No. 15-1474

In the United States Court of Appeals
For the Fourth Circuit

SB, a minor, by and through his Guardian and next friend, AL;
And TL, in his own right,

Plaintiffs – Appellants,

and

AL, in her own right,

Plaintiff,

v.

BOARD OF EDUCATION OF HARFORD COUNTY

Defendant – Appellee,

and

DR. ROBERT TOMBACK; WILLIAM LAWRENCE; AND MICHAEL O'BRIEN

Defendants

On Appeal from the United States District Court for the District of Maryland at Baltimore in Case No. 1:13-cv-01068-JFM
(Hon. J. Frederick Motz, Senior U.S. District Court Judge)

BRIEF FOR AMICI CURIAE NATIONAL SCHOOL BOARDS ASSOCIATION AND MARYLAND ASSOCIATION OF BOARDS OF EDUCATION IN SUPPORT OF DEFENDANT-APPELLEE

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Brief Supporting Appellees and Affirmance of Decision of U.S. District Court of Maryland

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

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No. 15-1474 Caption: SB v. Board of Education of Harford County

Pursuant to FRAP 26.1 and Local Rule 26.1,

National School Boards Association and Maryland Association of Boards of Education
(name of party/amicus)

who is Amicus Curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/Francisco M. Negrón, Jr. Date: September 23, 2015

Counsel for: Amicus Curiae

CERTIFICATE OF SERVICE

****

I certify that on September 23, 2015 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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September 23, 2015 (date)

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STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE

The National School Boards Association ("NSBA") is a non-profit organization representing state associations of school boards, and the Board of Education of the U.S. Virgin Islands. Through its member state associations, NSBA represents over 90,000 school board members who govern approximately 13,800 local school districts serving nearly 50 million public school students. NSBA regularly represents its members' interests before Congress and federal and state courts.

Founded in 1957, the Maryland Association of Boards of Education ("MABE") is a private, non-profit organization, to which all twenty-four Maryland school boards belong. MABE sponsors professional development activities for school board members and other school system employees throughout the State, and represents the school boards' point of view before the Maryland State Board of Education, the Maryland General Assembly and the United States Congress. The MABE Legal Services Association offers regular seminars on legal issues to Maryland school boards, their superintendents, and educators, and files *amicus curiae* briefs on behalf of Maryland school boards in education cases of statewide importance, such as the case now pending in this Honorable Court.

Amici and their members are committed to protecting students and to helping school districts develop and implement policies to address bullying and school climate. *Amici* have taken a proactive approach to assist their members in meeting this important commitment through advocacy before federal and state governmental entities, policy development assistance, consultation, educational materials, and professional training for school officials. These school officials are in the best position to develop strategies to create safe learning environments for all students. *Amici* submit this brief to urge this Court to avoid co-opting federal agency guidance into a standard of liability for peer harassment that would impose unreasonable obligations on schools that far exceed the parameters established by the U.S. Supreme Court in *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999).

No attorney for any party authored this brief in whole or in part, and no person or entity other than the *amici curiae* and their members and counsel made any monetary contribution to this brief's preparation or submission.

This brief is filed with the consent of the parties.

SUMMARY OF THE ARGUMENT

Recognizing that safe and supportive learning environments are crucial to the mission of every school district, NSBA has stated clearly its support for strong policies and practices aimed at preventing and addressing student-on-student harassment and bullying.[1] As federal courts throughout the country have repeatedly

[1] NSBA Beliefs and Policies, Article II, Section 3.2 - Non-Discrimination: "NSBA believes that school boards should ensure that students and school staff are not subjected to discrimination on the basis of socioeconomic status, race, color, national origin, religion, gender, disability, or sexual orientation."

NSBA Beliefs and Policies, Article IV, Section 2 - Maintaining a Safe and Supportive School Climate: "NSBA believes that students must have safe and supportive climates and learning environments that support their opportunities to learn and that are free of abuse, violence, bullying, weapons, and harmful substances. . . ."

NSBA Beliefs and Policies, Article IV, Section 2.11 - Harassment: "NSBA believes that all public school districts should adopt and enforce policies stating that harassment for any reason, including but not limited to harassment on the basis of race, ethnicity, gender, actual or perceived sexual orientation, gender identity, disability, age, and religion against students or employees will not be tolerated and that appropriate disciplinary measures will be taken against offenders. Such policies should include an effective complaint mechanism. Districts should institute in-service programs to train all school personnel, including volunteers to recognize and prevent harassment against employees and students. Districts should investigate complaints, initiate education programs for students, and institute programs to eliminate harassment."

recognized, however, by pursuing the laudable educational goal of maintaining a safe school environment, a school district does not become legally responsible to eradicate all incidents of student-on-student harassment. A school district is liable in money damages under civil rights statutes applicable to recipients of federal funds only when the district itself subjects a student to discrimination. *Amici* address these issues, using the applicable standards under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, which have been uniformly applied by courts considering Section 504 claims of alleged peer harassment and bullying based on disability.

Amici urge this Court to follow this established precedent and to resist the attempt in this case to expand the clear standard articulated by the Supreme Court in *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999). There, the Court carefully explained the stringent parameters under which a school district might be found liable for money damages in cases of peer harassment brought under Title IX, a statute under which the private right of action is not express but has been judicially implied. Taking into account the unique characteristics of K-12 schools, where students are still learning how to interact with their peers, school administrators must enjoy flexibility to make individual, student-based decisions. For this reason, the Court set out a standard that would allow for liability only when the *district itself*

subjects a student to discrimination through deliberate indifference to known harassment.

In the instant case, the Appellants attempt to change the standard to one of negligence, in which a court would look at an "industry standard" for appropriate prevention of and response to harassment in schools, as evidenced by federal agency guidance. This proposed expansion of *Davis* would discount years of precedent regarding deference to the decision-making of public officials generally, and school officials in particular with respect to matters of school discipline and safety. Such a change would not only constrain the ability of educators to address the needs of individual students and to take into account the specific circumstances of the alleged harassment, but also needlessly expose school districts to unwarranted liability. *Amici* urge the Court to uphold the decision of the district court granting summary judgment to the Board of Education of Harford County.

ARGUMENT

I. SECTION 504 CLAIMS SEEKING MONETARY DAMAGES FOR ALLEGED PEER HARASSMENT BASED ON DISABILITY ARE SUBJECT TO THE TITLE IX STANDARDS SET FORTH BY THE SUPREME COURT IN *DAVIS*.

The U.S. Supreme Court has made clear that the Title IX framework applies to Section 504 claims. In *Barnes v. Gorman*, 536 U.S. 181, 187 (2002), the Court, in considering the availability of punitive damages in a Section 504 case, employed

a "contract-law analogy," from *Gebser v. Lago Vista Indep. Sch. Dist*., 524 U.S. 274 (1998), and held punitive damages were not available because they ordinarily are not available in contract actions. 536 U.S. at 187-188. *Barnes* demonstrates that *Gebser* provides the framework for determining the scope of damages available under Section 504.

Under *Gebser*, there is only one standard for obtaining damages under Section 504, and it is a high one: deliberate indifference. *See also Stewart v. Waco Indep. Sch. Dist.*, 711 F.3d 513, 535 (5th Cir.), vacated by, 2013 WL 2398860 (5th Cir. June 3, 2013) (Higginbotham, J., dissenting) ("the level of culpability actionable under § 504 should be 'consonant with' the 'deliberate indifference'" standard under Title IX), citing *Gebser*, 524 U.S. at 290. All other circuits that have considered the question have applied the deliberate indifference standard to harassment claims under Section 504. *See, e.g., Long v. Murray County Sch. Dist.*, 522 Fed. App'x 576 (11th Cir. 2013); *Lance v. Lewisville Indep. Sch. Dist*., 743 F.3d 982 (5th Cir. 2014).

When the Supreme Court selected "deliberate indifference" to define "intentional discrimination," it tapped into a well-developed body of law under 42 U.S.C. § 1983 (2015). By employing this phrase and citing *Board of Comm'rs of Bryan County v. Brown*, 520 U.S. 397 (1997), the Court demonstrated just how high it intended the standard to be for a claimant to receive damages. Deliberate indifference is a "stringent" standard that requires more than "even heightened

negligence." *Brown*, 520 U.S. at 407, 410. The claimant must show that the "plainly obvious consequence" of the decision will be "the deprivation of a third party's federally protected right." *Id*. at 411. A "generalized" risk of harm is not enough. *Id*. at 410. *Amici* urge the Court to reject any liability standard that fails to satisfy these requirements.

II. THE SUPREME COURT'S INTENTIONALLY NARROW *DAVIS* STANDARD SHOULD NOT BE EXPANDED.

A. The *Davis* Standard Should Not Be Conflated with Measures Encouraged in Agency Enforcement Guidance.

The Appellants' arguments in this case are little more than pleas to this Court to dilute the deliberate indifference standard set forth in *Davis*, 526 U.S. 629, into a heightened negligence inquiry. In *Davis*, the Court articulated a clear standard to be applied when a federal funding recipient could be liable in damages in a peer harassment case:

> [F]unding 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 victim of access* to the educational opportunities or benefits provided by the school.

Id. at 650 (emphasis added). A plaintiff must satisfy *each* prong of the standard to be awarded damages. The Court also clearly admonished that the "deliberate indifference" prong affords school officials much deference:

> 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*.

Id. at 648 (emphasis added).

To support their interpretation of the "clearly unreasonable" standard, Appellants point the Court to administrative enforcement guidance documents issued by the U.S. Department of Education's ("ED") Office for Civil Rights ("OCR") and the district's alleged failure to follow processes outlined in state administrative regulations and the board's own policies. If this Court adopts their argument, it will expand the *Davis* standard to make it one of "reasonableness," a negligence inquiry. The Supreme Court has clearly rejected this approach.

NSBA warned against this unlegislated expansion of the standard, and concomitant potential liability for school districts, when OCR issued its October 26, 2010 "Dear Colleague" Letter ("2010 DCL").[2] NSBA cautioned ED that by strongly suggesting that schools are required to eliminate harassment, and by significantly expanding the *Davis* standard (by, for example, stating that a school is responsible for addressing harassment incidents about which it knew *or should have known*),[3]

[2] Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., to Colleagues (Oct. 26, 2010), *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html [hereinafter "2010 DCL"].
[3] *Id*. at 2.

OCR was providing a roadmap—albeit one based in legal error—for increased litigation against school districts. NSBA urged ED to no avail to issue clarification.[4]

The attempted expansion of the *Davis* standard about which NSBA expressed qualms appears in the instant case, as it has in a growing number of cases in which plaintiffs recast agency enforcement guidance as a gauge of legal liability. For the reasons set forth below, *Amici* urge this Court to solidify its rejection of agency guidance or administrative enforcement standards as relevant to the determination of school district liability for peer harassment. *See Doe v. Prince George's County Bd. of Educ.*, No. 13-2537 (4th Cir. Apr. 7, 2015) (unpub.) (declining in Title IX case to adopt OCR guidelines as a measure of school district liability given lack of evidence of school district's actual knowledge of escalating harassment). Other federal circuit courts faced with similar pleas by plaintiffs have rebuffed them and affirmed that the deliberate indifference element of the *Davis* liability standard sets an intentionally high bar that should not be lowered and replaced by agency guidance or administrative enforcement standards. *See, e.g., Long*, 522 Fed. App'x 576; *Lance*, 743 F.3d 982.

OCR itself acknowledges that the lenient standard articulated in the 2010 DCL does not apply to cases such as this one. In response to NSBA's concerns, OCR

[4] Letter from Francisco M. Negrón Jr., General Counsel, Nat'l Sch. Bds. Ass'n, to Charlie Rose, General Counsel, U.S. Dep't of Educ. (Dec. 7, 2010), *available at* http://www.nsba.org/SchoolLaw/Issues/Safety/NSBA-letter-to-Ed-12-07-10.pdf.

stated, "The DCL specifies 'the legal standards that apply in administrative enforcement and in court cases where plaintiffs are seeking injunctive relief.'"[5] The standard in private lawsuits for monetary damages is actual knowledge and deliberate indifference. *See Davis*, 526 U.S. at 643, 648. These statements acknowledging the limitations of the agency's own guidance documents are compelled by the Supreme Court's recognition that a school's non-compliance with administrative requirements will not support a claim for damages. *See, e.g., Gebser*, 524 U.S. at 292 (holding that the school district's failure to promulgate policies to combat discrimination "does not constitute 'discrimination' under Title IX" and no damages remedy will lie when a school violates "administrative requirements"). *See also Alexander v. Sandoval*, 532 U.S. 275, 291 (2001) (holding that damages are not available in Title VI cases involving "disparate impact" discrimination and non-compliance with federal regulations).

[5] Letter from Russlyn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., to Francisco Negrón, Nat'l Sch. Bds. Ass'n at 2 (Mar. 25, 2011) (quoting 2010 DCL); *see also* Letter from Russlyn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., to Colleagues at 4 fn. 12 (Apr. 4, 2011) ("This is the standard [referring to reasonableness standard] for administrative enforcement of Title IX and in court cases where plaintiffs are seeking injunctive relief (citing OCR's *Revised Sexual Harassment Guidance* at ii-v, 12-13 (2001)).

1. *Davis* requires plaintiffs in peer harassment cases to satisfy several challenging prongs.

In *Davis*, the Supreme Court articulated an intentionally high liability standard. School districts may be liable for damages related to peer harassment only if the entity had "actual knowledge"[6] of "harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit."[7] Finally and crucially, a school district must be found to have been deliberately indifferent in responding to such harassment. The *Davis* Court explicitly rejected the notion that the deliberate indifference prong requires school districts to remedy and prevent peer harassment: "On the contrary, the recipient must merely respond to *known* peer harassment in a manner that is not clearly unreasonable."[8] As applied, the *Davis* standard results in relatively few scenarios in which schools may be held liable for monetary damages, as well as attorney's fees and costs, for their actions in addressing peer harassment based on categories protected under federal civil rights laws.

Courts considering school district liability for peer harassment since *Davis* have recognized the stringency of the Court's standard and have generally found in

[6] *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999).
[7] *Id.* at 633.
[8] *Id.* at 648-49 (emphasis added).

favor of school districts, often at the dismissal or summary judgment stage. These decisions turn on the plaintiff's failure to allege or present enough evidence with respect to one of the *Davis* prongs. For example, several courts have held in a school district's favor because the plaintiff was unable to show that the harassment at issue is based on a protected category, and/or is severe, pervasive, and objectively offensive.[9] In *H.B. v. Monroe Woodbury Cent. Sch. Dist.*, No. 11–CV–5881, 2012 WL 4477552 (S.D.N.Y. Sept. 27, 2012), the court granted the district's motion to dismiss the students' claims under Title IX, stating, "the Supreme Court has admonished courts to take pains . . . to ensure that the purported harassment is sufficiently severe," as not all conduct that is upsetting to a targeted student such as insults, teasing, name-calling, shoving, and pushing is actionable harassment." *Id.* at *16 (citations omitted).

Courts frequently grant school districts summary judgment after determining that there is no genuine issue of material fact that the school officials lacked actual knowledge of the discriminatory harassment or that the school district was not deliberately indifferent because school officials' response was not clearly

[9] *E.g.*, *Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist.*, 647 F.3d 156 (5th Cir. 2011) (squabbles based on personal animosity are not actionable sex-based harassment under Title IX); *Brodsky v. Trumbull Bd. of Educ.*, No. 3:06-CV-1947, 2009 WL 230708 at *7 (D. Conn. Jan. 30, 2009) ("Title IX was not intended and does not function to protect students from bullying generally (as opposed to sexual harassment or gender discrimination) or to provide them recourse from mistreatment that is not based on sex.").

unreasonable.[10] Courts have made similar findings by applying *Davis* in cases involving disability-based peer harassment.[11]

2. Failure to follow agency guidance on responding to harassment does not amount to deliberate indifference.

Although the Appellants acknowledge that the *Davis* standard, including the requirement of deliberate indifference, is appropriately applied in this case, they urge

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[10] *E.g.*, *LeVarge v. Preston Bd. of Educ.*, 552 F. Supp. 2d 248 (D. Conn. 2008) (finding no deliberate indifference where school officials acted to protect plaintiff teased in a homophobic manner by separating him from other students and disciplining those students, even though plaintiff was required to write note to his parents, and school officials did not call his parents and failed to refer him to counseling); *P.K. v. Caesar Rodney High Sch.*, No. 10–CV–783, 2012 WL 253439 (D. Del. Jan. 27, 2012) (finding in Title IX peer harassment case, school officials had responded proactively and therefore had not acted in a clearly unreasonable manner); *Power v. Gilbert Pub. Sch.*, 454 F. App'x 556, 559 (9th Cir. 2011) (upholding grant of summary judgment for school district in Title IX peer sexual harassment case based on student's failure to show deliberate indifference, as school officials timely and thoroughly investigated each of plaintiff's complaints).

[11] *E.g.*, *Long v. Murray County Sch. Dist.*, 522 F. App'x 576 (11th Cir. 2013); *Lance v. Lewisville Indep. Sch. Dist.*, 743 F.3d 982 (5th Cir. 2014); *S.S. v. Eastern Kentucky Univ.*, 532 F.3d 445 (6th Cir. 2008) (affirming summary judgment for school district on disability-based harassment claim, as school officials took some action for each reported incident, demonstrating they were not deliberately indifferent); *P.R. v. Metro. Sch. Dist. of Washington Township*, No. 1:08-CV-1562, 2010 WL 4457417 (S.D. Ind. Nov. 1, 2010) (granting summary judgment to school district in Section 504/ADA case based on finding of no deliberate indifference to harassment of student with HIV where district took some action in three documented instances of harassment); *Scruggs v. Meriden Bd. of Educ.*, No. 3:03-CV-2224, 2007 WL 2318851 (D. Conn. Aug. 10, 2007) (granting summary judgment to school district based on finding of no deliberate indifference where school provided services and referrals to student who suffered disability-based harassment for years and eventually committed suicide; court did allow case to go forward on claim of denial of free appropriate public education).

this Court to adopt an analysis that departs from established legal doctrine on deliberate indifference. Instead, they attempt to steer this Court toward a professional negligence standard, as measured against OCR's enforcement guidance and state regulations. This Court should reject this approach as an unwarranted extension of *Davis* that: (1) deprives school officials of the substantial flexibility that the Supreme Court has already acknowledged they need in responding to discriminatory peer harassment;[12] and (2) erroneously judges the effectiveness of the district's response in hindsight based solely on the recurrence of harassment.[13]

In *Davis*, the Court clearly confirmed the necessity of a standard higher than negligence in Title IX suits for monetary damages. Citing *Gebser*, the Court explained in *Davis* that it not only had rejected the use of agency principles to impute liability to a school district for teacher misconduct, but also had "declined the invitation to impose liability under what amounted to a negligence standard—holding the district liable for its failure to react to teacher-student harassment of which it knew or *should have known.*"[14]

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[12] 526 U.S. at 648.

[13] *See, e.g., Sauls v. Pierce Cnty. Sch. Dist.*, 399 F.3d 1279, 1285 (11th Cir. 2005) ("relevant inquiry is not whether the measures taken were effective in stopping discrimination, but whether the school district's actions amounted to deliberate indifference"); *P.K.*, 2012 WL 253439 at *9 ("Supreme Court has made clear, the effectiveness of a district's methods is not a factor considered in the Title IX analysis and ineffectiveness is not dispositive of Title IX liability.").

[14] 526 U.S. at 642.

Deliberate indifference, the Court explained, is not a mere "reasonableness" standard under which a judge or jury assesses whether the response met an established duty of care as they would in a negligence case.[15] Instead, the school district may be found liable only when the school officials' intentional actions or failure to act can be said to "cause" the discrimination or to make students vulnerable to harassment on the basis of the protected category.[16] For liability to attach to the district, an "official decision not to remedy the violation" must have occurred—*i.e.*, a school official must have made a conscious choice to endanger the plaintiff. *See, e.g.*, *Valle v. City of Houston* 613 F.3d 536, 548 (5th Cir. 2010). Misjudgment, mismanagement and neglect are not enough, nor are the independent actions of subordinate employees who may fail to enforce remedial measures put in place by the district. *Gebser*, 524 U.S. at 290.

By establishing a standard of liability more rigorous than negligence in peer harassment cases brought under Title IX (and, as applied, under Section 504), the Court remained consistent with the widespread and longstanding recognition by courts and legislatures that negligence is a standard of liability incompatible with the efficient functioning of government, as government employees must be able to carry

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[15] *Id*. at 649.

[16] *Vance v. Spencer Cnty. Pub. Sch.*, 231 F.3d 253, 260 (6th Cir. 2000) (citing *Davis*, 526 U.S. at 645); *see also Grayson v. Peed*, 195 F.3d 692, 695 (4th Cir. 1999) ("Deliberate indifference is a very high standard—a showing of mere negligence will not meet it.").

out their official functions without undue fear of lawsuits.[17] This is particularly true for schools, where educators must often exercise professional judgment in carrying out their day-to-day responsibilities. For example, in *Hunter v. Board of Educ. of Montgomery County*, 439 A.2d 582, 585 (Md. App. Ct. 1982), the court refused to recognize a negligence cause of action for educational malpractice against school officials, stating:

> [T]o allow petitioners' asserted negligence claims to proceed would in effect position the courts of this State as overseers of both the day-to-day operation of our educational process as well as the formulation of its governing policies. This responsibility we are loathe to impose on our courts. Such matters have been properly entrusted by the General Assembly to the State Department of Education and the local school boards who are invested with authority over them.[18]

Despite this virtually universal spurning of liability based on negligence for discretionary acts of school personnel, a negligence analysis is exactly what the Appellants invite this Court to apply. The exceptional standard of care they urge

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[17] *See, e.g.*, *Jones v. Oxnard Sch. Dist*., 270 Cal. App. 2d 587 (1969) (holding in case arising prior to the California Tort Claims Act of 1963 that discretionary action by governmental personnel within the scope of their authority is privileged against tort liability and urging a flexible definition of "discretionary" that balances harm caused by inhibition upon governmental function against desirability of providing redress for injury); *Negron v. Ramirez*, No. CV 095013686, 2011 WL 2739499, at *4 (Conn. Super. Ct. June 10, 2011) (holding "[m]unicipal officials are immune from liability for negligence arising out of their discretionary acts in part because of the danger that a more expansive exposure to liability would cramp the exercise of official discretion beyond the limits desirable in our society. . . .").

[18] *See also* MD. CODE ANN. EDUC. § 4-106(a); MD. CODE ANN. CTS. & JUD. PROC. § 5-518(e).

upon the Court is set forth in OCR's Dear Colleague Letters that suggest approaches for schools to address and prevent peer harassment.[19] OCR itself has acknowledged, however, that the "remedies in the [2010] DCL may not be required or appropriate in every case," and that they "are designed to help schools better understand their responsibilities and their *options* for responding to harassment."[20] Assuming *arguendo* that some of these measures would be ideal or effective to address peer harassment in schools, nonetheless the failure of a school to adopt any one of these recommendations or other measures endorsed by federal agencies without more does not amount to deliberate indifference.[21]

3. Failure to conduct a formal investigation of every reported incident of student-on-student misconduct as disability-based harassment or bullying does not equate with deliberate indifference.

As discussed more thoroughly below, courts have recognized that not every instance of inappropriate behavior among students constitutes harassment that violates federal anti-discrimination laws.[22] Nor is every crude remark or unwanted

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[19] *See supra* Part II.A.

[20] *See supra* note 2 (emphasis added).

[21] *See, e.g., C.S. v. Couch*, 843 F. Supp. 2d 894 (N.D. Ind. 2011) (finding that school district investigated and took disciplinary action against perpetrators in four of six incidents allegedly motivated by race of which school officials were aware. School's response, therefore, was not clearly unreasonable.).

[22] *See, e.g., Sanches*, 647 F.3d 156; *Brooks v. City of Philadelphia*, 747 F. Supp. 2d 477 (E.D. Pa. 2010); *R.S. v. Board of Educ. of Hastings-On-Hudson Union Free Sch. Dist.*, 371 F. App'x 231 (2d Cir. 2010).

contact suffered at the hands of a classmate automatically a violation of a school district's policies prohibiting harassment and bullying. For this reason, the on-site school official receiving the report of the misconduct properly has the responsibility and the discretion to evaluate the situation and to determine the appropriate degree of inquiry as well as any disciplinary measures that may be warranted. Failure to perceive particular student misconduct as harassment based on the protected status of the target and to conduct formal investigations under a district's bullying or harassment policy do not make a district's response clearly unreasonable as required by *Davis* to impose liability. Likewise, failure to adhere in detail to federal or state agency guidance or best practices does not necessarily meet the high bar of deliberate indifference.

A determination of deliberate indifference does not turn on whether the school officials could or should have done more to investigate the reported incidents; the test is whether the actions of the school officials were clearly unreasonable.[23] A clearly unreasonable determination takes into account all the circumstances known to the school official who is directing or carrying out the investigation. This typically includes, among others, such factors as the frequency of the complaints, the

[23] *See, e.g.*, *Long*, 522 Fed. App'x 576 (finding school district should have done more to address harassment but holding that its response was not deliberately indifferent given lack of evidence that district knew its remedial actions were ineffective).

seriousness of the alleged misconduct, the past history of the parties involved, the facts uncovered that may corroborate or contradict the complaint, and the presence/absence of other indicators that the complainant is uncomfortable or fearful. To find deliberate indifference, a court must determine that in light of these and other relevant factors, the school officials in response to each reported incident of harassment made a conscious choice to carry out such a wholly inadequate investigation, that they caused the discrimination against a plaintiff. Officials' alleged failure in some instances to conduct an exhaustive and technically precise investigation falls far short of such an intentional decision.

4. Failure to eliminate harassment altogether does not equate automatically with deliberate indifference.

The Appellants argue that the Board was deliberately indifferent because school officials knew that there was ongoing harassment but took no action reasonably calculated to stop the alleged continuing misconduct. However, this contention conflicts with the *Davis* Court's express ruling that there is no requirement under federal law that to avoid liability, schools must eliminate or "remedy" peer harassment and "ensure that students . . . conform their conduct to certain rules."[24] In *Davis*, the Court explicitly contemplated the question as one of law, saying, "In an appropriate case, there is no reason why courts, on motion to

[24] 526 U.S. at 648.

dismiss, for summary judgment, or for a directed verdict, could not identify a response as not 'clearly unreasonable' as a matter of law."[25] As noted above, lower courts have done exactly that in many peer harassment cases, including some that involved continuing mistreatment of the plaintiff.

Making complete elimination of harassment the litmus test for deliberate indifference determinations would be untenable. School officials would have to assume the truth of every complaint of harassment (regardless of the evidence) and to take corrective measures or risk being deemed ineffective in stopping "harassment" should a later incident arise. Such a rule would impose a requirement on school districts upon the receipt of a new report of peer mistreatment to experiment continuously with strategy after strategy to stop misconduct even where the existence of harassment is isolated or minimal or unsubstantiated. In essence, even if deliberate indifference turned on the question of effectiveness—which it does not—this is a wholly unworkable basis for liability. It demands that any "strategy" that a school official might try in response to harassment must work instantly and completely or risk being deemed ineffective when any student experiences *new* incidents of harassment. In the wake of any new reports of harassment, school officials would be required to jettison "failed" approaches and find new ones, even

[25] *Id*. at 649.

if, in their informed professional judgment, they believed them to be viable and supportive of the students involved.

In *Patterson v. Hudson Area Schools*, 551 F.3d 438, 450 (6th Cir. 2009), after the Sixth Circuit found that the peer-to-peer harassment had occurred over years, and the district had repeatedly used the same ineffective method to address it, which the appeals court said a jury could find to be deliberate indifference subjecting the district to liability, it remanded the case for trial. The jury returned a verdict of $800,000 for the plaintiff. Importantly, however, the district court *set aside* the verdict, granting the school district's motion for judgment as a matter law:

> In the instant case, the Court finds that the uncontroverted evidence is that Defendant's teachers and administrators responded to each and every incident of harassment of which they had notice. More critically, the Court concludes that, as a matter of law, there was no evidence whatsoever presented that Defendant "was aware that adverse consequences from its action or inaction were certain or substantially certain to cause harm ... and that Defendant decided to act or not act in spite of that knowledge." . . . In other words, the Court finds, as a matter of law, that Defendant "responde[d] to known peer harassment in a manner that [was] not clearly unreasonable."[26]

B. *Davis*' Actual Notice Requirement Should Not Be Expanded.

Knowledge of individual acts of mistreatment of a student by other students is not necessarily sufficient to impose liability under Section 504 where the alleged mistreatment does not rise to the type or level of harassment against which this anti-

[26] 724 F. Supp. 2d 682, 696 (E.D. Mich. 2010) (citations omitted). *Contra Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 394 F. Supp. 2d 1299 (D. Kan. 2005).

discrimination law protects. Under *Davis*, the harassment must be "so severe, pervasive, and objectively offensive that it denies its victims the equal access to education . . . ."[27] The harassment must be based on a characteristic recognized under federal civil rights laws, a hurdle that is often difficult for plaintiffs to meet in peer harassment cases.[28] This is not to suggest that school officials should not respond to assist a student who reports that he is being repeatedly "picked on" or teased or taunted, but the existence of such behavior in itself, even on a continuing basis, is not *per se* a violation of federal anti-discrimination laws. The *Davis* Court clearly recognized that school children often engage in behavior that might be deemed harassment if carried out by adults in other contexts, but that such "rough and tumble" behavior does not necessarily constitute the type of harassment covered by federal law. *Davis*, 526 U.S. at 672-73.

[27] 526 U.S. at 652.
[28] *See supra* Part II.A.1.

III. SCHOOL OFFICIALS ARE IN THE BEST POSITION TO RESPOND TO KNOWN INCIDENTS OF BULLYING OR HARASSMENT.

A. This Court Should Affirm Established Precedent Deferring to Educational Judgments of Local School Officials, Who Know Community Resources and Students' Educational and Emotional Needs.

School officials need leeway to exercise educational discretion in determining whether an incident of bullying or harassment is isolated, is related to school climate issues, is a result of trending societal pressures in the community, or is related to other indicia of which only a school official can be aware. School size, student experiences and relationships, socio-economic realities, and community dynamics and history may all play a role.

School board members, school district administrators, school principals, and teachers have more direct and genuine information about their students than any other body of government—local, state, or federal. In addition, local school officials are keenly aware of societal issues affecting their communities and often have important leadership roles. School officials— especially school principals, who interact daily with students, parents, and staff—tend to be aware of individual students or groups of students who may be having difficulties in peer-to-peer or peer-to-faculty interactions.

Building and district-level educators trained in student service needs typically know community experts in various fields, who, through consultation and staff discussion, may provide input and knowledge about services that would best serve each student. These educators could include school nurses, guidance counselors, school psychologists, special education teachers, social workers, etc.

In terms of student discipline, building and district-level officials sometimes work with local law enforcement and other community groups in identifying trends in types of misconduct, creating plans for curbing such behaviors, and seeking other possible methods for creating a more positive school environment for students and staff.

Based on this ground-level knowledge of students and communities, as well as their specialized training as educators and representatives of their communities, school officials craft and implement policy. They base their decisions on myriad considerations within their unique professional judgment and frame of reference—student body size and demographics, staff size and experience, community characteristics, even weather. As student or staff demographics change, school officials often adjust policies and procedures. For example, changes in community demographics brought about by economic tides might require the school board and district-level administrators to rethink how certain policies, including student

discipline codes and harassment guidelines, might need to be modified to better address student needs and educational demands.

In implementing and enforcing policies, school officials must consider all the circumstances, including the rights and interests of the parties involved. With respect to disciplining students, school officials have as much responsibility to the accused student as to the complainant when determining what interventions or corrective actions should or may be taken. To the extent the district is unable after investigation to corroborate a complaint or has evidence contradicting the complaint, it may be limited in what actions it may take against the alleged wrongdoer.

Such community- and situation-specific information is obtained only through the intimate knowledge of community schools and local educators and is critical in adopting or amending policies and applying those policies to particular situations. For this reason, "[s]chool administrators are better equipped than judges to develop policies that best meet their local educational goals,"[29] including the appropriate response to student misconduct. Indeed, courts have routinely deferred to the decision-making of local school boards and school administrators. As courts have acknowledged, "the judiciary generally 'lacks the specialized knowledge and experience necessary to resolve persistent and difficult questions of educational

[29] Karen M. Clemes, *Lovell v. Poway Unified School District: An Elementary Lesson against Judicial Intervention in School Administrator Disciplinary Discretion*, 33 CAL. W. L. REV. 219, 241 (Spr. 1997).

policy.'"[30] Courts have recognized, "deference is owed to a municipal body's statutory interpretation of its own rules and regulations 'so long as its interpretation is based on a permissible construction.'"[31]

Courts have recognized that they are not educational experts in numerous areas in which school officials have had to make hard decisions,[32] expressing clear reluctance to encroach into areas such as the regulation of student speech,[33] student

[30] *Gagliardo v. Arlington Cent. Sch. Dist.*, 489 F.3d 105, 113 (2d Cir. 2007) (citations omitted).

[31] *American Civil Liberties Union of Fla. v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177, 1228 (11th Cir. 2009) (citations omitted) (deferring to school board's reasonable interpretation of its own local rule upholding decision to remove school library book from all school libraries).

[32] *Davis*, 526 U.S. at 648 (courts should not second guess school administrators' disciplinary decisions); *M.H. v. New York City Dep't of Educ.*, 685 F.3d 217, 240 (2d Cir. 2012) (courts should not substitute their own notions of sound educational policy for those of the school authorities which they review) (citing *Board of Educ. v. Rowley*, 458 U.S. 176, 206 (1982) (deference owed to administrative findings in IDEA case)); *see also T.P. ex rel. S.P. v. Mamaroneck Union Free Sch. Dist.*, 554 F.3d 247 (2d Cir. 2009) (reversing district court's order for failure "to defer appropriately to the decisions of the administrative experts on a difficult question of educational policy" in IDEA case).

[33] *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992) (indicating that *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271, 273 (1988), holds "federal courts are to defer to a school's decision to suppress or punish vulgar, lewd, or plainly offensive speech, and to 'disassociate itself' from speech that a reasonable person would view as bearing the imprimatur of the school, when the decision is 'reasonably related to legitimate pedagogical concerns.'").

discipline,[34] student dismissal,[35] ADA/Section 504 harassment,[36] racial harassment,[37] grade appeals,[38] and First Amendment dress code challenges.[39]

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[34] *Wise v. Pea Ridge Sch. Dist.*, 855 F.2d 560, 566 (8th Cir. 1988) (upholding use of corporal punishment and in-school suspension policies, noting that court's "decision is consistent with the Supreme Court's decisions that defer to school administrators in matters such as discipline and maintaining order in the schools"); *Doninger v. Niehoff*, 514 F. Supp. 2d 199, 215 (D. Conn. 2007) ("[T]he Court defers to their experience and judgment regarding student discipline, and has no wish to insert itself into the intricacies of the school administrators' decision-making process."); *Bystrom v. Fridley High Sch.*, 686 F. Supp. 1387, 1393 (D. Minn. 1987) (upholding suspension of students for distribution of unofficial school newspaper advocating violence against teachers).

[35] *Wong v. Regents of Univ. of Calif.*, 192 F.3d 807, 817 (9th Cir. 1999) (noting in ADA/504 action by disabled student that judges "should show great respect for [a] faculty's professional judgment" when reviewing "the substance of a genuinely academic decision.") (*quoted in Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985)).

[36] *Zukle v. Regents of Univ. of Calif.*, 166 F.3d 1041, 1047 (9th Cir. 1999) (noting that courts typically defer to the judgment of academics because courts generally are "ill-equipped," as compared with experienced educators, to determine whether a student meets a university's "reasonable standards for academic and professional achievement") (citing First, Second, and Fifth Circuits cases).

[37] *H.B. v. Monroe Woodbury Cent. Sch. Dist.*, No 11-CV-5881, 2012 WL 4477552, at *14 (S.D.N.Y. Sept. 27, 2012) ("'courts should avoid second guessing school administrators' decision[s] and should defer to the judgment of those administrations that are important to the 'preservation of order in the schools.'") (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 342 n.9 (1985)).

[38] *Ewing*, 474 U.S. at 226 (a federal court should "defer to the decision of school officials unless the plaintiff can show that the academic decision 'is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.'").

[39] *Pyle v. South Hadley Sch. Comm.*, 861 F. Supp. 157, 158 (D. Mass. 1994) ("In assessing the acceptability of various forms of vulgar expression in a secondary school, however, the limits are to be debated and decided within the community; the rules may even vary from one school district to another as the diversity of culture dictates.").

Indeed, if courts did not generally defer to school officials' judgment in these matters, the unlimited availability of judicial review of disputes would subject virtually every decision to a court inquiry at the behest of unsuccessful or disgruntled faculty, parents, or students. *See Faro v. New York Univ.*, 502 F.2d 1229 (2d Cir. 1974).

School officials have unique expertise to make decisions that will support the students in their charge. They should not have to work in fear that any particular decision they make, whether on student discipline, special education placement, curriculum materials, programming, textbook selection, or the like, would be easily subjected to judicial scrutiny. Local school officials need the flexibility to craft plans and policies that will meet the needs of their continually changing student populations based on school officials' own education, experience, judgment, and personal knowledge, especially when responding to student misconduct.

NSBA urges this Court to continue the judiciary's long-standing deference to school officials' decision-making in matters of student discipline and maintaining an orderly, safe learning environment, including peer harassment claims under federal civil rights statutes.

CONCLUSION

Amici pray that this Court rejects the Appellants' attempt to expand the strict standard articulated in *Davis*, opening up all school districts within the Fourth

Circuit to increased litigation, while denying school officials due deference to respond to known incidents in a reasonable manner. Under the Appellants' reasoning, any subsequent incidents of alleged harassment, whether reported or not, indicate that school officials were deliberately indifferent. *Amici* ask this Court to uphold the decision of the district court granting summary judgment to the Board of Education of Harford County.

Respectfully submitted,

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September 23, 2015

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 15-1474 **Caption:** SB v. Board of Education of Harford County

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Attorney for Amicus Curiae

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I certify that on Sept. 23, 2015 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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