No. 12-41139

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THE ESTATE OF MONTANA LANCE; JASON LANCE; DEBORAH LANCE

Plaintiffs-Appellants,

v.

LEWISVILLE INDEPENDENT SCHOOL DISTRICT

Defendant-Appellee

On Appeal from the United States District Court for
the Eastern District Of Texas – Sherman Division

BRIEF OF AMICI CURIAE NATIONAL SCHOOL BOARDS ASSOCIATION and THE TEXAS ASSOCIATION OF SCHOOL BOARDS LEGAL ASSISTANCE FUND IN SUPPORT OF DEFENDANT-APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that, in addition to those persons listed in the briefs previously filed by the parties to this appeal, the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. National School Boards Association, Alexandria, Virginia – *Amicus Curiae,* Alexandria, Virginia

2. Texas Association of School Boards Legal Assistance Fund (including the Texas Association of School Boards, Texas Association of School Administrators, and the Texas Council of School Attorneys) – *Amicus Curiae,* Austin, Texas

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/s/ Lisa A. Brown

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations and Other Material

INTEREST OF AMICI CURIAE[1]

The National School Boards Association ("NSBA") is a non-profit organization of state associations of school boards throughout the United States and the Board of Education of the U.S. Virgin Islands. Through its state associations, NSBA represents more than 90,000 of the nation's school board members who, in turn, govern approximately 13,600 local school districts that serve nearly 50 million public school students, which is approximately 90 percent of the elementary and secondary students in the nation. NSBA's amicus briefs have been cited by the United States Supreme Court and this Court in numerous cases involving education and civil rights. *See, e.g., Borough of Duryea v. Guarnieri*, 131 S.Ct. 2488 (2011); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999); *Doe v. Covington County Sch. Dist.*, 675 F.3d 849 (5th Cir. 2012).

The Texas Association of School Boards (TASB) is a Texas non-profit corporation whose voluntary membership consists of the 1,036 school boards in the State of Texas. TASB's mission is to promote educational excellence for Texas school children through advocacy, leadership, and high quality services to school districts. TASB established the Legal Assistance Fund (LAF) under a Trust Agreement nearly three decades ago. The purpose of the LAF is to assist parties

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[1] No attorney for any party has authored this brief in whole or in part, and no person or entity other than Amici and their counsel have made any monetary contribution to the preparation or submission of this brief.

whose positions are aligned with the interests of Texas school districts by advocating through litigation for issues or causes that generally affect or will affect the public schools of Texas. Nearly 800 Texas school districts are members of the LAF. The LAF's board of trustees is governed by nine members representing TASB, the Texas Association of School Administrators, and the Texas Council of School Attorneys.

ARGUMENT

I. Supreme Court precedent demonstrates that damages are not available for violations of Section 504 of the Rehabilitation Act unless the plaintiff can establish "intentional discrimination," which, *at a minimum*, requires proof of "deliberate indifference."

In their respective briefs, the parties agree that damages are not available for violations of Section 504 absent evidence of "intentional discrimination," but they disagree over the precise meaning of the phrase. The source of the parties' disagreement is a body of case law that, over the years, has generated a myriad of terms, each with its own nuances: "discriminatory animus," "deliberate indifference," "bad faith," "gross misjudgment." Lost in the debate is a trio of Supreme Court cases that provides the framework for determining when schools may be held liable in damages under Section 504.

The three cases – *Franklin*, *Gebser*, and *Barnes*[2]– guide any inquiry into the availability of damages under federal statutes enacted by Congress pursuant to its authority under the Spending Clause. Section 504, like Title IX and Title VI, is Spending Clause legislation. *See Barnes,* 536 U.S. at 185-188. When Congress acts pursuant to its power under the Spending Clause, the legislation is "much in the nature of a *contract*: in return for federal funds, the [funding recipients] agree to comply with federally imposed conditions." *Id.* at 186 (emphasis in the original) (citation omitted). The legitimacy of the spending power is the recipient's voluntary and knowing acceptance of the conditions attached to the money. *Id.* (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). Consequently, the Court "regularly" applies a contract-law analogy when determining whether damages are available under these statutes. *Id.*

Applying this contract-law analogy, the Supreme Court has held that damages are not available to remedy a violation of a Spending Clause statute unless the claimant can establish "intentional discrimination" by the recipient itself. *See Gebser*, 524 U.S. at 281, 291. This standard requires proof of at least "deliberate indifference," which requires a showing of actual knowledge of discrimination and a deliberate refusal to take corrective action. *Id.* at 290.

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[2] *See Barnes v. Gorman*, 536 U.S. 181 (2002); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998); *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992).

Without acknowledging the restrictions imposed by the Spending Clause, Appellants argue that "intentional discrimination" is a flexible, variable concept that depends on the nature of the claimant's allegations. They claim that "deliberate indifference" applies only in one narrow class of cases (peer harassment cases) and that a lower, gross negligence standard will apply in cases involving educational services. (Lance Reply Br. at 9-10.) Appellants' negligence argument is foreclosed by *Gebser*. The "tort paradigm" is simply contrary to the spending power. *Rosa H. v. San Elizario Sch. Dist.*, 106 F.3d 648, 654 (5th Cir. 1997).

Furthermore, despite Appellants' apparent acceptance of "deliberate indifference" as the standard applicable in peer harassment claims, their version dilutes key elements of the test. In particular, they seek to water down the actual knowledge requirement and to eliminate the claimant's burden of having to prove that the harassment was based on disability.

As shown below, the standard for obtaining damages under Section 504 is necessarily high, a result that reflects historical, statutory, and public policy considerations. Amici urge the Court to reject the Appellants' invitation to dilute the standards that have been carefully developed by the Supreme Court in cases involving alleged violations of Spending Clause legislation.

A. Because Section 504 was enacted pursuant to the Spending Clause, the availability of damages is greatly circumscribed.

Section 504 provides that no disabled person "shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). As previously noted, Section 504 is a funding statute enacted by Congress pursuant to its authority under the Spending Clause. *See Barnes,* 536 U.S. at 185-188. The contractual purpose and framework of spending power legislation restrict the availability of damages under these types of statutes.[3] *See Gebser*, 524 U.S. at 287.

As funding statutes, neither Section 504, Title IX, nor Title VI authorizes private lawsuits or recovery of damages. The only express remedy is termination of federal funds – an administrative process that requires the Department of Education to provide notice of the violation to the recipient's administrators and an opportunity for the recipient to take corrective action. *See Gebser*, 524 U.S. at 288-89; 42 U.S.C. § 2000d-1. The right of private litigants to sue and seek damages was judicially implied. Damages, however, are available only for "intentional" violations of the statute. *Franklin*, 503 U.S. at 70-71.

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[3] Because of their common heritage and similar wording, the analysis of damages claims under Section 504, Title IX, and Title VI is generally the same. *See Barnes,* 536 U.S. at 185, 189; *Gebser*, 524 U.S. at 286; 29 U.S.C. § 794a(a)(2) (stating that remedies under Title VI "shall be available" under Section 504).

In *Gebser*, the Supreme Court expanded upon *Franklin* and established the high standard that now governs these actions. *Gebser* involved an adult teacher who engaged in sexual intercourse with a female student. Despite the repugnant facts and a vulnerable victim, the Court was wary of recognizing a broad damages remedy against schools when Congress had not spoken on either the right or the remedy. 524 U.S. at 286. Considering the spending power origin of Title IX and looking at the wording and structure of the statute, the Court rejected both vicarious liability and negligence as liability standards. *Id.* at 288. The Court held that liability for damages requires, "at a minimum," actual notice of discriminatory conduct by an "official of the recipient entity with authority to take corrective action to end the discrimination." *Id.* at 290. The claimant must show that the official responded with "deliberate indifference." *Id.* at 290-91. The premise "is an *official decision* by the recipient not to remedy the violation." *Id.* (emphasis added). The Court was careful to craft a standard that avoided the "risk that the recipient would be liable in damages not for its own official decision but instead for its employees' independent actions." *Id.*

In rejecting a lower standard, the Supreme Court was guided by the fact that the only express remedy in the statute for violations was administrative termination of federal funds. It would be "unsound" for a statute's "*express* system of enforcement to require notice to the recipient and an opportunity to come into

voluntary compliance while a judicially *implied* system of enforcement permits substantial liability without regard to the recipient's knowledge." *Gebser,* 524 U.S. at 289 (emphasis in the original). The Court also found it significant that Title IX's definition of educational institution does not include the institution's "agents." *Id.* at 283. The absence of an agency provision counseled against vicarious liability. *Id.*

The *Gebser* standard necessarily focuses on the leadership hired by the school board to operate the district rather than the individual acts of lower-level school personnel. Thus, in *Gebser*, the Court examined the actions of the campus principal, and it cited with approval a Fifth Circuit opinion by Judge Higginbotham that contains a *Gebser*-style analysis that focuses on school leaders. *See Gebser*, 524 U.S. at 287-88 (quoting *Rosa H. v. San Elizario Sch. Dist.*, 106 F.3d 648, 654 (5th Cir. 1997)) ("When the school board accepted federal funds, it agreed not to discriminate on the basis of sex. We think it unlikely that it further agreed to suffer liability whenever its employees discriminate on the basis of sex."). When a school board confers the power to act on its behalf, "it makes a deliberate considered judgment about what sort of leadership the district should have." *Rosa H.*, 106 F.3d at 660. This approach "locates the acts of subordinates to the board at

a point where the board's liability and practical control are sufficient close to reflect its intentional discrimination."[4] *Id.*

Subsequently, the Court applied *Gebser* to a case involving student-on-student sexual harassment, holding that such harassment is actionable but only "in limited circumstances." *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 643 (1999). Once again, the Court emphasized Title IX's origin under the Spending Clause and reiterated that recipients may be held liable only for "official" decisions reflecting deliberate indifference. *Id.* at 642. *Davis* limits damages to cases "having a *systemic effect* on educational programs or activities." *Id.* at 653 (emphasis added). School boards may be held liable in damages "only" when they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school. *Id.* at 650. This standard does not require that schools purge harassment from schools to avoid liability; it "merely" requires the recipient to respond "to known peer harassment in a manner that is not clearly unreasonable." *Id.* at 648-49.

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[4] Both Section 504 and Title IX bar discrimination in the operations of the "local education agency," which is defined by law as a "public board of education" or other public authority that has been given legal authority by the state for "*administrative control or direction of school services.*" *See* 20 U.S.C. § 7801(26)(A); 29 U.S.C. § 794(b)(2)(B). In Texas, school boards, superintendents, and principals have administrative control of school services. *See* TEX. EDUC. CODE §§ 11.1511, 11.201, 11.202.

In 2002, the Supreme Court relied upon the *Franklin/Gebser/Davis* framework to determine the availability of damages in a Section 504 case against a municipality. *See Barnes,* 536 U.S. at 187. At issue in *Barnes* was the availability of punitive damages. Emphasizing Section 504's origin under the Spending Clause, the Court held that punitive damages were not available because punitive damages ordinarily are not available in contract actions. *Id.* at 187-88. The Court further held that Section 504's prohibition on punitive damages also impacted the plaintiff's claim under the Americans with Disabilities Act even though the ADA was not a Spending Clause statute. *Id.* at 189 n. 3. *Barnes* demonstrates that *Gebser* provides the relevant framework for determining the scope of damages available under Section 504.

Given this history, all circuits that have considered the question, with the exception of the Fifth Circuit, have held that deliberate indifference is the proper damages standard under Section 504. *See Liese v. Indiana River County Hosp. Dist.*, 701 F.3d 334, 345 (11th Cir. 2012) (citing cases). The deliberate indifference standard honors the purpose of Section 504 while protecting funding recipients from damages claims for violations for which they lacked notice. *Id.* at 348; *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).

When the Supreme Court selected "deliberate indifference" as a method of establishing intentional discrimination, it cited *Board of Comm'rs of Bryan County v. Brown*, 520 U.S. 397 (1997), thus tapping into a well-developed body of law under 42 U.S.C. § 1983. Under *Brown*, deliberate indifference is a "stringent" standard that requires more than "even heightened negligence." *Brown*, 530 U.S. at 407, 410. The claimant must show that the "plainly obvious consequence" of the official's 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 well-established requirements.

B. The *Gebser* standard applies to all claims for damages under Section 504; there is no statutory reason for carving out a special, lower standard for educational services disputes.

The driving force in *Gebser* was not the school context but the limitations of Spending Clause legislation. The Supreme Court's concerns about fair notice and an opportunity for voluntary compliance do not disappear merely because educational services are at issue. Whether a suit involves educational services or peer harassment, the funding recipient's actions must be judged in accordance with the deliberate indifferent standard.

This approach is well illustrated by a case with remarkably similar facts, *Hill v. Bradley County Bd. of Educ.*, 2007 WL 4124495 (E.D. Tenn., Nov. 19, 2007), *aff'd*, 2008 WL 4426339 (6th Cir, Sept. 30, 2008) (unpublished). In *Hill*, a student with disabilities killed himself by leaping from a moving school bus as two students taunted him. Two weeks before the student's death, he had threatened suicide; school officials talked to him, and he assured them he did not intend to harm himself. 2007 WL 4124495 at 7. The district court applied the deliberate indifference standard to all allegations, rejecting claims that the school failed to put in place an expedited evaluation and accommodation plan, suspended the student "without taking his mental disabilities into consideration," "fail[ed] to act appropriately in response to Rocky's suicide notes," failed to stop harassment by other students, and failed to stop the bus when the student said he was about to jump. *Id.* at 17-18. The Sixth Circuit affirmed. 2008 WL 4426339 at 1.

In the Fifth Circuit, the search for a Section 504 damages standard has produced a number of opinions employing a variety of different terms.[5] Although

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[5] *See, e.g., D.A. v. Houston Indep. Sch. Dist.*, 629 F.3d 450, 454 (5th Cir. 2010) (inquiring whether the school "refused" to provide a reasonable accommodation and whether the school's decisions rose to the level of "bad faith" and "gross misjudgment"); *Delano-Pyle v. Victoria County*, 302 F.3d 567 (5th Cir. 2002) (rejecting a "deliberate indifference" standard and inquiring whether the plaintiff was discriminated against solely by reason of his disability); *Carter v. Orleans Parish Pub. Sch.*, 725 F.2d 261, 264 (5th Cir. 1984) (holding that a parent could not recover damages for education-related claims unless the school's decision "was intentional or manifested some *discriminatory animus*"; parents' claim could not proceed because the allegations did not eliminate "negligence or inadvertence as sources of error") (emphasis added); *see also DeShay v. Bastrop Indep. Sch. Dist.*, 180 F.3d 262 (5th Cir. 1999) (unpublished) ("The

Amici agree with Judge Higginbotham's recent observation that all of the terms ultimately capture the same high level of animus,[6] we believe that clarification from the Court would aid in preventing future disputes.

The current debate before the Court – "gross misjudgment" versus "deliberate indifference" – echoes the debate that the *en banc* Fifth Circuit faced in *Hare v. City of Corinth*, 74 F.3d 633 (5th Cir. 1996), which involved the suicide of a pretrial detainee. In *Hare*, the Court considered whether medical services claims should be subjected to a reasonableness standard rather than the deliberate indifference standard applicable to failure-to-protect claims. The Court found "no principled basis for invoking a different legal standard" and held that deliberate indifference would apply to both types of claims. *Id.* at 643, 647. The Court concluded that the standards were "functionally" the same and that attempting to craft a standard lower than deliberate indifference "demand[ed] distinctions so fine as to be meaningless." *Id.* at 645-46.

Although the medical services context of *Hare* differs from this appeal's education context, it demonstrates the suitability of "deliberate indifference" as the

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only issue ... is whether Kevin was treated adversely *intentionally* and *solely* because of his disability"; the failure to provide a special procedure for providing emergency care did not support an inference of intentional discrimination) (emphasis in original); *Smith v. Tarkington Indep. Sch. Dist.*, 30 F.3d 1490 (5th Cir. 1994) (unpublished) ("no damages are recoverable unless the plaintiff can show that he was *completely excluded* from programs *or refused* reasonable accommodation of his handicap, *and* that he was intentionally discriminated against...") (emphasis added).

6 *See Stewart,* 711 F.3d at 536 (Higginbotham, J., dissenting).

standard for evaluating the provision of governmental services that require the exercise of professional judgment.

The focal point of the parties' debate in this case is the now-vacated *Stewart* decision and *D.A. v. Houston Indep. Sch. Dist.*, 629 F.3d 450 (5th Cir. 2010). In *Stewart*, the panel majority viewed *D.A.* as generally mandating a gross negligence standard. *Stewart,* 711 F.3d at 524 n. 14. Amici agree with Appellee that *D.A.* does not compel this conclusion.

In *D.A.*, the Court considered the claim of a student who alleged that the school district unduly delayed in testing him for special education services. The Court narrowly defined the question presented as "what remedies remain under §504 and the ADA for children whose parents are dissatisfied with the school's determinations under IDEA." *D.A.*, 626 F.3d at 454. Wary of recognizing a claim for "educational malpractice," the Court held that, in cases "*predicated on a disagreement with compliance with IDEA*," the facts must create an inference of "professional bad faith" or "gross misjudgment" in order to substantiate a claim for intentional discrimination. *Id.* at 455 (emphasis added).

In endorsing the bad faith/gross misjudgment standard, the *D.A.* court relied on a 1982 decision from the 8th Circuit, *Monahan v. State of Nebraska*, 687 F.3d 1164 (8th Cir. 1982). The discussion in *Monahan* shows that the gross misjudgment standard was intended to be a high standard designed to prevent courts from

substituting their own judgment for educational decisions made by school officials. *Id.* at 1171. *Monahan* cannot reasonably be read as endorsing a general negligence standard for the recovery of damages against public schools. To the contrary, it actually raises the bar by establishing a presumption of validity for the decisions of educators. *Id.* at 1170-1171. Neither *Monahan* nor *D.A.* purports to establish a standard of liability in cases predicated upon harm inflicted by third parties.

Moreover, allowing the recovery of damages for negligence or gross negligence would constitute a new funding condition for which school boards did not receive prior notice. Although *D.A.* does not discuss Section 504's origin under the Spending Clause, its damages standard ultimately must conform to the relevant precedents regarding Spending Clause legislation.

Fortunately, *D.A.* can be harmonized with *Gebser* and subsequent decisions. Like deliberate indifference, bad faith and gross misjudgment depend upon the educator having knowledge and then choosing not to act. An educator cannot misjudge and act with bad faith unless he has information to judge and act upon. In this regard, bad faith and gross misjudgment are conceptually consonant with deliberate indifference. *See also Stewart,* 711 F.3d at 536 (Higginbotham, J., dissenting) (concluding that bad faith, gross misjudgment, and deliberate indifference capture the same level of animus).

One final Fifth Circuit decision bears mention. Although not cited by the parties, it is cited in the Brief of the United States. (DOJ Br. at 15-16.) The decision demonstrates the need for clarity in this Circuit on this subject. In *Delano-Pyle v. Victoria County*, 302 F.3d 567 (5th Cir. 2002), a hearing impaired person who was improperly treated during an arrest sued a county under Section 504 and the Americans with Disabilities Act (ADA). Because the county failed to renew its motion for judgment at the close of the evidence, the Court was left to review the county's issues only for plain error. The Court affirmed the jury verdict against the county, finding that the deputy had engaged in intentional discrimination based on the plaintiff's disability. *Id.* at 574-75. Although the case was decided a few months after *Barnes*, the opinion did not reference the Spending Clause, the issue apparently not having been raised by the county. The Court then proceeded to allow vicarious liability and to reject deliberate indifference, the mirror opposite of the rulings in *Gebser*. *See id.* at 574-575; *see also Liese*, 701 F.3d at 345 (noting that the Fifth Circuit is the only circuit to reject deliberate indifference under Section 504). Because it did not consider pertinent authority, some of *Delano-Pyle's* conclusions are questionable.[7] The case further demonstrates the need for greater clarity in the circuit on these issues.

[7] When an appellate opinion fails to consider a Supreme Court precedent, a subsequent panel may disregard the opinion if the subsequent panel determines that the prior panel would have reached a different conclusion had it considered the precedent. *See Wilson v. Taylor,* 658

II. The rigorous *Davis* standard should not be diluted.

A. Peer harassment claims under Section 504 require proof that the student's disability actually prompted the harassment.

In a peer harassment case, proof of discriminatory motive is an essential element of the plaintiff's case. *See Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist.*, 647 F.3d 156, 165 (5th Cir. 2011). *Davis* does not authorize damages claims based on generic forms of bullying or provide students recourse for mistreatment that is not based on a protected status. *Id.* Section 504 by its terms provides a remedy only for discrimination "on the basis of" disability. 29 U.S.C. § 794(a). The Appellants, however, essentially ask this Court to erase this statutory requirement, claiming that, in disability cases, it is reasonable to *presume* that harassment of a disabled student occurred because of the student's disability. (Lance Br. at 8, 26.) Claimants may not rely on speculation to establish an essential element of their case.

Acceptance of Appellants' argument would broaden the potential liability of school districts to a degree not contemplated by Congress because it would permit liability regardless of whether the harassment *actually* was disability-based. Students with disabilities, like students without disabilities, may not recover damages for mistreatment that does not involve a protected status. A disabled

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F.2d 1021, 1035 (5th Cir. Unit B 1981); *Atlantic Thermoplastics Co. v. Faytex Corp.*, 970 F.2d 834, 838 n. 2 (Fed. Cir. 1992).

student who is pushed for cutting in line or who is teased over a new haircut has not been subjected to conduct that violates Section 504. *See, e.g., Werth v. Bd. of Directors*, 472 F.Supp.2d 1113, 1128 (E.D. Wis. 2003) (although physically-disabled student alleged that he was subjected to verbal attacks by fellow students, he did not show that these incidents were related to his disability). Appellants' argument is an improper backdoor attempt to recover damages based on disparate impact rather than intentional discrimination.

Furthermore, the burden of proving improper motive is not as onerous as Appellants would suggest. In Amici's collective experience, the vast majority of harassment cases involve crude and obvious name-calling.[8] Even in cases without overt name-calling, there is usually some objective evidence giving rise to a reasonable inference of discriminatory motive (*e.g.*, a student damaging another student's wheelchair). The Court should reject Appellants' request that they be excused from proving that the alleged harassment was based on disability.

Finally, the Appellants claim that schools have a "special, statutory duty" to protect disabled students from bullying. (Lance Br. at 40, emphasis added.) The primary support for their argument, however, is not the *statute* but a federal

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[8] *See, e.g., Sutherlin v. Indep. Sch. Dist. No. 40*, 2013 WL 1975644 (N.D. Okla., May 13, 2013) (student with mental functioning disorder was called "retard," "crazy," and "freak" by classmates, "names which can reasonably be inferred" to refer to plaintiff's disability); *P.R. v. Metro. Sch. Dist. of Washington Township*, 2010 WL 4457417 (S.D Ind., Nov. 1, 2010) (classmates of HIV-positive student told others not to kiss her because she had "AIDS").

regulation that says absolutely nothing about bullying or harassment.[9] Moreover, as discussed below, non-compliance with this type of regulation will not support a claim for money damages.

B. As a matter of law, a school's non-compliance with federal regulations will not support a claim for damages.

The Appellants claim that the failure to provide FAPE or "meaningful access" to services violates Section 504's implementing regulations. (Lance Br. at 22-23.) *Regulatory* non-compliance, however, is not the equivalent of a *statutory* violation. In *Gebser*, the Court held that the implied private right of action under Title IX did not allow damages for the school's non-compliance with various "administrative requirements." *Gebser*, 524 U.S. at 292 (although the agency could enforce the regulations "administratively," the regulations did not "purport to represent a definition of discrimination under the statute"). Similarly, in *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001), the Supreme Court held that private litigants could not sue to enforce an agency's disparate-impact regulations implemented under Title VI.[10]

The Appellants also claim that LISD failed to follow "basic investigatory steps" suggested by "agency directives" from the Office for Civil Rights. (Lance

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[9] The Appellants cite 34 C.F.R. § 104.33(b)(1), which states that schools must provide a free and appropriate education that is "designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met."

[10] As previously noted, the remedies under Section 504 are the same as the remedies under Title VI. 29 U.S.C. § 794a(a)(2).

Br. at 31, 38.) The agency guidance in question is two informal "Dear Colleague" letters issued by the U.S. Department of Education's Office for Civil Rights (OCR).[11] The agency guidance contains suggestions and options for schools to consider when addressing harassment in schools. These informal guidelines, which were not created in the rule-making process or subject to public comment before issuance, have even less force than the implementing regulations that the Supreme Court held were not actionable in *Gebser*. More egregiously, the Appellants have improperly conflated general guidance pertaining to administrative enforcement actions with the legal standard to obtain monetary damages in a court of law. The Appellants also ignore the fact that the OCR's enforcement standard as expressed in the 2010 "Dear Colleague" letter – *knew-or-should-have-known*"[12] – is contrary to the deliberate indifference standard of *Davis* and thus is inapplicable in litigation.

C. "Failure to prevent" harassment is not actionable.

The Appellants claim that three circuit courts have held that "failure to prevent" peer harassment is actionable under Section 504 if the harassment is extreme. (Lance Br. at 37.) Appellants' description of these cases is inaccurate.

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[11] *See* Letter from Russlynn Ali, Assistant Secretary for Civil Rights, U.S. Department of Education (Oct. 26, 2010), available at www2.ed.gov/aboutoffices/list/ocr/letters/colleague-201010.html [hereinafter OCR Letter 2010]; Letter from Norma Cantu, Assistant Secretary for Civil Rights, and Judith E. Heumann, Assistant Secretary for Special Education and Rehabilitative Services (July 25, 2000), available at www.ed.gov/about/offices/list/ocr/docs/disabharassltr.html.

[12] *See* OCR Letter 2010, *supra* note 12, at 2.

Two of the cases did not even involve Section 504, and *none articulates a standard for obtaining damages under Section 504.* Moreover, none of the cited cases requires *prevention* of harassment. As previously discussed, *Davis* expressly rejected any requirement that schools must eliminate harassment in order to avoid damages. *See Davis*, 526 U.S. at 648-649 (emphasizing that school boards may avoid liability even if they are not successful in "purging their schools" of harassment).

The first case that Appellants cite, *M.L. v. Federal Way Sch. Dist.*, 394 F.3d 634 (9th Cir. 2005), is solely an IDEA case, not a Section 504 case. In *M.L.*, the court held that, under IDEA, when a teacher is "deliberately indifferent" to teasing and the "abuse is so severe that the child can derive ***no benefit*** from the services" being offered, a denial of FAPE may occur. *Id.* at 650 (emphasis added). Applying the "no benefit" standard, the court held that the parents failed to state a claim. *Id.* at 651. Because damages are not available under IDEA, the court never discussed damages or the standard that would apply to obtain them.

The second case, *Shore Regional High School Board v. P.S.*, 381 F.3d 194 (3d Cir. 2004), also is an IDEA case and, once again, damages were not at issue. An administrative law judge found that the school failed to provide FAPE at the home campus due to "unusual" levels of harassment, but the district court reversed. *Id.* at 200. The court of appeals found that the district court had failed to give the

"requisite deference" to the ALJ's assessment of the witnesses. The court assumed without deciding that harassment could result in a denial of FAPE. *Id.* at 199.

The third case, *Charlie F. v. Board of Educ.*, 98 F.3d 989 (7th Cir. 1996), also does not support damages liability. *Charlie F.* involved a student who, like Montana, had an IEP under the IDEA. He claimed that he was harassed in the fourth grade by other students. *Id.* at 990. His parents filed a claim for damages under Section 504; they did not pursue any claims under IDEA. The Seventh Circuit held that the parents could not assert a claim for damages under Section 504 because they had failed to exhaust their remedies under IDEA. *Id.* at 992. The opinion contains no discussion about FAPE and does not articulate a standard for obtaining damages under Section 504.

D. Claims based on school climate and generalized risk are not actionable; proof of actual knowledge of specific acts of harassment is required.

Although *Gebser* and *Davis* require "actual knowledge" of specific acts of harassment, the DOJ presses for liability based on the amorphous concept of school climate and generalized risk. The DOJ references the alleged "culture of pervasive" bullying at Montana's school and suggests that "deliberate indifference to a discriminatory environment" may give rise to damages liability.[13] (DOJ Br. at 14 and 26.) The DOJ further contends that Montana's parents "need not establish

[13] Ironically, during the Supreme Court's consideration of *Franklin*, the United States filed a brief *opposing* money damages under Title IX. *See Franklin*, 503 U.S. at 75.

that school officials had actual knowledge of incidents" aimed at Montana. (*Id.* at 23.) According to the DOJ, the mere fact that some students did not want to sit with Montana should have been sufficient notice under *Davis*. (*Id.* at 25.)

These arguments impermissibly invite liability based on "knew-or-should-have-known" arguments – precisely the sort rejected in *Gebser* and *Davis*. *See generally Davis*, 526 U.S. at 646-47 (stating that claimant must establish "*known* acts of student-on-student sexual harassment") and at 644 (stating that Title IX "narrowly circumscribe[s] the set of parties whose *known* acts of sexual harassment can trigger some duty to respond") (emphasis added). The concept of deliberate indifference precludes liability based on a "generalized" risk of harm. *Brown*, 520 U.S. at 410, 412 (deliberate indifference standard requires "a finding that *this* officer was highly likely to inflict the *particular* injury suffered by the plaintiff") (emphasis in original). The actual knowledge requirement means that the claimant must specifically describe when and where the conduct occurred. *See, e.g.*, *Gabrielle M v. Park Forest-Chicago Heights Sch. Dist.*, 315 F.3d 817 (7th Cir. 2003) (child's statement that a boy touched her was vague and failed to explain "when, where, or how often this alleged conduct occurred and whether it was reported").

Diluting the "actual knowledge" standard would have enormous financial consequences for schools and would divert funding from education to litigation.[14] The public schools within the Fifth Circuit enroll approximately 6,000,000 students, each a potential offender or claimant.[15] Over the course of a school day, the typical student may encounter hundreds of other students on the bus, in the halls, in the cafeteria, and in the classroom. *Davis* recognized that student misconduct is "inevitable" and that school children are still learning how to interact with their peers. *Davis*, 526 U.S. at 651, 653. Appellants' argument would transform Section 504's *non-discrimination* requirement into an insurance policy that requires schools to *guarantee* a safe and perfect school environment. Although Amici's members are dedicated to providing safe and supportive learning environments, no federal law imposes this requirement.

The Appellants also favor an expansive view of the term "official." Their analysis fails to distinguish between employees who may have a duty to report harassment (such as a nurse) from employees who have the power to take corrective action (such as a principal). *See, e.g.*, *Rosa H.*, 106 F.3d at 660 (distinguishing the duty to report from the authority to "remedy the wrongdoing");

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[14] In one recent Title IX case, the school district reported that it had spent more than $200,000.00 in defense costs prior to the plaintiffs' voluntary dismissal. *See* "Bullying lawsuit in Cy-Fair student's death dropped," HOUSTON CHRONICLE (March 29, 2013).

[15] *See* U.S. Dept. of Educ., National Center for Education Statistics, http://nces.ed.gov/programs/stateprofiles.

Plamp v. Mitchell Sch. Dist. No. 17-2, 565 F.3d 450, 457 (8th Cir. 2009) (concluding in teacher/student harassment case that the record did not support finding that teachers and counselors were "appropriate persons" vested with remedial authority).

In *Davis*, the Court repeatedly focused on the alleged knowledge of school administrators as the source of the district's potential liability.[16] *See also Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 257 (2009) (stating that liability in a peer harassment case is permitted when a "school *administrator* with authority to take corrective action" responds with deliberate indifference) (emphasis added); *Floyd v. Waiters*, 171 F.3d 1264 (11th Cir. 1999) (holding that an "appropriate person" is an official "high enough up the chain-of-command that his acts constitute an official decision by the school district itself not to remedy the misconduct").

E. The deliberate indifference standard requires a conscious choice not to alleviate harm.

The Supreme Court did not intend to subject the public schools to trial every time there is a dispute over student discipline or student services. *Davis* leaves room for discretion, innovation, experimentation, and even mistakes. *See Sanches*,

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[16] *See Davis,* 526 U.S. at 653 ("the complaint alleges that there were multiple victims who were sufficiently disturbed by G.F.'s misconduct to seek an audience with *the principal*"); at 634 (petitioner alleged that the teacher assured her that "the *principal* ... had been informed of the incidents"); at 635 ("petitioner alleges that she spoke with *Principal Querry* ... and [he] simply stated, 'I guess I'll have to threaten him a little bit harder'"); at 648 ("*School administrators* will continue to enjoy the flexibility they require...."); at 651 ("*District administrators* are well aware of the daily ritual, yet they deliberately ignore requests for aid from the female students....") (emphasis added).

647 F.3d at 170 ("Title IX does not require flawless investigations or perfect solutions"). The Supreme Court purposely designed the liability standard to permit schools in appropriate cases to move for dismissal or summary judgment. *Davis*, 526 U.S. at 649; *see, e.g., Long v. Murray County Sch. Dist.*, 2013 WL 3015151 (11th Cir., June 18, 2013) (unpublished) (affirming summary judgment in Section 504 case involving suicide of student); *S.S. v. Eastern Ky. Univ.*, 532 F.3d 445, 453 (6th Cir. 2008) (affirming summary judgment in Section 504 harassment case).

In this case, Appellants' claims of misjudgment, mismanagement, and neglect fall far short of deliberate indifference standard. Deliberate indifference requires much more than just gross negligence. *See generally Hare*, 74 F.3d at 645 ("A 'gross' error is still only an error") (citation omitted); *Rosa H.*, 106 F.3d at 659 (a school district has not harassed a student "unless it knows of a danger of harassment and *chooses* not to alleviate that danger") (emphasis added); *Gonzalez v. Ysleta Indep. Sch. Dist.*, 996 F.2d 745, 754-56, 760 (5th Cir. 1993) ("deliberate indifference" requires the court "to separate omissions that 'amount to an intentional choice' from those that are merely "unintentionally negligent oversight[s]'"); *Valle v. City of Houston*, 613 F.3d 536, 548 (5th Cir. 2010) (deliberate indifference requires a "conscious choice").

Moreover, so long as the school district's response is not clearly unreasonable, liability may be avoided "even if the harm ultimately was not

averted." *Doe v. Dallas Indep. Sch. Dist.*, 220 F.3d 380 (5th Cir. 2000) (citation omitted) (principal's "ineffective response," leading to "tragic" consequences, was not deliberately indifferent); *see also Gabrielle M,* 315 F.3d at 825; (holding that a school's response can be acceptable even if it does not conclusively prevent further harassment); *Porto v. Town of Tewksbury*, 488 F.3d 67 (1st Cir. 2007) (although the school "perhaps should have done more," the fact that measures turn out to be ineffective does not establish that they were "clearly unreasonable"). These authorities contradict Appellants' suggestion that deliberate indifference ordinarily will be a jury question.

III. Whether a claimant has exhausted remedies must be determined at the time of educational deficiencies, not at the time of litigation.

The Appellants claim that exhaustion of administrative remedies was not required and, in any event, is excused due to futility. (Lance Reply Br. at 17.) The IDEA requires Section 504 claimants to exhaust IDEA's administrative remedies *if* the Section 504 claims could have been brought under the IDEA. *See* 20 U.S.C. § 1415(l). When a parent's allegations relate to a failure to provide a free appropriate public education or other "educational injuries," parents must exhaust the IDEA administrative process. *See, e.g., Cudjoe v. Indep. Sch. Dist. No. 12*, 297 F.3d 1058, 1063 (10th Cir. 2002); *see also Charlie F. by Neil F. v. Bd. of Educ.*, 98 F.3d 989, 992 (7th Cir. 1996); *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 875 (9th Cir. 2011). The exhaustion rule applies when a plaintiff seeks relief for injuries that

could have been addressed "to any degree" under the IDEA. *Cudjoe*, 297 F.3d at 1066.

Although Appellants are correct that futility is an exception to exhaustion, futility is not evaluated at the time of litigation. The proper inquiry is whether relief was available *at the time of the educational deficiencies*. *See Cudjoe*, 297 F.3d at 1067-68. Here, the alleged failures of LISD, such as failing to consider relevant information when developing Montana's IEP, could have been pursued through the appropriate administrative processes at the time the alleged injuries occurred. *See, e.g.*, *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 59-63 (1st Cir. 2002) (holding exhaustion was required even though student had graduated); *accord Polera v. Bd. of Educ.*, 288 F.3d 478, 490 (2d Cir. 2002).

IV. As a matter of sound public policy, courts historically have deferred to the educational judgments of local school officials.

Although the loss of Montana Lance is a tragedy of immeasurable proportion, the sympathetic circumstances do not warrant a dilution of legal standards that historically have required courts to show deference to educators in the performance of pedagogical functions.[17] School officials need leeway to ensure a tailored response to each student's needs. School size, student experiences and

[17] *See generally Davis*, 526 U.S. at 648 (courts must continue to "refrain from second-guessing the disciplinary decisions made by school administrators"); *D.A.*, 629 F.3d at 454 (warning against a court's substitution of its own judgment for education decisions made by state officials).

relationships, parental involvement, and community dynamics all may factor into a school's response to student misconduct. By and large, educators discharge their responsibilities in a manner that is both caring and careful. They attempt to do the right thing every school day, thus justifying the discretion placed in them by parents, courts, and state legislatures. When mistakes or misjudgments are made, damages are not available unless the relevant school officials have acted with deliberate indifference. Diluting this standard would be disruptive to the educational process, would subject virtually every school decision to oversight by the federal judiciary, and would pose serious federalism concerns.

CONCLUSION

Amici pray that the Court will affirm the judgment of the district court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on July 26, 2013, I electronically filed the foregoing brief as an attachment to Amici's Motion for Leave by using the appellate CM/ECF system. I certify that I have served this document electronically to all attorneys of record who are registered CM/ECF users.

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