No. 12-13248

In the United States Court of Appeals
For the Eleventh Circuit

DAVID LONG AND TINA LONG, INDIVIDUALLY, AS NATURAL PARENTS OF TYLER LEE LONG, DECEASED,
PLAINTIFFS/APPELLANTS,

v.

MURRAY COUNTY SCHOOL DISTRICT AND GINA LINDER

DEFENDANTS/APPELLEES.

On Appeal from the United States District Court
For the Northern District of Georgia, Rome Division

BRIEF OF AMICI CURIAE NATIONAL SCHOOL BOARDS ASSOCIATION, ALABAMA ASSOCIATION OF SCHOOLS BOARDS, GEORGIA SCHOOL BOARDS ASSOCIATION, AND GEORGIA SCHOOL SUPERINTENDENTS ASSOCIATION IN SUPPORT OF DEFENDANTS-APPELLEES AND URGING AFFIRMANCE

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APPEAL NO. 12-13248

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DAVID LONG, *et al*.,
Appellants,

v.

MURRAY COUNTY SCHOOL DISTRICT
and GINA LINDER,
Appellees

CERTIFICATE OF CORPORATE DISCLOSURE AND INTERESTED PERSONS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1-1 of the Rules of the Court of Appeals for the Eleventh Circuit, *Amici Curiae* National School Boards Association, Alabama Association of School Boards, Georgia School Boards Association, and Georgia School Superintendents Association hereby certify that each is a non-profit corporation, has no parent corporation and has no stock. Following is a list of persons and entities known to *amici curiae* to have an interest in the outcome of this appeal that have not already been named in Appellants' Certificate of Interested Persons and Corporate Disclosure Statement or the certificates contained in the subsequent briefs filed in this appeal. These certificates are otherwise correct and complete.

APPEAL NO. 12-13248
Long v. Murray County School District

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**Davis v. Monroe County Bd. of Educ.*,
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Demekpe v. Bd. of Trustees of California St. Univ.,
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Gagliardo v. Arlington Cent. Sch. Dist.,
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Metropolitan Sch. Dist. of Wayne Township v. Davila,
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Negron v. Ramirez,
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New Jersey v. T.L.O.,
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Pyle v. South Hadley Sch. Committee,
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Regents of the Univ. of Michigan v. Ewing,
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S.S. v. Eastern Kentucky Univ.,
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Wise v. Pea Ridge Sch. Dist.,
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OTHER AUTHORITIES:

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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 (SPR. 1997) 26

Letter from Francisco M. Negrón, Jr., General Counsel, National School Boards Association to Charlie Rose, General Counsel, U.S. Department of Education (Dec. 7, 2010), available at http://www.nsba.org/SchoolLawIssues/Safety/NSBA-letter-to-Ed-12-07-10.pdf 7

Letter from Norma V. Cantu, Assistant Secretary for Civil Rights, and Judith E. Huemann, Assistant Secretary for Special Education and Rehabilitative Services, to Colleagues (July 25, 2000), available at http://www.ed.gov/about/offices/list/ocr/docs/disabharassltr.html 21, 22

Letter from Russlyn Ali, Assistant Secretary for Civil Rights, U.S. Department of Education to Colleagues (Oct. 26, 2010), available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html 6, 22, 23

Letter from Russlyn Ali, Assistant Secretary for Civil Rights, U.S. Department of Education to Francisco M. Negrón, Jr., General Counsel, National School Boards Association, (March 25, 2011), available at http://www.nsba.org/SchoolLawIssues/Safety/ED-Response-to-NSBA-GCs-Letter-to-ED-on-OCR-Bullying-Guidelines.pdf 11-12

Letter from U.S. Secretary of Education Arne Duncan to Colleagues (Dec. 16, 2010), available at www2.ed.gov/policy/gen/guid/secletter/101215.html 24

National School Boards Association, Bullying Definitions in State Anti-Bullying Statutes, (Feb. 2012), available at http://www.nsba.org/SchoolLawIssues/Safety/Definitions.pdf 23

National School Boards Association, State Anti-Bullying Statutes, (April 2012), available at http://www.nsba.org/SchoolLawIssues/Safety/Table.pdf 23

National School Boards Association, State Educational Agency Anti-, Bullying Policies and Other Resources (July 2011), available at http://www.nsba.org/SchoolLawIssues/State-Educational-Agency-Model-Anti-Bullying-Policies-and-Other-Resources.pdf 23

U.S. Department of Education Press Release: U.S. Education Secretary Highlights Best Practices of Bullying Policies (Dec. 16, 2010), available at http://www.ed.gov/news/press-releases/us-education-secretary-highlights-best-practices-bullying-policies 24

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INTEREST OF THE *AMICI*

The National School Boards Association ("NSBA") is a nonprofit 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.

The Alabama Association of School Boards ("AASB") is the official voice of the state's local school boards and other boards governing K-12 public education agencies. Founded in 1949, AASB has grown in size and stature as a vocal advocate of local school boards. In 1955, the Alabama Legislature designated AASB as the "organization and representative agency of the members of the school boards of Alabama." Ala. Code § 16-1-6.

The Georgia School Boards Association ("GSBA") is a voluntary organization composed of all the local boards of education in the State of Georgia. The association's mission is to ensure excellence in the governance of local school systems by providing leadership, advocacy and services and by representing the collective resolve of Georgia's 180 elected boards of education.

The Georgia School Superintendents Association ("GSSA") is a voluntary organization whose present membership includes all 180 public school system superintendents in the State. Representing those superintendents, the association advocates for its beliefs that high quality education programs should be made available to each public school student and that competent and caring individuals should be employed in the schools to achieve this goal.

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* submits 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).

STATEMENT REGARDING PREPARATION AND FILING OF THE BRIEF

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.

STATEMENT OF THE ISSUE

This brief is limited to the following issue:

Whether summary judgment was properly granted on the claim of disability discrimination under Section 504 and the Americans with Disabilities Act based on the district court's finding that the school district was not deliberately indifferent as a matter of law to the alleged peer harassment.

SUMMARY OF THE ARGUMENT

Amici urge this Court to resist this attempt 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 in money damages in cases of peer harassment brought under Title IX. Taking into account the unique characteristics of K-12 schools, where students are still learning how to interact with their peers and school administrators must enjoy flexibility to make

individual, student-based decisions, the Court set out a standard that would allow for liability only when the district itself *subjects* a student to discrimination.

The Longs attempt to change the standard to one of simple negligence, in which a court would look at an "industry standard" for appropriate prevention of and response to bullying in schools, as evidenced by agency guidance and "expert" reports and testimony. This approach is dangerous for many reasons. True harassment based on a protected category such as sex, race or disability, has a vastly different legal significance from peer bullying, which can be based on any characteristic. To conflate guidance for public schools regarding bullying (which may or may not constitute harassment) with a legal standard for monetary damages under federal law will subject thousands of school districts to liability needlessly.

The proposed expansion of Davis would discount years of precedent regarding deference to public officials generally, and school officials in particular with respect to matters of school discipline and safety. *Amici* urge the Court to uphold the decision of the district court granting Murray County School District ("MCSD") summary judgment.

ARGUMENT

I. The Supreme Court's Intentionally Narrow Davis Standard Should Not Be Expanded.

A. The Davis Standard, As Applied in Cases of Alleged Discrimination on the Basis of Disability Under Section 504, Should Not Be Conflated With Measures Encouraged In Agency Enforcement Guidance.

The arguments put forward by the Longs and their *amici* in this case are little more than pleas to this Court to dilute the deliberate indifference standard set forth by the U.S. Supreme Court in Davis, 526 U.S. 629, into a negligence inquiry. *Amici* urge this Court to resist this proposed expansion of well-established, clear precedent.

The Davis 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 was also very clear in its admonition 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).

The Longs and their *amici* argue that MCSD failed to follow an "industry standard" on addressing bullying and harassment in public schools. To determine the supposed industry standard, they ask the Court to rely on suggested measures offered in administrative enforcement guidance issued by the U.S. Department of Education's ("ED") Office for Civil Rights ("OCR"), or on "generally accepted standards in the profession"[1] cited in "expert" opinions or recommendations. If this Court adopts their argument, it will expand the Davis standard to make it one of "reasonableness," a negligence inquiry. The Supreme Court clearly rejected this approach.

NSBA warned against this expansion of the standard, and concomitant potential liability for school districts, when OCR issued its October 26, 2010 "Dear Colleague" Letter ("2010 DCL").[2] In December of that year, NSBA cautioned ED that by strongly suggesting that schools are required to take multiple measures to eliminate harassment, and by significantly expanding the Davis standard (by, for example, stating that a school is responsible for addressing harassment incidents

[1] Corrected Appellants' Initial Brief at 57.

[2] Letter from Russlynn Ali, Assistant Secretary for Civil Rights, U.S. Department of Education, to Colleagues (Oct. 26, 2010), available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html [hereinafter "2010 DCL"].

about which it knew *or should have known*),[3] OCR was providing a roadmap for future litigation against school districts. NSBA urged ED to no avail to issue clarification.[4] The expansion of the Davis standard which NSBA feared now appears in the Longs' arguments, recasting agency enforcement guidance as a gauge of legal liability. For the reasons set forth below, *Amici* urge this Court to rebuff the Longs' plea and to affirm that the deliberate indifference element of the Davis liability standard sets an intentionally high bar that should not be lowered and replaced by analysis of so-called "best" practices, whether in agency guidance or "expert" opinions. Such a change would constrain the ability of educators to address the needs of individual students and needlessly expose school districts to increased liability.

[3] Id. at 2.

[4] Letter from Francisco M. Negrón Jr., General Counsel, National School Boards Association, to Charlie Rose, General Counsel, U.S. Department of Education (Dec. 7, 2010), available at http://www.nsba.org/SchoolLaw/Issues/Safety/NSBA-letter-to-Ed-12-07-10.pdf.

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

In Davis, the Supreme Court articulated a liability standard that is intentionally high. School districts may be liable for damages related to peer harassment only if the entity had "actual knowledge"[5] of "harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit."[6] 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."[7] 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 in Title IX cases since Davis have recognized the stringency of the Court's standard and have

[5] 526 U.S. at 650.

[6] Id. at 633.

[7] Id. at 648-49 (emphasis added).

generally found in 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.[8] In H.B. v. Monroe Woodbury Central 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

[8] 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.").

deliberately indifferent because school officials' response was not clearly unreasonable.[9] Courts have made similar findings by applying Davis in cases involving alleged peer racial harassment,[10] as well as disability-based peer harassment.[11]

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[9] 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 who was teased in a homophobic manner by separating him from the other students and disciplining those students, although 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).

[10] E.g., D.T. ex rel. J.L. v. Somers Cent. Sch. Dist., 348 F. App'x 697, 699 (2d Cir. 2009) ("under Title VI, a plaintiff may sue a school district for money damages based on alleged student-on-student harassment only if the school district 'acts with deliberate indifference to known acts of harassment.'" (citations omitted)).

[11] E.g., 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 district 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

2. Failure to follow agency guidance or "expert" recommendations on responding to harassment does not amount to deliberate indifference.

Although the Longs and their *amici* acknowledge that the Davis standard, including the requirement of deliberate indifference, is appropriately applied in this case, they urge this Court to adopt an analysis that departs from established legal doctrine on deliberate indifference. Instead, they are steering this Court toward a professional negligence standard, as measured against OCR's enforcement guidance, as well as the testimony of their "experts." 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 acknowledged they need in responding to discriminatory peer harassment;[12] and (2) erroneously judges the effectiveness of the district's response in hindsight based on a review of the district's alignment with agency recommendations admittedly intended only to apply in enforcement actions,[13] and on "expert" evaluations made after the fact.[14]

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deliberate indifference where school had 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).

[12] 526 U.S. at 648.

[13] Letter from Russlyn Ali, Assistant Secretary for Civil Rights, U.S. Department of Education, to Francisco M. Negrón, Jr., General Counsel, National School Boards Association at 2 (March 25, 2011), available at

In Davis, the Court clearly confirmed the necessity for a standard higher than negligence in Title IX suits for monetary damages. Citing its landmark ruling on Title IX liability in Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 118 S.Ct. 1989 (1998), 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*."[15] 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.[16] 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

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http://www.nsba.org/SchoolLaw/Issues/Safety/ED-Response-to-NSBA-GCs-Letter-to-ED-on-OCR-Bullying-Guidelines.pdf; see also supra note 2 at 1 n. 6.

[14] See, e.g., Sauls v. Pierce County Sch. Dist., 399 F.3d 1279, 1285 (11th Cir. 2005) ("the 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 ("the 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.").

[15] 526 U.S. at 642.

[16] Id. at 649.

vulnerable to harassment on the basis of the protected category.[17] For liability to be imposed, school officials' response to the harassment or lack thereof must be clearly unreasonable in light of the known circumstances.

By establishing a standard of liability more rigorous than negligence in peer harassment cases brought under Title IX (and, as applied, under Section 504 and Title VI), 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 out their official functions without undue fear of lawsuits.[18] This is particularly true for schools, where educators must often react quickly in the interest of safety. For example, in Teston v. Collins, 459 S.E.2d 452

[17] 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.").

[18] See, e.g., Jones v. Oxnard Sch. Dist., 270 Cal. App. 2d 587 (1969) (in case arising prior to the California Tort Claims Act of 1963, court held discretionary action by governmental personnel within the scope of their authority is privileged against tort liability, 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, *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. . .").

(Ga. App. Ct. 1995), the court granted a principal and a teacher immunity from tort liability where there was no evidence that they exercised their discretionary authority with actual malice or intent to cause harm to a student who sustained injuries during an altercation with a visitor.

Despite this virtually universal spurning of liability based on negligence for discretionary acts of school personnel, a negligence analysis is exactly what the Longs and their *amici* invite this Court to apply. The exceptional standard of care they urge upon the Court is set forth in OCR's Dear Colleague Letters that suggest approaches for schools to address and prevent peer harassment, or expressed in the testimony of their experts.[19] The U.S. Department of Justice (DOJ), citing these guidance letters, argues that a jury could find MCSD deliberately indifferent because it allegedly failed to provide anti-harassment training to students, families and school staff; to adequately communicate its anti-harassment policy to employees and students; and to evaluate whether its remedial efforts were effective against harassment.

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*

[19] See infra Part II.A.

for responding to harassment."[20] Assuming *arguendo* that some of these measures would be ideal or effective to address peer harassment in schools, the failure of a school to adopt any one of these recommendations might arguably constitute negligence in a given set of circumstances; but without more, it would not necessarily amount to deliberate indifference.[21]

3. Failure to eliminate harassment altogether does not automatically make deliberate indifference a jury question.

Contrary to the Longs' contention, it is well-settled that the question of deliberate indifference is one of law for the court, and not one for a jury, regardless of evidence of continuing harassment. The Longs argue that the deliberate indifference question is one of fact because, they assert, MCSD officials knew that there was ongoing disability-based harassment despite disciplining the identified harassers, but took no action to stop this alleged continuing misconduct by other unidentified students. But, the Longs' 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 . . .

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[20] See supra note 13 (emphasis added).

[21] See, e.g., C.S. v. Couch, 843 F.Supp.2d 894 (N.D. Ind. 2011) (finding in suit alleging race-based peer harassment 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.).

conform their conduct to certain rules."[22] In fact, 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 dismiss, for summary judgment, or for a directed verdict, could not identify a response as not 'clearly unreasonable' as a matter of law."[23] As noted above, lower courts have done exactly that in many peer harassment cases, including some that involved continuing mistreatment of the plaintiff.

Making deliberate indifference a jury question whenever harassment is not completely eliminated is untenable. Such a rule would impose a requirement on school districts to continuously experiment with strategy after strategy to stop misconduct even where the existence of harassment is isolated or minimal. 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 these new incidents, school officials would be required to jettison "failed" approaches and find new ones, even if, in their

[22] 526 U.S. at 648.

[23] Id. at 649.

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

In support of their argument, the Longs and their *amici* rely heavily on the Sixth Circuit's decision in Patterson v. Hudson Area Schools, 551 F.3d 438 (6th Cir. 2009). There, 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. After the Sixth Circuit remanded the case for trial,[24] the jury returned a verdict of $800,000 for the plaintiff. Importantly, 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."[25]

[24] Patterson, 551 F.3d at 450.

[25] 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).

B. Davis' Actual Notice Requirement Should Not Be Expanded So That *Any* Report to a School Employee of Peer "Bullying" Triggers School Liability.

1. Delegation of authority or responsibility to a school employee to address student misconduct is insufficient to identify an "appropriate person" for liability purposes.

Under Davis, liability may be imposed on a school district where it acts with deliberate indifference to peer harassment of which an "appropriate person" in the district had actual knowledge.[26] In determining who qualifies as an "appropriate person," most courts have used as a starting point the Supreme Court's explanation in Gebser that an appropriate person "is, at a minimum, an official of the recipient entity with authority to take corrective action to end the discrimination."[27]

Contrary to the Gebser standard, however, DOJ argues expansively that to assess whether a particular school employee had the requisite "authority," the Court must determine whether the school administrator had "delegated" to the individual "authority" to receive and respond to reports of harassment. Under such an analysis, virtually every school employee would become an "appropriate" person for purposes of assessing district liability, regardless of their authority "to take corrective action to end the discrimination." School employees who witness

[26] 526 U.S. at 648.

[27] 524 U.S. at 290.

or receive information about "harassment" or "bullying" specified in school or district policy, are most likely required to report it to a central location where such complaints are handled.[28]

2. All reports of peer mistreatment do not constitute knowledge of actionable harassment under federal anti-discrimination laws.

This Court should reject the Longs' request for reversal of summary judgment based on genuine issues of material fact concerning deliberate indifference to *known* harassment. Even assuming the school official is an "appropriate" person with authority to take corrective action, knowledge of individual acts of mistreatment of a student by other students is not necessarily sufficient to impose liability under Section 504 or the Americans with Disabilities Act (ADA) where the alleged mistreatment does not rise to the type or level of harassment against which these anti-discrimination laws protect. Under Davis, the harassment must be "so severe, pervasive, and objectively offensive that it denies its victims the equal access to education . . . ."[29] The harassment must be based on a characteristic recognized under federal civil rights laws, a hurdle that is often

[28] Reports are even required by some state statutes. E.g., N.J. Stat. Ann. § 18A:37-16(b) (2012).

[29] 526 U.S. at 652.

difficult for plaintiffs to meet in peer harassment cases.[30] 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.

II. School Officials Are in the Best Position to Develop Effective Strategies to Create Safe Learning Environments.

A. A One-Size-Fits-All Strategy for Preventing and Eliminating Peer Harassment Based on Disability Is Ill-Suited for the Realities of School Environments.

The Longs and their *amici* rest their arguments on the assumption that there is an industry standard in the arena of bullying and harassment prevention in public schools. Contrary to the contentions of the Longs' *amici*, however, there are no "widely accepted" policies or strategies for combating bullying or disability-based harassment in schools. Indeed, the federal government explains the lack of federal law addressing bullying on its StopBullying.gov web site,[31] where multiple federal agencies provide resources on bullying identification, response, and prevention: "There is *no federal law or policy* governing bullying" in schools.[32] The site states

[30] See supra Part I.A.1.

[31] A website managed by the U.S. Department of Health & Human Services.

[32] Policies & Laws, Stopbullying.gov, http://www.stopbullying.gov/laws/index.html (emphasis added).

that when a student is bullied on the basis of the student's protected status, *i.e.*, race, color, national origin, sex, disability, or religion, the "bullying overlaps with harassment and schools are legally obligated to address it."[33]

For disability-based harassment, such an obligation arises under Section 504 and the ADA.[34] While it is widely known that disability-based harassment is a form of discrimination prohibited by Section 504 and the ADA, it is also widely known that neither the statutory nor regulatory language of Section 504 or the ADA sets forth *how* a local school district is to address and/or prevent disability harassment from occurring in the school setting.[35]

To "develop greater awareness" of the issue of disability-based harassment, OCR issued a Dear Colleague Letter in July 2000 ("2000 DCL") to "*suggest* measures that school officials should take to address" such harassment.[36] As discussed in Part I.A. supra, OCR issued another DCL in October 2010 that dealt

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[33] Id.

[34] 29 U.S.C. § 794(a) (2012); 34 C.F.R. pt. 104 (2012); 42 U.S.C. §§ 12131-12134 (2012); 28 C.F.R. pt. 35 (2012).

[35] 29 U.S.C. § 794(a) (2012); 34 C.F.R. §§ 104.4, .31-.37 (2012); 42 U.S.C. §§ 12131-12134 (2012); 28 C.F.R. § 35.130 (2012).

[36] Letter from Norma V. Cantu, Assistant Secretary for Civil Rights, and Judith E. Heumann, Assistant Secretary for Special Education and Rehabilitative Services, to Colleagues (July 25, 2000) (emphasis added), http://www.ed.gov/about/offices/list/ocr/docs/disabharassltr.html [hereinafter "2000 DCL"].

with peer harassment generally in schools, including disability-based harassment.[37] Like the 2000 DCL, the 2010 DCL identified a variety of steps a school district *might* take to respond to harassment, in addition to reiterating what the implementing regulations require—*i.e.*, policies prohibiting harassment and procedures for reporting and resolving complaints.

Together, the 2000 and 2010 DCLs provide guidance from ED, constituting an interpretative rule[38] on *harassment*, including disability-based harassment, not a national mandate on how to prevent and eliminate *bullying behaviors* that are not based on disability. Nor could they be a national mandate, given the limitations Congress placed on the federal government's participation in education, both before and around the time ED was established.[39] Indeed, it has long been recognized that, "[b]ecause education is a state and local obligation, federal participation in education is usually thought to supplement rather than supplant

[37] 2010 DCL, supra note 2.

[38] In general terms, an "interpretative rule simply states what the administrative agency thinks the [underlying] statute means, and only reminds affected parties of existing duties, …." Metropolitan Sch. Dist. of Wayne Township v. Davila, 969 F.2d 485, 489 (7th Cir. 1992) (rule regarding requirement that handicapped students who are expelled or subject to long-term suspensions be provided education services was interpretive and not subject to Act).

[39] 20 U.S.C. § 1232a (2012) (prohibition against federal control of education); 20 U.S.C. § 3403(a) (2012) (rights of local governments and educational institutions).

state and local education policy, just as federal monies are intended to supplement rather than supplant state and local funds for education."[40]

Because public education is the responsibility of state and local governments, state and local lawmakers "have taken action to prevent bullying and protect children. Through laws (in their state education codes and elsewhere) and model policies (that provide guidance to districts and schools), *each state addresses bullying differently*."[41] With each state legislature and education agency guiding school districts within its borders, it is no surprise that states' general policies for responding to bullying vary. Additionally, each of the over 13,800 school districts in the nation may address bullying and harassment differently to reflect their ever-changing individual student populations.[42] Here, one size does not fit all.

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[40] Burton D. Friedman, *State Government and Education: Management in the State Education Agency* 30 (1971).

[41] Stopbullying.gov, supra note 29 (emphasis added). See also State Anti-Bullying Statutes, National School Boards Association (April 2012), http://www.nsba.org/SchoolLaw/Issues/Safety/Table.pdf; Bullying Definitions in State Anti-Bullying Statutes, National School Boards Association (Feb. 2012), http://www.nsba.org/SchoolLaw/Issues/Safety/Definitions.pdf; State Educational Agency Anti-Bullying Policies and Other Resources (July 2011), http://www.nsba.org/SchoolLaw/Issues/Safety/State-Educational-Agency-Model-Anti-Bullying-Policies-and-Other-Resources.pdf

[42] ED recognized these differences in its December 2010 DCL and technical assistance memo, which outlined "key components of strong *state* bullying laws

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 another indicia of which only a school official can be aware. An isolated bullying incident may not indicate a pervasive bullying climate that requires a systemic approach. School size, student experiences and relationships, socio-economic realities, and community dynamics and history may all play a role.

B. This Court Should Continue Its Precedent of Deferring to the Educational Judgments of Local School Officials, Who Know Community Resources and Students' Educational and Emotional Needs.

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 own communities. They

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and policies" states could use in developing or revising their laws and policies. Letter from U.S. Secretary of Education Arne Duncan to Colleagues (Dec. 16, 2010), available at www2.ed.gov/policy/gen/guid/secletter/101215.html; "U.S. Education Secretary Highlights Best Practices of Bullying Policies: Key examples in state laws are highlighted as legislation that works to help protect students," U.S. Department of Education Press Release (Dec. 16, 2010) (emphasis added), http://www.ed.gov/news/press-releases/us-education-secretary-highlights-best-practices-bullying-policies.

typically have important leadership roles in their communities. 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 are coming up through the grades and may be having difficulties in peer-to-peer or peer-to-faculty interactions.

For students with disabilities, building and district-level educators trained in student service needs typically know community experts in the medical and social fields, such that they are able, through consultation and staff discussion, to obtain input and knowledge about what types of special education and related and other services 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 in identifying trends in types of misconduct, creating plans for curbing such behaviors, and seeking out 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 make adjustments to 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.

None of these types of community-specific information obtained only through the close knowledge of community schools and local educators can be garnered at the state, much less the national level. For this reason, "School administrators are better equipped than judges to develop policies that best meet their local educational goals,"[43] including the appropriate response to inappropriate student conduct. 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 policy.'"[44] This Court has

[43] 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).

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

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.'"[45]

Courts have recognized that they are not educational experts in numerous areas in which school officials have had to make hard decisions,[46] expressing clear reluctance to encroach into areas such as the regulation of student speech,[47] student

[45] American Civil Liberties Union of Florida, Inc. v. Miami-Dade County 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).

[46] Davis, 526 U.S. at 648 (courts should not second guess school administrators' disciplinary decisions); M.H. v. New York City Dept. 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 Bd. 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).

[47] Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 529 (9th Cir. 1992) (indicating in dicta, without any mention of "viewpoint neutrality," 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,[48] student dismissal,[49] ADA/Section 504 harassment,[50] racial harassment,[51] grade appeals,[52] and First Amendment dress code challenges.[53]

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[48] 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 the court's "decision is consistent with the Supreme Court's decisions which 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).

[49] Wong v. Regents of the Univ. of California, 192 F.3d 807, 817 (9th Cir. 1999) (in ADA/504 action by disabled student, court noted 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 the Univ. of Michigan v. Ewing, 474 U.S. 214, 225 (1985)).

[50] Zukle v. Regents of the Univ. of California, 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 with approval cases from the First, Second, and Fifth Circuits).

[51] H.B. v. Monroe Woodbury Cent. Sch. Dist., No 11-CV-5881, 2012 WL 4477552, *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)).

[52] Regents of Univ. of Michigan v. Ewing, 474 U.S. 214, 226 (1985) (cited in Demekpe v. Bd. of Trustees of California St. Univ., No. 11-CV-1177, 2011 WL 7578069 (C.D. Cal. Nov. 22, 2011) (the U.S. Supreme Court has stated that a federal court will "defer to the decision of school officials unless the plaintiff can

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 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.

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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.'").

[53] Pyle v. South Hadley Sch. Committee, 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.").

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 reject the attempt by the Longs and their *amici* to expand the strict standard articulated in Davis, opening up all school districts within the Eleventh Circuit to increased litigation, while denying school officials due deference to craft education policy specific to their districts. *Amici* ask this Court to uphold the decision of the district court granting summary judgment to Murray County School District.

Respectfully submitted this 28th day of November 2012.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App.P.32(a)(7)(B) because this brief contains 6932 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-Point Times New Roman.

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November 28, 2012

CERTIFICATE OF SERVICE

I hereby certify that on November 28, 2012, I electronically filed the foregoing BRIEF FOR THE NATIONAL SCHOOL BOARDS ASSOCIATION ET AL, AS AMICI CURIAE SUPPORTING DEFENDANTS-APPELLEES AND URGING AFFIRMANCE with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF System, and that seven paper copies of the electronically-filed brief were sent to the Clerk of the Court by First Class mail.

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