

GINSBURG, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 96–1866

ALIDA STAR GEBSER AND ALIDA JEAN MCCULLOUGH, PETITIONERS v. LAGO VISTA INDEPENDENT SCHOOL DISTRICT

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

[June 22, 1998]

JUSTICE GINSBURG, with whom JUSTICE SOUTER and JUSTICE BREYER join, dissenting.

JUSTICE STEVENS' opinion focuses on the standard of school district liability for teacher-on-student harassment in secondary schools. I join that opinion, which reserves the question whether a district should be relieved from damages liability if it has in place, and effectively publicizes and enforces, a policy to curtail and redress injuries caused by sexual harassment. *Ante*, at 13. I think it appropriate to answer that question for these reasons: (1) the dimensions of a claim are determined not only by the plaintiff's allegations, but by the allowable defenses; (2) this Court's pathmarkers are needed to afford guidance to lower courts and school officials responsible for the implementation of Title IX.

In line with the tort law doctrine of avoidable consequences, see generally C. McCormick, *Law of Damages* 127–159 (1935), I would recognize as an affirmative defense to a Title IX charge of sexual harassment, an effective policy for reporting and redressing such misconduct. School districts subject to Title IX's governance have been instructed by the Secretary of Education to install procedures for "prompt and equitable resolution" of complaints,

34 CFR §106.8(b) (1997), and the Department of Education's Office of Civil Rights has detailed elements of an effective grievance process, with specific reference to sexual harassment, 62 Fed. Reg. 12034, 12044–12045 (1997).

The burden would be the school district's to show that its internal remedies were adequately publicized and likely would have provided redress without exposing the complainant to undue risk, effort, or expense. Under such a regime, to the extent that a plaintiff unreasonably failed to avail herself of the school district's preventive and remedial measures, and consequently suffered avoidable harm, she would not qualify for Title IX relief.