALIDA JEAN MCCULLOUGH,
PETITIONERS

v.

LAGO VISTA INDEPENDENT SCHOOL DISTRICT

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the court of appeals adopted the correct legal standard to determine when a school district may be liable in damages, under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, to a student who was sexually harassed by one of the district's teachers.

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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 of Civil Rights (OCR), has promulgated regulations, a policy memorandum, and a policy guidance based on its longstanding interpretation of school district liability under Title IX. The Department of Justice enforces Title IX in federal court in cases referred to it by OCR.

STATEMENT

1. a. In the spring of 1991, petitioner Alida Star Gebser was a thirteen-year-old eighth-grade student at the middle

school in respondent school district. Pet. App. 12a.[1] She was in the program for gifted and talented children. Because Gebser "needed a more challenging academic program," her teacher arranged for Gebser to join the high school great books discussion group led by her husband, Frank Waldrop, a teacher at the district high school. *Ibid.*; J.A. 51a. During the book group discussions, Waldrop often made suggestive comments and jokes. Pltf. Mot. for Partial Summ. Jdgmt., Exh. 1 (Gebser Dep.), at 26-27.

In the fall of 1991, Gebser entered the district high school and was assigned to a small social studies class taught by Waldrop. Gebser Dep. 25, 28-29. Waldrop continued to make the same type of comments. For example, he suggested that one of the students had engaged in sex with her boyfriend in a hotel room and, when the girl took offense, expressed his belief that of all the girls he knew, she was the girl most likely to be a virgin. *Id.* at 29-30. Waldrop directed his sexual comments toward female students, sometimes in front of other students and teachers. *Id.* at 38-39. Waldrop also made inappropriately suggestive comments to Gebser individually and, in doing so, implied that he considered her "very nearly a peer and that he expected [her] to act that way." *Id.* at 42-44.

In the spring semester of 1992, Gebser was also assigned to Waldrop's class; for approximately 75% of the time, she was the only student in the classroom with Waldrop, because the other two students spent most of the class time working in the computer lab and library. Gebser Dep. 44-45. Although respondent school district is small, it was unusual to have just one student in a high

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[1] Because the case comes to the Court from a grant of summary judgment in respondent's favor, we state the facts in the light most favorable to petitioners, as disputed facts should be resolved against respondent. *General Electric Co.* v. *Joiner*, 118 S. Ct. 512 (1997).

school class alone with one teacher most of the time. *Id.* at 46. Waldrop continued to make suggestive comments to Gebser, *id.* at 45-46, and eventually he initiated sexual contact when, "[k]nowing she would be alone, he visited [Gebser at home] under the pretext of returning a book" she needed for a research project for school. Pet. App. 12a. Waldrop embraced Gebser, kissed her, fondled her breasts, unzipped her pants and fondled her genitalia, and told her that he loved her. J.A. 54a-55a. Gebser asked Waldrop repeatedly about his young son, whom Waldrop had left out in the car, and Waldrop eventually left. J.A. 55a.

The sexual assault by her teacher terrified Gebser. J.A. 56a. Gebser testified that she "had believed" in Waldrop, who "was basically [her] mentor," that he "was the main teacher at the school with whom [she] had discussions," that he was the person in the school system whom she "most trusted," and that she "didn't know what to do" because he was the person against whom she had a complaint. J.A. 57a, 63a. The only exposure she had had "to anything like that to even have the concept that that could happen was * * * references on TV and stuff about female students marrying their professors." J.A. 57a. She "had no idea that that stuff actually happened." *Ibid.* Gebser wanted someone to help her figure out what she should do, and she told one male friend who was also a high school student. J.A. 58a. He advised against a relationship, but did not suggest that Gebser report the incident. Gebser Dep. 56-57. Gebser testified that if, at the beginning, she had known what she was supposed to do when a teacher started making sexual advances to her, she "would have reported it." J.A. 65a.

Waldrop escalated his advances toward Gebser and, later that semester, engaged in sexual intercourse with her. J.A. 59a-60a. He had sex with her on other occasions during the rest of her freshman year. J.A. 60a. That summer, Gebser was the only student in Waldrop's advanced

placement class, and he often used the weekly class time to engage in sexual intercourse with her. *Ibid.* Waldrop would pick up Gebser from her home and make comments about studying psychology, which both Gebser and Waldrop understood really meant having sexual intercourse. *Ibid.*

In the fall of 1992, Gebser returned for her sophomore year and again had Waldrop as a teacher. J.A. 60a-61a. Waldrop would call Gebser aside as she was leaving the classroom or walking in the hall and ask if she could "study psychology that day," and she "basically just went along with what he said." J.A. 61a. Gebser testified that it seemed to her that the sexual relationship now "was a necessary component" of the intellectual relationship and that, if she were "to blow the whistle on [the sexual relationship]," then she wouldn't be able to have Waldrop as a teacher anymore, which was her main interest in the relationship. J.A. 62a. Gebser testified that she was ashamed of the sexual relationship and felt that, by trying to act like an adult in response to Waldrop's comments, she had led him on and had to go along with it. *Ibid.* Waldrop told Gebser that if the sexual relationship were discovered, he could lose his job and they would both be in trouble. Gebser Dep. 75. Gebser decided that she would graduate a year early "because it seemed to [her] that that would be a way that without being discovered, * * * [she] could get out of it without having his disapproval." J.A. 64a.

In October 1992, other high school girls complained to the school about Waldrop. One of the girls refused to stay after school when she discovered that Waldrop was on duty. The girl did not want to risk being the only student in the classroom with Waldrop. J.A. 89a. She explained to her parents that the way he looked her up and down made her uncomfortable and that he had made suggestive comments to female students. When the girl's mother asked her other daughter and her daughter's friend, who lived

with the family, about Waldrop, they also said that he made them uncomfortable. J.A. 85a-91a. The friend explained that she had been in a class (with Gebser) taught by Waldrop and that he had spent most of the class time in conversation, much of which had sexual connotations, and told off-color jokes that made her uncomfortable. J.A. 90a.

The other girls' parents called the high school principal and complained about Waldrop's conduct. J.A. 91a. The principal arranged a meeting in his office with the parents and Waldrop during which the parents relayed the girls' complaints. J.A. 79a. According to the principal, Waldrop never denied making the comments, but indicated that he did not think anything he had said was offensive; he then apologized and said it would not happen again. *Ibid.*[2] The principal told Waldrop that he should be careful to avoid making remarks that could be construed as offensive, but he did not say the remarks were improper. J.A. 80a-81a. The principal, who was new to the district that semester, did not note the complaint or meeting in Waldrop's personnel file and did not know whether the preceding principal had had any similar meetings with Waldrop. J.A. 81a-82a; Pltf. Mot. for Partial Summ. Jdgmt., Exh. 3 (Riggs Dep.), at 33, 35, 41. The principal told the school guidance counselor about the conference at that time, but he did not inform the Title IX coordinator (the district superintendent) about the complaint until after Waldrop's sexual abuse of Gebser came to light. Riggs Dep. 32, 36-37, 39-40.[3]

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[2] The complaining parents testified that Waldrop flatly denied the accusations, thought the girls were lying, and "didn't know why they would lie about that." J.A. 93a.

[3] One of the girls had complained to another teacher about Mr. Waldrop's telling dirty jokes and making remarks with sexual connotations, but that teacher did not believe her and "every time she told [him] about something, he told her that she must be misunderstanding

A few months later, in January 1993, a police officer discovered Waldrop and Gebser engaged in sexual intercourse and arrested Waldrop. Pet. App. 12a. The school district terminated Waldrop's employment, and the State ultimately withdrew his teaching license. Riggs Dep. 43-44.[4]

b. Throughout the period in which Waldrop was sexually abusing Gebser, the school district's Title IX coordinator was the school district superintendent. J.A. 69a. According to the superintendent, a student who felt she had been victimized by sexual harassment should have complained directly to the school principal. J.A. 71a-72a. The superintendent was not aware, however, of any communication that informed students that they should go to the principal with such a complaint. J.A. 72a. The superintendent believed that it was a "campus issue" and "would have expected it to be addressed by the principals." *Ibid.* The superintendent was not aware that Title IX's implementing regulations require that a recipient of federal funds have a grievance system for sexual discrimination claims and that the students be informed about that system. J.A. 73a. The superintendent testified that the district did not have any established policy that would have governed how it responded to reports that a teacher might be engaging in sexually abusive or harassing behavior with a student. Pltf. Mot. for Partial Summ. Jdgmt., Exh.

Mr. Waldrop's intentions and what was said." Pltf. Resp. to Def. Mot. for Summ. Jdgmt., Exh. A (Tully Dep.) 42-45.

[4] When the parents who had complained about Waldrop learned that the principal had not reported their earlier complaints to the district superintendent, they notified a school board member about their complaints and were told that they were "not the only parent[s] [who] had complained." Tully Dep. 20. The school board member explained: "We've had many complaints from other parents complaining of Waldrop's abusive treatment of students. And we just haven't been able to catch him until now." Tully Dep. 20. See also Gebser Dep. 33-35.

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2 (Collier Dep.), at 42. The district's informal policy would have been to investigate the matter immediately and completely, including talking with the teacher, "other students who might have been witness to this, anyone that the parent referred you to that could substantiate the charge, the student." *Id.* at 43-45. If any of the alleged comments or conduct occurred in front of other persons, talking with the teacher would not be adequate, and the investigation "would go beyond the teacher's statement." *Id.* at 45.[5]

2. Gebser's mother filed the instant action in state court, on behalf of her daughter, who was then still a minor, and on her own behalf. Respondent removed the action to federal district court. In their second amended complaint, petitioners alleged, *inter alia*, that respondent had vio-lated Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.* (Title IX). Pet. App. 1a. Respondent moved for summary judgment on all claims, and petitioners moved for summary judgment on the Title IX claim. Pet. App. 1a-2a.

The district court denied petitioners' motion and granted respondent's motion. Pet. App. 1a-10a.[6] Reasoning that respondent could be held liable only for a policy of discrimination in its federally funded education programs, the court held that "[o]nly if school administrators have some type of notice of the gender discrimination and fail to

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[5] Respondent later submitted an affidavit of the superintendent that is inconsistent with the superintendent's deposition and suggests that respondent had a written sexual harassment policy. See J.A. 43a-47a. That submission raises a disputed issue of fact and, in any event, does not contradict the evidence that no Title IX policy or grievance procedure was ever communicated to the students.

[6] Petitioners also raised claims based on 42 U.S.C. 1983 and common law negligence; the court entered summary judgment for respondent on those claims as well. Pet. App. 2a-5a. In this Court, petitioners have raised only their Title IX claims.

respond in good faith can the discrimination be interpreted as a policy of the school district." *Id.* at 6a-7a (emphasis omitted). The court ruled that, "in order to prevail on a Title IX cause of action for personal injuries and damages, a plaintiff must show the school district had actual or constructive notice of the nature or type of the discrimination alleged by a plaintiff or notice of circumstances which indicate a strong potential for the type of discrimination alleged by the plaintiff." *Ibid.* The court then characterized petitioners' evidence regarding notice as only a "complaint about offensive remarks made during class" that was not sufficient to establish a genuine issue of material fact as to respondent's actual or constructive notice of Waldrop's sexually discriminatory conduct. *Id.* at 9a.

3. The court of appeals affirmed (Pet. App. 11a-18a), based on two Title IX cases it had recently decided. *Id.* at 12a (citing *Rosa H.* v. *San Elizario Indep. Sch. Dist.*, 106 F.3d 648 (5th Cir. 1997); *Canutillo Indep. Sch. Dist.* v. *Leija*, 101 F.3d 393 (5th Cir. 1996), cert. denied, 117 S. Ct. 2434 (1997)). First, the court rejected imposition of strict liability on the school district in teacher-student sexual harassment cases because it "is not part of the Title IX contract." *Id.* at 14a. Second, the court rejected liability based on constructive notice because "there is not enough evidence for a jury to conclude that a Lago Vista school official should have known about the abuse"; in the court's view, the complaint about Waldrop's inappropriate remarks to students "did not concern [Gebser] and gave officials no reason to think that Waldrop would have sex with a student." *Ibid.* Third, the court rejected liability based on agency principles because "a common-law agency theory would permit courts to use [Restatement (Second) of Agency] § 219(2)(d) [(1958)] and that * * * section would generate vicarious liability in virtually every case of teacher-student harassment." *Id.* at 15a. The court held

that "school districts are not liable in tort for teacher-student harassment under Title IX unless an employee who has been invested by the school board with supervisory power over the offending employee actually knew of the abuse, had the power to end the abuse, and failed to do so." *Ibid.*

SUMMARY OF ARGUMENT

In *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), the Court indicated that, in Title IX cases involving teacher-student harassment, courts should look to agency principles developed in Title VII cases involving supervisor harassment. The Department of Education has reasonably applied agency principles under Title IX in a manner consistent with the particular circumstances of the school setting. The Department interprets Title IX to hold a federal fund recipient responsible for harassment of students by a teacher if (a) the teacher was aided in accomplishing the harassment by his agency relationship with the recipient or his apparent authority; or (b) the recipient knew or should have known of the harassment and failed to take immediate and appropriate action to remedy the situation. Highly relevant to that determination is whether the recipient has complied with the longstanding regulatory mandate that it adopt a policy against sex discrimination and an effective grievance procedure for such complaints, including complaints of sexual harassment, and that that policy and procedure be communicated to students and employees.

Agency principles apply in Title IX cases in much the same manner as in Title VII cases, although there are relevant differences between the situation presented by a student in an elementary or secondary school and an adult in the workplace. School administrators and teachers, acting *in loco parentis*, have substantially more authority and control over elementary and secondary students than

employers have over employees; attendance is mandatory; schools have duties to young children that do not apply in the workplace; the teacher-student relationship provides teachers with unusual influence; and the emotional, sexual, and intellectual immaturity of children makes them more vulnerable than adults to sexual harassment.

The court of appeals' view that liability can be imposed on a school district only if the harassing teacher's supervisor actually knew of the harassment cannot be reconciled with this Court's holding in *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57, 64 (1986), that lack of notice does not insulate an employer from liability for a supervisor's harassment of an employee. The standard applicable under Title IX should be at least equally protective of children victimized by sexual harassment by teachers. The court of appeals misread *Franklin* as precluding damages in this case. The Court held in *Franklin* that sexual harassment cases under Title IX involve intentional discrimination and that therefore the normal presumption in favor of all appropriate remedies, including damages, applies.

Judged under the proper legal standards, the evidence in this case raises issues of material fact that preclude entry of summary judgment for respondent. The court of appeals' judgment should therefore be vacated and the case remanded for further proceedings.

ARGUMENT

THE COURT OF APPEALS APPLIED THE WRONG LEGAL STANDARD TO DETERMINE WHETHER RESPONDENT SCHOOL DISTRICT COULD BE LIABLE FOR DAMAGES, UNDER TITLE IX, TO A STUDENT WHO WAS SEXUALLY HARASSED BY ONE OF RESPONDENT'S TEACHERS

A. There Is A Basis For A School District's Liability For Damages Under Title IX For Teacher-Student Sexual Harassment When The Teacher Is Aided In The Harassment By His Agency Relationship With The School District Or Uses His Apparent Authority, Or When The District Knew or Should Have Known About the Harassment And Failed To Take Appropriate Corrective Action

1. a. In *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), the Court held that a money damages remedy would be available, under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, upon a sufficient showing by a high school student who had been sexually harassed by one of the district's teachers. In holding that a damages remedy against a school district is authorized in such a case, the Court declared:

> Unquestionably, Title IX placed on [the school district] the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57, 64 (1986). We believe the same rule should apply when a teacher sexually harasses and abuses a student. Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe.

503 U.S. at 75. In *Vinson*, the Court held that hostile environment sexual harassment is a form of sex dis-

crimination that is actionable under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and that the determination of employer liability for harassment of an employee by a supervisor should be guided by agency principles. 477 U.S. at 72. Citing Restatement (Second) of Agency [hereinafter Restatement] §§ 219-237 (1958), the Court made clear that, under such principles, employers are not always liable for sexual harassment by their superiors, but that "absence of notice to an employer does not necessarily insulate that employer from liability." *Vinson*, 477 U.S. at 72.[7]

b. In light of *Franklin* and *Vinson*, agency principles and Title VII case law are appropriate guides for determining school district liability for harassment of a student by a teacher in a hostile environment sexual harassment case.[8] Accordingly, the Department of Education relies

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[7] Under general principles of agency law, the master is liable for torts committed by his servants while acting in the scope of employment. Restatement § 219(1), at 481. When the servant acts outside the scope of his employment, the master is liable if (a) "the master intended the conduct or the consequences," (b) "the master was negligent or reckless," (c) "the conduct violated a non-delegable duty of the master," or (d) "the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation." *Id.* § 219(2).

We discuss more fully the application of agency principles in Title VII cases in our brief in *Faragher* v. *City of Boca Raton*, cert. granted, No. 97-282 (Nov. 14, 1997). We have furnished a copy of our *Faragher* brief to the parties in this case.

[8] Several courts have looked to agency principles and/or Title VII law in determining a recipient's liability under Title IX. See, *e.g.*, *Kracunas* v. *Iona College*, 119 F.3d 80, 88 (2d Cir. 1997); *Doe* v. *Claiborne County*, 103 F.3d 495, 513-514 (6th Cir. 1996); *Kinman* v. *Omaha Pub. Sch. Dist.*, 94 F.3d 463, 469 (8th Cir. 1996); *Murray* v. *New York Univ. College of Dentistry*, 57 F.3d 243, 249 (2d Cir. 1995); see *Lipsett* v. *University of Puerto Rico*, 864 F.2d 881, 900 (1st Cir. 1988);

on such legal authorities in its interpretation of Title IX. That interpretation is reasonable, consistent with the text and purpose of Title IX, and entitled to judicial deference. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996); see *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 522 n.12 (1982).[9]

The Department has issued a 1981 policy memorandum and a 1997 policy guidance addressing Title IX and sexual harassment.[10] The 1981 policy memorandum cites Title VII case law and the Title VII sexual harassment guidelines of the Equal Employment Opportunity Commission (EEOC) to support its interpretation of Title IX to cover sexual harassment claims. Dep't of Educ. Policy Memorandum from Antonio J. Califa to Regional Civil Rights Directors (Memorandum) at 2, 6, Tabs B, C (Aug. 31, 1981). It discusses agency principles to explain that, "[i]n some situations, a recipient may be liable under Title IX for the sexual harassment acts of one student perpetrated upon another student under an agency/principal theory," because where the institution receiving funds "has delegated some responsibility to a student to act in an authori-

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Mabry v. *State Bd. of Community Colleges and Occupational Educ.*, 813 F.2d 311, 317 (10th Cir.), cert. denied, 484 U.S. 849 (1987). The Seventh Circuit has followed the Fifth Circuit in refusing to apply Title VII agency principles under Title IX and refused to defer to the Department's Guidance. *Smith* v. *Metropolitan Sch. Dist. Perry Township*, 128 F.3d 1014 (1997).

[9] Under Title IX, Congress empowered federal funding agencies to effectuate the prohibition against sex discrimination. As a provider of such funds, the Department, as the ultimate sanction, may terminate federal funding if "compliance cannot be secured by voluntary means." 20 U.S.C. 1682. The Department is vested with the authority to promulgate rules, regulations, and orders to gain compliance by recipients. *Ibid.*

[10] For the convenience of the Court, we have lodged copies of both of these documents with the Clerk.

tative position with respect to another student, the institution is responsible for the acts of that student acting in the delegated capacity." *Id.* at 7. In other words, when a teaching assistant uses his agency authority in sexually harassing a student, "the recipient institution would have responsibility under Title IX for those acts." *Ibid.* The necessary premise of that interpretation is that a recipient institution would be responsible under Title IX for sexual harassment of a student by a teacher employee wielding authority over the student that is delegated to him by the institution.

The Department's 1997 policy guidance more specifically places the question of school district responsibility under Title IX for teacher-student sexual harassment within the framework of agency principles and Title VII case law. Dep't of Educ., Office of Civil Rights (OCR), Sexual Harassment Policy Guidance (Guidance), 62 Fed. Reg. 12,034, 12,039, 12,047 n.18 (1997). Consistent with those principles, when a "teacher or other employee uses the authority he or she is given (e.g., to assign grades) to force a student to submit to sexual demands, the employee 'stands in the shoes' of the school and the school will be responsible for the use of its authority by the employee or agent." 62 Fed. Reg. at 12,039. Thus, a Title IX recipient school district should be liable for quid pro quo harassment by its teachers, whether or not it had notice or approved of the harassment. *Id.* at 12,039, 12,047 n.19 (citing *Vinson*, 477 U.S. at 70). Similarly, a recipient school district should be liable for severe, persistent, or pervasive, hostile environment sexual harassment by its teacher or other employee if that person "was aided in carrying out the sexual harassment of students by his or her position of authority with the institution." *Id.* at 12,039, 12,048 & nn. 22-24 (citing, *inter alia*, Restatement § 219(2)(d), EEOC Policy Guidance and Title VII cases). For example, a teacher who sexually harasses his student

by requiring the student to stay after class under the guise of a disciplinary sanction is aided in carrying out that harassment by the authority the district conferred on him. Liability may also be imputed to the school district if, "because of the school's conduct, the employee reasonably appears to be acting on behalf of the school, whether or not the employee acted with authority." 62 Fed. Reg. at 12,039, 12,048 n.22 (citing Restatement § 219(2)(d)). For example, a security employee may reasonably be perceived by very young students as acting with the authority of the educational institution although the actual delegation of authority to him may be very limited.

Thus, consistent with *Vinson*, school districts will not always be liable for sexual harassment by teachers and administrators. Where the district has not had notice of, and an opportunity to remedy, the hostile environment, liability under Title IX should depend on factors such as the extent of the delegation of actual authority to the employee, the effectiveness of the school's grievance procedure (see pp. 15-18, *infra*), and the age of the student (because the younger a student is, the more likely he or she would reasonably consider any adult employee to be in a position of authority). See 62 Fed. Reg. at 12,039. Of necessity, this is a fact-dependent inquiry.

Whether or not an employee's misconduct is aided by the use of actual or apparent authority, a school district should be liable for sexual harassment by an employee if "an agent or responsible employee of the school" knew or should have known of an existing hostile environment and the school failed to take immediate and appropriate steps to remedy that harassment. 62 Fed. Reg. at 12,039, 12,048 n.28 (citing Restatement § 219(2)(b)); *id.* at 12,050 n.63.[11]

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[11] This is the standard the Department applies in cases involving student-on-student sexual harassment. 62 Fed. Reg. at 12,039. A petition for a writ of certiorari presenting the question of Title IX's ap-

Notice to "an agent or responsible employee of the school" serves as notice to the school. *Ibid.* Under this theory, the school should be held liable for "its own discrimination in failing to remedy [the harassment] once the school has notice." *Id.* at 12,040. It does not "necessarily require that the employee who receives notice of the harassment also be responsible for taking appropriate steps to end the harassment or prevent its recurrence," so long as the employee has a duty "to report the harassment to other school officials who have [such] responsibility." *Id.* at 12,037. Cf. *Younger* v. *Bayer Corp.*, 123 F.3d 672, 674-675 (7th Cir. 1997). This principle is important in the school setting where, as we explain below (see p. 21, *infra*), teachers are required by law to report sexual harassment that rises to the level of suspected child abuse. Constructive notice of the harassment depends on whether the district exercised reasonable care given all the circumstances of the case. This includes, for example, whether known incidents of harassment "should have triggered an investigation that would have led to a discovery of the additional incidents." 62 Fed. Reg. at 12,042. In some cases, the pervasiveness of the harassment itself may be enough to establish constructive notice. *Id.* at 12,042, 12,050 n.64 (citing Title VII cases).

An important factor in the determination of school district liability under these agency principles is whether the district has an effective policy against sex discrimination and a grievance procedure for such complaints, including sexual harassment complaints, and has communicated those policies and procedures to its students.[12] "[W]ithout

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plicability to such peer sexual harassment is currently pending before the Court. *Davis* v. *Monroe County Bd. of Educ.*, 120 F.3d 1390 (11th Cir.), petition for cert. pending, No. 97-843 (filed Nov. 19, 1997).

[12] Since 1975, Title IX fund recipients have been mandated by regulation to have such a policy that is disseminated to their students,

a policy and procedure, a student does not know either of the school's interest in preventing this form of discrimination or how to report harassment so that it can be remedied." 62 Fed. Reg. at 12,040.

That is especially true in the elementary and secondary school settings. Unlike the employment context, where employees are more likely to be aware that there are levels of management higher than their direct supervisors from whom they can seek recourse, schoolchildren tend to interact exclusively with their classroom teachers and often may not understand the district's channels of authority. It is the classroom teacher through whom a school district generally acts in day-to-day relations with its students, not the school principal or school board members. See *Ambach* v. *Norwick*, 441 U.S. 68, 81-82 n.15 (1979). And, due to their intellectual, emotional, and sexual immaturity, elementary and secondary school students are substantially more vulnerable, especially to sexual harassment, than are most adult employees. See *Eddings* v. *Oklahoma*, 455 U.S. 104, 115 & n.11 (1982) (minority "is a time and condition of life when a person may be most susceptible to influence and to psychological damage"). See also, *e.g.*, *Hazelwood Sch. Dist.* v. *Kuhlmeier*, 484 U.S. 260, 272 (1988); *New Jersey* v. *T.L.O.*, 469 U.S. 325, 342 (1985); *Ingraham* v. *Wright*, 430 U.S. 651, 662 (1977).

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to identify a Title IX coordinator and inform students about how to contact that person, to adopt a grievance procedure for prompt and equitable resolution of sex discrimination complaints, and to publish that procedure. 34 C.F.R. 106.8, 106.9; see 40 Fed. Reg. 24,139 (1975). A separate policy and procedure for sexual harassment is not required so long as a school's "nondiscrimination policy and grievance procedures for handling discrimination complaints * * * provide effective means for preventing and responding to sexual harassment." 62 Fed. Reg. at 12,040, 12,044-12,045 (discussing features of effective grievance procedures).

Thus, in the absence of a known policy and procedure, it is more likely that a teacher would be aided by actual or apparent authority in sexually harassing a student. For example, if a child has not been told by the school what to do if he or she is touched in an inappropriate manner by anyone at school, including a teacher, it is more likely that a teacher would be aided by his authority in sexually harassing the child. The fact that a school does not have a meaningful policy and grievance procedure for sexual harassment complaints may create or contribute to the appearance of authority of school employees to harass students. See 62 Fed. Reg. at 12,040, 12,048 n.33 (citing EEOC Policy Guidance). Moreover, the absence of an effective policy and procedure can prevent the school from learning of incidents of harassment about which the school should have known—and on that basis can contribute to a finding of liability. 62 Fed. Reg. at 12,040. This case may be an example of that because there is evidence that respondent did not communicate to its students that they should report sexual harassment without fear of adverse consequences and that Gebser, if she had known what to do, would have reported it.

2. As *Franklin* suggests, the principles of agency liability for sexual harassment apply under Title IX just as they do under Title VII. As the Court indicated in *Vinson*, however, application of common-law principles of agency should take into account the particulars of the pertinent statute. See 477 U.S. at 72 (noting that common-law agency principles "may not be transferable in all their particulars to Title VII"). The text of Title IX and a school's power over and duties to students suggest a broad scope for vicarious liability in the elementary and secondary school setting.

a. Title IX is cast in very broad terms and is not limited, as is Title VII, to particular actors (employers)

and their agents. Title IX imposes, as a condition on receipt of federal funds, the blanket prohibition 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. Congress did not limit the nondiscrimination mandate to conduct engaged in "by" the recipient or its agents, but rather extended it to any "exclu[sion] from participation in," "deni[al of] the benefits of," or "subject[ion] to discrimination under," any federal fund recipient's educational programs or activities.[13] In *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), the Court recognized that Congress drafted Title IX "with an unmistakable focus on the benefited class," and did not "writ[e] it simply as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices." 441 U.S. at 691-693; see also *id.* at 693 & n.14.

b. School settings and teacher-student relationships are governed by principles that differ from those governing adult workplaces and supervisor-employee relationships. Schools and their teachers wield much greater control and authority over students than employers and supervisors typically do over employees. "Of necessity, teachers have a degree of familiarity with, and authority over, their students that is unparalleled except perhaps in the relationship between parent and child." *T.L.O.*, 469 U.S. at 348 (Powell, J., concurring). "Traditionally at com-

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[13] Compare 20 U.S.C. 1684 (contemporaneously enacted Title IX provision provides that no person shall be denied admission to a course of study "by" a federal fund recipient based on impaired vision).

mon law, and still today," with regard to unemancipated minors, school teachers and administrators "stand *in loco parentis* over the children entrusted to them," exercising delegated authority from parents over their children. *Vernonia Sch. Dist.* v. *Acton*, 515 U.S. 646, 654-655 (1995).[14] That delegated parental authority is "custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults." *Id.* at 655. A school teacher's authority over a student may even extend beyond the limits desired by the student's parents. See *Ingraham*, 430 U.S. at 662-663 & nn.22, 24 (state authorization of corporal punishment of student without parental approval not unconstitutional); cf. *Schall* v. *Martin*, 467 U.S. 253, 265 (1984).

Teachers and school administrators owe duties to students not owed by employers to employees. "Children, by definition, are not assumed to have the capacity to take care of themselves." *Schall*, 467 U.S. at 265. And the State has an independent interest in protecting the welfare of children and safeguarding them from abuses. *Ginsberg* v. *New York*, 390 U.S. 629, 640-641 (1968); see also *T.L.O.*, 469 U.S. at 350 (Powell, J., concurring) (teachers have general duty to protect pupils from mistreatment).[15] There is "obvious concern on the part of

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[14] For purposes of this brief, our discussion focuses on elementary and secondary school students. Title IX applies with equal force to fund recipients that operate post-secondary educational institutions, but the liability calculus in those cases may be significantly different because they involve young adults and different types of school settings.

[15] Also, unlike employees' attendance at work, nearly all elementary and many secondary students are compelled by the government to attend school. Mahoney, *School Personnel & Mandated Reporting of Child Maltreatment*, 24 J. Law & Educ. 227, 228 & n.3 (1995) (compulsory school attendance statutes in all 50 states, usually applying to children aged 5 to 16); *Ingraham*, 430 U.S. at 660 n.14. The State "has a

parents, and school authorities acting *in loco parentis*, to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech." *Bethel Sch. Dist. No. 403* v. *Fraser*, 478 U.S. 675, 684 (1986). All fifty States mandate that school teachers and administrators report suspected abuse of students. Mahoney, *School Personnel & Mandated Reporting of Child Maltreatment*, 24 J. Law & Educ. 227, 230 & n.13 (1995).

The common law has long recognized that heightened duties of care can render a party vicariously liable for its agent's intentional harm of those it has a duty to protect. See *Prosser and Keeton on the Law of Torts* 506-507 (W. Page Keeton ed., 5th ed. 1984) ("even where the servant's ends are entirely personal, the master may be under such a duty to the plaintiff that responsibility for the servant's acts may not be delegated to him. This is true in particular in those cases where the master, by contract or otherwise, has entered into some relation requiring him to be responsible for the protection of the plaintiff."). Accordingly, a school's extraordinary control of, and responsibility for, its students may create cir-cumstances in which school district liability may be appropriate even where employer liability might not be.

B. The Court Of Appeals Applied The Wrong Legal Standard In Limiting Title IX Recipient Liability to Actual Knowledge

1. By limiting school district liability under Title IX for teacher-student harassment to cases in which a district employee with supervisory authority over the harasser actually knew of the abuse (or substantial risk thereof), had the power to end it, and failed to do so, the

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heightened obligation to safeguard students whom it compels to attend school." *T.L.O.*, 469 U.S. at 353 (Blackmun, J., concurring).

court of appeals (Pet. App. 15a) disregarded the traditional agency principles that both *Franklin* and *Vinson* indicate should be applied. In particular, the legal standard applied by the court of appeals cannot be reconciled with the ruling in *Vinson* that "absence of notice to an employer does not necessarily insulate that employer from liability" to an employee who was sexually harassed by her supervisor. 477 U.S. at 72 (citing Restatement §§ 219-237). Certainly the potential for school district liability should be at least as great where a child is sexually harassed by her teacher as it would be in the employment context.

The court of appeals also ignored the realities of children's vulnerability in elementary and secondary school settings. The court of appeals' interpretation would deny Title IX's protection to children who cannot understand which teacher or other authority figure at school has supervisory authority over the harasser. The consequences of the court of appeals' rule are illustrated by *Canutillo Independent School District* v. *Leija*, 101 F.3d 393 (5th Cir. 1996), cert. denied, 117 S. Ct. 2434 (1997), in which the same court held that a school district was not liable for a teacher's sexual molestation of a second grader during weekly movies in health class—despite the fact that (a) the student and her mother, as well as another girl in the class, had all complained to the girls' homeroom teacher about the other teacher's conduct, (b) complaining to the homeroom teacher complied with the procedures in the school's handbook, *id.* at 398-402, and (c) the same teacher continued to sexually molest little girls in his class for another year until "four more girls complained of sexual abuse, this time to the principal," who reported the matter to the superintendent. *Id.* at 402.

2. The court of appeals based its erroneous legal standard in part on its reasoning in *Rosa H.* v. *San Elizario Independent School Dist.*, 106 F.3d 648 (5th Cir. 1997), that money damages were not available because

Title IX was enacted under the Spending Clause and Title IX recipients are not on sufficient notice, as required by *Pennhurst State School and Hospital* v. *Halderman*, 451 U.S. 1, 28-29 (1981), of their liability for intentional acts of their agents.[16] This Court rejected that view in *Franklin*:

> The point of not permitting monetary damages for an unintentional violation [as in *Pennhurst*] is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award. * * * This notice problem does not arise in a case such as this, in which intentional discrimination is alleged.

Franklin, 503 U.S. at 74-75. The *Franklin* Court held that, "[u]nquestionably," the district had notice under Title IX that it had a duty not to discriminate on the basis of sex and that, "when a teacher sexually harasses and abuses a student," that is intentional discrimination based

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[16] 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 (and Title VI and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, which are similar federal funding statutes with nondiscrimination conditions) were enacted pursuant to Section 5 of the Fourteenth Amendment. See *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 732 (1982) (assum-ing that Title IX is Section 5 legislation); *Cannon* v. *University of Chicago*, 441 U.S. 677, 688 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 Attorney's 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 of America* v. *Weber*, 443 U.S. 193, 206 n.6 (1979)(contrasting Title VI to 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).

on sex, which Congress clearly did not intend to support with federal funds. *Id.* at 75. Thus, in such cases "the normal presumption in favor of all appropriate remedies," including damages, applies. *Id.* at 74. Although the Court's description of the facts in *Franklin* indicated that the complaint alleged that "teachers and administrators" had become aware of the harassment but had failed to take action to halt it (*id.* at 64), the Court did not advert to that fact in its legal analysis or suggest that it was a necessary condition for liability. As a condition of receiving federal funds, respondent agreed to abide by Title IX's requirement that no person be subjected to sex discrimination under any of its programs or activities. There is nothing ambiguous about that agreement and no justification for deviating from normal legal rules that would hold an entity bound by such a condition liable when its agent, to whom it delegated authority under the education program, fails to satisfy the condition. "[F]ew doctrines of the law are more firmly established or more in harmony with accepted notions of public policy than that of liability of the principal without fault of his own." *American Soc'y of Mechanical Eng'rs, Inc.* v. *Hydrolevel Corp.*, 456 U.S. 556, 568 (1982) (quoting *Gleason* v. *Seaboard Air Line Ry.*, 278 U.S. 349 (1929)).[17]

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[17] In *Hydrolevel*, this Court upheld the liability of a nonprofit organization for punitive, treble damages, based on its agent's violation of antitrust law even though the agent acted only with apparent authority, because only a principal "can take systematic steps to make improper conduct on the part of all agents unlikely, and the possibility of civil liability will inevitably be a powerful incentive for [the principal] to take those steps." 456 U.S. at 572. The Court further noted that to require the principal to ratify an agent's action before liability attaches would discourage oversight of agents, because principals would have reason to remain ignorant of agents' conduct. *Id.* at 573. Cf. *Bonner* v. *Lewis*, 857 F.2d 559 (9th Cir. 1988) (applying respondeat superior liability under Section 504, noting, *inter alia*, that

The antidiscrimination mandate of Title IX is clear, and the contrast between it and the ambiguous congressional preference at issue in *Pennhurst* "could not be more stark." Cf. *School Bd. of Nassau Co.* v. *Arline*, 480 U.S. 273, 286 n.15 (1987) (distinguishing analogous antidiscrimination mandate in Section 504 of the Rehabilitation Act from statutory provision at issue in *Pennhurst*); *Irving Indep. Sch. Dist.* v. *Tatro*, 468 U.S. 883, 891 n.8 (1984) (distinguishing express statutory obligation to provide special education and related services as condition of receipt of funds, from "precatory terms" at issue in *Pennhurst*). Title IX fairly put respondent on notice that, as a condition of federal funding, it must abide by the nondiscrimination provision. Because a school district can act only through individuals, application of traditional, imputed employer liability for intentional wrongs of employees would be a reasonable expectation, particularly in the absence of any other liability standard articulated by Congress. Cf. *Bennett* v. *Kentucky Dep't of Educ.*, 470 U.S. 656, 665 (1985) (absence of bad faith does not absolve State from liability for funds spent contrary to terms of grant agreement under Title I of the Elementary and Secondary Act of 1965).

3. The court of appeals also declined to apply agency principles in Title IX cases because Title IX does not explicitly refer to an "agent" as Title VII does. But in *Vinson* the Court viewed the inclusion of the term "agent" in the Title VII definition of "employer" as a *limitation* on employer liability. For that reason, the Court held that

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a well-known justification is to induce employers to exercise special care in selection, instruction and supervision of employees, and that sanctions under Section 504 are aimed at fund recipients, not employees); *Sharrow* v. *Bailey*, 910 F. Supp. 187 (M.D. Penn. 1995) (Section 504 respondeat superior liability); *Glanz* v. *Vernick*, 756 F. Supp. 632, 636 (D. Mass. 1991) (same); *Patton* v. *Dumpson*, 498 F. Supp. 933 (S.D.N.Y. 1980) (same).

employers are not "always automatically liable for sexual harassment by their supervisors" under Title VII. 477 U.S. at 72. The absence of such a limiting provision in Title IX's broad prohibition of discrimination cannot therefore be interpreted to immunize Title IX recipients from liability for the acts of their employees. To the contrary, as we have explained, the text of Title IX supports liability under agency principles, consistent with the special considerations pertinent to the school setting and the teacher-student relationship.[18]

C. The Record Evidence Raises Issues Of Material Fact That Preclude Summary Judgment for Respondent

1. The record contains sufficient evidence (see pp. 1-5, *supra*) from which a factfinder could conclude that Waldrop was aided by his agency relationship with the school district in creating the hostile educational environment to which Gebser was subjected. The incidents of harassment occurred during a period in which Gebser was under Waldrop's direct supervision and control and he had authority to direct her studies and grade her work. A factfinder could conclude that Waldrop used his authority to inject sexually suggestive comments and innuendo during class, when students were essentially a captive audience. There is evidence that Waldrop used his professional authority over Gebser to obtain entry to her home, under the guise of providing her with materials for a

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[18] In *Rosa H.*, 106 F.3d at 658, the Fifth Circuit declined to defer to the Department's policy guidance on sexual harassment in cases where the sexual harassment had occurred before issuance of the guidance. The court thereby mistakenly treated the guidance as legislative in nature—i.e., as prescribing new norms of conduct, rather than as an interpretation of an unchanged statutory provision. Moreover, the Department of Education had long interpreted Title IX to impose liability on recipients for sexual harassment by teachers in a case such as this (see pp. 13-14, *supra*); and this Court had decided *Vinson* and *Franklin* before the sexually assaultive incidents in this case occurred.

school assignment, so that he could sexually assault her. There is also record evidence that throughout the summer Waldrop (a) used his authority as a teacher in the district to enable him to supervise Gebser on a weekly basis during which time he continued to sexually harass her; (b) was able to gain custody over her during those periods by picking her up from her parents' house, under the guise of his authority as her school teacher; (c) used his authority to direct her to a place other than his classroom where she was in a more vulnerable position; and (d) exploited his professional author-ity by using the purported study times to engage in sexual intercourse with Gebser. Waldrop continued to use his professional authority over Gebser the next fall to call her aside at the end of class to arrange to have sexual intercourse with her.

In sum, there is sufficient evidence from which to find that Waldrop was aided by his agency relationship with the school district and used his supervisory authority over Gebser to accomplish his sexual harassment of her. Furthermore, a factfinder could conclude that it was reasonable for Gebser to fear that adverse educational consequences would result if she resisted or complained. Gebser testified at her deposition that her primary reason for acquiescing in the sexual relationship was her fear that if she reported it, she would lose Waldrop as a teacher and mentor and thus forfeit the recognition and development of her academic abilities that he provided in his agency role. J.A. 62a-63a.

2. The record evidence (see pp. 4-7, *supra*) also raises an issue of material fact regarding whether respondent knew or should have known about the harassment of Gebser. There is evidence that respondent was on actual notice that other girls complained about inappropriate sexual comments by Waldrop. Complaints about his sexually suggestive comments were made to a high-level agent of respondent, the school principal. Evidence showed that

one girl was so leery of Waldrop that she refused to be alone in a classroom with him after school, and another girl complained about his sexually inappropriate remarks in a class in which Gebser was also a student. Yet respondent did not take steps to determine the truth of the allegations,[19] did not inform Waldrop that his comments were improper, and did not check whether any previous complaints had been made against Waldrop. Respondent did not interview other students or teachers who were present when the alleged conduct took place. Respondent's superintendent acknowledged that, in such circumstances where the alleged conduct occurred in front of other people, it would be inadequate simply to interview the teacher. Collier Dep. 45. Here, Gebser was identified as one of the other students in the class in front of whom Waldrop had made inappropriately sexual comments; thus, she was one of the witnesses who could have been questioned about the allegations. Furthermore, in light of one girl's reported fear of being alone in a classroom with Waldrop, a reasonable investigation would have included an interview with any students who had spent substantial time alone with him in a classroom, which would have led directly to Gebser.

There is also evidence that a school board member knew of previous complaints about Waldrop, although the present record does not manifest whether those complaints involved sexual conduct or comments. There is evidence that another teacher had actual notice of complaints about Waldrop's sexually inappropriate classroom behavior, but apparently did not report them further and did nothing to investigate. See note 3, *supra*. In addition,

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[19] See 62 Fed. Reg. at 12,050 n.69 ("Schools have an obligation to ensure that the educational environment is free of discrimination and cannot fulfill this obligation without determining if sexual harassment complaints have merit.").

the evidence indicates that respondent took no action to prevent or deter future harassment. At a minimum, an appropriate response would have involved "inform[ing] the school community that harassment will not be tolerated," and "making sure that the harassed students and their parents know how to report any subsequent problems and making follow-up inquiries to see if there have been any new incidents or any retaliation." 62 Fed. Reg. at 12,043, 12,050 n.77.

A factfinder could also conclude that respondent did not have an effective sexual harassment policy or grievance procedure. According to the deposition of respondent's Title IX coordinator, the district had no formal policy or procedure with respect to complaints of sex discrimination or sexual harassment. It is undisputed that no such information was ever communicated to respondent's students. And Gebser testified that she did not know what she was supposed to do when she became the victim of Waldrop's harassment as a fourteen-year-old high school freshman and that, had she been made aware that the school had effective procedures for dealing with such incidents, she would have reported the harassment. A factfinder could conclude that, in light of all these circumstances, respondent knew or should have known about the harassment of Gebser and failed to respond effectively.

CONCLUSION

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

Respectfully submitted.

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