

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: AURELIA DAVIS, AS NEXT FRIEND OF LaSHONDA
D., Petitioner v. MONROE COUNTY BOARD OF
EDUCATION, ET AL.

CASE NO: No. 97-843 C-2

PLACE: Washington, D.C.

DATE: Tuesday, January 12, 1999

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 AURELIA DAVIS, AS NEXT FRIEND :

4 OF LaSHONDA D., :

5 Petitioner :

6 v. : No. 97-843

7 MONROE COUNTY BOARD OF :

8 EDUCATION, ET AL. :

9 - - - - -X

10 Washington, D.C.

11 Tuesday, January 12, 1999

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 10:07 a.m.

15 APPEARANCES:

16 VERNA L. WILLIAMS, ESQ., Washington, D.C.; on behalf of
17 the Petitioner.

18 BARBARA D. UNDERWOOD, ESQ., Deputy Solicitor General,
19 Department of Justice, Washington, D.C.; for the
20 United States, as amicus curiae, supporting the
21 Petitioner.

22 W. WARREN PLOWDEN, JR., ESQ., Macon, Georgia; on behalf of
23 the Respondents.

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On behalf of the Respondents	28

1 PROCEEDINGS

2 (10:07 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in No. 97-843, Aurelia Davis v. the
5 Monroe County Board of Education.

6 Ms. Williams.

7 ORAL ARGUMENT OF VERNA L. WILLIAMS

8 ON BEHALF OF THE PETITIONER

9 MS. WILLIAMS: Mr. Chief Justice, and may it
10 please the Court:

11 At issue in this case is whether title IX's
12 broad prohibition against sex discrimination requires
13 schools to remedy and address student-to-student sexual
14 harassment.

15 The Eleventh Circuit has decided that title IX
16 imposes no obligations on schools to remedy this type of
17 discrimination, no matter how severe or pervasive the
18 harassment, no matter how cognizant school officials are
19 -- are of it, no matter how capable officials were of
20 remedying the harassment. Under this blanket rule,
21 schools simply cannot be held accountable under title IX
22 either in court or in the administrative enforcement
23 context for -- for refusing to address this
24 discrimination. This result cannot be squared with title
25 IX and with this Court's interpretations of the statute.

1 QUESTION: May I ask, Ms. Williams, how you
2 would propose to cabin this cause of action were we to
3 agree with you?

4 I'm sure that school children nationwide tease
5 each other, and little boys tease little girls, and so
6 forth throughout their years in school. And is every one
7 of those incidents going to lead to some kind of a
8 lawsuit?

9 MS. WILLIAMS: No, Your Honor. The legal
10 framework that has developed in this area provides
11 standards for determining what constitutes sexual
12 harassment and what isn't sexual harassment.

13 QUESTION: What standards would you think would
14 govern to cabin this kind of a cause of action?

15 MS. WILLIAMS: First, I would recommend looking
16 at the title VII standards. The Court said in Gebser that
17 title VII standards inform whether sex -- sexual
18 harassment is sex discrimination under title IX. And
19 under those standards, a particular instance isn't sexual
20 harassment unless it is severe, it's pervasive, unless it
21 is sufficiently -- unless it is objectively offensive to a
22 reasonable person, unless it is offensive to the person
23 who has experienced the sexual harassment.

24 QUESTION: Gee, but little girls always tease
25 little boys and little boys always tease little girls.

1 That's pervasive.

2 MS. WILLIAMS: It's pervasive, but it is not
3 severe.

4 QUESTION: In my experience, it's -- it's
5 severe.

6 MS. WILLIAMS: But it doesn't always --

7 QUESTION: Are you going to apply a reasonable
8 -- a reasonable teenager standard? Is that -- is that the
9 criteria?

10 MS. WILLIAMS: Well, the Department of Education
11 has applied the title VII standards and given
12 consideration as to how they would apply to the education
13 context. So, they do recommend that school officials use
14 age-appropriate measures. But the important --

15 QUESTION: The concern -- the concern is I think
16 that if you simply take the same standards of title VII,
17 i.e., anything that would be sexual harassment in the work
18 place, when done by a co-worker or a supervisor to a
19 subordinate or a co-worker, that which is sexual
20 harassment there is also sexual harassment for which the
21 school district is liable when a 7-year-old does it to a
22 6-year-old or a 13-year-old to a 12-year-old. The concern
23 is, as you've said, you take the same standards. You
24 would remove what is a pervasive problem in the schools
25 from the hands of educators and psychologists and give

1 that problem to lawyers and judges.

2 Now, I don't think the latter is the right group
3 of people to solve it. Perhaps it is, perhaps it isn't.

4 But I want to bring out into the open what I
5 think is the problem or a problem, and I want to know how
6 you -- anything you could say that would reassure me or
7 others that -- how -- that this would -- what I've just
8 said may not be the case.

9 MS. WILLIAMS: We understand the concern and we
10 think that, first of all, the title VII standards wouldn't
11 apply wholesale in the education context. They would have
12 to -- they would inform the analysis of sexual harassment
13 in the first instance.

14 And the second thing is that title IX doesn't
15 require schools to be successful in addressing student-
16 to-student sexual harassment. In other words, to avoid
17 being held out of compliance with title IX, the school
18 would need to take reasonable steps to remedy and address
19 the sexual harassment.

20 QUESTION: I think then that every school
21 district in the Nation should adopt guidelines and codes,
22 as we've suggested for employers.

23 Do you think there was a suggestion in the
24 congressional debates and in the text of this statute that
25 there would be Federal standards for school behavior in

1 every classroom in this country?

2 MS. WILLIAMS: We're not suggesting that there
3 are Federal standards for school behavior. We are
4 suggesting --

5 QUESTION: I thought this was a Federal statute
6 we're talking about.

7 MS. WILLIAMS: Well, we are talking about a
8 Federal statute, but the Federal statute imposes the
9 obligation on educational institutions to ensure that no
10 person is excluded from participation in, denied the
11 benefits of, or subjected to discrimination under the
12 education program or activity.

13 QUESTION: Now, let's -- let's -- let's be very
14 careful here. If you're going to have standards, they're
15 Federal standards, are they not?

16 MS. WILLIAMS: Yes.

17 QUESTION: Thank you.

18 QUESTION: Do you really think it -- it -- it
19 imposes an obligation on these educational institutions to
20 prevent anyone being denied the benefits of or excluded
21 from participation in, that's what it requires every
22 school district to do?

23 MS. WILLIAMS: The -- the -- the prohibition is
24 broad.

25 QUESTION: Well, what if -- what if parents,

1 benighted as they may be, decide that they don't want
2 their daughter to study science because they think girls
3 shouldn't study science? Title IX makes it the
4 responsibility of the school district to prevent that?

5 MS. WILLIAMS: The parents wouldn't be persons
6 that are under control of the institution. And so, in
7 that instance, title IX wouldn't have -- wouldn't require
8 schools to step in to -- to deal with that situation.

9 QUESTION: I -- I suppose the -- the parents are
10 under the control of the institution to the extent that
11 the institution decides what course ultimately the student
12 will take. And if the institution knows that the parent
13 is -- is depriving this child from taking science, because
14 the parents feel that the girl shouldn't have science,
15 surely the institution can prevent that.

16 MS. WILLIAMS: Title IX doesn't impose an
17 obligation on the school to act in that instance any more
18 than title VII would require an institution to step in if
19 a husband didn't want his wife to work in a nontraditional
20 occupation in the public employment sector.

21 QUESTION: So, you think the language cannot be
22 read literally, that it -- it in fact does not mean that
23 no one -- when it says no one shall be deprived of the
24 benefits of or subjected to discrimination under, it
25 doesn't mean that it's the responsibility of the school to

1 assure absolutely that that will be the result.

2 MS. WILLIAMS: It would be difficult to say that
3 absolutely everything, and certainly --

4 QUESTION: Yes.

5 MS. WILLIAMS: -- in the instance that --

6 QUESTION: So, it's just a question of where we
7 draw the line. It's just a question of where we draw the
8 line. You acknowledge that they're not responsible for
9 eliminating the effects of the parental discrimination or
10 the parental desires, and the question before us is
11 whether they are responsible for eliminating the effects
12 of the -- of the children's desires. And I don't -- I
13 don't know why it's absolutely clear that -- that there's
14 a line between those two.

15 MS. WILLIAMS: Well, in the student-to-student
16 sexual harassment context, the kind of conduct that would
17 be actionable or the kind of conduct under which a school
18 would be -- be found out of compliance is the type of
19 conduct that interferes with the student's ability to gain
20 an education and it -- and otherwise to fulfill the
21 other --

22 QUESTION: So is the parents' --

23 MS. WILLIAMS: -- requirements of the --

24 QUESTION: So is the parents' determination that
25 -- that the child shouldn't take science..

1 MS. WILLIAMS: But the parent is not someone
2 that the school has ultimate control over.

3 QUESTION: The -- the parent -- the school has
4 control over what courses the child takes.

5 MS. WILLIAMS: Well, we would submit that the --
6 under the hypothetical under the situation that you have
7 articulated, that title IX would not impose an obligation
8 on schools. And moreover, that's --

9 QUESTION: Well, in -- in the case of sexual
10 harassment, I take it the school has the duty to call the
11 parent in and -- and tell the parent to control the child.
12 Correct?

13 MS. WILLIAMS: Yes, that would be part of --

14 QUESTION: All right. Why in Justice Scalia's
15 hypothetical doesn't the school have the duty to call the
16 parent in to say not to impose racial -- or sexual gender
17 stereotypes on the -- on the child? I don't think you're
18 answering the question.

19 MS. WILLIAMS: In the -- getting back to my --
20 my -- I would like to modify my answer to your question.
21 Title IX doesn't require the schools to take any specific
22 steps. It requires the schools to ensure that students
23 and other persons are not subjected to discrimination
24 under the program or activity.

25 And under this particular hypothetical, again

1 the parents are not persons that are within the control of
2 the institution, and so, as I said, under --

3 QUESTION: Well, neither is the student in every
4 situation. Is it possible that title IX liability
5 requires that the action of harassment be done by an agent
6 of the school district?

7 MS. WILLIAMS: No. No, Your Honor.

8 QUESTION: In Gebser, of course, it was a
9 teacher and the teacher was an agent of the district. So,
10 certainly it's possible then that liability would be
11 focused on those who are agents of the district.
12 Liability of the district would depend upon actions of an
13 agent.

14 MS. WILLIAMS: We submit that Gebser rejected
15 holdings -- holding schools liable for the independent
16 actions of teachers, and in that case the Court was asked
17 to adopt a theory of vicarious liability that would be
18 dependent upon the agents --

19 QUESTION: No. It -- it required the
20 intentional action of the school district, but it also
21 happened to involve action by an agent. And so I'm asking
22 you whether both are required, the knowledge and -- and --
23 and neglect of the school district to control behavior
24 that it knows was improper by an agent, or can it be
25 anyone? Could it be a stranger coming in and doing this

1 or a parent who frequently comes to school and says
2 insulting things to other children? Would the school
3 district be liable for that?

4 MS. WILLIAMS: If a school district -- if school
5 officials, the appropriate school officials, had actual
6 notice of that type of misconduct and they responded to it
7 with deliberate indifference, they would be accountable.
8 They would be held accountable under title IX.

9 I think that the -- the Seventh Circuit's
10 opinion in Doe v. University of Illinois does provide a
11 cabining concept that you were asking about, Your Honor,
12 in that the liability would -- would attach to those
13 situations that are happening in school or in school
14 activities or school sponsored activities. And that would
15 help to, I think, address in part Justice Scalia's
16 question.

17 But the important thing to remember is that the
18 statute does require that institutions not subject persons
19 to discrimination, and the Court's decision in Gebser
20 shows that the appropriate analysis in large part is an
21 examination of how the school responded to the
22 discrimination when it was made aware of it.

23 QUESTION: That's right, but it was carried out
24 by an agent of the school, to wit, a teacher.

25 MS. WILLIAMS: Yes, it was. That is true. But

1 the -- the Court's analysis did not focus on the
2 harasser's relationship to the institution to make the
3 ultimate determination of whether damages liability would
4 attach.

5 QUESTION: Ms. Williams, I thought your position
6 was not that there's responsibility for what the child
7 does, the way there might be for a teacher, but that there
8 were repeated notice. It was the school's nonresponse.
9 It was the school's conduct and not the fifth grade
10 harasser's conduct --

11 MS. WILLIAMS: Yes. Yes, that's exactly right,
12 Your Honor.

13 QUESTION: -- that renders the -- the district
14 liable.

15 QUESTION: But --

16 MS. WILLIAMS: That in response to the -- the
17 underlying discriminatory conduct of the student.

18 QUESTION: But that response is blameworthy only
19 if the school has an obligation to act. If it has no
20 obligation to act, its failure to respond shouldn't
21 subject it to liability. Why does it have an obligation
22 to act with respect to two little kids teasing each other
23 when it does not with respect to a parent who -- who
24 decides the child shall take particular courses?

25 The statute requires discrimination under --

1 under -- a program. It prohibits discrimination under any
2 education program. I always thought under the program
3 meant that the program itself discriminated --

4 MS. WILLIAMS: Well --

5 QUESTION: -- not that the program stopped, you
6 know, contractors or the students themselves or the
7 parents of the students from discriminating. I wouldn't
8 consider that discrimination under the program.

9 MS. WILLIAMS: Well, we submit that that would
10 be, the -- in the peer situation, that that is
11 discrimination under the -- the program or activity.

12 QUESTION: Any failure of the program to prevent
13 discrimination which it has the power to prevent
14 constitutes discrimination under the program.

15 MS. WILLIAMS: Any discrimination in the sexual
16 harassment context, if the conduct rises to the level of
17 discriminatory sexual harassment, the -- the title IX
18 imposes an obligation on schools to address that.

19 QUESTION: Whether -- whether its their agents
20 that are doing it or not, whatever discrimination by the
21 public at large the school can prevent, it must prevent.

22 MS. WILLIAMS: If -- remember that in -- in
23 order to -- under the Gebser standard, what limits the
24 liability is the situation in which the school has actual
25 notice of it and responds with it to deliberate

1 indifference.

2 QUESTION: I understand.

3 MS. WILLIAMS: So, the statute --

4 QUESTION: But if it knows about it, it must
5 prevent it.

6 MS. WILLIAMS: If it knows about it, it must
7 take reasonable steps to address and remedy. And as I
8 emphasized before, the statute doesn't require schools to
9 address it perfectly. It merely requires them to take
10 reasonable steps in order to --

11 QUESTION: And you think that that is conveyed
12 by the language discrimination under the program.

13 MS. WILLIAMS: Yes. Yes, we --

14 QUESTION: The students themselves are not
15 committing a legal wrong, are they, in -- in the usual
16 sexual harassment case? There was a battery here, but in
17 -- in most cases that you have in mind, the students
18 aren't committing a legal wrong, are they?

19 MS. WILLIAMS: They are part of the legal wrong.

20 QUESTION: They are not committing a legal wrong
21 under Federal law. They are not -- they have no
22 liability, do they?

23 MS. WILLIAMS: I'm sorry. I'm not understanding
24 your question. They don't have any legal liability. In
25 other words, we wouldn't file an --

1 QUESTION: Johnny harasses Mary. That is not a
2 legal wrong on the part of Johnny.

3 MS. WILLIAMS: Right. But the schools --

4 QUESTION: All right. It's -- it's an odd,
5 unusual, not unknown scheme that we impute liability to
6 the principal for an act that is not wrong when done by
7 the actor.

8 MS. WILLIAMS: Well, the acts -- if the act --
9 if Johnny harasses Susie and John's action is based on sex
10 and it's severe and it's pervasive and it is offensive to
11 Mary and it's offensive to a reasonable person looking at
12 the situation and if it interferes with Mary's ability to
13 get an education, he has engaged in sexual harassment that
14 violates the law. And if the school fails to respond to
15 that, upon getting notice by Mary, then the school has
16 violated title IX as well. And in fact, under the
17 Gebser --

18 QUESTION: But he has no -- he has no legal
19 liability under the statute.

20 MS. WILLIAMS: The statute doesn't allow a
21 plaintiff to go after that person, but certainly the cases
22 that -- that this Court has decided counsel that we look
23 at the underlying discrimination and look at the -- the
24 actions of the person who has -- is alleged to have done
25 the harassment.

1 QUESTION: And that -- that applies to the
2 parents as well.

3 MS. WILLIAMS: If in a --

4 QUESTION: I mean, if the parents don't want
5 their daughters to take science or don't their -- their
6 sons to take ballet, the -- the -- that's okay. But the
7 school which has the power to determine whether the
8 children will take ballet or science can, in effect, stop
9 the parents from that -- from that -- I don't know --
10 wicked action or whatever the action is considered.

11 MS. WILLIAMS: I wouldn't say in every
12 circumstance. I think the way -- in this hypothetical I
13 would say the answer is no, but if parents, on the other
14 hand, were standing outside of the doors of the computer
15 lab saying that no female students shall enter and they
16 were doing this in -- in plain view of school officials,
17 then the school might be liable for that because they
18 would be denying female students the ability to benefit
19 from the education program or activity and, moreover,
20 subjecting them to discrimination.

21 So, it is no answer -- you're right -- for me to
22 say the parents -- the actions of parents can never be the
23 basis of liability under title IX, but there are
24 circumstances in which they can be.

25 QUESTION: Let me ask you a definitional

1 question. Let's assume we get to the point of saying that
2 student-to-student behavior can be a predicate for the
3 school's obligation here. How does the -- how does the
4 school define in its guidelines, be they formal or
5 informal, the -- the concept of the harassment that
6 amounts to discrimination, as you put it, as distinguished
7 simply from -- from teasing which may be pervasive.

8 I mean, in the first grade, boys tease girls
9 because they are girls and vice versa. I presume that all
10 of that is not supposed to be subject to a -- in effect,
11 an enforceable Federal standard. But how would -- A, am I
12 correct in assuming that on your view it would not be,
13 and --

14 MS. WILLIAMS: Yes.

15 QUESTION: -- B, if I am correct, could you give
16 me an idea of how you would state the definitional line
17 that divides one from the other?

18 MS. WILLIAMS: A, you are correct. We don't
19 think that teasing, simple teasing, between students would
20 constitute sexual harassment.

21 B --

22 QUESTION: But it -- it is on the basis of sex,
23 though.

24 MS. WILLIAMS: It's on the basis of sex but --

25 QUESTION: I mean, it's because they're girls

1 and because they're boys.

2 MS. WILLIAMS: -- it's not severe. It's not
3 pervasive. It's not --

4 QUESTION: Well, but it can be. I mean, you
5 know, little gangs form in schools and it can be very
6 pervasive and very distressing to kids. And it's done on
7 a sexual basis. It's done because the -- the receivers
8 are girls or boys and the givers are vice -- boys or -- or
9 girls. So -- so, it can be pervasive.

10 MS. WILLIAMS: It can be.

11 QUESTION: And it certainly is on the basis of
12 sex. But I presume that still you would draw a line.

13 MS. WILLIAMS: It wouldn't always be sexual
14 harassment, and indeed there are many policies --

15 QUESTION: Right, but -- and how --

16 MS. WILLIAMS: -- and procedures at schools --

17 QUESTION: -- how -- what's the -- how do you
18 state the line because your time is getting short.

19 MS. WILLIAMS: Yes, it is.

20 Well, we would say, as a starting point, the
21 legal framework that has developed can provide a way of --
22 of analyzing and articulating what constitutes sexual
23 harassment.

24 QUESTION: But that's part of the problem
25 because under the title VII standards in the work place,

1 I'm sure the kind of behavior that occurs at schools
2 between children would be actionable. So, how do we apply
3 it in the student context?

4 MS. WILLIAMS: The Department of Education has
5 used those standards and has said, take a look -- use them
6 in an age-appropriate way. And -- and they have
7 articulated, for example, severe to -- in determining
8 whether behavior is severe, schools should look at the --
9 the number of instances, where they occurred, who's doing
10 the harassing. In that context, there may be a difference
11 in the analysis based on whether a teacher is doing the
12 harassing or whether it's another student doing the
13 harassing.

14 QUESTION: Thank you, Ms. Williams.

15 Ms. Underwood, we'll hear from you.

16 ORAL ARGUMENT OF BARBARA D. UNDERWOOD

17 FOR THE UNITED STATES, AS AMICUS CURIAE,

18 SUPPORTING THE PETITIONER

19 MS. UNDERWOOD: Mr. Chief Justice, and may it
20 please the Court:

21 When the principal of a school learns that a
22 fifth grade girl is being sexually harassed by a classmate
23 so severely that she can't learn and the principal
24 responds with deliberate indifference, the student is
25 subjected to discrimination on the basis of sex under the

1 school's educational program. And if the school receives
2 financial assistance, Federal financial assistance, it may
3 be liable in damages and equitable relief may be available
4 even where damages are not.

5 I'd like to address the cabining principle
6 question that has been on the table. It seems to me the
7 -- the important thing to --

8 QUESTION: Excuse me. The what question?

9 MS. UNDERWOOD: The question of cabining
10 principles.

11 QUESTION: Oh, cabining principle.

12 MS. UNDERWOOD: Cabining principles.

13 Unless the behavior in question is so severe as
14 to exclude, deny benefits, educational benefits, or
15 discriminate under the education program, ordinary teasing
16 would not rise to the level of an actionable wrong under
17 the program.

18 QUESTION: But I take it if -- if it is
19 pervasive, you know, if the kids gang up and the one --
20 the -- the object of the teasing really is -- is -- is
21 left incapable of getting the benefit of the education, I
22 take it your answer is -- implicit in your answer is
23 there's -- there's no principle line between harassment
24 and what we call teasing by -- by primary grade children.

25 MS. UNDERWOOD: Well, when it's sufficiently

1 severe as to deprive somebody of the ability to get an
2 education and it's done on the basis of sex and the school
3 fails to respond in a reasonable fashion, it seems to me
4 that's --

5 QUESTION: Excuse me. Why -- why does it have
6 to deprive someone of the ability to get an education?
7 That's not what the statute says. That's a separate basis
8 for violation; that is, be denied the benefits of. All it
9 says is, be subjected to discrimination under. Why -- why
10 -- I don't know why you insist that it be so severe that
11 the person can't even learn.

12 MS. UNDERWOOD: I think the key here is that
13 ordinarily there -- there will be deference to the
14 reasonable judgment of school officials.

15 QUESTION: This is true -- I can't believe that
16 you're -- I mean, I -- I doubt -- you seem to be saying
17 that if -- if X is sexual harassment when a teacher does
18 it to a student, it is sexual harassment when a student
19 does it to a student, when an employer does it to an
20 employee, and the concern -- I'll take that as a given.
21 Maybe you'll deny that. I hope -- maybe you should.

22 But -- but -- but if that's the given, what's
23 the concern I think is that whereas one might have no
24 hesitance about insisting in the work place that if they
25 don't shape up, they can be sued, at a school there are

1 many, many incidents where the proper response seems to be
2 a kind of discussion, mediation, getting together with a
3 family, bringing in psychologists, all kinds of things
4 that don't seem appropriate in the work place.

5 And I guess my concern anyway is -- is there
6 some way for the law to be sensitive to that other than
7 opening up a can of worms so that when, as happened, in
8 school X which had a group of girls that were bigger than
9 the boys and they used to beat them up after class, all
10 right, the way the school responds is not with lawsuits?
11 The way the school responds is through discussion and
12 mediation and so forth, all kinds of ways of response.
13 What's worrying is the gearing up of the great legal
14 mechanism to supersede that.

15 MS. UNDERWOOD: But there's no reason why those
16 discussions, counseling sessions, training, conciliation
17 wouldn't be precisely the sort of response that would
18 avoid deliberate indifference and would avoid liability.
19 That is to say, the appropriate response in the school
20 setting could be very different, would be very different
21 from --

22 QUESTION: Well, but if it continues again,
23 there's another incidence of it, it fails, then there you
24 go. You're marching off to court to resolve these issues.

25 MS. UNDERWOOD: There's no -- there's no

1 requirement that a school guarantee that this not happen.
2 The rule is that a school -- for a school to subject a
3 student to discrimination isn't the same thing as for this
4 behavior to happen.

5 QUESTION: Well, that's very true, but I think
6 our concern is -- is a slightly different concern, and
7 that is, if there is, as -- as -- as seems to be
8 developing, no principle line between sexual harassment at
9 the -- at the -- in effect, at the high end of the scale
10 in high school and -- and teasing in the first grade, then
11 in every case in which there is pervasive teasing, which
12 we all know goes on, there is a potential Federal case
13 here whenever the parents are dissatisfied with the
14 actions, which you quite rightly describe any reasonable
15 school should take. And I think the concern is that there
16 is no way really in principle to draw a line between every
17 act of teasing and -- and a subject of Federal litigation.

18 MS. UNDERWOOD: Well, I think the principle
19 where to draw the line is in recognizing that the
20 appropriate response of the school is different from the
21 appropriate response of an employer --

22 QUESTION: Well, that goes to the -- that goes
23 to the school's response when it gets into court.

24 MS. UNDERWOOD: No, it doesn't.

25 QUESTION: But it still remains the case that

1 the school is going to be subject to -- to a Federal court
2 action, and it is going to be Federal guidelines which
3 will be implicated by the claim for every first grade
4 pervasive teasing incident. That's the concern.

5 MS. UNDERWOOD: Well, of course, it's always
6 possible to bring a lawsuit, but the cases that have
7 developed so far and presumably, should this Court adopt
8 this rule, the courts could quickly establish what would
9 be a basis for summary judgment, that is, what sort of --
10 that -- that it would only be a failure of -- of the --
11 that rises to the level of deliberate indifference that
12 would be a basis for --

13 QUESTION: Well, is it possible that under title
14 IX the harasser must be an agent of the school district
15 and the district must have actual knowledge and act with
16 deliberate indifference? Is that a possible
17 interpretation of that statute?

18 MS. UNDERWOOD: I don't think it's -- it's true
19 to the purpose of the statute. Title IX, like title VI
20 before it, was designed to provide students with equal
21 access on the basis of sex in the one case and race on the
22 other to an education. Title VI, after all, was
23 concerned, among other things, with the racial hostility
24 of students to each other in newly integrated schools, as
25 well as the racial hostility of teachers. So, when the --

1 when a gang prevents a student from essentially
2 participating in the school program on the basis of race
3 or on the basis of sex, that's right at the heart of what
4 title IX means.

5 QUESTION: You -- you keep saying that. I don't
6 know why you can say that. If -- if you are correct about
7 what title IX provides, you don't have to -- it doesn't
8 have to be so severe as to deny the person the benefits of
9 the program.

10 MS. UNDERWOOD: The more severe it is, the
11 clearer it is that the school has to respond.

12 QUESTION: I suppose that's right, but -- but --

13 QUESTION: I agree with Justice Scalia.

14 QUESTION: -- all it has to be is discrimination
15 on the basis of sex which the school is aware of.

16 MS. UNDERWOOD: And fails to respond
17 appropriately to.

18 QUESTION: And fails to respond to.

19 MS. UNDERWOOD: And ordinarily -- as amici for
20 -- for the schools here point out, ordinarily schools do
21 respond. That's the -- that's the other cabining
22 principle here. Presumably it would be the unusual case
23 where a school was in fact deliberately indifferent, and
24 you would have ordinarily to make that out, egregious
25 behavior and no response or -- or --

1 QUESTION: But the point -- but the point is you
2 do not have to show, under the statute, as Justice Scalia
3 suggests and as I understand it, that the students cannot
4 learn as well. Suppose the student comes home in tears --
5 most students do one -- one or more times -- and decides
6 that what that student will do is to really study hard and
7 to excel. Is there discrimination there?

8 MS. UNDERWOOD: It depends on whether the school
9 has failed to respond reasonably or not. You don't have
10 an answer to the question on the basis of the student's
11 action. It is, as I think Gebser said, the school's
12 response that's in question here, and --

13 QUESTION: But not -- Ms. Underwood, I think the
14 point is are you distinguishing between the student who
15 can't learn she's so upset or the one who says, this is
16 horrible. I'm being exposed to this horrible thing every
17 day, but I'm going stand up against it. The same thing
18 that came up in Harris against Forklift.

19 MS. UNDERWOOD: No. I don't -- I don't -- I'm
20 not suggesting that there's only discrimination if the
21 student is demolished, but I am suggesting that the
22 student's reaction is relevant to the appropriate response
23 on the part of the school, and that that's where the --
24 the limitation comes in.

25 I'd like to point out that it's not unusual in

1 the law, or at least it's not unheard of, in
2 discrimination law for the entity to be liable for an act
3 when the -- when the first line actor is not. Under title
4 VII, it may well be that the employer is liable but the
5 mid-level supervisor who's doing the discrimination --
6 it's not clear whether that supervisor could also be
7 liable under title VII or not. There are simply different
8 questions at stake when you're asking whether the
9 individual is liable and whether the institution is
10 liable.

11 One of the reasons the individual is not liable
12 here is that the individual -- there are many reasons, but
13 one of them is that the individual is a child and the idea
14 of liability on the part of that child brings into
15 question quite different considerations from the liability
16 on the part of the school which has authority over the
17 situation to do something about it and to respond.

18 The --

19 QUESTION: Thank you, Ms. Underwood.

20 Mr. Plowden, we'll hear from you.

21 ORAL ARGUMENT OF W. WARREN PLOWDEN, JR.

22 ON BEHALF OF THE RESPONDENTS

23 MR. PLOWDEN: Mr. Chief Justice, and may it
24 please the Court:

25 The petitioner is asking this Court to create a

1 private claim for damages under title IX by applying adult
2 standards of hostile environment sex harassment to
3 children.

4 Like other school districts, Monroe County has
5 the obligation to educate all of the students, all of the
6 children, as they go through various developmental stages
7 from K-5 through 12th grade. Throughout these years, 45
8 million children, grades K-12, struggle to sort out the
9 differences between boys and girls, acting out these
10 relationships, flirting, repeating newly learned
11 vulgarities --

12 QUESTION: Mr. Plowden, can I give you a
13 hypothetical that occurred to me as I listened to the
14 dialogue in the last argument?

15 MR. PLOWDEN: Certainly, Your Honor.

16 QUESTION: Just let's get away from the sexual
17 harassment scenario for just a moment. Suppose you had a
18 -- a baseball field and the rules of the school said,
19 after school there will be an hour for women -- or the
20 female students and an hour for the male students. And
21 that's the rule. It's perfectly clear. That's the rule
22 policy.

23 But, in fact, the boys decide they want the --
24 the field for 2 hours, and they're just not going to let
25 the girls on. And they do that over and over and over

1 again, and the athletic director knows about it but does
2 nothing about it. And he says, well, our rule is it's
3 equal time for both.

4 Is there a cause of action? Is that
5 discrimination in violation of the statute?

6 MR. PLOWDEN: Your Honor, we draw a bright line
7 here between acts of misconduct of adults on the one hand,
8 as you had in Gebser, and the acts of misconduct of
9 children.

10 QUESTION: Misconduct for the adult in my
11 hypothetical is that the adult did nothing about it when
12 fully informed as to what happened.

13 MR. PLOWDEN: Yes, sir, but the underlying
14 predicate for that, presumably the intent to discriminate,
15 is the group of boys that are --

16 QUESTION: Correct.

17 MR. PLOWDEN: -- that are shuffling the girls
18 off --

19 QUESTION: And as a result of their conduct,
20 week after week after week, they have exclusive use of the
21 athletic facility, and that would not, in your view,
22 violate the statute.

23 MR. PLOWDEN: If Your Honor please, I --

24 QUESTION: What is your view on my hypothetical?

25 MR. PLOWDEN: I still would not agree that

1 that's a violation of title IX --

2 QUESTION: That wouldn't -- that would not
3 violate title IX.

4 MR. PLOWDEN: -- for -- for which someone could
5 take my client into court and sue them for damages. No,
6 sir.

7 QUESTION: Well, you've given me two answers.
8 Is it a violation of title IX?

9 MR. PLOWDEN: No, sir.

10 QUESTION: No you state.

11 MR. PLOWDEN: No.

12 QUESTION: Not even for purposes of injunctive
13 relief to say to the school, you put a teacher on that
14 field to make sure the girls have their equal time.

15 MR. PLOWDEN: If Your Honor please, I believe
16 that -- that OCR can enforce title IX, as it does every
17 day, against schools with -- there's no requirement. This
18 -- this is in Gebser. OCR can enforce the mandate of --
19 of the requirement even if it doesn't purport to represent
20 a definition of discrimination.

21 QUESTION: I don't follow that. I mean, if it's
22 a violation of the statute, then OCR can enforce it. If
23 it's not a violation of the statute, then they can't
24 enforce it.

25 MR. PLOWDEN: Well, you -- if Your Honor please,

1 the opinion for the Court in Gebser says that they can
2 enforce the nondiscrimination mandate even if the
3 requirement they impose does not purport to represent a
4 definition of discrimination.

5 QUESTION: No, but they can't enforce anything
6 given your answer to Justice Stevens because there has
7 been no violation. So, if -- if I understand your answer
8 to Justice Stevens, there could never be injunctive
9 action. Is that correct?

10 MR. PLOWDEN: That's correct.

11 QUESTION: And that would be true even if -- if
12 the action of the boy students were to block admission of
13 the girls to a science class, a group of students who
14 said, we're not going to let girls in here. Out of here.
15 And the teacher knows that, the principal knows it, and
16 the girls don't get to take a class they want to take. No
17 -- no violation of title IX and no injunctive relief
18 possible at the instance of the Federal officials.

19 MR. PLOWDEN: No, Your Honor. No injunctive
20 relief in Federal court, but parents can get relief by
21 complaining to OCR and going through the express statutory
22 remedy that is set out in title IX.

23 QUESTION: How could they get relief if there is
24 no violation of the statute?

25 MR. PLOWDEN: OCR frequently, many times, comes

1 down, investigates, finds a potential violation, and then
2 enters into negotiations with --

3 QUESTION: Oh, a raised eyebrow. You mean you
4 -- you can -- you can muscle them. Even though it's not
5 really a violation, they -- they will --

6 MR. PLOWDEN: That's --

7 QUESTION: -- snap to attention if -- well --

8 MR. PLOWDEN: Your Honor, that's exactly --

9 QUESTION: You don't want us to sanction that
10 sort of thing, do you?

11 (Laughter.)

12 MR. PLOWDEN: Well, I'd a whole lot rather you
13 sanction that than open up the courthouse door to all of
14 these kinds of lawsuits that we're liable to face here.

15 And -- and Gebser says exactly that, Your Honor
16 please.

17 QUESTION: Is it possible --

18 QUESTION: What Gebser focused on, of course,
19 was the concept that if the school district has actual
20 knowledge of the problem and is deliberately indifferent
21 to it, then there can be liability.

22 MR. PLOWDEN: Yes, deliberate indifference.

23 QUESTION: Now, that does offer some kind of
24 standard. It isn't a negligence standard.

25 MR. PLOWDEN: Oh, no, ma'am. And -- and -- and

1 you defined -- the opinion of the Court defined that to
2 mean a refusal to act as -- as being deliberate
3 indifference.

4 QUESTION: Well, what's wrong --

5 QUESTION: I understand what the -- what the --
6 exactly -- I assume if the situation in Justice Stevens'
7 hypothetical were that the -- the male students were
8 making use of a -- of a -- a school facility, for example,
9 holding the gates shut or something of that sort, I assume
10 you could say that it is the responsibility of the coach
11 or whoever has authority over the field to keep that gate
12 open regardless of -- regardless of what the male students
13 are doing. I mean, in some -- in some situations at
14 least, you would be able to find affirmative action on the
15 part of an agent of the school which is causing these --
16 these young women to be excluded from the athletic
17 facilities.

18 MR. PLOWDEN: I think --

19 QUESTION: And you'd have no problem with
20 finding liability there.

21 MR. PLOWDEN: If Your Honor please, I think
22 that's correct. You can pose a hypothetical question to
23 the point that the -- the involvement of the teacher or
24 the coach or whoever it might be, is such that he is -- he
25 or she has become complicit or co-conspiratory --

1 QUESTION: Something more than merely -- merely
2 refusing to punish these boys for something that they do
3 off of the school grounds.

4 MR. PLOWDEN: To the extent that -- that you
5 could draw the conclusion that that person had formed an
6 intent to discriminate --

7 QUESTION: No. My hypothetical is that the --

8 MR. PLOWDEN: -- and that's Gebser.

9 QUESTION: -- what the adult member of the
10 school staff does is nothing. He does nothing with full
11 knowledge. He doesn't do anything affirmatively, and you
12 say there's no liability in that case.

13 MR. PLOWDEN: Yes.

14 QUESTION: Even if not only they -- not only do
15 they exclude them from the -- from the field, but they
16 also happen to beat them up or something like that because
17 they really want to teach them a lesson, there's still no
18 liability.

19 MR. PLOWDEN: Well, if they beat them up and
20 there's -- and there's assault --

21 QUESTION: No Federal liability.

22 MR. PLOWDEN: -- and that sort of thing
23 involved, then there's mandatory reporting laws that that
24 teacher or person --

25 QUESTION: I think we need a Federal law to

1 solve that problem --

2 QUESTION: Well, that's the question.

3 QUESTION: -- of -- of young -- young men
4 beating up young women.

5 QUESTION: Before you leave that, could --
6 could --

7 MR. PLOWDEN: Yes, sir.

8 QUESTION: I mean, what Justice O'Connor I think
9 was suggesting possibly is the possibility of creating a
10 standard that's strict enough to stop the administrative
11 problem that you're worried about. Now, suppose you did
12 combine what she suggested, which is that the school
13 district needs actual knowledge and virtually doesn't
14 respond at all, with what I think was implicit in your
15 opponent's suggestion that maybe the harassment would have
16 to rise to the level of a significant denial of the
17 program's benefit.

18 Now, if you put those two things together, the
19 significant denial of the program's benefit so it isn't
20 just teasing or things that the kids can get over,
21 together with a very strict standard of liability such
22 that the school district has to actually know and its
23 response has to be nonexistent or grossly inadequate -- if
24 you put those two things together, would you leave the
25 kind of leeway for the school district that I think I

1 suggested might be desirable and that you apparently think
2 is desirable?

3 MR. PLOWDEN: If Your Honor please, no matter
4 what the standard, how high the test or where you set the
5 bar, once you have opened the door to the courthouse to
6 these lawsuits, it means that a Federal district judge at
7 some -- some stage of the procedure here, a motion to
8 dismiss, summary judgment, or -- or perhaps even a trial,
9 is going to have to make a determination, was the response
10 of the school officials enough.

11 QUESTION: Under the standard proposed by
12 Justice Breyer, are you confident how the case at bar
13 would come out?

14 MR. PLOWDEN: I'm sorry. I didn't --

15 QUESTION: Under the standard proposed by
16 Justice Breyer, are you confident in knowing how this case
17 would come out?

18 MR. PLOWDEN: I'm not sure, Your Honor. I
19 haven't thought about that, and I'm not -- to be perfectly
20 honest with you, not entirely sure I understood his
21 standard.

22 QUESTION: I was simply taking Justice
23 O'Connor's idea that the school district has to know
24 exactly and they have to have no response or a grossly
25 inadequate response, virtually no response, and in

1 addition, the harassment has to rise to the level of
2 denying the significant benefit of the program, which I
3 think was discussed on the other side. So, it can't --
4 those are the ideas of keeping the teasing out, of keeping
5 anything, even ordinary, you know -- well, I won't repeat
6 it.

7 MR. PLOWDEN: We're creating a higher standard
8 here to --

9 QUESTION: Very high. Very high. Quite high.

10 MR. PLOWDEN: I would still draw the line at no
11 sex harassment here if no -- no -- excuse me -- no private
12 right of action here if the predicate conduct is the
13 student. I make that distinction, and I would suggest to
14 the Court that there is a difference between the
15 relationship of a school district to teachers and students
16 that should inform the rule that you adopt.

17 QUESTION: And you would say the same thing
18 under title VI for race then? Let's say that there's a
19 racial minority in the school, and the racial majority on
20 the playing field during recess is beating up on the
21 minority, and the teachers stand by. They're not
22 affirmatively encouraging anything. They're just not
23 stopping it. There would also be no liability under title
24 VI?

25 MR. PLOWDEN: Yes, Your Honor, that's what I'm

1 saying. Most of those racial harassment cases, the older
2 ones anyway, invariably involve situations in which there
3 was an affirmative injunction in force to desegregate the
4 school district and, as part of it, were provisions about
5 harassment.

6 QUESTION: Do we -- do we have to be concerned
7 at all with the fact that in public schools, in any event,
8 the children are compelled by law to attend and the school
9 does act as a sort of in loco parentis situation during
10 the school day? Does that impose responsibility on a
11 school as a result that we have to be concerned about here
12 that might be part and parcel of the background of title
13 IX?

14 MR. PLOWDEN: No, ma'am. And I -- and I -- you
15 don't have to be in terms of whether or not there's going
16 to be a damage action in Federal district court for this.

17 But let me hasten to add that refusing to create
18 such a remedy is not going to be any green light for
19 children to misbehave at will. Every school in my State
20 is required by law -- it's mandatory to have a school
21 behavior, school discipline code, and these are on file
22 with the State. Every State has mandatory reporting of
23 sex abuse by children laws and makes it a misdemeanor to
24 fail to do that on the part of a teacher. Because of the
25 educational efforts of DOE, as well as the associations

1 that boards of education belong to, sex harassment
2 policies and procedures and grievance mechanisms have been
3 widely adopted throughout my State and throughout the
4 country.

5 In Georgia a school board is -- is a local
6 tribunal. It is set up under State law as a local
7 tribunal to hear and decide any action that arises under
8 the school law, and under that statute, parents who are
9 dissatisfied with the response they get from a principal,
10 or indeed even a superintendent, can appeal that matter to
11 the board of education. I've had those cases happen in my
12 county where I live involving this very issue.

13 In addition to those mechanisms that are within
14 the school context, there's the possibility of a tort
15 action against students if -- if it arises to the level of
16 a battery or an assault. There's juvenile court if they
17 are underage, and for the students who have reached the
18 age of majority, there's adult criminal court. All of
19 these mechanisms are there to help the parent and the
20 school --

21 QUESTION: Mr. Plowden, I may have missed it in
22 your description. Is there a remedy under State law
23 against the school board if it totally ignores a serious
24 problem?

25 MR. PLOWDEN: Not in my State, Your Honor.

1 QUESTION: No, no.

2 QUESTION: What is the authority of the schools
3 in -- in -- in your -- in your State? Do the schools have
4 authority to expel students or discipline them for things
5 that they do off the school grounds? I mean, suppose this
6 harassment is going on before the students get to school?
7 Can -- can -- is there authority --

8 MR. PLOWDEN: There is an extent to which
9 schools can assert jurisdiction for misbehavior that
10 occurs off the school grounds, yes, sir.

11 QUESTION: What is -- what is the extent?

12 MR. PLOWDEN: It has to relate to something at
13 the school. For example, students are harassing somebody
14 at the mall or the problem begins at school and it ends
15 after they get to the bus stop and they're on their way
16 from there. Those kinds of things are routinely dealt
17 with as school discipline matters under these discipline
18 codes that I was referring to. Now, that's not statutory
19 in Georgia, but most districts assert that right to do
20 that.

21 QUESTION: So, if it's sort of generalized
22 harassment that occurs off the school grounds, you'd say
23 that they have no -- probably have no authority, but if it
24 is harassment that relates specifically to what goes on at
25 school, even if it occurs off the school grounds, you

1 think they would have authority.

2 MR. PLOWDEN: Yes, sir. In Georgia, there's a
3 body of law developed by the State board. That's where
4 these things get appealed, and they hold that there must
5 be some connection there. You can't just willy-nilly
6 apply disciplinary action at school for totally unrelated
7 activity off campus.

8 QUESTION: Of course, the text of title IX here
9 is -- I mean, it speaks very broadly. It says, no person
10 shall, on the basis of sex, be excluded from -- be
11 excluded -- it's in the passive -- be excluded from
12 participation in, be denied the benefits of, or be
13 subjected to discrimination. It doesn't say who has to do
14 this act which results in the being.

15 MR. PLOWDEN: It says --

16 QUESTION: So, technically under the words of
17 the statute, why couldn't we say that the individual
18 students are in violation of section IX?

19 MR. PLOWDEN: It says --

20 QUESTION: In Justice Stevens' example, why
21 couldn't we say that the students who prevent the girls
22 from entering the field violates section IX themselves?

23 MR. PLOWDEN: If Your Honor please, it says that
24 that -- those kinds of things shall not happen under any
25 program or activity which receive Federal funds, which is

1 then further defined to mean all of the operations of a
2 local school district. So, I think the statute clearly
3 focuses in the first clause, if you will, on the
4 participant in the program, but it also says who is not
5 going to -- who is going to be responsible if any of these
6 things occur --

7 QUESTION: Well, that's one way to read it, to
8 read as -- as implicitly saying shall not be excluded by
9 the person who runs the program, but that's not really in
10 there. And certainly another way to read it is that
11 anyone who excludes someone from participation in a -- in
12 a school program that's federally funded violates title
13 IX.

14 MR. PLOWDEN: I suppose --

15 QUESTION: You could read it that way, couldn't
16 you?

17 MR. PLOWDEN: It is a possible reading of the
18 statute and --

19 QUESTION: How has it been read by the agency
20 that administers it? Title IX has been around now for
21 over a quarter of a century. And a basic question like
22 that, who does the statute -- who is the object of the
23 statute -- hasn't there been something --

24 MR. PLOWDEN: Well, the agency that administers
25 this statute in my case is the Department of Education

1 through the Office of Civil Rights. And long after this
2 -- the conduct at issue here and the lawsuit was filed in
3 -- in fact, it came -- became final in 1997, they issued
4 some guidance on this subject.

5 QUESTION: But not just -- Justice Scalia's
6 question didn't go to sexual harassment. It's who is
7 responsible under title IX. You answered it is the
8 recipient of Federal funds.

9 MR. PLOWDEN: They --

10 QUESTION: It is not the -- the student in the
11 school.

12 MR. PLOWDEN: They adopt what I call the occurs
13 in theory, which is a possible -- although not one we
14 would urge, but a possible broad reading of the statute to
15 mean, in effect, anything that happens anywhere in the
16 school community by anybody.

17 QUESTION: Well, one thing -- one thing is what
18 the recipient is responsible for, but where do you get the
19 limitation of title IX to the recipient of Federal funds?
20 I think --

21 MR. PLOWDEN: In this case I get it in this
22 fashion, Your Honor. As the opinion of the Court says in
23 Gebser, what we're doing here is crafting the contours of
24 an implied private right of action. It's not in a statute
25 anywhere. It's a creation of this Court in the Cannon

1 case.

2 And -- and Gebser goes on to say that you have
3 the leeway in -- in fashioning this remedial scheme to
4 come out with a rule that is consistent with the purpose
5 of the statute but which at the same time ensures that the
6 Federal funds in question are going to wind up going to
7 support education programs rather than being diverted to
8 support litigation.

9 So, although -- albeit that is a possible
10 reading, the occurs in -- you could read it that way. We
11 would strongly urge the Court not to. You don't have to
12 under your jurisprudence as set out in Gebser, and you can
13 read it in a more sensible fashion that avoids all of the
14 problems that would arise -- will arise if they are
15 correct and -- and there is this private right of action
16 because once -- once you step over that line, once you
17 cross my bright line test that I'm suggesting to you here
18 today, then not only do parents have all of the kinds of
19 formal and informal adjustment mechanisms that I -- that I
20 described a while ago, but now the door to the Federal
21 courthouse is open.

22 A January 9 op ed piece indicates that according
23 to a study by the American Association of University
24 Women, over three-quarters of all girls and over two-
25 thirds of all boys report being harassed somewhere in

1 grades 8 through 11. The potential here for litigation is
2 enormous.

3 QUESTION: But we don't know from that whether
4 -- what the definition of harassment was. Everyone agrees
5 it's got to be pervasive. It's got to be repeated, and
6 the school has to be deliberately indifferent. In the
7 survey that you're referring to, anybody who had been --
8 had one exposure could answer yes.

9 MR. PLOWDEN: Yes.

10 QUESTION: And that certainly is not what anyone
11 says would be -- would trigger liability under title IX.

12 MR. PLOWDEN: Well, I'm not suggesting here that
13 all two-thirds of the 45 million boys would have a claim.
14 I'm just suggesting to you that once you open the door,
15 two things -- well, three things really have occurred
16 here. No matter where the bar is, we're now in Federal
17 court litigating over the response of the school district
18 to these reports, after-the-fact reports like you have in
19 this case, of sex harassment.

20 QUESTION: Well, it's only money.

21 (Laughter.)

22 MR. PLOWDEN: I would respectfully suggest, Your
23 Honor, that you could be talking about a lot of money
24 here.

25 Creating this cause of action could turn out to

1 be self-defeating in terms of the use of Federal funds to
2 enhance these programs.

3 QUESTION: It's not -- it's not only money.
4 Isn't it -- isn't it a necessary consequence of the
5 position the petitioners argued that there will be a
6 Federal code of conduct in every classroom in the country?

7 MR. PLOWDEN: Exactly, Your Honor. Precisely my
8 point. What will happen here is -- and it's a backward
9 looking and a forward looking situation, if you will.

10 For the case that's made it into court, the
11 Federal district judge has got to deal with the issue.
12 Regardless of how high the bar is set, what the test is,
13 there's got to be a review on some basis looking back at
14 the action or alleged inaction, whatever you call it, of
15 the school officials and response to the reports of
16 harassment by the student.

17 On a going forward basis, school administrators,
18 school board attorneys are going to have to constantly
19 refine and fine tune the punishment provisions in their
20 discipline codes in order to make sure that they --
21 they're protected for the next case that comes along.
22 When the -- when the district court somewhere decides,
23 well, this was not enough, then we may need to adjust our
24 punishment, and as the principal in this case said, get
25 down on them a little harder. So, you've -- you've got

1 both of those problems.

2 You've also, in -- in the course of doing this,
3 focused the attention of the administrators, teachers,
4 school officials into the courthouse into the litigation
5 process and away from the school function, the school
6 program which, after all, is the object of these various
7 Federal grants that we're talking about here.

8 QUESTION: Mr. Plowden, I understand the -- the
9 problem that people have been wrestling with, that is, how
10 do you draw the line between rough-stuff teasing and
11 harassment that's covered. But on the other hand, I don't
12 understand why it's so hard to separate negligence from
13 deliberate indifference, that it means you have to know
14 and you have to deliberately not do anything about it. It
15 seems to me that that's not a hard standard to define and
16 apply.

17 MR. PLOWDEN: I'm not suggesting so much that
18 the difference there is hard to apply as I am saying that
19 it has to be applied at all because once you get into the
20 courthouse, whatever that standard might be that you would
21 adopt, it's got to be applied in court with children
22 testifying about the pervasiveness or lack of it here or
23 perhaps even the welcomeness of it. That's another
24 concept here that goes into this adult notion of sex
25 harassment that you'll now be applying to the children.

1 QUESTION: Would your answer be the same if it
2 were racial harassment?

3 MR. PLOWDEN: Under this scheme, yes, Your
4 Honor, it would. I --

5 QUESTION: I mean, suppose -- you know, imagine
6 very, very severe racial harassment by students against
7 someone who was different racially and -- and they can't
8 use the program.

9 MR. PLOWDEN: They can't benefit.

10 QUESTION: To the point where they can't benefit
11 from the educational program. Is it likely that the
12 Congress wanted that to be ignored?

13 MR. PLOWDEN: Not if the adult involvement in
14 that situation in terms of ignoring it, looking the other
15 way, to the point perhaps of covering it up, if you get to
16 that stage, then under those circumstances you -- you've
17 perhaps crossed over my bright line.

18 QUESTION: No, but you still have -- it seems to
19 me you have the same hypothetical in the black/white
20 situation. The white boys say, this field is for whites
21 only, and the -- and the -- and the school does nothing.
22 You still say that -- there's no liability there.

23 MR. PLOWDEN: I do, Your Honor.

24 QUESTION: You have to say that.

25 MR. PLOWDEN: I do, Your Honor, and I --

1 QUESTION: Well, does title IX cover racial
2 discrimination?

3 QUESTION: No, I'm talking about title VI.

4 MR. PLOWDEN: Title VI does.

5 QUESTION: And they work the same way, the two,
6 with respect to the -- to the mechanism, the private right
7 of action and the OCR authority.

8 MR. PLOWDEN: Yes, Your Honor. You have
9 probably inferred a private right of action in Guardians
10 if you put together all the -- the opinions and add up the
11 -- the positions of the court in that case.

12 QUESTION: The statute in front of us is written
13 in the -- I guess the passive voice. No person shall be
14 subjected. It seems to me that -- that aids somewhat the
15 construction that the petitioner is urging on us. Schools
16 simply have a duty to ensure that the prohibited conduct
17 doesn't happen no matter who causes it.

18 MR. PLOWDEN: Again, Your Honor --

19 QUESTION: That's a permissible reading it --

20 MR. PLOWDEN: I would agree that you can read
21 that statute and the definitions if you follow them
22 through to the end, that there is this occurs in theory
23 out there. I would strongly urge the Court to reject that
24 reading. You don't have to read it that way.

25 QUESTION: Well, if you give it that reading,

1 you don't have to sue the school. You could -- you could
2 sue the individual kids who -- who are doing the sexual
3 taunting --

4 MR. PLOWDEN: Well, the --

5 QUESTION: -- or the -- the individual students
6 who are excluding people from the playing field.

7 MR. PLOWDEN: Well, if Your Honor please,
8 jurisprudence thus far -- and of course, you haven't
9 addressed this issue --

10 QUESTION: No. I mean, if you accept Justice
11 Kennedy's position that the passive voice is the passive
12 voice.

13 MR. PLOWDEN: You could perhaps extend the
14 private right of action that far to reach the conduct of
15 nonrecipients in your example.

16 QUESTION: Has any court ever done that?

17 MR. PLOWDEN: Not that I'm aware of, Your Honor.

18 We urge the Court in this case to adopt a rule
19 which is informed not by the exception, not by these
20 hypotheticals, but which recognizes that a school district
21 -- school districts in this country are making concerted
22 efforts to deal with the problem of student misbehavior
23 whether it has a sexual connotation or not and that
24 Federal funds should be -- should be used to support
25 educational programs rather than litigation.

1 Refusing to adopt the rule petitioner urges does
2 not condone that conduct, but it does recognize that all
3 violence and all harassment from whatever source and
4 whatever direction is objectionable. But it leaves the
5 responsibility of dealing with that to parents and schools
6 operating under State law.

7 We urge you not to apply a rule which
8 federalizes school discipline process by applying adult
9 concepts to children.

10 Thank you.

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

13 The case is submitted.

14 (Whereupon, at 11:04 a.m., the case in the
15 above-entitled matter was submitted.)
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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:

AURELIA DAVIS, AS NEXT FRIEND OF LaSHONDA D., Petitioner v. MONROE COUNTY BOARD OF EDUCATION, ET AL.
CASE NO: 97-843

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

BY:

Liona M. May
(REPORTER)