

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: ALIDA STAR GEBSER and ALIDA JEAN
McCULLOUGH, Petitioners v. LAGO VISTA
INDEPENDENT SCHOOL DISTRICT
CASE NO: 96-1866
PLACE: Washington, D.C.
DATE: Wednesday, March 25, 1998
PAGES: 1-54

ALDERSON REPORTING COMPANY
1111 14TH STREET, N.W.
WASHINGTON, D.C. 20005-5650
202 289-2260

LIBRARY
APR 01 1998
Supreme Court U.S.

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE

'98 APR -1 P3:20

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X
3 ALIDA STAR GEBSER and ALIDA :
4 JEAN McCULLOUGH, :
5 Petitioners :
6 v. : No. 96-1866
7 LAGO VISTA INDEPENDENT SCHOOL :
8 DISTRICT :
9 - - - - -X

10 Washington, D.C.

11 Wednesday, March 25, 1998

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 11:10 a.m.

15 APPEARANCES:

16 TERRY L. WELDON, ESQ., Austin, Texas; on behalf of the
17 Petitioners.

18 BETH S. BRINKMANN, ESQ., Assistant to the Solicitor
19 General, Department of Justice, Washington, D.C.; on
20 behalf of the United States, as amicus curiae,
21 supporting the Petitioners.

22 WALLACE B. JEFFERSON, ESQ., San Antonio, Texas; on behalf
23 of the Respondent.

1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8
9
0
1
2
3
4
5

PAGE

On behalf of the Petitioners Gebaer and Alida Jean3

On behalf of the United States, as amicus curiae,
supporting the petitioners THE PETITIONERS 20

On behalf of the Respondent is the standard under 30

1 P R O C E E D I N G S

2 (11:10 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 96-1866, Alida Star Gebser and Alida Jean
5 McCullough v. the Lago Vista Independent School District.
6 Mr. Weldon.

7 ORAL ARGUMENT OF TERRY L. WELDON

8 ON BEHALF OF THE PETITIONERS

9 MR. WELDON: Mr. Chief Justice, may it please
10 the Court:

11 The issue in this case is the standard under
12 which a school district can be held liable for violation
13 of Title IX of the education amendments when one of its
14 teachers intentionally discriminates against one of his
15 students by engaging in sexual harassment of her.

16 Petitioner was clearly subjected to intentional
17 discrimination under, using the terminology of this
18 statute, under the educational programs and activities
19 provided by the respondent.

20 QUESTION: Was there some showing that it was
21 discriminatory? Because I read many of the statements in
22 the various briefs in the proceeding and there's virtually
23 no mention of discrimination. There's a lot of mention of
24 sexual harassment.

25 MR. WELDON: We're using in the briefs and in

1 the documents in the case that are in the joint appendix,
2 we're using the term, sexual harassment, as synonymous
3 with discrimination, and I believe the Franklin court --

4 QUESTION: Well, I think in Oncale we said it
5 wasn't.

6 MR. WELDON: Well --

7 QUESTION: That you have to show that the
8 treatment -- not only that the treatment was harassing,
9 but that it was -- you were treating one sex on a basis
10 that you would not have treated the other sex.

11 MR. WELDON: And I think that's amply shown by
12 the record in this case and I think that the Franklin case
13 simply stands for the proposition that when a teacher
14 intentionally harasses a student, that is discrimination
15 based on sex.

16 QUESTION: Well, the Franklin case said there's
17 a private cause of action.

18 MR. WELDON: Yes, sir.

19 QUESTION: But are you saying that it would be
20 enough if you showed there was just harassment of a
21 student by a teacher of a different sex?

22 MR. WELDON: If the harassment was based on sex,
23 yes.

24 QUESTION: Well, I think the statute says you
25 have to discriminate on the basis of sex. You have to --

1 the teacher has to treat students of one sex differently
2 from another.

3 MR. WELDON: And in this case that's exactly
4 what happened. The teacher singled out this young girl.

5 QUESTION: Because of her sex?

6 MR. WELDON: Because of her sex.

7 The Fifth Circuit standard from which we appeal
8 would require proof of actual knowledge not only in the
9 school district generally but in the superior of the
10 teacher who was guilty of the discrimination, or at least
11 in some person who had immediate power over that teacher
12 with respect to --

13 QUESTION: Well, you know, I think the tough
14 question we need to answer here is whether a suit under
15 Title IX, which this is, I think --

16 MR. WELDON: Yes, Your Honor.

17 QUESTION: -- should be governed by the
18 principles of Title VII suits, or whether there is some
19 different standard here under Title IX because essentially
20 it's a Federal financial grant program under Title IX, and
21 it's quite possible that agency principles don't apply to
22 Title IX at all. Are you going to address that question?

23 MR. WELDON: I'll do it right now.

24 The -- there are obvious similarities between
25 Title VII and Title IX in that they have as their object

1 the prevention or redress of sexual discrimination, but
2 there are important differences as well.

3 As we are argue in some detail in the brief,
4 those differences lead, I think, to the conclusion that
5 Title IX provides wider protection even though it does not
6 use the word agent in a definitional way as Title VII does
7 with respect to employers.

8 The reason for that is that the focus of the two
9 statutes is quite different. The focus in Title VII\
10 says -- is on the employer, and it tells what the employer
11 and his agents are prohibited from doing.

12 As the Court pointed out early on in the Cannon
13 case, the focus of Title IX is completely different. The
14 focus there is on the beneficiary, and the focus is on
15 discrimination without respect to who might be guilty of
16 the discrimination.

17 QUESTION: But, what about the supposed
18 constitutional distinction between them? I mean, the
19 argument is being made on the other side that under what
20 is in effect a spending power, piece of spending power
21 legislation, an obligation cannot be imposed upon the
22 Government that takes the money, which is not very clearly
23 spelled out.

24 And if the standard of liability for the
25 employer is not clearly spelled out, then the only

1 standard that can be applied is that which necessarily
2 would be applied if there's going to be liability at all,
3 i.e. in this case actual knowledge.

4 What's your response to that argument?

5 MR. WELDON: The respondent, with all respect, I
6 think overreads the Spending Clause and overreads the
7 cases that construe the Spending Clause. My belief is,
8 and I'm referring specifically to Pennhurst, my belief is
9 that the Spending Clause statute must fairly inform the
10 recipient of the funds what the conditions of the funding
11 are.

12 At the time in question in this case the school
13 district obviously knew the contents of Title IX. The
14 school district obviously knew the contents of regulations
15 which have the force of statute because the statute
16 authorizes the Department of Education and predecessor
17 agencies to enact these regulations.

18 QUESTION: Well, are you saying that there were
19 regulations at the time in question here that indicated
20 that the standard of employer liability for employee
21 conduct would be something different from actual
22 knowledge?

23 MR. WELDON: That would be my --

24 QUESTION: What did they say?

25 MR. WELDON: -- my disagreement with the

1 implication of your question, Justice Souter, and that is
2 that I do not believe that the Pennhurst case or any of
3 the Spending Clause cases require any extensive catalogue
4 of what facts or what fact patterns might trigger
5 liability, any more than the Spending Clause requires an
6 exhaustive listing of the potential remedies that might
7 follow if there is a violation.

8 QUESTION: Do you draw any distinction between
9 the significance of the Spending Clause for primary
10 liability -- i.e., the liability of the employee, or the
11 conduct --

12 MR. WELDON: Yes.

13 QUESTION: -- which could give rise to liability
14 and, on the other hand, the significance of the Spending
15 Clause argument for determinations of imputed or vicarious
16 liability? Are the implications different in those -- for
17 those two different questions?

18 MR. WELDON: I think -- to the extent that there
19 are differences, I think they get resolved the same way.
20 I think that the Spending Clause simply -- and I don't
21 mean to oversimplify, but simply requires that the
22 recipient of Federal funds have some idea, some clear idea
23 what the conditions of accepting the fund are, and here I
24 find no ambiguity in anything that the school district --

25 QUESTION: So -- and do you --

1 QUESTION: Of course, it's sort of swallowing
2 the camel and straining out the gnat if -- inasmuch as the
3 statute doesn't even show on its face that there's a
4 private cause of action at all.

5 MR. WELDON: Yes, sir.

6 QUESTION: If we really believe strongly in the
7 principle that Spending Clause impositions upon the States
8 must be clearly expressed, there wouldn't be a cause of
9 action here at all, right?

10 MR. WELDON: If I may, Justice Scalia, I'll
11 invoke your concurring opinion in the Franklin case and
12 simply observe that a couple of bridges have been crossed.

13 QUESTION: No, but I'm saying, it's -- we're
14 sort of switching the music if, having created the cause
15 of action in the face of its nonexpression, despite the
16 fact that this is a spending thing, we suddenly -- we get
17 very picky, I suppose, about what the content of that
18 cause of action is.

19 MR. WELDON: Well, I --

20 QUESTION: Of course, Cannon was decided long
21 before we adopted this rule about Spending Clause
22 certainties.

23 MR. WELDON: I understand that, but I'd like to
24 point out, as you pointed out in that same concurring
25 opinion, that Congress then took subsequent action --

1 QUESTION: Right.

2 MR. WELDON: -- with the enactment of the civil
3 rights bill that extended Title IX to the States.

4 QUESTION: Quite so.

5 MR. WELDON: And I believe that it has to be
6 taken in the context of the Cannon case.

7 QUESTION: Oh, I'm not suggesting going back on
8 it, but I'm suggesting that in our -- I'm trying to help
9 you. Never mind.

10 (Laughter.)

11 QUESTION: It seems to me an argument in your
12 favor that we've already taken the step, and Congress has
13 accepted it, of creating this cause of action in the teeth
14 of its nonappearance in the statute.

15 MR. WELDON: And then, of course, the second
16 step was to recognize in Franklin that despite the silence
17 of the statute, which obviously, being implied, would be
18 silent, that the presumption is that all reasonable
19 remedies or usual remedies apply.

20 QUESTION: May I ask, to the extent to which
21 Title VII would be the model, do you accept that the
22 statutory caps that are in Title VII would apply under
23 Title IX?

24 MR. WELDON: Your Honor, I haven't read the
25 statute closely, but I think the statute is specific with

1 respect to Title VII. I think it would be entirely
2 appropriate for Congress to consider whether enacting a
3 statute imposing caps on Title IX precisely the way they
4 have done for Title VII, but I do think --

5 QUESTION: Yes, but it's not there now, and yet
6 this Title IX tells us very little, so we look -- we fill
7 in the gaps, I think you suggest, by looking to the law
8 built up under Title VII, so one question was, but you
9 wouldn't take the caps from the statute? I guess
10 that's -- your answer is no, not unless Congress imposed
11 them.

12 MR. WELDON: It's obviously a policy
13 consideration, but with all deference I think it's
14 probably -- my view is that it's a legislative policy
15 consideration and not a judicial one.

16 QUESTION: But the judicial -- we -- we have
17 crafted this claim, and so we have to give it some
18 content, too, because where else are we going to look?
19 Congress hasn't done it.

20 MR. WELDON: And again, your question is
21 specifically with regard to caps --

22 QUESTION: So I -- so I -- well, one thing to do
23 is to say, we'll do this the same way as Title VII, so
24 we'll incorporate the Title VII case law and the Title VII
25 statutory revisions, but you say no.

1 MR. WELDON: I think the Title VII cases are an
2 appropriate analogue. I think the Court reflected at
3 least that instinct, I wouldn't call it a holding, by it's
4 reference to the Meritor in the midst of the Franklin
5 case, but I think Title VII is just an analogue and not a
6 direct road map, and I think the reason for that is
7 principally because, first of all -- two things.

8 The context of Title IX is significantly
9 different than the context of Title VII. Title IX
10 obviously applies to education from kindergarten or
11 preschool all the way up to post graduate, and the other
12 reason is the text of the statutes are so completely
13 different.

14 QUESTION: Do we -- do you think we could adopt
15 one standard of liability for the private right of action
16 and permit HHS to use a different standard for the cutting
17 off of funds under Title IX, or do we have to go in
18 lockstep with -- I mean, assuming we're making it up, as
19 Justice Ginsburg suggests, do we have to make it up in
20 lockstep with HHS, or could -- you know -- do you
21 understand what I'm asking?

22 MR. WELDON: If you're --

23 QUESTION: Suppose -- if you do X --

24 MR. WELDON: Yes.

25 QUESTION: -- you are liable for the cutting off

1 of Federal funds under the regulations issued by the
2 Secretary, which the Secretary has authority to issue.

3 MR. WELDON: That's right.

4 QUESTION: And the authority has -- the
5 Secretary has no authority to issue regulations about
6 private causes of action, which we've created. Does our
7 private cause of action have to make the basis of
8 liability the same thing that the Secretary says is the
9 basis of cutting off Federal funds?

10 MR. WELDON: I do not think so. Frankly, that's
11 not a question that's concerned me.

12 QUESTION: All right --

13 MR. WELDON: It occurred to me in my
14 preparation, but I do not think so. I don't think so
15 because I think what would govern the case -- the Court in
16 these decisions is the text of Title IX and the text of
17 the actual regulations, the Code of Federal Regulations
18 that were adopted implementing Title IX as the Department
19 was authorized to do.

20 QUESTION: So we have to follow those
21 regulations, you say. If it's a violation of the regs
22 it's the basis for liability in the private cause of
23 action.

24 MR. WELDON: I just want to point out -- yes,
25 but I want to point out that at least in my mind there's a

1 considerable distinction between the regulations in the
2 Code of Federal Regulations, which are fairly minimal, as
3 compared to the guidelines which are merely intended, I
4 believe, and do not have the same statutory force as the
5 regulations do.

6 The guidelines are a means of educating school
7 districts and helping them implement Title IX, but they do
8 not have the force of law with -- in the same way as these
9 regulations.

10 QUESTION: Are the school districts bound by the
11 guidelines to the extent that if they don't follow them
12 they can have their funds cut off? I thought they could.

13 MR. WELDON: The Government is going to argue
14 that extensively, and I don't want to anticipate the
15 Government's argument too much, and I certainly wouldn't
16 want to disagree with them, but my own personal answer to
17 that would be not necessarily.

18 QUESTION: Well, you indicated that because of
19 this -- the Spending Clause nature of this act that the
20 municipality or the governmental entity must be aware of
21 the conditions under which its funds might be cut off.

22 MR. WELDON: Yes, sir.

23 QUESTION: It seems to me, if that's so, that it
24 is very difficult to say that they accepted the funds
25 knowing that they would be cut off when there was some act

1 occurring of which they had no knowledge.

2 MR. WELDON: And the principal reason in this
3 case that they did not have any knowledge is that they
4 failed to follow the regulations, which have the force of
5 law, and the regulations required not only the adoption of
6 an antidiscrimination policy, which they have summary
7 judgment establishing that they did, but a complaint
8 procedure and publicizing that complaint procedure to the
9 student body, and that is our principal and primary
10 argument, that by failing to follow that regulation they
11 created for themselves what the Fifth Circuit has now
12 recognized as an absolute defense.

13 QUESTION: Well, somewhat as in the last case,
14 that this egregious criminal, outrageous conduct,
15 everyone, including the student, would know that the board
16 wouldn't tolerate for a second.

17 MR. WELDON: That's true, but the testimony in
18 the case was -- from the student, she did not know -- when
19 the approaches by the teacher were merely verbal, in the
20 form of insinuations and suggestions -- he was beginning
21 his concentrated campaign to seduce her. She did not
22 know -- she did not -- I'm sorry. She did not know to
23 whom she could turn. She did not know that there were
24 procedures that -- she did not know that there was a
25 complaint procedure, and she would have --

1 QUESTION: But she's not -- that's not -- the
2 gravamen of her complaint were not the initial overtures.

3 MR. WELDON: But if she had known that there was
4 a complaint procedure -- I mean, that was at that point, I
5 would suggest to you, a mild form of sexual discrimination
6 in the form of harassment because of the suggestive nature
7 of the remarks.

8 If she had known about it she would have
9 complained, she said, and if she had complained and
10 effective action had been taken at that point, then her
11 damages would be much different and basically we would not
12 be in court at all, much less here.

13 QUESTION: She's -- how old was she at this
14 time?

15 MR. WELDON: She was 13 when she met the
16 teacher. He was -- she was approximately 14 when he began
17 making these -- not approximately. She was 14 when he
18 began making these suggestive remarks, and the
19 relationship became physical before she became 15 and
20 ended when she was 15.

21 QUESTION: And she didn't know that there were
22 people in positions of authority over the teacher to whom
23 she could complain, like a school principal? Did she know
24 that the school principal --

25 MR. WELDON: Of course she knew that.

1 QUESTION: -- had authority over the teacher?

2 MR. WELDON: Of course she knew that, but she
3 didn't know those people personally.

4 QUESTION: There were other girls who were also
5 approached by this man and who did, indeed, take that
6 course, didn't they?

7 MR. WELDON: And that is often going to be the
8 case. There are often going to be parents who had the
9 initiative to go and --

10 QUESTION: Well, she didn't tell her parents.

11 MR. WELDON: I beg your pardon?

12 QUESTION: That's -- in the one case the
13 children told their parents what had been said by the
14 teacher. The -- I take it that this girl's parents did
15 not go what was going on --

16 MR. WELDON: That is correct.

17 QUESTION: -- until they were caught in the act,
18 so -- it's not so clear to me that the best policy in the
19 world would have been used by this young woman, but
20 suppose there -- one of the things you complain about is
21 that there was kind of this nebulous policy. You didn't
22 know who was the right person to complain to.

23 Suppose there was just the right kind of policy,
24 the kind that NEA describes in its brief, and yet the same
25 thing went on, would the school district be liable if it

1 made its best efforts to have as clear a policy and as
2 clear an identification of the person in charge of
3 implementation? Would that have made any difference?

4 MR. WELDON: Yes. It makes a big difference.

5 But I suggest to you -- and here's one of the
6 reasons that it -- that the text, or rather the context of
7 Title IX, the schools dealing with students of all ages,
8 is important -- an important consideration.

9 It would make a big difference the older and
10 more sophisticated the student was toward imposing on her
11 a duty to utilize the complaint procedures, but if you're
12 talking about a 7 or 8-year-old, as, for example, was
13 considered by the Fifth Circuit in the case called
14 Canutillo, then you have obviously completely different
15 considerations.

16 QUESTION: Well, let's take this case, and she's
17 14 and 15, and they do have -- they've done the best job
18 that they can with putting a policy in place, telling the
19 students about it, telling the teachers about it,
20 identifying the right official to call.

21 MR. WELDON: And may I also assume in my answer
22 to you that there's no thing so flagrant about the
23 behavior of the teacher and student that a reasonable
24 person would become suspicious.

25 QUESTION: No, I'm taking this case, and the

1 only thing that I'm changing -- see --

2 MR. WELDON: Yes.

3 QUESTION: -- one of the things you said, that
4 the policy was very fuzzy, nobody knew who to call, or
5 suppose we make it the best policy. I wanted to know, as
6 I asked in the last case, does it make any difference?

7 MR. WELDON: It does make a difference, but
8 because we are talking about 14's and 15-year-olds, I
9 think it makes less of a difference than it might for an
10 adult in the workplace under Title VII.

11 QUESTION: Well, what's the theory of the
12 difference? The theory of the difference is, the employer
13 has done all that the employer could do, and therefore it
14 would be unfair to impose liability on any theory?

15 MR. WELDON: Well, that's why it's a harder
16 case, but I would like to come back to say --

17 QUESTION: No, but you said it would make a
18 difference, and I want to know what the theory of the
19 difference is.

20 MR. WELDON: The theory of the difference is
21 that you cannot expect even 14, 15-year-old girls to have
22 the same presence of mind, the same degree of initiative,
23 the same --

24 QUESTION: No, I understand that, but from the
25 employer's standpoint, once the employer has promulgated

1 the perfect policy in the world --

2 MR. WELDON: Yes.

3 QUESTION: -- you say it makes a difference,
4 and is it because the employer has done all the employer
5 can do, or is there some other theory?

6 MR. WELDON: The other theory, and this would
7 depend on, again, the factual context. The other theory
8 would depend on whether the sexual discrimination is at
9 the hands of a teacher who is exploiting his educational
10 control and authority over the student.

11 It would not lead to liability in a situation
12 involving pure harassment, it would not lead to
13 liability --

14 QUESTION: I think you've answered the question,
15 Mr. Weldon. Thank you.

16 MR. WELDON: Thank you.

17 QUESTION: We'll hear now from you,
18 Ms. Brinkmann.

19 ORAL ARGUMENT OF BETH S. BRINKMANN

20 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

21 SUPPORTING THE PETITIONERS

22 MS. BRINKMANN: Mr. Chief Justice, and may it
23 please the Court:

24 I think it's important to focus on the court of
25 appeals' erroneous restriction in this case of the Court's

1 customary remedial powers that this Court recognized in
2 Franklin to award all appropriate remedies in a case of
3 sexual harassment discrimination under Title IX.

4 The court of appeals here held that damage
5 awards would be appropriate only if a higher-ranking
6 employee knew of the harassment and failed to stop it.
7 The absence of explicit notice by a high-ranking official
8 should not automatically insulate the recipient from
9 liability. This is particularly true where, as here, the
10 district did not have a policy to prohibit discrimination
11 or a procedure for effective reporting of that.

12 QUESTION: Why shouldn't we require that the
13 district, in order to be liable, have a policy that
14 permits discrimination, that affirmatively permits it?

15 The way the statute reads, it says no one shall
16 be excluded from participation and be denied the benefits
17 of or be subject to discrimination under any educational
18 program or activity, not in connection with it, under, and
19 I thought it was mainly directed at educational programs
20 that allow sports for boys, no sports for girls, things of
21 that sort. That is discrimination under the program.

22 MS. BRINKMANN: Well, Your Honor, the --

23 QUESTION: In other words, why shouldn't we
24 apply the same kind of a test we apply in 1983 cases, that
25 there has to be a policy of the school as far as private

1 liability is concerned, a policy of discriminating?

2 MS. BRINKMANN: Your Honor, the differences
3 between Title IX and section 1983 demonstrate that that
4 would not be an appropriate application. First and
5 foremost, the reasons underlying the 1983 standard,
6 according to this Court's opinions, are rooted in the text
7 of section 1983 and its history, and the text of 1983 says
8 any person who causes another to be -- have their rights
9 violated shall be subject to suit.

10 This text of Title IX is very different. It is
11 a condition on receipt of Federal funds. A recipient
12 receives those funds and knows that under that program and
13 activity, under its programs and activities there cannot
14 be a denial of admission, exclusion from the benefits of
15 vacation, or discrimination under that program based on
16 sex.

17 QUESTION: Right, and I think it's reasonable to
18 read that to mean, you know, in accordance with the
19 policies of that program.

20 MS. BRINKMANN: Well --

21 QUESTION: You're being discriminated against
22 under the program if the program, by policy, does not
23 treat you equally.

24 MS. BRINKMANN: But Your Honor, a recipient --
25 this school district, just like any other entity that --

1 can only act through human agents, and any discrimination
2 under its program activities is going to be carried out by
3 its human agents, and there is no reason to deviate.

4 QUESTION: The same argument was made in 1983
5 and somehow we've stumbled through.

6 MS. BRINKMANN: But Your Honor, in addition to
7 the text of section 1983, which is remarkably different
8 from Title IX, there is also the history, and what led
9 this Court --

10 QUESTION: I'm unsympathetic to your arguments
11 based on the text of Title IX inasmuch as Title IX doesn't
12 even create a cause of action at all.

13 MS. BRINKMANN: Well, Your Honor, as my
14 colleague mentioned we've crossed that bridge and, in
15 fact, acts by Congress since then have reinforced the
16 breadth of Title IX and, as you -- your concurrence in
17 Franklin pointed out, Congress enacted a statute to
18 abrogate Eleventh Amendment immunity, and there
19 specifically refers to legal remedies.

20 QUESTION: And I accept all that, but we're not
21 in an area where we're bound very tightly to the text.

22 MS. BRINKMANN: Your Honor, I think the other --

23 QUESTION: May I just ask you this question, and
24 of course, in Cannon we held that Congress implicitly did
25 intend a remedy. We didn't say a word about creating any

1 elements of causes of action or substantive liability.

2 That isn't made up. That's all what we thought
3 Congress meant, and is there any difference between the
4 standard that would be applied for revocation of funds
5 under the congressional standard as implemented by
6 regulations and the standard that should be applied here?

7 MS. BRINKMANN: No, Your Honor, we don't believe
8 so. What the Department of Education --

9 QUESTION: So you're arguing that on these facts
10 the funds could be revoked for this school district?

11 MS. BRINKMANN: Yes, but I have to qualify that
12 there is a statutory requirement placed on the Department
13 of Education to make preliminary steps of voluntary
14 conciliation because of the extreme nature of cutting off
15 funds, and what the Court has recognized is that a private
16 damage remedy stops short of that and also serves another
17 function of Title IX, and that's its remedial purpose.

18 We believe that when there's a violation of
19 Title IX, as this Court said in Franklin, the presumption
20 is that all appropriate remedies apply and there's no
21 basis for restricting courts' authority to do that.

22 And I just want to address the concern about the
23 amount of damages that Justice Ginsburg brought up with
24 that cap under Title VII.

25 First of all, I think it's important to realize

1 that there are other damages remedies that can be obtained
2 against school districts -- for example, Title VII -- and
3 there is now that cap, and there could certainly be a
4 guidance for courts to look to, but along with the
5 inherent power of courts to order remedies is often the
6 inherent authority to remit damages.

7 We also would point out --

8 QUESTION: Well, Ms. Brinkmann, I'm not sure we
9 get to that question at all. This is a spending, funding
10 program of the Federal Government, and we have indicated
11 that we think when States or local agencies accept money
12 under a spending program it has to be clear what the
13 conditions are, and what the liabilities would be in
14 accepting that money, and we're struggling in the
15 preceding case with trying to figure out what the
16 liabilities are under Title VII.

17 MS. BRINKMANN: Your Honor --

18 QUESTION: It certainly isn't clear under Title
19 VII. How could it be possibly clear under Title IX to a
20 school district what the liability might be? I think you
21 have a first step to take.

22 MS. BRINKMANN: Your Honor, the concern
23 underlying the Court's opinions about Spending Clause
24 statutes is notice to a recipient. The language of Title
25 IX is quite clear that discrimination that's based on sex

1 is prohibited, and in Franklin --

2 QUESTION: Well, in programs and activities of
3 the school. I think it speaks in terms of very broad
4 concerns about schools that might not admit both sexes, or
5 might not enable them to have physical education programs,
6 or that discriminate in never hiring a teacher --

7 MS. BRINKMANN: Your Honor, we would --

8 QUESTION: -- who's a female, or something like
9 that.

10 MS. BRINKMANN: We urge, though, that actually
11 the focus on the text of Title IX is broader than Title
12 VII's antidiscrimination prohibition.

13 Those concerns about admission policies and
14 denying educational benefits, those are referenced in
15 other clauses of Title IX in addition to prohibiting a
16 person from being excluded from participation in, which
17 would be an admission policy that the district level at
18 the policy level would clearly be carrying out, or denying
19 someone the benefits of an educational program.

20 There's also the prohibition about -- against
21 being subjected to discrimination under a program or
22 activity, and again, this is an entity that only can carry
23 out its programs and activities through its agents, and
24 there's no justification to deviate from the normal
25 background --

1 QUESTION: Yes, well, but --

2 MS. BRINKMANN: -- principles for finding --

3 QUESTION: That's true, as you've indicated with
4 any corporate or fictional entity, but in this case the
5 whole thrust of Title IX is that there must be a policy or
6 program, and now you're saying that the school can be held
7 liable for something that it knew nothing about.

8 It seems to me that this is almost an a fortiori
9 case, as suggested by Justice Scalia's line of
10 questioning, for a Monell type of requirement that the
11 city or the school district has to have a policy that
12 contradicts this program, and in this case it didn't.

13 MS. BRINKMANN: Well, Your Honor, the other
14 reason, the only reason that the courts have given, other
15 than the text of section 219(2)(d) for imposing that
16 policy, was the history of the rejection of the Sherman
17 amendment to the 1871 act, and that was -- you're looking
18 at congressional intent and what Congress intended.

19 At the time that Title IX was enacted it could
20 not possibly have been relying on the Monell standard
21 because Monell was not decided. In 1972, when Title IX
22 was enacted, Monroe v. Pape was on the books, so there was
23 no intent of Congress --

24 QUESTION: But the point is, how do we make the
25 implied right of action that we've invented parallel,

1 consistent with the terms of the statute that's being
2 enforced --

3 MS. BRINKMANN: I think it's what the Court said
4 in Franklin --

5 QUESTION: -- and it seems to me this is an
6 easier case for excusing -- for having a Monell-type
7 liability than 1983.

8 MS. BRINKMANN: I think the task of this Court
9 is to define congressional intent to the best it can, and
10 in Franklin, recognizing the implied cause of action, it
11 looked to the background principles against which Congress
12 enacted Title IX, and that was the presumption of all
13 appropriate remedies.

14 Congress could certainly take it upon
15 themselves, as they did in other antidiscrimination
16 statutes, to set a cap. That would be a policy matter.

17 Would it depend, for example, on the number of
18 employees, as the cap under Title VII does, or the amount
19 of funds that the school receives, or the amount of -- the
20 size of the student population? Those are matters for
21 Congress, and here, relying on Cannon and Franklin, the
22 Court has recognized that that presumption of all
23 appropriate remedies including damages, should apply under
24 Title IX.

25 QUESTION: But what about the issue of what kind

1 of conduct on the part of the supervisory employer here,
2 the teacher, holds the school district, and there I think
3 you have a big difference between on the beach, open,
4 everybody could see it, and here, where nobody knew.

5 MS. BRINKMANN: Well, Your Honor, it's certainly
6 not the actual knowledge standard that the court of
7 appeals imposed. At least it would be a knew-or-should-
8 have-known standard, and that's what the policy is about.

9 QUESTION: But how could a school district ever
10 know about something like this?

11 MS. BRINKMANN: In many ways, Your Honor. They
12 are educators. Part of the problem is, to let students
13 know about -- other teachers knew about this that could
14 have reported it if there had been a procedure in place,
15 other students had heard about comments, there was the
16 inadequate --

17 QUESTION: So if they had a great policy, then
18 there would be no liability. Is that what --

19 MS. BRINKMANN: That could be a very significant
20 factor, and it may undermine theories of knew-or-should-
21 have-known. Certainly liability also may be a defense to
22 an aided-by theory, depending if the plaintiff had any
23 other evidence that she brought forth.

24 QUESTION: Thank you, Ms. Brinkmann.

25 MS. BRINKMANN: Thank you, Your Honor.

1 QUESTION: Mr. Jefferson, we'll hear from you.

2 ORAL ARGUMENT OF WALLACE B. JEFFERSON

3 ON BEHALF OF THE RESPONDENT

4 MR. JEFFERSON: Mr. Chief Justice, and may it
5 please the Court:

6 Frank Waldrop's acts were criminal in the State
7 of Texas, forbidden by standards issued by the Texas
8 Education Agency, repugnant to policies actually adopted
9 by the Lago Vista Independent School District, and morally
10 repulsive to everyone in this courtroom. His conduct very
11 properly landed him in jail.

12 Prior to his apprehension, Waldrop had managed
13 to keep his sins concealed. No one at the district was
14 aware of these acts. No one in the school administration
15 knew about it. No teachers knew about it. There were no
16 rumors among the teachers, or the faculty, or the staff.
17 There was no gossip.

18 All of the conduct we're talking about here
19 occurred off-campus. He did not physically touch her in
20 the school, not once. He did not use school facilities to
21 accomplish his mission. He did not engage in sexually
22 explicit conversation on the campus. No one but he and
23 his victim knew of the child abuse until he was caught in
24 the act, in public, by a police officer.

25 QUESTION: Now, he used his position as a

1 teacher, and it was a course in which she was one of the
2 only or very few students, and some of this -- the initial
3 encounters, of course, occurred on the campus.

4 MR. JEFFERSON: Well, certainly their first
5 introduction was in the context of the school setting, but
6 that's all you have. That's all you have. I mean, the
7 teaching role -- it's sort of like the first case, and I
8 agree with the city in the first case.

9 What the teacher did here was criminal. There
10 is no way in the world that anyone could assume that he
11 was acting within, any way within the scope of his
12 authority, or that the district said, this is acceptable.

13 Now, Lago Vista's reaction when it was first
14 notified of this relationship was swift and severe. The
15 superintendent personally marched into the jail and
16 delivered papers to the inmate, suspending him from any
17 contact with the school.

18 As soon as the lawyers told him due process was
19 satisfied, the superintendent then marched into the
20 psychiatric hospital and gave him his termination papers.
21 Waldrop would not set foot in the Lago Vista school again,
22 and well before it became an issue in this case, back in
23 April of 1989, the district had adopted a policy
24 forbidding sexual harassment by employees. That's at 420
25 of the record.

1 And within months of this Court's watershed
2 opinion in Franklin, the school district adopted a policy
3 stating expressly that district employees shall not engage
4 in sexual harassment of students. That's at 417, and that
5 was in 1992.

6 Now, the district's policy of nondiscrimination,
7 general policy of nondiscrimination like the statute
8 provides was disseminated to the students and to the
9 parents in the student-teacher handbook. That's in the
10 record at page 389.

11 Now, we understand why, in the briefing, and
12 here this morning in oral argument, the petitioner would
13 like to demonize the school district, but we are confident
14 that when you look at the record it will not support that
15 attempt.

16 The real question is whether Title IX requires
17 the district to answer, in damages, for criminal conduct
18 of an employee when the district lacks notice, actual or
19 constructive, of the crime, and whether the district had
20 any hint that its acceptance of a relatively nominal
21 amount of Federal funds would potentially expose it to
22 limitless actual and punitive damages, potentially, and we
23 say no for several reasons.

24 QUESTION: Do you think the Government could
25 have withheld funds in the future for the --

1 MR. JEFFERSON: Yes.

2 QUESTION: You think they could have?

3 MR. JEFFERSON: Yes.

4 QUESTION: Therefore you are acknowledging the
5 school district violated the statute and the regulation?

6 MR. JEFFERSON: I don't think they could
7 legitimately, but under their argument -- under their
8 argument this is a violation of Title IX.

9 QUESTION: Oh, no, I mean under your view of the
10 law.

11 MR. JEFFERSON: Oh, no. No. No, because it's
12 not a violation of Title IX to begin with.

13 QUESTION: Do you think there's a difference in
14 standards between an attempt by the Government to
15 withhold -- revoke your funding on the one hand and a
16 private damage action on the other?

17 MR. JEFFERSON: No. I think the same standard's
18 going to have to apply to both. Now --

19 QUESTION: Do you know practically how often the
20 cut-off of funding has been used as distinguished from
21 lesser remedies?

22 MR. JEFFERSON: Justice Ginsburg, there is no
23 evidence of that in the record, and I do not know
24 personally what those statistics would hold.

25 QUESTION: Because that's a rather severe

1 sanction.

2 MR. JEFFERSON: Yes, it is.

3 QUESTION: And defeats the whole purpose of the
4 funds.

5 MR. JEFFERSON: Indeed it does, and that leads
6 to another point of the Spending Clause legislation.

7 Now, if -- if, because some criminal,
8 unbeknownst to anyone in the district -- I mean, no
9 rumors, no circulation of gossip or anything like that, is
10 going to be cut off from Federal funds and subject to
11 potentially unlimited damages -- I mean, the verdicts in
12 cases like these are -- and it's -- there's no reason -- I
13 mean, we know why they are. They're huge. They're in the
14 millions of dollars.

15 Now, you take a school district like Lago Vista
16 that had in the year that these activities were occurring
17 about 646 students in the whole district, that's
18 accepting, what, less than -- around \$100,000 in Federal
19 funds, whose whole budget is only about \$1.6 million --

20 QUESTION: Lago Vista is in Travis County, near
21 Austin?

22 MR. JEFFERSON: Yes, that's correct, Your Honor.

23 Why would a district even accept the money, and
24 that's -- the purpose of our bringing up the Spending
25 Clause is, we need to know. The districts around the

1 country need to know that in exchange for receiving a
2 nominal amount of Federal funds -- a judgment could wipe
3 out the whole district.

4 QUESTION: How much in Federal funds did you
5 receive?

6 MR. JEFFERSON: It was about, approximately
7 120,000, \$120,000 back in the 1992-'93 school year, and
8 that's in that -- the -- you can find it in the Texas
9 Education Agency's snap-book, snapshot that's in the
10 National Association's brief, and --

11 QUESTION: One --

12 MR. JEFFERSON: -- in the public record in that
13 year, in 1992-'93, the entire budget was only about \$1.6
14 million.

15 QUESTION: One answer possibly to the Spending
16 Clause argument is that until there was some kind of an
17 adjudication you didn't know that there would necessarily
18 be a private cause of action. I think everybody accepts
19 that. Until there was some kind of an adjudication the
20 district wouldn't necessarily know what kind of primary
21 liability would necessarily give rise to liability, what
22 kind of primary action would give rise to liability.

23 But any school district is certainly deemed to
24 know that because it acts through its employees, its
25 liability, if there's going to be liability, is going to

1 be dependent on some sort of theories of imputed
2 responsibility, and you did know that, and you didn't know
3 a court adjudication to tell you that you at least ran the
4 risk of liability imputed on the usual principles of
5 agency.

6 MR. JEFFERSON: I can agree with --

7 QUESTION: So what's the answer to that?

8 MR. JEFFERSON: Well, I can agree with that. I
9 mean, everyone knows that in districts, as with
10 employment, you know, the corporation acts through its
11 employees, the district acts through its employees, and
12 there's no question about that, so that yes, we did know
13 that if there was going to be liability it would have to
14 be routed somehow through the action of its employees.

15 Franklin is --

16 QUESTION: Well, is that an adequate answer,
17 then, to your Spending Clause argument?

18 MR. JEFFERSON: No.

19 QUESTION: In other words, you -- we're not at
20 the point of asking whether there's going to be a cause of
21 action. We're not at the point of asking what kind of
22 primary conduct on the part of an employee would give rise
23 to liability.

24 We're simply at the point of saying, how do you
25 get from the employee's action to the employer, and you

1 say yes, we all understand that the agency relationship
2 and the rules that define it will govern that liability.

3 MR. JEFFERSON: Well, if the rules that define
4 it govern that liability, there is no liability here in an
5 agency relationship context, because what was done here
6 was a criminal act that was completely away --

7 QUESTION: Okay, but that's not a Spending
8 Clause argument. That's a --

9 MR. JEFFERSON: Oh, it is.

10 QUESTION: That's an agency law argument.

11 MR. JEFFERSON: I believe it is a Spending
12 Clause argument.

13 QUESTION: I don't understand.

14 MR. JEFFERSON: Okay. I believe it's a Spending
15 Clause for this reason, and let's compare this case to
16 Franklin. You know, Franklin is a case where the
17 district -- where the teachers and the staff and the
18 administration knew that this conduct was going on, knew
19 that sexual harassment was taking place.

20 This Court, I believe, held in Franklin that
21 that is intentional conduct of the district itself. Yes,
22 they're acting through employees. I mean, they've got to
23 act through employees, but when it became known to the
24 district itself, no action was taken. In fact, not only
25 was no action taken to prevent it, action was taken to

1 silence the victim in that case.

2 Well, that's a case of intentional conduct, and
3 in Guardians you said intentional conduct can make the
4 district liable, even if it's Spending Clause legislation,
5 and so that's the difference.

6 Here, there is no intentional conduct
7 whatsoever. There is no notice whatsoever to the
8 district, and what the employee was doing, what this
9 teacher was doing was a crime, was a -- it should have
10 landed him in jail, and it did land him in jail.

11 QUESTION: This saves your case very well, but
12 what you're saying with that test is that in the next
13 case, when one coteacher knew about it, that's enough.

14 MR. JEFFERSON: No, because I think that the --
15 the -- a coteacher wouldn't satisfy the test of actual
16 knowledge to the district.

17 QUESTION: Why? The district has to act through
18 its agents, you said.

19 MR. JEFFERSON: Well --

20 QUESTION: And the coteacher's an agent.

21 MR. JEFFERSON: It does, but in order to hold
22 the district liable you've got to show that the
23 district -- in Franklin, the principal knew. It wasn't
24 just the teachers, although they did, and they were trying
25 to get this information to the principal.

1 The principal was taking it in and then
2 conducting a fraudulent investigation, didn't even look
3 into it, so there you have someone at the level that the
4 Fifth Circuit said would be responsible.

5 QUESTION: Do you concede that we use agency
6 principles, as we did in the last case, to determine when
7 the district is liable under Title IX?

8 MR. JEFFERSON: I don't have problems with the
9 Court using some form of agency principles. My problem is
10 that the principles that they're relying on, 219(2)(d) and
11 this agency -- and this aided in accomplishing, they just
12 don't apply here. They have no application here
13 whatsoever.

14 QUESTION: When you say here, you mean to your
15 case --

16 MR. JEFFERSON: To our case.

17 QUESTION: -- not to Title IX funding.

18 MR. JEFFERSON: To our case is what I'm saying,
19 that's correct.

20 QUESTION: But you would have no -- you would
21 have no problem in our applying the agency Restatement
22 principles --

23 MR. JEFFERSON: When I say --

24 QUESTION: -- to determine the district's
25 liability and to determine when they knew, including

1 constructive knowledge?

2 MR. JEFFERSON: Well, there is no such thing as
3 constructive knowledge under Title IX to hold the district
4 liable. That's our position, and so agency wouldn't
5 work --

6 QUESTION: Suppose I thought they were under
7 agency law? They I wouldn't be applying agency principles
8 to Title IX.

9 MR. JEFFERSON: Then you'd be applying simply
10 strict liability, and we say for sure, we say that this
11 Court should declare that that's not the test. Strict
12 liability is not the test and could not be the test, and
13 the reason is, if you apply strict liability in a case
14 like this, or in cases like these, not just ours, you're
15 going to run contrary to the whole purpose of Title IX.

16 We've all agreed this morning, at least in the
17 briefs on their side and our side, that this is Spending
18 Clause legislation, which means we're talking about
19 voluntary acceptance of Federal funds. The district can
20 either accept it or not.

21 If the district knows that as a result of
22 accepting a few dollars in Federal funds its whole budget
23 could go to one victim, and not to students at large in
24 the district, well then the district's not going to accept
25 those funds --

1 QUESTION: But suppose --

2 QUESTION: But you do know that now.

3 MR. JEFFERSON: -- and then Title IX's role in
4 the educational process will be gutted.

5 QUESTION: Don't you have to say that you do
6 know that now, after Franklin, if your principal acted the
7 way that the principal in Franklin did.

8 MR. JEFFERSON: If there's intentional conduct
9 by the district, yes.

10 QUESTION: So there is a risk that you might
11 have liability greater than the amount of money
12 you receive?

13 MR. JEFFERSON: Yes, but the district can say to
14 itself, you know, we're not going to intentionally
15 sexually abuse a minor student, and we know that. That's
16 not going to happen. And so yes, they can take the funds
17 with Franklin in mind.

18 But what they can't do, and what they have no
19 notice of, is if they take their funds, some janitor who
20 does this is going to make the whole district liable, or
21 some employee that the district has no notice of.

22 QUESTION: Yes, but the only difference -- the
23 difference basically is the difference in the amount of
24 risk. The chances of having a Franklin-type principal are
25 low. The chances of having a janitor doing something

1 wrong are much higher. I mean, that's the distinction,
2 isn't there?

3 We're will -- you're in effect saying, look,
4 we're willing to run the risk of a Franklin situation and
5 still take the money.

6 MR. JEFFERSON: It's not willing --

7 QUESTION: We're not going to be willing to run
8 the risk of the janitor situation.

9 MR. JEFFERSON: I -- we -- the district's, and
10 this district in particular is not willing to take the
11 risk at all and is going to do everything it can to
12 prevent that sort of thing from happening, including
13 background checks and making sure that people it hires are
14 great educators, so it's not a matter of, well, we're
15 going to accept this risk because we know this thing's
16 going to happen. It's a matter of human nature. This
17 thing does happen.

18 It's a terrible and it's a repugnant and
19 repulsive thing, but it happens in this country --

20 QUESTION: What about Title VII?

21 MR. JEFFERSON: -- and the question is, do
22 you --

23 QUESTION: Are you not liable for activity of
24 this sort anyway under different provisions, 1983, or --

25 MR. JEFFERSON: You could be. Under 1983 you

1 could be, if you meet the standards in Monell. A school
2 district like Lago Vista could certainly be, if it adopted
3 some custom or policy that allows this to happen, or if
4 there's a pattern that it turns a blind eye to and lets it
5 happen over a course of the year, a number of different
6 times, there's some sort of pattern to it, certainly there
7 could be --

8 QUESTION: Suppose that a teacher -- suppose the
9 school district receives a grant for a French program, and
10 there are two or three students interested, and the
11 teacher says, you know, I just don't want to teach a
12 woman. I'll teach the men, but I don't want to teach a
13 woman. Is the school district liable?

14 I mean, they'd be horrified when they find out
15 about it, but that's just this teacher's quirk, and --

16 MR. JEFFERSON: Well, when they find out about
17 it --

18 QUESTION: Yes.

19 MR. JEFFERSON: -- is the test.

20 QUESTION: Why -- well, there's one person who
21 knows about it who is a school department official, who
22 absolutely knows about it. That's the teacher.

23 MR. JEFFERSON: That's not enough.

24 QUESTION: Why not?

25 MR. JEFFERSON: Because the teacher doesn't have

1 the authority to bind the district to any policy like
2 that.

3 QUESTION: Well, the teacher decides who comes
4 into, say, her class, if it's a -- I mean, doesn't she?

5 MR. JEFFERSON: Yes, but once that decision is
6 made, when the district hears about it -- and certainly a
7 complaint will be made in that situation. When the
8 district hears about it, if they do nothing, or if they
9 try to cover it up like the district did in Franklin, then
10 there's liability. But if it's just one teacher in one
11 class making that statement, no.

12 QUESTION: Suppose it happens to be the
13 superintendent who on his own is teaching that class.

14 MR. JEFFERSON: If it's the superintendent I
15 think there's liability. I think that --

16 QUESTION: So you're dividing it according to
17 the rank of the person.

18 MR. JEFFERSON: I am.

19 QUESTION: And is there -- is there anything in
20 the law that says the teacher is down there with the
21 janitor, but the superintendent is up there with the
22 Governor, I mean, or whatever, I mean --

23 (Laughter.)

24 QUESTION: What is it in the law that creates
25 that division?

1 MR. JEFFERSON: It's going to be this Court.

2 It's --

3 (Laughter.)

4 QUESTION: How -- if it's a --

5 MR. JEFFERSON: No --

6 QUESTION: How are we supposed to decide that?

7 I mean, what's the ground, then, for figuring that out? I
8 mean, how would we -- I mean, what's the key to that?

9 QUESTION: I had thought your answer, your
10 answer to me was the law of agency, which surprised me a
11 little bit. I would think that you'd want something like
12 a Monell policy rule.

13 MR. JEFFERSON: What my answer is, and I think
14 it -- I think what the Fifth Circuit did was, a clear
15 rule, a clear guide to the court and to the circuits, that
16 are divided right now, is that the district will be liable
17 if someone who has actual knowledge of the abuse was
18 invested by the school board with the authority to
19 supervise the employee and the power to take action to end
20 the abuse and didn't take that action, and failed to take
21 remedial action. I think that standard is the standard
22 that could be applied.

23 QUESTION: It's Monell-like. It's a little less
24 than Monell, isn't it?

25 MR. JEFFERSON: It's -- it is Monell-like,

1 because it is sort of a deliberate indifference standard.
2 You've got someone at a level, a high-up enough level that
3 knows and has the discretion to make decisions.

4 QUESTION: The only Monell case in which we
5 talked about deliberate indifference was somewhat
6 different than this. The standard you propose now would
7 be more favorable to a plaintiff than a straight Monell
8 standard, would it not?

9 MR. JEFFERSON: It would, indeed. Indeed it
10 would, but it's one that, you know, the Court is asking
11 counsel here, what is the clear rule --

12 QUESTION: Well, you're on the safe side of it,
13 so it --

14 MR. JEFFERSON: Yes.

15 QUESTION: -- why ask for more than you need?

16 MR. JEFFERSON: That's exactly right, Your
17 Honor.

18 (Laughter.)

19 MR. JEFFERSON: I want to mention one additional
20 point here, and the Solicitor General talks about, well,
21 you know, let's have this constructive knowledge standard,
22 and I want to make a rather procedural point here. That
23 theory, constructive knowledge based on comments made to
24 this teacher, by the teacher to other students in the
25 past, that has been abandoned by the petitioner in this

1 case. I don't even think it's part of the case.

2 The district court found no evidence whatsoever
3 of constructive knowledge. The Fifth Circuit said they're
4 not complaining about constructive knowledge and there's
5 no evidence of it here anyway, and so we don't have to
6 address it.

7 QUESTION: Mr. Jefferson, will you help me out
8 on one point? I'm frankly a little mixed up on it.

9 It seems to me your opponent argued, or the
10 briefs argued that the school district violated the
11 regulations because it didn't have an adequate policy in
12 place, and if that were true, and if it conceivably would
13 give rise to cut-off of funds, why wouldn't the failure to
14 promulgate adequate regulations also justify a remedy in
15 this case?

16 MR. JEFFERSON: If I can answer in this case --

17 QUESTION: Right.

18 MR. JEFFERSON: If we're talking about this
19 case, the student here knew precisely what to do to stop
20 this activity, and she testified -- I --

21 QUESTION: Well, but now, stick with me on
22 the -- do you agree or disagree that there was a violation
23 of agency -- Federal regulations?

24 MR. JEFFERSON: Well, I disagree in this sense.
25 Franklin was decided in 1992, and within months of that

1 opinion, that's when the district adopted a policy of
2 saying, sexual harassment of students means this, and
3 who -- and here's who you go to report to.

4 What I'm saying is --

5 QUESTION: Well, were those regulations in --
6 was that policy in place at the time of the conduct here?

7 MR. JEFFERSON: In part. You know, in -- the
8 conduct began in the fall of 1992. This Court's opinion I
9 believe was sometime during that fall of 1992, and then
10 the policies were in place by October of 1992. This
11 conduct continued until January of 1993, so what I'm
12 saying is, before --

13 QUESTION: Well, but is it true that some of the
14 conduct preceded the regulation?

15 MR. JEFFERSON: Yes.

16 QUESTION: Some did.

17 MR. JEFFERSON: Yes.

18 QUESTION: Now, what's your response to -- say
19 you have a defense after the regulations went into effect.
20 What is your defense under the argument that I repeated to
21 the pre-regulation conduct.

22 MR. JEFFERSON: Before the regulations went into
23 effect we had a policy of nondiscrimination, which is what
24 Title IX requires, which was disseminated to the students.

25 After 1992, after this Court's decision in

1 Franklin, the world changed.

2 QUESTION: But did that pre-Franklin policy
3 comply with the Federal regulations?

4 MR. JEFFERSON: I -- you know, I think there
5 was -- technically the answer is probably not, because it
6 doesn't say within 5 days you must report it, you know, a
7 reported violation has to be, you know, submitted to a
8 committee, and within 10 days a decision, so that sort of
9 policy was not in place.

10 QUESTION: Then how relevant, if it is the fact
11 that during a portion of the period there was a failure to
12 comply with Federal regulations, how relevant, if at all,
13 is that to the problem before us?

14 MR. JEFFERSON: I don't think it's -- I don't
15 think it's relevant and again, I must -- the reason that I
16 mentioned what the petitioner's knowledge was was because
17 a policy in this case would have made absolutely no
18 difference.

19 QUESTION: Oh, I see. It's the causality
20 element.

21 MR. JEFFERSON: There is a causality element,
22 that's right, in this case.

23 QUESTION: Had that policy made a difference,
24 though, you agree that not having that policy in place
25 would automatically make you liable?

1 MR. JEFFERSON: No. I do not agree with that.

2 QUESTION: Well, you said before that you
3 thought we had to apply the same standards for a violation
4 of the funding regulations as we must apply for liability
5 under the personal actions.

6 MR. JEFFERSON: Well, because the --

7 QUESTION: Do you believe that or not? If so,
8 when you violate the regulation you are automatically
9 subject to suit and the only question is one of causality,
10 which will usually have to go to the jury, I assume.

11 MR. JEFFERSON: But then the question there
12 would be funding, but it wouldn't be the -- it wouldn't be
13 bound up with the private cause of action for the
14 petitioner in this case.

15 Yes, there could be a cessation of funding. I
16 don't think it would happen. I think in the real world
17 they're going to give -- the agency's going to give the
18 district a chance of --

19 QUESTION: But it would be a jury question,
20 wouldn't it, whether -- whether the --

21 MR. JEFFERSON: The jury --

22 QUESTION: -- failure to have the 5, 10-day,
23 whatever it is, was a cause of the injury here, and if it
24 was you'd be liable.

25 MR. JEFFERSON: Number 1, I don't think the jury

1 would get this question to begin with --

2 QUESTION: Oh.

3 MR. JEFFERSON: -- and number 2, I don't think
4 that the absence of a policy would make the district here
5 liable for the criminal conduct of a teacher that the
6 district knew nothing about.

7 QUESTION: Well, then you're saying you don't
8 really think that we should apply the same standard for
9 the cut-off of funding that we apply for personal
10 liability, or for --

11 MR. JEFFERSON: Well --

12 QUESTION: -- you know, monetary liability.

13 MR. JEFFERSON: Well, except your -- the
14 question to me doesn't -- doesn't get into what happened
15 here in this case. I mean --

16 QUESTION: The funding cut-off isn't automatic
17 anyway. I mean --

18 MR. JEFFERSON: No.

19 QUESTION: -- there would certainly -- there'd
20 be a notice. There'd be an opportunity to come into
21 compliance.

22 MR. JEFFERSON: That's correct.

23 QUESTION: There'd be negotiation.

24 MR. JEFFERSON: That's correct.

25 QUESTION: All of which are reasons why you

1 wouldn't want the same standard for the two, it seems to
2 me.

3 MR. JEFFERSON: I --

4 QUESTION: The one is optional. The other,
5 you're socked with a lawsuit, with no choice.

6 MR. JEFFERSON: I take your point. I mean, and
7 it's true, the -- there is the possibility of compliance
8 under Title IX. If there's -- you know, it would be as
9 if, as in Franklin, the complaint is made and the district
10 does nothing about it.

11 If, under Title IX, the district is apprised of
12 its noncompliance and does nothing about it, well then the
13 severe sanction, you know, withdrawal of funding, would be
14 appropriate. But of course, you know, what would happen
15 in that situation is the district would come into
16 compliance or would just decide, no longer do we need
17 Federal funds. I mean, it would be their option.

18 And so again, I think under the facts of this
19 case the -- here, the absence of a policy makes no
20 difference whatsoever.

21 Now, the other thing we need to talk about is,
22 was this actually sexual discrimination under a policy, or
23 under a program or an activity, and again, we say, and I'm
24 mirroring some of the comments made in the argument
25 before, no.

1 What happened here was a teacher who, to all
2 intents and purposes was a good teacher, but who did a
3 criminal act, who engaged himself in an act that was
4 private, that was prurient, that was criminal, that could
5 land him in jail and did land him in jail. That is not in
6 any way associated with any education program or activity.

7 Now, what counsel say on this side is, well,
8 you've got this sort of -- you've got this sort of program
9 and it's got to be implemented by agents, and the agent
10 here was a teacher, and so therefore there's liability.

11 But if we do go back to Title IX and the
12 congressional intent, when you look at Title IX, what
13 they're talking about, Mr. Chief Justice, as you
14 mentioned, is things like discrimination in funding of
15 sports, or employment discrimination, you know, after a
16 decision in this Court.

17 That sort of thing, which is always carried out
18 by agents who have the discretion to hire and fire or to
19 fund or not to fund, it's always someone who has the sort
20 of authority that we're talking about who needs to be
21 there before you can hold the district liable.

22 What happened, and what makes this case odd, is
23 Franklin, and Cannon before it, you know, adopting a whole
24 private cause of action and then this Court becoming in
25 effect a legislature. We keep coming back to the Court

1 for new rules and new regulations -- well, what about
2 this, Your Honor, and what about that, Your Honor --
3 because now the Court is sitting as Congress should have
4 sat before, if it wanted to find this cause of action,
5 this private cause of action.

6 The sort of agent that they contend is making
7 the district liable is not proper, because the agent here
8 is engaging in purely criminal activity.

9 If there are no further questions, we would ask
10 that the Court affirm the judgment of the Fifth Circuit.

11 CHIEF JUSTICE REHNQUIST: Thank you,
12 Mr. Jefferson.

13 The case is submitted.

14 (Whereupon, at 12:06 p.m., the case in the
15 above-entitled matter was submitted.)
16
17
18
19
20
21
22
23
24
25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

ALIDA STAR GEBSER and ALIDA JEAN McCULLOUGH, Petitioners v. LAGO VISTA INDEPENDENT SCHOOL DISTRICT
CASE NO: 96-1866

and that these attached pages constitutes the original transcript of the proceedings for the records of the court:

BY Don Mari Federico

(REPORTER)