

No. 97-1055

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

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PENELOPE C. MURRELL, *et. al.*,

Plaintiff-Appellant,

v.

SCHOOL DISTRICT NUMBER 1, *et. al.*,

Defendant-Appellee.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

The Honorable Zita L. Weinshienk, District Judge

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AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT  
BY THE NATIONAL ASSOCIATION OF SCHOOL PSYCHOLOGISTS,  
THE NATIONAL ASSOCIATION OF SOCIAL WORKERS, AND  
LAMBDA LEGAL DEFENSE AND EDUCATION FUND

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## INTRODUCTION

This amici curiae brief addresses three pivotal issues for the Title IX sexual harassment claim in this case: (1) the requirement that the student-on-student harassment be “based on sex”; (2) the requirement that the facts provide a basis for institutional liability -- one sufficient basis being that the school knew or should have known of the hostile environment caused by peer sexual harassment and failed to take appropriate corrective action; and (3) the entirely separate issue, at the remedy rather than the liability phase, of whether damages against the school are an available remedy in Title IX sexual harassment cases. The district court confused these three issues and construed Title IX in an impermissibly narrow fashion, erroneously dismissing plaintiff’s Title IX cause of action for failure to state a claim.

In merging the three issues, the lower court adopted an erroneous legal standard for institutional liability under which a school may be liable only when it treats complaints of sexual harassment differently. Under this erroneous standard, a plaintiff must prove double discrimination based on sex, first establishing that the peer harassment was “based on sex,” and then establishing that the school treated complaints of peer harassment differently “based on sex.” Further, under the erroneous standard, schools evade liability for peer sexual harassment by ignoring, on an equal basis, complaints of abuse from both girls and boys. By contrast, under the widely adopted standard for institutional liability, courts focus on whether schools’ have ratified the discriminatory harassment based on sex when they knew or should have known of a hostile environment and yet failed to take appropriate corrective action.

## INTEREST OF AMICI

Established in 1969, the **National Association of School Psychologists** (“NASP”) is a nonprofit professional association that represents over 19,000 school psychologists and related professionals throughout the United States. NASP is the world’s largest organization of school psychologists. NASP serves its members and society by promoting the rights, welfare, education and mental health of children and youth and by advancing the profession of school psychology. As part of its work on behalf of children and youth, NASP is deeply concerned about the destructive consequences seen by its members from student-on-student sexual harassment in the nation’s schools.

The **National Association of Social Workers** (“NASW”), a nonprofit professional association with over 150,000 members, is the largest association of social workers in the world. NASW is devoted to promoting the quality and effectiveness of social work practice, advancing the knowledge base of the social work profession, and improving the quality of life through utilization of social work knowledge and skills. The education of our nation’s children has been a top priority of NASW and of great concern to its school social worker members. NASW’s school social worker section is particularly concerned about the harmful effects of sexual harassment and sex discrimination among peer groups in the schools. It is also a goal of NASW that students with disabilities receive appropriate educational services and support.

**Lambda Legal Defense and Education Fund** (Lambda) is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men and people with HIV/AIDS, through impact litigation, education and public policy work. Founded in 1973,

Lambda is the oldest and largest legal organization dedicated to those goals. Lambda represented the plaintiff on appeal in Nabozny v. Podlesny, see 92 F.3d 446 (7th Cir. 1996), the landmark successful challenge to a school's denial of equal protection in its response to anti-gay peer harassment, which resulted in a jury verdict for plaintiff on remand. Lambda has an interest in the issues in this case because of its related efforts to assure that schools provide all students, including lesbian and gay students, with a safe environment in which to get their education.

## ARGUMENT

### I. TITLE IX DOES NOT REQUIRE PLAINTIFFS WITH PEER SEXUAL HARASSMENT CLAIMS TO PROVE DOUBLE DISCRIMINATION.

The District Court here relied upon erroneous Fifth Circuit authority for the dismissal of the Title IX claim at issue in this appeal. Ruling orally from the bench, the District Court quoted from the Fifth Circuit's Rowinsky opinion as follows:

In the case of peer sexual harassment, a plaintiff must demonstrate that the school district responded to sexual harassment claims differently based on sex. Thus a school district might violate title IX if it treated sexual harassment of boys more seriously than sexual harassment of girls, or even if it turned a blind eye towards sexual harassment of girls while addressing assaults that harmed [boys].

Tr. 32-33 (Appellant's App. at 110-111). In reliance upon the Fifth Circuit's opinion, without any further analysis, the District Court then held as follows:

Based on Rowinsky, my ruling on the motion to dismiss the Title IX claim will be granted. A Title IX claim may be only against the school district, not against teachers, not against assaults by students, and there has not been any allegation to support that. I already read a quote from the Doe case which also dismissed the Title IX claim and reached the same decision.

Tr. 33 (Appellant's App. at 111).<sup>1</sup>

The Rowinsky court based its rationale on the mistaken belief that plaintiff sought to impute the acts of students to the school, holding that the only basis for institutional liability in peer sexual harassment cases is where a school responds "to sexual harassment claims differently based on sex." Rowinsky v. Bryan Independent Sch. Dist., 80 F.3d 1006, 1016 (5th Cir.), cert. denied, 117 S.Ct. 165 (1996). In so doing, the Rowinsky court missed the point of these claims, which do not seek to impute the acts of students to the school, but instead seek to hold the school liable for its own acts of failing to take appropriate action to stop harassment of which it knew or should have known, and for thereby ratifying the discriminatory harassment which is itself based on sex. Consequently, Rowinsky requires a showing of double discrimination: first it would have to be shown that the student suffered a hostile environment because of conduct of a sexual nature, and second it would have to be shown that the school treated complaints differently based on sex. Under the proper standard for institutional liability, however, a plaintiff first proves that he or she was subjected to the requisite level of violative conduct prohibited by Title IX, and then plaintiff establishes liability by showing the school ratified the violation because it knew or should have known of the hostile environment but failed to take appropriate action.

This Court has previously set forth the elements necessary to prove a Title IX sexual harassment claim. Seamons v. Snow, 84 F.3d 1226, 1232 (10th Cir. 1996). The two elements the District Court confused here are the requirement that the sexual harassment was "based on

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<sup>1</sup> Prior to the District Court's October 3, 1996 ruling, the Doe opinion referenced by the Court in the holding had been vacated and a new opinion had reissued on July 22, 1996, rejecting the Rowinsky rationale. Doe v. Petaluma City Sch. Dist., 949 F.Supp. 1415 (N.D.Cal. 1996)("Petaluma III").

sex,” and the requirement that “some basis for institutional liability has been established.” In addition, the District Court, in its reliance on the Fifth Circuit’s Rowinsky opinion, further confused the analysis by merging the discussion of the liability phase with the remedy phase. Amici review the two pivotal elements of the claim below, and then address the issue of remedy in a separate discussion.

A. ONE WAY TO MEET THE REQUIREMENT THAT THE DISADVANTAGE TO PLAINTIFF IS BASED ON SEX IS BY PROVING A HOSTILE ENVIRONMENT FROM HARASSMENT THAT IS SEXUAL IN NATURE.

When this Circuit last reviewed a Title IX peer harassment case, the analysis turned on whether or not the conduct complained of was “based on sex.” Seamons, 84 F.3d at 1232-33. The Seamons decision held that the plaintiff failed to allege sufficient facts to indicate that the conduct complained of was “‘sexual’ in nature, as defined in the hostile environment context.” Id. The standard applied by this Court in Seamons to the “based on sex” element is consistent with prevailing law, and is met in the instant case by the allegations of conduct of a sexual nature. A student who is subjected to a hostile environment created by conduct of a sexual nature suffers a disadvantage which is inherently “based on sex.”<sup>2</sup>

The federal sex discrimination statutes, Title IX for the educational context and Title VII for the workplace, prohibit disadvantages imposed on students or workers “because of sex.” It is

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<sup>2</sup> As emphasized by the federal Department of Education’s Office of Civil Rights (“OCR”), while the discrimination “based on sex” arises from the conduct of a sexual nature, plaintiffs must nonetheless go on to show that the conduct was “sufficiently severe, persistent, or pervasive to limit a student’s ability to participate in or benefit from an education program or activity, or to create a hostile or abusive educational environment.” Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034, 12038 (1997) (“OCR Guidance”).

helpful to clarify the distinction between conduct that does not turn on different treatment between two groups in order to be “based on sex”, like conduct of a sexual nature, and inherently neutral conduct that is violative only if there is different treatment. There is a broad range of intentional conduct that is likely to fall under the statutes’ prohibitions only if it treats men and women differently, because otherwise it simply is not shown to disadvantage workers or students “because of sex.” Classic examples include the differential enforcement of neutral rules -- such as those regarding timeliness, attendance or levels of productivity; or the use of standards that appear unrelated to sex but that are imposed pretextually, to disadvantage a person because of his or her sex. In such circumstances, there is often no direct evidence that a plaintiff’s sex was at issue at all. When that is the case, a plaintiff can show that an adverse action was taken based on sex is to show that a person of a different sex was not, or would not be, treated the same way.<sup>3</sup>

By contrast to cases in which different treatment must be shown, allegations of a hostile environment, including that created by conduct of a sexual nature, do not require a showing of different treatment to demonstrate that the conduct at issue is “based on sex.” When there is a showing of a hostile environment created by harassing conduct of a sexual nature that rises to the requisite level of severity, the requirement that a disadvantage be imposed “because of sex” is met by that very showing. There is no basis for requiring further proof that similar behavior or disadvantages would not be directed at a person of a different sex. Indeed, in cases where

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<sup>3</sup> A simple illustration may clarify this: A student who alleges that her school violates Title IX because it will not give her credit for any class in which she missed more than 5 sessions does not suggest a disadvantage “because of sex.” If, however, she alleged that boys were given credit when they missed more than five classes and she was not, she has now suggested that the disadvantage imposed upon her was “because of sex.”

women have suffered sexual harassment, it would be ludicrous to allow defendants to negate claims with the defense that boys or men suffered sexual harassment as well.

That a hostile environment based on conduct of a sexual nature is per se one that is “based on sex” is easily understood by analogy to racial harassment. In a racial harassment case, where a plaintiff shows a pattern of racial slurs based on the particular race of one group of students or workers that rises to the level of creating a hostile environment, it would be absurd for a court to then require a showing that racial slurs are not directed at those of other races. See, e.g., Daniels v. Essex Group, 937 F.2d 1264 (7th Cir. 1991). Once plaintiff makes the requisite showing of a hostile environment based on racial harassment, or sexual harassment, there has been direct evidence of violative conduct, namely conduct which disadvantages based on race or sex. It is unnecessary, as well as superfluous, to make the comparison with how others fared. Indeed, if violative conduct were directed at everyone in the workplace or schoolhouse, it would not neutralize the impermissible disadvantage imposed on each individual worker or student based on his or her particular race or sex. One violation does not negate another; rather each scenario reflects a violation.

It is also helpful to further clarify why conduct of a sexual nature satisfies the “based on sex” element. Such conduct focuses students or workers on just one component of their overall identity: their sex. When peers in a work or school setting introduce sexually charged language and/or sexual acts to the setting, particularly when it rises to the sufficient level of severity or pervasiveness, the result is to demean the importance of all other aspects of the identity of the affected peer(s). The sexual harassment strips aside the worker/student’s ability to feel judged or perceived based on a range of his or her qualities -- qualities as a worker or student, qualities as

a family person, qualities as a moral person, overall qualities as a human being whose integrity is important -- and renders them subordinate to sex.

For this reason, as well, a harasser's particular motivation for sexual harassment is irrelevant. While sexual desire, or hatred of girls or women (or males), or a power relationship, may explain the harassment, if the conduct underlying the harassment is of a sexual nature then its effect is to disadvantage "based on sex," regardless of the host of reasons that might have motivated the harasser(s) to impose that disadvantage. Of course, the analysis must also proceed to examine severity and pervasiveness.

When workers or students, through their conscious, deliberate actions, engage in conduct of a sexual nature that targets particular peers or plays off of other peers' sex, and the conduct is sufficiently severe or pervasive to create a hostile environment, that hostile environment disadvantages the victims because of their sex. The harmful conduct is based on sex because it demeans, distracts and harms the employee or student based on the "sex" aspect of their identity, and therein lies the prohibited conduct that discriminates.

"The intent to discriminate on the basis of sex in cases involving sexual propositions, innuendo, pornographic materials, or sexual derogatory language is implicit, and thus should be recognized as a matter of course. A more fact intensive analysis will be necessary where the actions are not sexual by their very nature." Andrews v. City of Philadelphia, 895 F.2d 1469 (3rd Cir. 1990). Thus, courts have routinely assumed that conduct of a sexual nature is "based on sex" and moved on to subsequent points in the analysis. See, e.g., Franklin v. Gwinnett County Public Sch., 503 U.S. 60 (1992)(in a Title IX action where plaintiff alleged harassment in the form of kissing and sexual intercourse, Court held that a damages remedy is available to enforce

Title IX); Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986)(in a Title VII action where plaintiff alleged fondling, indecent exposure, and sexual intercourse, Court addressed whether Title VII encompasses non-economic harm and renders employers strictly liable); Winsor v. Hinckley Dodge, Inc., 79 F.3d 996 (10th Cir. 1996)(after reviewing the various acts that were “sexual in nature,” this Court found that the motivation for the acts, namely dislike for the plaintiff as a person rather than as a woman, were irrelevant to the sexual harassment claim because of the sexual nature of the acts); Hicks v. Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987)(this Court found that, in addition to conduct of a sexual nature, conduct of a non-sexual nature may be considered in a sexual harassment claim).

When Title IX plaintiffs in sexual harassment cases make a showing of conduct of a sexual nature, they have made the showing of conduct based on sex. If plaintiffs further establish that the conduct is sufficient to establish a hostile environment, then the question of an impermissible disadvantage based on sex is settled, and the remaining question is whether there is a basis for institutional liability in culpably ratifying that conduct. No separate, or second, showing of a discriminatory act on the part of the institution sued is necessary.

**B. PLAINTIFF CAN SHOW THAT THE SCHOOL DISCRIMINATED BY RATIFYING THE CONDUCT THAT DISADVANTAGED HER BASED ON SEX WITH EVIDENCE THAT THE SCHOOL KNEW OR SHOULD HAVE KNOWN OF A HOSTILE ENVIRONMENT; NO SECOND SHOWING OF DISCRIMINATION ON THE PART OF THE SCHOOL IS NEEDED.**

**1. The Proper Standard For Institutional Liability.**

Under Title IX, a school is liable for student-on-student sexual harassment, that creates a hostile environment, when the school knew or should have known of the harassment but failed to

take appropriate corrective action. ”The overwhelming majority of courts that have considered the issue of sexually hostile environments caused by peers have indicated that schools may be liable under Title IX for their knowing failure to take appropriate actions to remedy the hostile environment.” Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034, 12039 n. 27 (1997) (“OCR Guidance”). See also, e.g., Kinman v. Omaha Public Sch. Dist., 94 F.3d 463, 469 (8th Cir. 1996); Davis v. Monroe County Bd. of Educ., 74 F.3d 1186 (11th Cir.), vacated, reh’g en banc granted, 91 F.3d 1418 (11th Cir. 1996); Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir. 1988); Petaluma III., 949 F.Supp. at 1415.

While this Circuit has not had the occasion to apply the established standard for institutional liability under Title IX, Seamons, 84 F.3d at 1233 n. 7, over a decade ago this Circuit took the lead in expressly reasoning that Title VII standards are most appropriate for analysis under Title IX. “Because Title VII prohibits the identical conduct prohibited by Title IX, i.e., sex discrimination, we regard it as the most appropriate analogue when defining Title IX’s substantive standards.” Mabry v. State Bd. of Community Colleges, 813 F.2d 311, 316 n. 6 (10th Cir.), cert. denied, 484 U.S. 849 (1987). Other Circuits followed this Circuit on that issue. See, e.g., Lipsett v. University of Puerto Rico, 864 F.2d 881, 896-897 (1st Cir. 1988).

Moreover, in the Title VII context, this Circuit was one of the first to adopt the very standard for entity liability that other courts have since acknowledged as equally applicable to Title IX, namely that an employer is liable for worker-on-worker sexual harassment, that creates a hostile environment, when the employer knew or should have known of such harassment and

did nothing about it. Baker v. Weyerhaeuser Co., 903 F.2d 1342, 1345-1346 (10th Cir. 1990).<sup>4</sup> Again, other Circuits followed this Circuit. See Davis, 74 F.3d at 1193 n. 6 (collecting the law on the point). Indeed, the Ninth Circuit has extended the standard to sexual harassment of employees by customers. Folkerson v. Circus Circus Enterprises, 107 F.3d 754, 756 (9th Cir. 1997)(“We now hold that an employer may be held liable for sexual harassment on the part of a private individual, such as a casino patron, where the employer either ratifies or acquiesces in the harassment by not taking immediate and/or corrective actions when it knew or should have known of the conduct.”)

Accordingly, the law of this Circuit calls for applying the Circuit’s Title VII standard for employer liability to the Title IX context, consistent with the law of the overwhelming majority of other courts and with the policy and regulatory statements of the federal Departments of Education and Labor.

2. The District Court Adopted the Improper Standard Because It Overlooked the Nature of the Claims Asserted by Plaintiff.

In turning to the Fifth Circuit’s anomalous Rowinsky opinion for authority, the District Court misconstrued the case at bar as one in which plaintiffs seek to hold a school liable by imputing the acts of the students to the school instead of one in which the school is liable for its

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<sup>4</sup> The Department of Labor’s regulations provide for the same Title VII standard adopted by this Circuit:

With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

29 C.F.R. § 1604.11 (d) (1997).

own acts in failing to meaningfully address the hostile environment of which it knew or should have known. The Rowinsky opinion similarly misconstrued the claim before it, as best explained by the Northern District of California:

“ . . . [the] Rowinsky [opinion] is manifestly based on a fundamental misunderstanding of the nature of this type of claim. The majority opinion continually refers to the plaintiff’s claim as being based on the conduct of the peer harassers rather than on the action and inaction of the school district, and its reasoning is based upon this characterization. Thus the court holds that ‘[i]mposing liability for the acts of third parties would be incompatible with the purpose of a spending condition,’ . . . and that the legislative history demonstrates that the statute was directed exclusively ‘to the practices of grant recipients.’ . . . The actual thrust of this claim, is to impose liability on the school district based not on the harassing conduct of its students, but on the district’s own conduct of knowingly permitting the discriminatory hostile and abusive environment to continue and to inflict an ongoing injury on its female students. Rowinsky does not recognize that inaction may constitute actionable discrimination.”

Petaluma III., 949 F.Supp. at 1421(citations omitted). See also Davis, 74 F.3d at 1193 (“The evil Davis sought to redress through her hostile environment claim was not the direct act of a school official demanding sexual favors, but rather the officials’ failure to take action to stop the offensive acts of those over whom the officials exercised control.”); Nicole M. v. Martinez Unified Sch. Dist., -- F.Supp. -- , No. C-93-4531 MHP, 1997 WL 193919 (N.D.Cal. April 15, 1997).

The federal Department of Education’s Office of Civil Rights takes the identical view of the Rowinsky opinion:

Consistent with the vigorous dissent in Rowinsky, as well as with other Federal decisions contrary to the Rowinsky holding, OCR continues to believe that the Rowinsky decision was wrongly

decided. In OCR’s view, the holding in *Rowinsky* was based on a mistaken belief that the legal principle underpinning this aspect of the Guidance makes a school responsible for the actions of a harassing student, rather than for the school’s own discrimination in failing to respond once it knows that the harassment is happening.”

OCR Guidance, 62 Fed. Reg. at 12036.

In the Title VII context, this Circuit has already addressed the problem of litigants misconstruing claims as imputing acts to the employer rather than challenging the acts of the employer. For example, the Court articulated the broad harassment standard for the workplace as follows: “an employer who has reason to know that one of his employees is being harassed in the workplace by others on grounds of race, sex, religion, or national origin, and does nothing about it, is blameworthy.” *Baker*, 903 F.2d at 1346, quoting *Hunter v. Allis-Chalmers Corp., Engine Div.*, 797 F.2d 1417 (7th Cir. 1986). “This principle is sometimes described incorrectly as an application of respondeat superior.” *Id.* Nonetheless, both as to the Title VII claim and a related state claim, the employer in *Baker* argued the lack of agency, leading this Court to observe that “this argument misses the point.” *Baker*, 903 F.2d at 1347. Likewise, the District Court here, and the *Rowinsky* opinion upon which it relies, miss the point.<sup>5</sup>

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<sup>5</sup> Perhaps some of the confusion arises from the Supreme Court’s observation that Congress wanted courts “to look to agency principles for guidance in [construing Title VII]” in some circumstances. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 72 (1986). However, the Court had under review a ruling that employers could be strictly liable for its employees’ actions, namely imputing employees’ acts to the employer, and the Court warned of the limitations to applying agency principles. *Id.* (“ . . . such common-law principles may not be transferable in all their particulars to title VII . . .”). Under Title IX, agency principles may transfer and apply to facts such as those involving a teacher acting with “apparent authority” or when “aided in carrying out the sexual harassment by his or her position of authority.” But in cases of peer harassment, where a plaintiff attributes direct knowledge of abuse to the school and challenges the school’s action or inaction in response to its knowledge, agency principles are inapplicable

In missing the point, the District Court’s adoption of Fifth Circuit authority “yields extreme results inconsistent with the body of discrimination law.” Petaluma III., 949 F.Supp. at

1421. Under the Rowinsky approach:

. . . if harassment exists only against girls, such that there are no complaints by boys providing a comparison point for the treatment of girls’ complaints, girls are necessarily deprived of a remedy, even if the sexually hostile environment is extremely severe and pervasive, the school district actually knows of the hostile environment, and the district fails to take any action whatever to remedy it. Moreover, that would be so even if the school district’s inaction was directly caused by discriminatory animus.

Id. Further, under the Rowinsky approach, no liability arises where a school wholly fails to address an environment in which both boys and girls are complaining of or subject to severe sexual harassment. As the Seventh Circuit has observed of Rowinsky and cases with similar reasoning, they “interpret sex discrimination in too literal a fashion.” McDonnell v. Cisneros, 84 F.3d 256, 260 (7th Cir. 1996). Regrettably, the cramped, erroneous nature of that reasoning is tragically harmful.

The harmful results profoundly contradict the statutory purpose of Title IX. In interpreting Title IX, the Supreme Court found that a student should have the same protection in school that an employee has in the workplace. Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 74-75 (1992).

The ability to control and influence behavior exists to an even greater extent in the classroom than in the workplace, as students look to their teachers for guidance as well as for protection. The damage caused by sexual harassment also is arguably greater in the

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and make way for the “knew or should have known and failed to take action” standard. OCR Guidance, 62 Fed. Reg. at 12039. See also Kinman, 94 F.3d at 469 (in Title IX case, agency principles are not always appropriate, leaving the “knew or should have known” standard).

classroom than in the workplace, because the harassment has a greater and longer lasting impact on its young victims, and institutionalizes sexual harassment as accepted behavior. Moreover, as economically difficult as it may be for adults to leave a hostile workplace, it is virtually impossible for children to leave their assigned school.

Petaluma III, 949 F.Supp. at 1420 (citation omitted). Not only does the Rowinsky approach fail to reflect the greater vulnerability of students in school compared to employees in the workplace, it erroneously shrinks the scope of protection for students. Whereas Rowinsky would have a school escape Title IX liability for ignoring an abusive environment as long as there are no complaints from the unaffected gender or as long as both girls and boys suffer equally, at the same time Title VII liability attaches to an employer in all cases where worker-on-worker sexual harassment creates a hostile environment and the employer knew or should have known of such harassment and did nothing about it. Baker, 903 F.2d at 1345-1346. Both Title VII and Title IX are aimed at stopping practices or behavior which disadvantage individuals “because of sex,” but the Rowinsky approach creates a doctrinal rift in the body of sex discrimination law, with students paying the price.

When Title VII standards are applied to Title IX in accordance with this Circuit’s law and the general body of discrimination law, schools are not suddenly vulnerable to widespread litigation. Plaintiffs still, for example, have the burden to show that the conduct complained was “sufficiently severe, persistent, or pervasive to limit a student’s ability to participate in or benefit from an education program or activity, or to create a hostile or abusive educational environment.” Seamons, 84 F.3d at 1232; OCR Guidance, 62 Fed. Reg. at 12038. Moreover, plaintiffs have the burden to show that the school knew or should have known about the hostile

environment, if it existed. Id. Lastly, the school may nonetheless avoid liability if it takes appropriate action to correct the hostile environment. Id.

## **II. DAMAGES ARE AN AVAILABLE REMEDY FOR TITLE IX SEXUAL HARASSMENT CLAIMS SUCH AS PLAINTIFF STATES**

Following the liability analysis, as an entirely distinct inquiry, is the analysis of remedy. The Supreme Court has already held that, in keeping with the general rule for all kinds of federal claims, the range of remedies including damages are available under Title IX. Franklin, 503 U.S. 60. Indeed, the Supreme Court emphasized that damages are certainly available for Title IX sexual harassment claims because that category of claims addresses intentional discrimination in violation of a clear statutory standard. Id. at 74-75. Thus, while damages are categorically available in this type of case because it involves a Title IX sexual harassment claim, whether damages will ultimately flow depends on whether plaintiff is successful in the liability phase. In addition, the showing which plaintiff must make in the liability portion of the case further assuages any concerns with respect to the notice a school should have before being liable for money damages based on the conscious nature of the school's actions.

In Franklin, the Court reasoned that in Title IX sexual harassment cases there need be no concerns about notice to schools of potential liability. Id. at 74-75. The statute provides notice of liability that arises through the schools' actions in all sexual harassment cases, including cases where the schools act to ratify peer harassment. Id.

Even apart from this categorical analysis, concerns about notice are addressed in each individual case of peer sexual harassment because imposing institutional liability requires that the plaintiff sustain her burden of showing that the school knew or should have known of the

hostile environment. If plaintiff sustains that burden, notice is clearly not a problem.

Given that plaintiffs in peer sexual harassment cases assert that the school knew, or should have known, of the hostile environment, and by its own conduct ratified the imposition of a severe disadvantage based on sex, the availability of damages fulfills the Franklin Court's call for investing Title IX with the meaning Congress intended. The Court declared as follows: "Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe." Id.

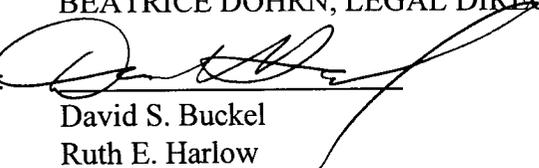
## CONCLUSION

The District Court erred in dismissing the Title IX claim in this action. In relying for the dismissal upon Rowinsky, the District Court missed the point of the claim, which is based upon the allegation that the school acted to ratify the underlying sexual harassment, and not based upon the imputation of the underlying sexual harassment to the school. Instead, the District Court confused two of the elements of the claim, along with an issue related to damages as a remedy, and adopted a rule of law that requires sexually harassed students to show double discrimination. The District Court's erroneous legal standard conflicts with this Circuit's law, the law in the overwhelming majority of courts, and federal regulations, and produces results in contravention of well-established discrimination law. This Circuit should overturn the dismissal of the Title IX claim, clarifying that plaintiffs need not make double showings of conduct violative of Title IX, and clarifying that damages are always an available remedy for sexual harassment claims under Title IX.

Dated: June 11, 1997

Respectfully submitted,

LAMBDA LEGAL DEFENSE  
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Certificate of Service

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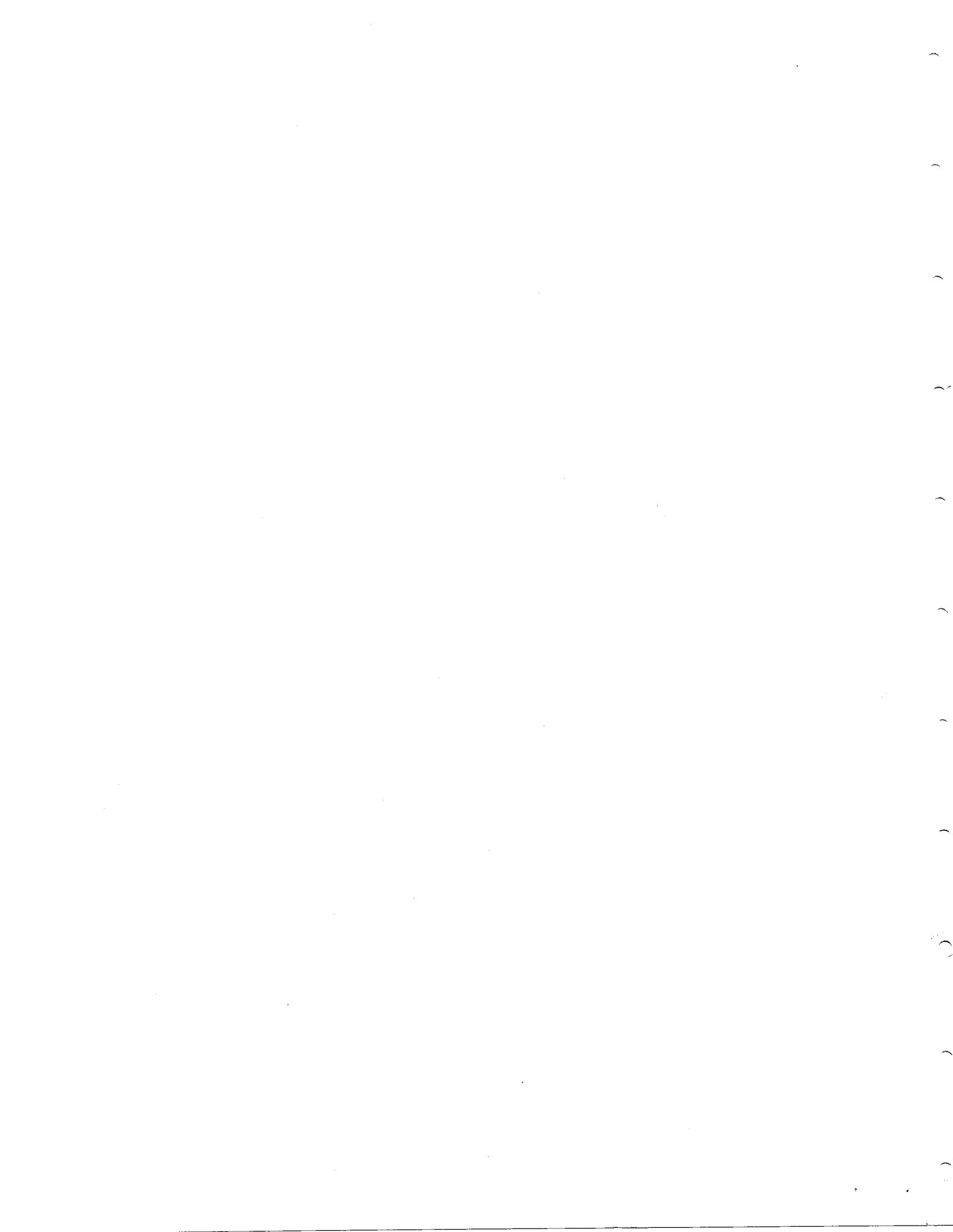
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No. 97-1055

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

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PENELOPE C. MURRELL, *et. al.*,

Plaintiff-Appellant,

v.

SCHOOL DISTRICT NUMBER 1, *et. al.*,

Defendant-Appellee.

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

The Honorable Zita L. Weinshienk, District Judge

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MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF  
IN SUPPORT OF PLAINTIFF-APPELLANT  
BY THE NATIONAL ASSOCIATION OF SCHOOL PSYCHOLOGISTS,  
THE NATIONAL ASSOCIATION OF SOCIAL WORKERS, AND  
LAMBDA LEGAL DEFENSE AND EDUCATION FUND

---

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Pursuant to Federal Rule of Appellate Procedure 29, the following Amici, the National Association of School Psychologists, the National Association of Social Workers, and Lambda Legal Defense and Education Fund, respectfully request the permission of this Court to file the attached brief in support of Appellant. Appellant's claims involve a secondary school student who alleges peer sexual harassment. Amici each have missions as non-profits that include promoting the welfare of children, and each have a specific interest in the issues of harassment, abuse, and violence in the elementary and secondary school settings. As more fully reflected in the section on "Interest of Amici" in the attached brief, the National Association of Social Workers has a membership section devoted to the social workers who work with students in the school setting, Lambda Legal Defense and Education Fund has litigated the rights of students to a safe environment in the schools, and National Association of School Psychologists has a membership that is defined by its work with students in the schools. By virtue of their memberships, missions, and backgrounds, Amici are uniquely suited to offer this Court a helpful perspective.

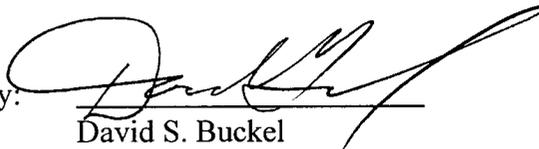
Accordingly, Amici respectfully request that this Court accept the attached brief for

consideration in the above-captioned matter.

Dated: June 11, 1997

Respectfully submitted,

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