policies leave indefensible gaps in students' right to protection from sexual pressure.

At the high school level, sexual contacts short of intercourse are usually legal if the student is over 13 or 14 years old. And in many states intercourse is legal whenever the student is over 16, regardless of the age or status of the other party. In effect these states focus on maturity (age) as the sole measure of capacity to consent, ignoring the problems of power that arise when an adolescent and her sexual partner are not contemporaries. Federal laws against sexual harassment do not apply unless the student has affirmatively indicated that the contacts are unwelcome, and high school students are often too immature or intimidated to think clearly about how they want to react to sexual invitations from a teacher.

Davis v. Monroe County (1999)

Title IX, like Title VII, prohibits sexual harassment by peers as well as by supervisors. The case of LaShonda Davis, a fifth grader at Hubbard Elementary School in Monroe County, Georgia, offers an egregious example of peer on peer harassment. G.F., a classmate, repeatedly tried to touch her breasts and genitals, rubbed his body against hers, and made such remarks as, "I want to feel your boobs." LaShonda told her mother and her classroom teacher about these incidents. When the harassment continued, the mother spoke to the teacher, who assured her that the principal had been informed. By now, La Shonda was no longer G.F.'s only target. She and several other girls sought an appointment with the principal and were rebuffed. The school took no disciplinary action against the boy. His harassment worsened to the point that LaShonda could not concentrate on her studies and wrote a suicide note. The incidents stopped only after G.F. was charged with sexual battery. LaShonda's mother, Aurelia, sued the school district on her daughter's behalf, alleging that its failure to act constituted a violation of Title IX.

DAVIS V. MONROE COUNTY BOARD OF EDUCATION ET AL.

526 U.S. 629 (1999)

[Many citations have been omitted.—AU.]

JUSTICE O'CONNOR delivered the opinion of the Court.

. . .We consider here whether a private damages action may lie against the school board in cases of student-on-student harassment. We conclude that it

may, but only where the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities. Moreover, . . .such an action will lie only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit. . . .

II

Title IX provides, with certain exceptions not at issue here, that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

Congress authorized an administrative enforcement scheme for Title IX. Federal departments or agencies with the authority to provide financial assistance are entrusted to promulgate rules, regulations, and orders to enforce the objectives of § 1681, see § 1682, and these departments or agencies may rely on "any . . . means authorized by law," including the termination of funding, to give effect to the statute's restrictions.

. . .[A]t issue here is the question whether a recipient of federal education funding may be liable for damages under Title IX under any circumstances for discrimination in the form of student-on-student sexual harassment.

A

Petitioner urges that Title IX's plain language compels the conclusion that the statute is intended to bar recipients of federal funding from permitting this form of discrimination in their programs or activities. She emphasizes that the statute prohibits a student from being "*subjected to discrimination* under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681 (emphasis supplied). It is Title IX's "unmistakable focus on the benefited class," rather than the perpetrator, that, in petitioner's view, compels the conclusion that the statute works to protect students from the discriminatory misconduct of their peers.

Here, however, we are asked to do more than define the scope of the behavior that Title IX proscribes. We must determine whether a district's failure to respond to student-on-student harassment in its schools can support a private suit for money damages. This Court has indeed recognized an implied private right of action under Title IX, and we have held that money damages are available in such suits. Because we have repeatedly treated Title IX as legislation enacted pursuant to Congress' authority under the Spending Clause, however, private damages actions are available only where recipients of federal

funding had adequate notice that they could be liable for the conduct at issue. In interpreting language in spending legislation, we thus "insist that Congress speak with a clear voice," recognizing that "there can, of course, be no knowing acceptance [of the terms of the putative contract] if a State is unaware of the conditions [imposed by the legislation] or is unable to ascertain what is expected of it."

. . .[R]espondents urge that Title IX provides no notice that recipients of federal educational funds could be liable in damages for harm arising from student-on-student harassment. Respondents contend, specifically, that the statute only proscribes misconduct by grant recipients, not third parties. Respondents argue, moreover, that it would be contrary to the very purpose of Spending Clause legislation to impose liability on a funding recipient for the misconduct of third parties, over whom recipients exercise little control.

We agree with respondents that a recipient of federal funds may be liable in damages under Title IX only for its own misconduct. The recipient itself must "exclude [persons] from participation in,. . .deny [persons] the benefits of, or. . .subject [persons] to discrimination under" its "programs or activities" in order to be liable under Title IX. The Government's enforcement power may only be exercised against the funding recipient, see §*1682, and we have not extended damages liability under Title IX to parties outside the scope of this power.

We disagree with respondents' assertion, however, that petitioner seeks to hold the Board liable for *G.F.*'s actions instead of its own. Here, petitioner attempts to hold the Board liable for its *own* decision to remain idle in the face of known student-on-student harassment in its schools [emphases original—AU.].

. . .[In *Gebser*], we concluded that the district could be liable for damages only where the district itself intentionally acted in clear violation of Title IX by remaining deliberately indifferent to acts of teacher-student harassment of which it had actual knowledge. . . .By employing the "deliberate indifference" theory already used to establish municipal liability. . ., we concluded in *Gebser* that recipients could be liable in damages only where their own deliberate indifference effectively "caused" the discrimination. The high standard imposed in *Gebser* sought to eliminate any "risk that the recipient would be liable in damages not for its own official decision but instead for its employees' independent actions."

Gebser thus established that a recipient intentionally violates Title IX, and is subject to a private damages action, where the recipient is deliberately indifferent to known acts of teacher-student discrimination. . . .

We consider here whether the misconduct identified in *Gebser*—deliberate indifference to known acts of harassment—amounts to an intentional violation of Title IX, capable of supporting a private damages action, when the harasser is a student rather than a teacher. We conclude that, in certain limited circumstances, it does.

. . .This is not to say that the identity of the harasser is irrelevant. On the contrary, both the "deliberate indifference" standard and the language of Title IX narrowly circumscribe the set of parties whose known acts of sexual harassment can trigger some duty to respond on the part of funding recipients. Deliberate indifference makes sense as a theory of direct liability under Title IX only where the funding recipient has some control over the alleged harassment. A recipient cannot be directly liable for its indifference where it lacks the authority to take remedial action.

The language of Title IX itself—particularly when viewed in conjunction with the requirement that the recipient have notice of Title IX's prohibitions to be liable for damages—also cabins the range of misconduct that the statute proscribes. The statute's plain language confines the scope of prohibited conduct based on the recipient's degree of control over the harasser and the environment in which the harassment occurs. If a funding recipient does not engage in harassment directly, it may not be liable for damages unless its deliberate indifference "subjects" its students to harassment.

. . .These factors combine to limit a recipient's damages liability to circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs. . . .We agree with the dissent that these conditions are satisfied most easily and most obviously when the offender is an agent of the recipient. We rejected the use of agency analysis in *Gebser*, however, and we disagree that the term "under" somehow imports an agency requirement into Title IX. As noted above, the theory in *Gebser* was that the recipient was *directly* liable for its deliberate indifference to discrimination. Liability in that case did not arise because the "teacher's actions [were] treated" as those of the funding recipient; the district was directly liable for its *own* failure to act. . . .

Where, as here, the misconduct occurs during school hours and on school grounds—the bulk of G. F.'s misconduct, in fact, took place in the

classroom—the misconduct is taking place "under" an "operation" of the funding recipient. See *Doe* v. *University of Illinois*, 138 F.3d at 661 (finding liability where school fails to respond properly to "student-on-student sexual harassment that takes place while the students are involved in school activities or otherwise under the supervision of school employees"). In these circumstances, the recipient retains substantial control over the context in which the harassment occurs. More importantly, however, in this setting the Board exercises significant control over the harasser. We have observed, for example, "that the nature of [the State's] power [over public schoolchildren] is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults." *Vernonia School Dist. 47J* v. *Acton*, 515 U.S. 646, 655 (1995). On more than one occasion, this Court has recognized the importance of school officials' "comprehensive authority . . ., consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U.S. 503, 507 (1969); see also *New Jersey* v. *T. L. O.*, 469 U.S. 325, 342, n. 9 (1985). . . .The common law, too, recognizes the school's disciplinary authority. We thus conclude that recipients of federal funding may be liable for "subjecting" their students to discrimination where the recipient is deliberately indifferent to known acts of student-on-student sexual harassment and the harasser is under the school's disciplinary authority.

At the time of the events in question here, in fact, school attorneys and administrators were being told that student-on-student harassment could trigger liability under Title IX. In March 1993, even as the events alleged in petitioner's complaint were unfolding, the National School Boards Association issued a publication, for use by "school attorneys and administrators in understanding the law regarding sexual harassment of employees and students," which observed that districts could be liable under Title IX for their failure to respond to student-on-student harassment. Drawing on Equal Employment Opportunity Commission guidelines interpreting Title VII, the publication informed districts that, "if [a] school district has constructive notice of severe and repeated acts of sexual harassment by fellow students, that may form the basis of a Title IX claim."

. . .Likewise, although they were promulgated too late to contribute to the Board's notice of proscribed misconduct, the Department of Education's Office for Civil Rights (OCR) has recently adopted policy guidelines providing that student-on-student harassment falls within the scope of Title IX's proscriptions.

We stress that our conclusion here—that recipients may be liable for their deliberate indifference to known acts of peer sexual harassment—does not mean that recipients can avoid liability only by purging their schools of actionable peer harassment or that administrators must engage in particular disciplinary action. We thus disagree with respondents' contention that, if Title IX provides a cause of action for student-on-student harassment, "nothing short of expulsion of every student accused of misconduct involving sexual overtones would protect school systems from liability or damages." . . .

School administrators will continue to enjoy the flexibility they require so long as funding recipients are deemed "deliberately indifferent" to acts of student-on-student harassment only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances. The dissent consistently mischaracterizes this standard to require funding recipients to "remedy" peer harassment, and to "ensure that . . . students conform their conduct to" certain rules. Title IX imposes no such requirements. On the contrary, the recipient must merely respond to known peer harassment in a manner that is not clearly unreasonable. . . .

Like the dissent, we acknowledge that school administrators shoulder substantial burdens as a result of legal constraints on their disciplinary authority. To the extent that these restrictions arise from federal statutes, Congress can review these burdens with attention to the difficult position in which such legislation may place our Nation's schools. We believe, however, that the standard set out here is sufficiently flexible to account both for the level of disciplinary authority available to the school and for the potential liability arising from certain forms of disciplinary action. A university might not, for example, be expected to exercise the same degree of control over its students that a grade school would enjoy, and it would be entirely reasonable for a school to refrain from a form of disciplinary action that would expose it to constitutional or statutory claims.

While it remains to be seen whether petitioner can show that the Board's response to reports of G. F.'s misconduct was clearly unreasonable in light of the known circumstances, petitioner may be able to show that the Board "subjected" LaShonda to discrimination by failing to respond in any way over a period of five months to complaints of G. F.'s in-school misconduct from LaShonda and other female students.

B

The requirement that recipients receive adequate notice of Title IX's proscriptions also bears on the proper definition of "discrimination" in the context of a private damages action. We have elsewhere concluded that sexual harassment is a form of discrimination for Title IX purposes and that Title IX proscribes harassment with sufficient clarity to satisfy [the] notice requirement and serve as a basis for a damages action. Having previously determined that "sexual harassment" is "discrimination" in the school context under Title IX, we are constrained to conclude that student-on-student sexual harassment, if sufficiently severe, can likewise rise to the level of discrimination actionable under the statute. The statute's other prohibitions, moreover, help give content to the term "discrimination" in this context. Students are not only protected from discrimination, but also specifically shielded from being "excluded from participation in" or "denied the benefits of" any "education program or activity receiving Federal financial assistance." § 1681(a). The statute makes clear that . . . students must not be denied access to educational benefits and opportunities on the basis of gender. We thus conclude that funding recipients are properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.

The most obvious example of student-on-student sexual harassment capable of triggering a damages claim would thus involve the overt, physical deprivation of access to school resources. Consider, for example, a case in which male students physically threaten their female peers every day, successfully preventing the female students from using a particular school resource—an athletic field or a computer lab, for instance. District administrators are well aware of the daily ritual, yet they deliberately ignore requests for aid from the female students wishing to use the resource. The district's knowing refusal to take any action in response to such behavior would fly in the face of Title IX's core principles, and such deliberate indifference may appropriately be subject to claims for monetary damages. It is not necessary, however, to show physical exclusion to demonstrate that students have been deprived by the actions of another student or students of an educational opportunity on the basis of sex. Rather, a plaintiff must establish sexual harassment of students that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience,

that the victim-students are effectively denied equal access to an institution's resources and opportunities.

Whether gender-oriented conduct rises to the level of actionable "harassment" thus "depends on a constellation of surrounding circumstances, expectations, and relationships," *Oncale* v. *Sundowner Offshore Services, Inc.*, including, but not limited to, the ages of the harasser and the victim and the number of individuals involved. Courts, moreover, must bear in mind that schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults. Indeed, at least early on, students are still learning how to interact appropriately with their peers. It is thus understandable that, in the school setting, students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it. Damages are not available for simple acts of teasing and name-calling among school children, however, even where these comments target differences in gender. Rather, in the context of student-on-student harassment, damages are available only where the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect.

The dissent fails to appreciate these very real limitations on a funding recipient's liability under Title IX. It is not enough to show, as the dissent would read this opinion to provide, that a student has been "teased," or "called . . . offensive names." Comparisons to an "overweight child who skips gym class because the other children tease her about her size," the student "who refuses to wear glasses to avoid the taunts of 'four-eyes,' " and "the child who refuses to go to school because the school bully calls him a 'scaredy-cat' at recess," are inapposite and misleading. Nor do we contemplate, much less hold, that a mere "decline in grades is enough to survive" a motion to dismiss. The drop-off in LaShonda's grades provides necessary evidence of a potential link between her education and G.F.'s misconduct, but petitioner's ability to state a cognizable claim here depends equally on the alleged persistence and severity of G.F.'s actions, not to mention the Board's alleged knowledge and deliberate indifference. We trust that the dissent's characterization of our opinion will not mislead courts to impose more sweeping liability than we read Title IX to require.

. . .The fact that it was a teacher who engaged in harassment in *Franklin* and *Gebser* is relevant. The relationship between the harasser and the victim necessarily affects the extent to which the misconduct can be said to breach Title IX's guarantee of equal access to educational benefits and to have a

systemic effect on a program or activity. Peer harassment, in particular, is less likely to satisfy these requirements than is teacher-student harassment.

C

Applying this standard to the facts at issue here, we conclude that the Eleventh Circuit erred in dismissing petitioner's complaint. Petitioner alleges that her daughter was the victim of repeated acts of sexual harassment by G. F. over a 5-month period, and there are allegations in support of the conclusion that G. F.'s misconduct was severe, pervasive, and objectively offensive. The harassment was not only verbal; it included numerous acts of objectively offensive touching, and, indeed, G. F. ultimately pleaded guilty to criminal sexual misconduct. Moreover, the complaint alleges that there were multiple victims who were sufficiently disturbed by G. F.'s misconduct to seek an audience with the school principal. Further, petitioner contends that the harassment had a concrete, negative effect on her daughter's ability to receive an education. The complaint also suggests that petitioner may be able to show both actual knowledge and deliberate indifference on the part of the Board, which made no effort whatsoever either to investigate or to put an end to the harassment.

. . .[T]he judgment of the United States Court of Appeals for the Eleventh Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE THOMAS join, dissenting.

. . .A vital safeguard for the federal balance is the requirement that, when Congress imposes a condition on the States' receipt of federal funds, it "must do so unambiguously." As the majority acknowledges, "legislation enacted . . . pursuant to the spending power is much in the nature of a contract," and the legitimacy of Congress' exercise of its power to condition funding on state compliance with congressional conditions "rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' " " 'There can, of course, be no knowing acceptance [of the terms of the putative contract] if a State is unaware of the conditions [imposed by the legislation] or is unable to ascertain what is expected of it.' " *Pennhurst* v. *Halderman,* 451 U.S. 1. at 17.

Our insistence that "Congress speak with a clear voice" to "enable the States to exercise their choice knowingly, cognizant of the consequences of their participation," . . .is a concrete safeguard in the federal system. Only if States receive clear notice of the conditions attached to federal funds can they

guard against excessive federal intrusion into state affairs and be vigilant in policing the boundaries of federal power. . . .While the majority purports to give effect to these principles, it eviscerates the clear-notice safeguard of our Spending Clause jurisprudence.

. . .The remedial scheme the majority creates today is neither sensible nor faithful to Spending Clause principles. In order to make its case for school liability for peer sexual harassment, the majority must establish that Congress gave grant recipients clear and unambiguous notice that they would be liable in money damages for failure to remedy discriminatory acts of their students. The majority must also demonstrate that the statute gives schools clear notice that one child's harassment of another constitutes "discrimination" on the basis of sex within the meaning of Title IX, and that—as applied to individual cases—the standard for liability will enable the grant recipient to distinguish inappropriate childish behavior from actionable gender discrimination. The majority does not carry these burdens.

. . .In the end, the majority not only imposes on States liability that was unexpected and unknown, but the contours of which are, as yet, unknowable. The majority's opinion purports to be narrow, but the limiting principles it proposes are illusory. The fence the Court has built is made of little sticks, and it cannot contain the avalanche of liability now set in motion. The potential costs to our schools of today's decision are difficult to estimate, but they are so great that it is most unlikely Congress intended to inflict them.

The only certainty flowing from the majority's decision is that scarce resources will be diverted from educating our children and that many school districts, desperate to avoid Title IX peer harassment suits, will adopt whatever federal code of student conduct and discipline the Department of Education sees fit to impose upon them. The Nation's schoolchildren will learn their first lessons about federalism in classrooms where the federal government is the ever-present regulator. The federal government will have insinuated itself not only into one of the most traditional areas of state concern but also into one of the most sensitive areas of human affairs. This federal control of the discipline of our Nation's schoolchildren is contrary to our traditions and inconsistent with the sensible administration of our schools. Because Title IX did not give States unambiguous notice that accepting federal funds meant ceding to the federal government power over the day-to-day disciplinary decisions of schools, I dissent.

I. . .

A

. . .[A] plaintiff cannot establish a Title IX violation merely by showing that she has been "subjected to discrimination." Rather, a violation of Title IX occurs only if she is "subjected to discrimination under any education program or activity," 20 U.S.C. § 1681(a), where "program or activity" is defined as "all of the operations of" a grant recipient, § 1687.

Under the most natural reading of this provision, discrimination violates Title IX only if it is authorized by, or in accordance with, the actions, activities, or policies of the grant recipient.

. . .Teacher sexual harassment of students is "under" the school's program or activity in certain circumstances, but student harassment is not. Our decision in *Gebser* recognizes that a grant recipient acts through its agents and thus, under certain limited circumstances, even tortious acts by teachers may be attributable to the school. . . .Where the heightened requirements for attribution are met, the teacher's actions are treated as the grant recipient's actions. In those circumstances, then, the teacher sexual harassment is "under" the operations of the school.

I am aware of no basis in law or fact, however, for attributing the acts of a student to a school and, indeed, the majority does not argue that the school acts through its students. . . .Discrimination by one student against another therefore cannot be "under" the school's program or activity as required by Title IX. The majority's imposition of liability for peer sexual harassment thus conflicts with the most natural interpretation of Title IX's "under a program or activity" limitation on school liability. At the very least, my reading undermines the majority's implicit claim that Title IX imposes an unambiguous duty on schools to remedy peer sexual harassment.

B

1

. . .The majority contends that a school's deliberate indifference to known student harassment "subjects" students to harassment—that is, "causes [students] to undergo" harassment. The majority recognizes, however, that there must be some limitation on the third-party conduct that the school can fairly be said to cause. In search of a principle, the majority asserts, without much elaboration, that one causes discrimination when one has some "degree of control" over the discrimination and fails to remedy it.

To state the majority's test is to understand that it is little more than an exercise in arbitrary line-drawing. The majority does not explain how we are to determine what degree of control is sufficient—or, more to the point, how the States were on clear notice that the Court would draw the line to encompass students.

. . .One would think that the majority would at least limit its control principle by reference to the long-established practice of the Department of Education (DOE). For the first 25 years after the passage of Title IX—until 1997—the DOE's regulations drew the liability line, at its most expansive, to encompass only those to whom the school delegated its official functions. It is perhaps reasonable to suppose that grant recipients were on notice that they could not hire third parties to do for them what they could not do themselves. For example, it might be reasonable to find that a school was on notice that it could not circumvent Title IX's core prohibitions by, for example, delegating its admissions decisions to an outside screening committee it knew would discriminate on the basis of gender.

Given the state of gender discrimination law at the time Title IX was passed, however, there is no basis to think that Congress contemplated liability for a school's failure to remedy discriminatory acts by students or that the States would believe the statute imposed on them a clear obligation to do so. When Title IX was enacted in 1972, the concept of "sexual harassment" as gender discrimination had not been recognized or considered by the courts. . . .

2

The majority nonetheless appears to see no need to justify drawing the "enough control" line to encompass students. In truth, however, a school's control over its students is much more complicated and limited than the majority acknowledges. A public school does not control its students in the way it controls its teachers or those with whom it contracts. Most public schools do not screen or select students, and their power to discipline students is far from unfettered.

Public schools are generally obligated by law to educate all students who live within defined geographic boundaries. Indeed, the Constitution of almost every State in the country guarantees the State's students a free primary and secondary public education. . . .Schools that remove a harasser from the classroom and then attempt to fulfill their continuing-education obligation by placing the harasser in any kind of group setting, rather than by hiring expensive tutors for each student, will find themselves at continuing risk of

Title IX suits brought by the other students in the alternative education program.

In addition, federal law imposes constraints on school disciplinary actions. This Court has held, for example, that due process requires "at the very minimum," that a student facing suspension "be given some kind of notice and afforded some kind of hearing." *Goss* v. *Lopez*, 419 U.S. 565, 579 (1975).

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.* (1994 ed., Supp. III), moreover, places strict limits on the ability of schools to take disciplinary actions against students with behavior disorder disabilities, even if the disability was not diagnosed prior to the incident triggering discipline. "Disability," as defined in the Act, includes "serious emotional disturbance," § 1401(3) (A) (i), which the DOE, in turn, has defined as a "condition exhibiting . . . over a long period of time and to a marked degree that adversely affects a child's educational performance" an "inability to build or maintain satisfactory interpersonal relationships with peers and teachers" or "inappropriate types of behavior or feelings under normal circumstances." 34 CFR § 300.7(b)(9) (1998). If, as the majority would have us believe, the behavior that constitutes actionable peer sexual harassment so deviates from the normal teasing and jostling of adolescence that it puts schools on clear notice of potential liability, then a student who engages in such harassment may have at least a colorable claim of severe emotional disturbance within the meaning of IDEA. When imposing disciplinary sanction on a student harasser who might assert a colorable IDEA claim, the school must navigate a complex web of statutory provisions and DOE regulations that significantly limit its discretion.

The practical obstacles schools encounter in ensuring that thousands of immature students conform their conduct to acceptable norms may be even more significant than the legal obstacles. School districts cannot exercise the same measure of control over thousands of students that they do over a few hundred adult employees. The limited resources of our schools must be conserved for basic educational services. Some schools lack the resources even to deal with serious problems of violence and are already overwhelmed with disciplinary problems of all kinds.

Perhaps even more startling than its broad assumptions about school control over primary and secondary school students is the majority's failure to grapple in any meaningful way with the distinction between elementary and secondary schools, on the one hand, and universities on the other. The majority bolsters its argument that schools can control their students' actions by quoting

our decision in *Vernonia School Dist. 47J* v. *Acton*, 515 U.S. 646, 655 (1995), for the proposition that " 'the nature of [the State's] power [over public school children] is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults.' " Yet the majority's holding would appear to apply with equal force to universities, which do not exercise custodial and tutelary power over their adult students.

A university's power to discipline its students for speech that may constitute sexual harassment is also circumscribed by the First Amendment. A number of federal courts have already confronted difficult problems raised by university speech codes designed to deal with peer sexual and racial harassment.

The difficulties associated with speech codes simply underscore the limited nature of a university's control over student behavior that may be viewed as sexual harassment. Despite the fact that the majority relies on the assumption that schools exercise a great deal of control over their students to justify creating the private cause of action in the first instance, it does not recognize the obvious limits on a university's ability to control its students as a reason to doubt the propriety of a private cause of action for peer harassment. It simply uses them as a factor in determining whether the university's response was reasonable. . . .

II

. . .The law recognizes that children—particularly young children—are not fully accountable for their actions because they lack the capacity to exercise mature judgment. It should surprise no one, then, that the schools that are the primary locus of most children's social development are rife with inappropriate behavior by children who are just learning to interact with their peers. The *amici* on the front lines of our schools describe the situation best:

> "Unlike adults in the workplace, juveniles have limited life experiences or familial influences upon which to establish an understanding of appropriate behavior. The real world of school discipline is a rough-and-tumble place where students practice newly learned vulgarities, erupt with anger, tease and embarrass each other, share offensive notes, flirt, push and shove in the halls, grab and offend." Brief for National School Boards Assoc. as *Amici Curiae* (hereinafter school *amici*).

No one contests that much of this "dizzying array of immature or uncontrollable behaviors by students," *ibid.* is inappropriate, even "objectively offensive" at times, and that parents and schools have a moral and ethical

responsibility to help students learn to interact with their peers in an appropriate manner. It is doubtless the case, moreover, that much of this inappropriate behavior is directed toward members of the opposite sex, as children in the throes of adolescence struggle to express their emerging sexual identities.

It is a far different question, however, whether it is either proper or useful to label this immature, childish behavior gender discrimination. Nothing in Title IX suggests that Congress even contemplated this question, much less answered it in the affirmative in unambiguous terms.

. . .[R]espondents have made a cogent and persuasive argument that the type of student conduct alleged by petitioner should not be considered "sexual harassment," much less gender discrimination actionable under Title IX [stating in their brief]:

> "At the time Petitioner filed her complaint, no court, including this Court had recognized the concept of sexual harassment in any context other than the employment context. Nor had any Court extended the concept of sexual harassment to the misconduct of emotionally and socially immature children. The type of conduct alleged by Petitioner in her complaint is not new. However, in past years it was properly identified as misconduct which was addressed within the context of student discipline. The Petitioner now asks this Court to create out of whole cloth a cause of action by labeling childish misconduct as 'sexual harassment,' to stigmatize children as sexual harassers, and have the federal court system take on the additional burden of second guessing the disciplinary actions taken by school administrators in addressing misconduct, something this Court has consistently refused to do."

Likewise, the majority's assertion that *Gebser* and *Franklin* settled the question is little more than *ipse dixit*. *Gebser* and *Franklin* themselves did nothing more than cite *Meritor Savings Bank, FSB* v. *Vinson,* 477 U.S. 57 (1986), a Title VII case, for the proposition that "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminates' on the basis of sex." See *Franklin* at 74; *Gebser*, 524 U.S. at 282–283. To treat that proposition as establishing that the student conduct at issue here is gender discrimination is to erase, in one stroke, all differences between children and adults, peers and teachers, schools and workplaces.

In reality, there is no established body of federal or state law on which courts may draw in defining the student conduct that qualifies as Title IX gender discrimination. Analogies to Title VII hostile environment harassment are inapposite, because schools are not workplaces and children are not adults. The norms of the adult workplace that have defined hostile environment sexual harassment, see, *e.g.*, *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), are not easily translated to peer relationships in schools, where teenage romantic relationships and dating are a part of everyday life. Analogies to Title IX teacher sexual harassment of students are similarly flawed. A teacher's sexual overtures toward a student are always inappropriate; a teenager's romantic overtures to a classmate (even when persistent and unwelcome) are an inescapable part of adolescence.

The majority admits that, under its approach, "whether gender-oriented conduct rises to the level of actionable 'harassment' . . . 'depends on a constellation of surrounding circumstances, expectations, and relationships, including, but not limited to, the ages of the harasser and the victim and the number of individuals involved." The majority does not explain how a school is supposed to discern from this mishmash of factors what is actionable discrimination. Its multifactored balancing test is a far cry from the clarity we demand of Spending Clause legislation.

. . .The only guidance the majority gives schools in distinguishing between the "simple acts of teasing and name-calling among school children," said not to be a basis for suit even when they "target differences in gender," and actionable peer sexual harassment is, in reality, no guidance at all. The majority proclaims that "in the context of student-on-student harassment, damages are available only in the situation where the behavior is so serious, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect." . . .Is equal access denied when a girl who tires of being chased by the boys at recess refuses to go outside? When she cannot concentrate during class because she is worried about the recess activities? When she pretends to be sick one day so she can stay home from school? It appears the majority is content to let juries decide.

The majority's reference to a "systemic effect" does nothing to clarify the content of its standard. The majority appears to intend that requirement to do no more than exclude the possibility that a single act of harassment perpetrated by one student on one other student can form the basis for an actionable claim. That is a small concession indeed.

. . .On the facts of this case, petitioner has stated a claim because she alleged, in the majority's words, "that the harassment had a concrete, negative effect on her daughter's ability to receive an education." In petitioner's words, the effects that might have been visible to the school were that her daughter's grades "dropped" and her "ability to concentrate on her school work [was] affected." Almost all adolescents experience these problems at one time or another as they mature.

III

The majority's inability to provide any workable definition of actionable peer harassment simply underscores the myriad ways in which an opinion that purports to be narrow is, in fact, so broad that it will support untold numbers of lawyers who will prove adept at presenting cases that will withstand the defendant school districts' pretrial motions. Each of the barriers to run-away litigation the majority offers us crumbles under the weight of even casual scrutiny.

. . .The majority seems oblivious to the fact that almost every child, at some point, has trouble in school because he or she is being teased by his or her peers. The girl who wants to skip recess because she is teased by the boys is no different from the overweight child who skips gym class because the other children tease her about her size in the locker room; or the child who risks flunking out because he refuses to wear glasses to avoid the taunts of "four-eyes"; or the child who refuses to go to school because the school bully calls him a "scaredy-cat" at recess. Most children respond to teasing in ways that detract from their ability to learn. The majority's test for actionable harassment will, as a result, sweep in almost all of the more innocuous conduct it acknowledges as a ubiquitous part of school life.

. . .[T]he Court's reliance on the impact on the child's educational experience suggests that the "objective offensiveness" of a comment is to be judged by reference to a reasonable child at whom the comments were aimed. Not only is that standard likely to be quite expansive, it also gives schools—and juries—little guidance, requiring them to attempt to gauge the sensitivities of, for instance, the average seven year old.

. . .The majority's limitations on peer sexual harassment suits cannot hope to contain the flood of liability the Court today begins. The elements of the Title IX claim created by the majority will be easy not only to allege but also to prove. A female plaintiff who pleads only that a boy called her offensive names,

that she told a teacher, that the teacher's response was unreasonable, and that her school performance suffered as a result, appears to state a successful claim.

There will be no shortage of plaintiffs to bring such complaints. Our schools are charged each day with educating millions of children. Of those millions of students, a large percentage will, at some point during their school careers, experience something they consider sexual harassment. A 1993 Study by the American Association of University Women Educational Foundation, for instance, found that "fully 4 out of 5 students (81%) report that they have been the target of some form of sexual harassment during their school lives."

. . .The prospect of unlimited Title IX liability will, in all likelihood, breed a climate of fear that encourages school administrators to label even the most innocuous of childish conduct sexual harassment. It would appear to be no coincidence that, not long after the DOE issued its proposed policy guidance warning that schools could be liable for peer sexual harassment in the fall of 1996, see 61 Fed. Reg. 42728, a North Carolina school suspended a 6-year-old boy who kissed a female classmate on the cheek for sexual harassment, on the theory that "unwelcome is unwelcome at any age." *Los Angeles Times*, Sept. 25, 1996, p. A-11. A week later, a New York school suspended a second-grader who kissed a classmate and ripped a button off her skirt. *Buffalo News*, Oct. 2, 1996, p. A16. The second grader said that he got the idea from his favorite book "Corduroy," about a bear with a missing button. School administrators said only, "We were given guidelines as to why we suspend children. We follow the guidelines."

At the college level, the majority's holding is sure to add fuel to the debate over campus speech codes that, in the name of preventing a hostile educational environment, may infringe students' First Amendment rights. Indeed, under the majority's control principle, schools presumably will be responsible for remedying conduct that occurs even in student dormitory rooms. As a result, schools may well be forced to apply workplace norms in the most private of domains.

. . .The majority's holding in this case appears to be driven by the image of the school administration sitting idle every day while male students commandeer a school's athletic field or computer lab and prevent female students from using it through physical threats. Title IX might provide a remedy in such a situation, however, without resort to the majority's unprecedented theory of school liability for student harassment. If the school usually disciplines students for threatening each other and prevents them from blocking others' access to school facilities, then the school's failure to enforce

its rules when the boys target the girls on a widespread level, day after day, may support an inference that the school's decision not to respond is itself based on gender. That pattern of discriminatory response could form the basis of a Title IX action.

. . .I fail to see how federal courts will administer school discipline better than the principals and teachers to whom the public has entrusted that task or how the majority's holding will help the vast majority of students, whose educational opportunities will be diminished by the diversion of school funds to litigation. The private cause of action the Court creates will justify a corps of federal administrators in writing regulations on student harassment. It will also embroil schools and courts in endless litigation over what qualifies as peer sexual harassment and what constitutes a reasonable response.

. . .[T]he majority's decision today says not one word about the federal balance. . . .The delicacy and immense significance of teaching children about sexuality should cause the Court to act with great restraint before it displaces state and local governments.

. . . Enforcement of the federal right recognized by the majority means that federal influence will permeate everything from curriculum decisions to day-to-day classroom logistics and interactions. After today, Johnny will find that the routine problems of adolescence are to be resolved by invoking a federal right to demand assignment to a desk two rows away.

. . .We can be assured that like suits will follow—suits, which in cost and number, will impose serious financial burdens on local school districts, the taxpayers who support them, and the children they serve. Federalism and our struggling school systems deserve better from this Court. I dissent.

Case Questions

1. Justice Anthony Kennedy employs the time-honored debating technique of *reductio ad absurdum*. Is his critique of the majority's test effective? Was the majority's response to him adequate?

2. Suppose the principal and school district had told Aurelia Davis, "Boys will be boys. G.F.'s behavior is normal. He'll outgrow it. Learning how to cope with this behavior is a part of growing up. Maybe your daughter needs some help." How might O'Connor's resolution of this case have changed? Kennedy's? Yours?

3. The cases O'Connor cites to illustrate the Court's endorsement of school authority—*New Jersey v. T.L.O* and *Vernonia v. Acton*—uphold, respectively, student searches and drug testing. How are they similar to *Davis*? How different?