No. 19-2203

In the

United States Court of Appeals

For the Fourth Circuit

JANE DOE,

Plaintiff-Appellant,

v.

FAIRFAX COUNTY SCHOOL BOARD,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA,
ALEXANDRIA DIVISION (1:18-cv-00614-LO-MSN)

BRIEF OF AMICI CURIAE NATIONAL SCHOOL BOARDS ASSOCIATION, VIRGINIA SCHOOL BOARDS ASSOCIATION, MARYLAND ASSOCIATION OF BOARDS OF EDUCATION, NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, and SOUTH CAROLINA SCHOOL BOARDS ASSOCIATION

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Brief Supporting Appellee and Affirmance of the Decision of the U.S. District Court

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 19-2203 Caption: Jane Doe v. Fairfax County School Board

Pursuant to FRAP 26.1 and Local Rule 26.1,

National School Boards Ass'n, Virginia School Boards Ass'n, Maryland School Boards Ass'n,
(name of party/amicus)

North Carolina School Boards Ass'n, and South Carolina School Boards Ass'n

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

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

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

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

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

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

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Robert W. Loftin Date: 16 March 2020

Counsel for: Amicus Curiae in Support of Appellee

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

The National School Boards Association ("NSBA") is a non-profit organization representing state associations of school boards, and the Board of Education of the U.S. Virgin Islands. Through its member state associations, NSBA represents over 90,000 school board members who govern approximately 13,600 local school districts serving nearly 50 million public school students. NSBA regularly represents its members' interests before Congress and federal and state courts.

The Virginia School Boards Association ("VSBA") is a voluntary, nonpartisan organization whose primary mission is the advancement of K-12 education in Virginia. Every public school board in the Commonwealth of Virginia is a member of VSBA. The VSBA promotes excellence in public education through training, advocacy, and services. It also supports school boards by providing information and guidance related to compliance with state and federal laws, including Title IX.

The Maryland Association of Boards of Education ("MABE") is a private, not-for-profit organization that represents and has a membership consisting of all of Maryland's 24 local boards of education. MABE advocates for the statewide concerns of Maryland boards of education before state and federal courts and

agencies, the Maryland General Assembly, and the United States Congress. A decision in this case will affect all Maryland boards of education.

The North Carolina School Boards Association ("NCSBA") is a nonprofit organization formed to support local school boards across North Carolina. Although participation is voluntary, all of the 115 local boards of education in North Carolina are members, as is the school board for the Eastern Band of the Cherokee Nation. The NCSBA advocates for the concerns of local school boards in North Carolina, in federal courts, and in legislatures. There is no other entity that represents the interest of the North Carolina boards of education or that has the same understanding of matters affecting them. The NCSBA files amicus curiae briefs on behalf of North Carolina school boards in State and federal appellate cases, the results of which will have statewide impact. A decision in this case will affect all North Carolina school boards.

Since 1950, the South Carolina School Boards Association ("SCSBA") has served as the unified voice of school boards governing South Carolina's K-12 public school districts. Membership consists of all 79 school boards across South Carolina, but the SCSBA also provides resources to a number of non-traditional education entities such as the South Carolina School for the Deaf and Blind. SCSBA is a membership-driven, non-profit organization that provides a variety of board services, ranging from policy resources to training for members, and represents the

statewide interests of public education through legal, political, community and media advocacy. As a legal advocate for public school districts, the SCSBA represents the interests of its members in supporting and enhancing elementary and secondary education in matters before the State and federal courts.

Amici recognize that safe and supportive learning environments are crucial to the mission of every school district. *Amici* and their members are committed to protecting students and to helping school districts develop and implement policies to address unlawful harassment and the overall 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 schools officials are in the best position to develop strategies to create safe learning environments for all students.

This brief is filed with the consent of the parties. No attorney for any party authored this brief in whole or in part, and no person or entity other than the *Amici* and their members and counsel made any monetary contribution to this brief's preparation or submission.

SUMMARY OF THE ARGUMENT

The Supreme Court of the United States has established a demanding liability standard for claims of student-on-student sexual harassment against school districts.

A school district is liable in money damages under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, only when the district itself subjects a student to discrimination based on sex. Among other things, that standard requires proof of actual knowledge of harassment as well as a deliberately indifferent response. In setting a high bar for Title IX liability, the Supreme Court acknowledged the unique characteristics of K-12 schools, where students are still learning about social interactions, and emphasized the importance of giving educators needed flexibility to assess developmentally-appropriate behavior and respond with individual, student-based decisions. It is equally important that courts arm educators with clear standards that enable them to make those assessments and focus on educating students.

With this in mind, this Court should reject the Appellant's invitation to expand the liability standard to attach to notice of any allegation, even mere rumors. Blurring the lines of actual knowledge will place educators in a no-win situation, in which they face liability from victims for not acting on unsubstantiated allegations or liability from the accused for taking action on rumors. Instead of creating such confusion, this Court should follow existing Supreme Court and Fourth Circuit precedent that clearly defines actual knowledge as knowledge of acts of unlawful harassment.

In addition, this Court should enforce the rigorous deliberate indifference standard articulated by the Supreme Court. Under this high standard, liability attaches to funding recipients only where they are deliberately indifferent to known sexual harassment that deprives a student of access to the educational program. A showing of negligence does not suffice. The record here establishes that Fairfax County School Board went above and beyond in responding to the known circumstances. It conducted a full and prompt investigation, took action to keep Jack Smith away from Jane Doe, and granted Doe numerous academic accommodations. There was no evidence presented of any further incidents of alleged harassment after the band trip. Such a response cannot be deliberate indifference as a matter of law.

Finally, this Court should decline Appellant's invitation to grant a spoliation instruction to address the accidental or negligent loss of evidence. Under clear precedent from this Court, such an instruction is appropriate only to address intentional conduct that results in prejudice.

ARGUMENT

I. The Supreme Court Has Clearly Articulated an Intentionally Narrow Standard for Actual Knowledge for Purposes of Title IX

A. "Actual Knowledge" Requires Proof of Actual Knowledge of Objectively Severe and Pervasive Harassment.

In *Davis v. Monroe County Board of Education*, the Supreme Court confirmed that a school district may only be liable for "student-on-student" harassment where "the funding recipient acts with deliberate indifference to known acts of harassment

in its programs or activities." 526 U.S. 629, 633 (1999). A school district may be liable only if it had "actual knowledge" of "harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Id.* at 650, 633. Throughout its opinion, the Supreme Court was careful to specify that school officials must subjectively know about "*acts*" of harassment before liability may attach—nowhere did the Court mention knowledge of allegations, or risks, or rumors. *E.g.*, *id.* at 642 (confirming that a school district may be liable for damages only by "remaining deliberately indifferent to acts of teacher-student harassment of which it had actual knowledge") (citing *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998)); *see also id.* at 643 (paraphrasing the *Gebser* standard as "deliberate indifference to known acts of harassment"); *id.* at 647 (concluding that recipients are liable "where the recipient is deliberately indifferent to known acts of student-on-student sexual harassment").

The Supreme Court also contrasted "actual knowledge" with "constructive knowledge," which would impose liability on school officials who "knew *or should have* known" about in-school harassment, *i.e.*, those who were merely negligent. *Id.* at 642. Thus, *Davis* makes clear that school officials must have "actual knowledge" of "acts of student-on-student harassment" to be liable for damages.

"Harassment," in turn, exists under Title IX only if the plaintiff experiences "'an environment that a reasonable person would find hostile or abusive' and that

the victim herself 'subjectively perceive[s] . . . to be abusive.'" *Jennings v. Univ. of N. Carolina*, 482 F.3d 686, 696 (4th Cir. 2007) (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)). Courts have recognized that not every instance of inappropriate behavior among students constitutes harassment that invokes school district liability under federal anti-discrimination statutes. Citing NSBA's *amicus* brief, the *Davis* court noted "schools are unlike the adult workplace . . . [C]hildren may regularly interact in a manner that would be unacceptable among adults . . . ." 526 U.S. at 651. Applying this definition to the *Davis* standard confirms that a school official must actually know that (i) the complainant subjectively perceived that she was experiencing unwelcome and abusive harassment, and (ii) the complained-of acts were "severe, pervasive, and objectively offensive." *Hill v. Cundiff*, 797 F.3d 948, 969 (11th Cir. 2015).

This result faithfully tracks Fourth Circuit precedent. In *Baynard v. Malone*, 268 F.3d 228 (4th Cir. 2001), this Court applied the Supreme Court's holdings in *Gebser* and *Davis* to clarify the actual notice an educational institution must receive to incur monetary liability under Title IX. *Baynard* expressly rejected the premise that "actual notice of a *substantial risk* of ongoing sexual abuse" is sufficient to show actual knowledge of harassment. 268 F.3d at 237-38 (emphasis in original). Rather, this Court confirmed that "Title IX liability may be imposed only upon a showing that the school district officials possessed actual knowledge of the discriminatory

conduct in question." *Id.* The Court also emphasized that *Davis* foreclosed institutional liability for "failure to react to teacher-student harassment of which [the school district] knew or should have known," and, instead, limited liability to cases involving sexual harassment about which school officials have "actual knowledge[.]" *Id.* This Court should therefore reject Doe's efforts to sidestep this unambiguous and binding precedent.

B. Actual Knowledge Depends on the Information School Officials Receive, and Demands Appropriate Deference to Their Professional Judgment.

This conclusion then raises the next question: how much information is necessary to confer "actual knowledge" of "acts of harassment"? It depends. Underlying the jurisprudence both parties have cited is an implicit recognition that whether a reasonable juror can infer a school official's "actual knowledge" necessarily depends on the totality of the circumstances. *Cf. Coppage v. Mann*, 906 F. Supp. 1025, 1036 (E.D. Va. 1995) (noting that, in the Eighth Amendment context, "a jury must consider the totality of the circumstances" in deciding "whether actual knowledge of a substantial risk of harm should be inferred"). Those circumstances include the source, nature, and trustworthiness of any reports the official received, as well as any corroborating or conflicting evidence. Thus, in some cases, student or parent complaints may confer actual knowledge, if the complaints are detailed, unequivocal, and/or repeated. *Cf. Davis*, 526 U.S. at 653 (finding that the plaintiff's

and her mother's repeated and detailed complaints to multiple school officials plausibly alleged actual knowledge at the motion to dismiss stage); *Jennings*, 482 F.3d at 693, 700 (finding that a player's vivid report of her coach's sexually demeaning behavior, if proven, could constitute actual knowledge).

Allegations that are ambiguous or facially implausible, however, cannot create actual knowledge without some additional corroboration. *E.g.*, *Rost ex rel. v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1119 (10th Cir. 2008) (holding that the plaintiff's "statement that the boys were bothering her was insufficient to give the district notice that she was being sexually harassed"); *R.F. v. S. Country Cent. Sch. Dist.*, 2016 WL 5349782, at *10 (E.D.N.Y. Sept. 23, 2016) (finding that a "hurried and confusing report about a Facebook message from two students between classes does not amount to actual knowledge"). Likewise, rumors alone cannot constitute actual notice under Title IX. *E.g.*, *Blue v. Dist. of Columbia*, 811 F.3d 14, 21 (D.C. Cir. 2015) (finding that a school district did not have actual knowledge of harassment despite rumors of a sexual relationship between a student and teacher and reports that they were often seen alone together); *Baynard*, 268 F.3d at 233.

School officials need leeway to exercise educational discretion in determining whether an incident of harassment is isolated, is related to school climate issues, is a result of trending societal pressures in the community, or is related to other indicia

of which only a school official can be aware. School size, student experiences and relationships, socio-economic realities, and community dynamics and history may all play a role.

In every case, however, officials' discretion to evaluate the available information is essential. Courts have frequently recognized the importance of judicial deference to an educator's professional judgment across numerous contexts. *E.g.*, *Regents of the Univ. of Michigan v. Ewing*, 474 U.S. 214, 225 (1985) (providing that "[w]hen judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment"); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (stating that courts "cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values"); *Gagliardo v. Arlington Cent. Sch. Dist.*, 489 F.3d 105, 113 (2d Cir. 2007) (citations omitted) (recognizing "the judiciary generally 'lacks the specialized knowledge and experience necessary to resolve persistent and difficult questions of educational policy.'"); *Planned Parenthood of S. Nevada, Inc. v. Clark Cty. Sch. Dist.*, 941 F.2d 817, 829 (9th Cir. 1991) (holding that a school's decision not to promote controversial speech "is a judgment call which . . . [is] in the discretion of school officials and which is afforded substantial deference"); *Red Clay Consol. Sch. Dist. v. T.S.*, 893 F. Supp. 2d 643, 656 (D. Del. 2012) (noting that "not

every behavioral issue justifies official school intervention" and the "expertise of school administrators deserves due deference in the context of student discipline"); *see also* 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).

Such deference to an educator's discretion is particularly critical in the "student-on-student" harassment context, for several reasons. First, school officials have more accurate and reliable information about their students and school dynamics than any court or any government body could ever have. School officials interact with students daily, so they generally know which students are isolated, which students have had previous scuffles, and which students just broke up. Myriad facts that officials have learned about their school, staff, and students, along with officials' own specialized training and expertise, help officials evaluate reports of student misbehavior.

Second, as the Supreme Court has recognized, children "regularly interact in a manner that would be unacceptable among adults." *Davis*, 526 U.S. at 651. Even at the best schools, students call their classmates names, shove each other in the halls, experiment with their emerging sexuality, and exchange flirtatious or vulgar messages. And, children are prone to revising their stories to suit their own motivations or adapt to their questioner's beliefs. *Cf.* Diana Younts, *Evaluating and*

Admitting Expert Opinion Testimony in Child Sexual Abuse Prosecutions, 41 Duke L.J. 691, 692 (1991). Federal courts have repeatedly acknowledged that they are not to second-guess school officials' consideration of these realities or to replace professional experience and expertise with their own.

Third, prohibiting educators from exercising their professional judgment to evaluate the facts they receive puts schools in an impossible position. Schools have responsibilities to accused students just as they do to accusers, and an overarching duty to all students to maintain a safe environment. In recent years, accused students have increasingly sought judicial recourse because they feel a school reacted too hastily or punished too severely. And, regardless which party ultimately prevails, the school can rarely satisfy the students and parents on the other side. Expanding liability to allow potential monetary damages whenever a teacher hears a rumor of sexual misbehavior only further narrows the channel through which schools must navigate.

In short, Title IX neither requires nor permits this Court to substitute its views, or the views of a "reasonable person," for that of trained school officials. Affirming a subjective "actual knowledge" standard is both necessary and appropriate to protect those officials' judgment. Therefore, *Amici* urge this Court to continue its long-standing deference to school officials' discretion in matters of student discipline and safety.

C. The Jury Correctly Found that Hogan did not have Actual Knowledge that Doe Experienced Harassment.

Even though the district court incorrectly instructed the jury that Doe need only prove the School Board's actual knowledge of a harassment allegation, *see* Fairfax Cty. Sch. Bd. Br. at 30, rather than knowledge of the harassment itself, the jury correctly concluded that no actual knowledge existed. Indeed, Doe's highly selective recitation of the trial court record further underscores the importance of the actual knowledge standard and its attendant deference to educators' professional judgment. By Doe's account, Assistant Principal Jennifer Hogan[1] actually knew that Doe was reporting sexual harassment because (i) Doe told Hogan she had "tried to block" Smith's advances, (ii) Doe wrote that she was "so shocked and scared that [she] did not know what to say or do," and (iii) Doe's mother said Doe had been sexually assaulted. Doe Br. at 36-40. Even a brief review of the record, however, reveals that the picture Hogan received was far less clear.

For example, when Taylor initially alerted Hogan to the situation, she told Hogan that Doe had "engaged in sexual activity with Jack on the bus; Jane had had a 'crush' on Jack; and Jane was upset after finding out that Jack 'had a girlfriend.'" Fairfax Cty. Sch. Bd. Br. at 8. Hogan also learned that another student had spoken

[1] Doe has not appealed the jury's findings that Assistant Principal Michelle Taylor and Principal Banbury did not have actual knowledge sufficient to impute Title IX liability.

to her mother about the incident, and the mother had implied to Taylor that Doe "may not have wanted to be a full participant." JA 1188:6-10. But, when pressed by Doe's counsel at trial, Hogan firmly denied that she had enough information at that point to think Smith had sexually assaulted Doe. JA 1186:19-1187:6.

Hogan's subsequent conversations with Doe and Smith showed that Doe's story was inconsistent at best. When Hogan first interviewed Doe, she stated that Smith had asked for a blanket and had initiated the sexual contact. JA 1195:23-25. During this first interview, Doe said she "felt stuck in [the] situation," but "never said she pulled away." JA 1196:21-25, 1201:1-20. In fact, Doe said they were "both touching" for about 20 minutes. JA 1258:25-1259:9. Doe was very upset that Smith had a girlfriend, and mentioned the girlfriend several times. JA 1198:13-16. Throughout the interview, Doe seemed calm, and did not indicate Smith had forced her. JA 1196:13-18.

Hogan then interviewed Smith, who said Doe had initiated the encounter, never pulled his hand away, and never tried to stop him. JA 1267:9-20. Smith also said Doe had discussed sitting together on the bus, she was wearing his hat, she put her head on his shoulder, she retrieved the blanket, she "touched [him] first," and she "never gave [him] any indication" that she did not want to participate. JA 1219:24-1220:1, 1269:20-1270:6, 1272:19-22.

When Hogan questioned Doe again, Doe confirmed that she had planned to

sit with Smith on the bus, she was wearing his hat, and she had put her head on his shoulder. JA 1275:10-24, 1276:16-23. Security Officer Baranyk asked whether Doe wanted to press criminal charges, and Doe visibly recoiled at the idea. JA 1281:1-11. During this second interview, Doe said she "didn't want to be in the situation and tried to pull away," and that she "[didn't] think it was consensual." JA 1210:11-17, 1280:2-4. But, upon further inquiry, Doe admitted she had pulled away "once," before stroking Smith's penis for 15 minutes. JA 2518. And, she later testified that she believed that if she did not "explicitly say yes," she considered the encounter nonconsensual. JA 1772:16-1773:1. Hogan also spoke to two other students Smith had identified as being on the bus, neither of whom had seen or heard anything. JA 1215:19-22, 1182:20-1184:2, 1287:4-14.

Based on her first-hand conversations with Doe, Smith, and multiple other eyewitnesses, Hogan concluded that Doe had fully participated in the encounter with Smith, and that no sexual assault had occurred. JA 1221:4-13, 1286:3-14. To allow Doe to second-guess Hogan's conclusion (and the jury's decision to believe her) would "invite an avalanche of Title IX litigation and risk resultant financial harm to school districts." *Doe v. Bd. of Educ. of Prince George's Cty.*, 982 F. Supp. 2d 641, 657 (D. Md. 2013) (citing *Saleh v. Upadhyay*, 11 F. App'x 241, 258 (4th Cir.

2001)).[2]

Hogan's conversations with multiple witnesses are similar to those taking place in school buildings across the country every day. School officials must consider all the circumstances, including the rights and interests of all of the students involved. School officials gather the facts as presented by those involved, do their best to ferret out the truth, apply school policy, and care for students affected by any decisions. And courts acknowledge this tough work requires deference.

II. This Court Should Reject the Invitation to Depart from Clear Precedent Regarding Actual Knowledge

Doe appears to concede she cannot meet the "actual knowledge" standard articulated in *Davis* and *Baynard* based on the facts described above. That is, she does not contend that Hogan subjectively knew harassment had actually occurred. Instead, Doe says Hogan had "actual knowledge" if Hogan actually knew Doe and her mother were claiming sexual harassment. But, contrary to what Doe suggests, "actual knowledge" cannot be based on one student's equivocal account that requires an educator to *infer* non-consensual sexual activity *might* have occurred. That formulation distorts the plain language of *Davis* and *Baynard*, ignores the policy

[2] The rule advanced by Doe runs contrary to the requirement that Title IX liability attaches only to intentional misconduct. As recognized by Fairfax County School Board, "Title IX is a Spending Clause statute under which school divisions must have clear notice of its requirements, and neither Congress nor the courts have informed school divisions that liability attaches to honest-but-negligent assessments that no harassment has occurred." Fairfax Cty. Sch. Bd. Br. at 30.

rationales on which they rest, and would expand schools' monetary liability to Title IX plaintiffs even beyond a negligence standard. In *Davis*, the Supreme 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*, 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 it 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." 526 U.S. at 642.

Moreover, Doe's assertion that a true "actual knowledge" standard invites schools to "promote ignorance among their staff so appropriate persons would not recognize sexual harassment" is both legally and practically unsound. Doe Br. at 32. Legally, the actual knowledge requirement does not, and should not, shield a school's officials from liability for intentional obtuseness. The boundaries that courts have drawn around "actual knowledge" in the Eighth Amendment context are instructive on this point. For example, the actual knowledge requirement does not permit a school official to "escape liability if the evidence showed that he merely refused to verify underlying facts that he strongly suspected to be true[.]" *Farmer v. Brennan*, 511 U.S. 825, 843 n.8 (1994). Similarly, sexual harassment could conceivably "be so obvious that the factfinder could conclude that the [official] *did*

know of it because he could not have failed to know of it." *Brice v. Va. Beach Corr. Ctr.*, 58 F.3d 101, 105 (4th Cir. 1995). In other words, the "actual knowledge" standard does not allow officials to disregard consciously the facts before them.

Practically speaking, it bears emphasis that the threat of money damages is by no means a school's only incentive to ferret out and minimize student misconduct. Schools are primarily concerned with the safety and education of their charges. Allowing student misconduct to run rampant undermines those goals and defies any educator's instincts. Educators also have a duty to report suspected criminal misconduct under state mandatory reporting laws. *Cf.* Va. Code Ann. § 63.2-1509(D). And, school districts that turn a blind eye to discrimination may be investigated by the United States Department of Education's Office for Civil Rights, which can lead to required changes to policies and procedures and loss of federal funding. Therefore, expanding monetary liability for teachers and administrators making informed judgments about whether student misbehavior rises to the level of "harassment" will not protect the students; it will serve only to divert the limited resources that would otherwise support their education. For all of these reasons, the Court should reject Doe's invitation to expand the concept of "actual knowledge," and Title IX's implied monetary remedy, to every case of reported student misbehavior.

III. The School Board Was Not Deliberately Indifferent

The deliberate indifference element of the *Davis* liability standard sets an intentionally high bar. If applied properly, that standard should result in relatively few scenarios in which schools may be held liable for monetary damages for their actions in addressing student-on-student harassment. That high standard mandates a finding of no deliberate indifference in this case.

Title IX liability attaches to funding recipients only where they are "deliberately indifferent" to known harassment. *Davis*, 526 U.S. at 650. Deliberate indifference exists only when the "response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances." *Id.* at 648. This is a "very high standard—a showing of mere negligence will not meet it." *Baynard*, 268 F.3d at 236 (quoting *Grayson v. Peed*, 195 F.3d 692, 695 (4th Cir. 1999)); *S.B. v. Bd. of Educ. of Harford Cty.*, 819 F.3d 69, 76 (4th Cir. 2016) ("*Davis* sets the bar high for deliberate indifference."). The Supreme Court recognized the importance of setting this heightened standard to ensure that school administrators "continue to enjoy the flexibility they require." *Davis*, 526 U.S. at 648. "The point, again, is that a school may not be held liable under Title IX . . . for what its students do, but only for what is effectively 'an official decision by the school not to remedy' student-on-student harassment." *S.B.*, 819 F.3d at 76-77 (quoting *Davis*, 526 U.S. at 642). Importantly, "school administrators are entitled to substantial deference" in

developing a "response to student-on-student bullying or harassment." *Id.* at 77.

The record as a whole shows that the School Board acted reasonably in responding to the bus incident. Far from acting with deliberate indifference, the School took the following steps to address the bus incident:

- Taylor checked on Doe the morning after learning about the incident (Fairfax Cty. Sch. Bd. Br. at 3);
- Taylor interviewed Victoria, a potential witness, the day after learning about the incident (Fairfax Cty. Sch. Bd. Br. at 3);
- Taylor continued to monitor Doe throughout the remainder of the school field trip (Fairfax Cty. Sch. Bd. Br. at 5);
- Hogan, accompanied by the Counselor, interviewed Doe on March 13th, the first school day following the field trip. Hogan also requested that Doe submit a written statement (Fairfax Cty. Sch. Bd. Br. at 9-10);
- Hogan, accompanied by the Safety and Security Specialist, interviewed Smith on March 13th as well. Hogan also contacted Smith's parents and asked Smith for a written statement (Fairfax Cty. Sch. Bd. Br. at 11-13);
- That same day, Hogan told Smith not to talk to other students about the incident and admonished him "do not talk to Jane Doe, and . . . never do this again." (Fairfax Cty. Sch. Bd. Br. at 13);
- Hogan interviewed Doe for a second time on March 13th after Smith's interview. Hogan asked Doe to identify potential witnesses and confirmed that Doe had no troubling interactions with Smith since the bus incident (Fairfax Cty. Sch. Bd. Br. at 13-16);
- Hogan interviewed two other student witnesses identified by Doe or Smith on March 13th (Fairfax Cty. Sch. Bd. Br. at 16-17);
- Hogan met with Smith's mother and Doe's father on March 13th (Fairfax Cty. Sch. Bd. Br. at 17);

- On March 14th and March 15th, Hogan communicated with Doe's mother to schedule a meeting and discuss academic accommodations for Doe (Fairfax Cty. Sch. Bd. Br. at 18-19);

- Hogan interviewed another student who potentially witnessed the bus incident (Fairfax Cty. Sch. Bd. Br. at 20);

- On March 16th, Hogan and the Counselor met with Doe's parents and agreed to academic accommodations requested by Doe's parents. Hogan also offered Doe support services, including the services of the Counselor and school psychologist. (Fairfax Cty. Sch. Bd. Br. at 20-21);

- On March 17th, the Counselor emailed all seven of Doe's teachers about making academic accommodations for Doe, including giving her extra time to turn in assignments, excuse any non-essential assignments, and allow her to make-up assignments as needed. The Counselor also asked teachers to report back if Doe struggled academically or emotionally. (Fairfax Cty. Sch. Bd. Br. at 21-22);

- Per Doe's mother's request, the Band Director excused Doe from three band classes and allowed her to work on homework in a practice room instead (Fairfax Cty. Sch. Bd. Br. at 24);

- The Band Director rearranged the band seating to keep Smith out of Doe's line of sight per Doe's father's request (Fairfax Cty. Sch. Bd. Br. at 24);

- Doe's teachers provided generous accommodations per Doe's mother's request throughout the remainder of the school year, including excusing Doe altogether from her pre-calculus exam and allowing Doe to take six exams in Physics at home, including the final exam (Fairfax Cty. Sch. Bd. Br. at 22-23); and

- Hogan offered counseling services to Doe on numerous occasions (Fairfax Cty. Sch. Bd. Br. at 23).

This conduct simply does not constitute deliberate indifference.[3] To hold otherwise would render the deliberate indifference standard meaningless. And it is hard to imagine how a school could escape liability under Title IX in any case if the School Board's actions here are deemed insufficient. The School Board investigated, interviewed numerous potential witnesses, admonished Smith to stay away from Doe, acquiesced to Doe's request to rearrange the seating in band class, provided Doe numerous academic accommodations, and offered Doe counseling services. *S.B.*, 819 F.3d at 77 (finding no deliberate indifference where school

[3] Even though Hogan did not think that Doe had been sexually harassed, she recognized that Doe was struggling and made sure that the student received the numerous academic accommodations she requested. The School Board's actions were effective. Doe has not alleged, nor was any evidence offered at trial to show, any factual basis for a claim of denial of access to the educational program other than the incident on the bus. By the language of Title IX itself, liability lies only where the plaintiff is "subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). The Supreme Court in *Davis* interpreted this provision to "suggest[] that the behavior be serious enough to have the systemic effect of denying the victim equal access to an educational program or activity." 526 U.S. at 652. "[I]n theory," the Court explained, "a single instance of sufficiently severe one-on-one peer harassment could be said to have such an effect, [but] we think it unlikely that Congress would have thought such behavior sufficient to rise to this level in light of the . . . amount of litigation that would be invited by entertaining claims of official indifference to a single instance of one-on-one peer harassment." *Id.* at 652-53. Under the rule adopted by a majority of circuits, following *Davis*, liability cannot be imposed on a school board in this case because Doe was not subject to further harassment. *See, e.g., Kollaritsch v. Mich. State Univ. Bd. of Trs.*, 944 F.3d 613, 618, 628-30 (6th Cir. 2019); *K.T. v. Culver-Stockton Coll.*, 865 F.3d 1054, 1057-58 (8th Cir. 2017); *Williams v. Bd. of Regents of the Univ. Sys. of Georgia*, 477 F.3d 1282, 1295-99 (11th Cir. 2007); *Escue v. N. Okla. Coll.*, 450 F.3d 1146, 1155-56 (10th Cir. 2006); *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 740 (9th Cir. 2000).

investigated complaints, issued discipline ranging from parent phone calls to suspensions where appropriate, and took other protective measures to respond to alleged harassment). The Court should uphold the rigorous deliberate indifference standard and find that such conduct does not constitute deliberate indifference as a matter of law.

IV. The Record Does Not Support a Spoliation Instruction

The district court properly exercised its discretion in denying Doe's request for a spoliation jury instruction. Doe requested such an instruction for evidence that had been accidentally lost or destroyed. But Fourth Circuit precedent makes clear that such an instruction may follow only intentional or willful conduct that results in lost or destroyed evidence. The Court should not expand the circumstances justifying a spoliation instruction to negligent or accidental conduct. Doing so would lead to spoliation findings whenever records are lost, irrespective of whether they were destroyed on purpose to gain a litigation advantage.

"Spoliation is a rule of evidence, and the decision to impose sanctions for violations is one 'administered at the discretion of the trial court' and governed by federal law." *Turner v. United States*, 736 F.3d 274, 281 (4th Cir. 2013) (quoting *Hodge v. Wal-Mart Stores, Inc.*, 360 F.3d 446, 450 (4th Cir. 2004)). "[A] district court's ruling on a plaintiff's request for a spoliation inference . . . 'must stand unless it was an abuse of the district court's broad discretion in this regard.'" *Id.* at 281-82

(quoting *Hodge*, 360 F.3d at 450). *See also Callahan v. Pac. Cycle, Inc.*, 756 F. App'x 216, 227 (4th Cir. 2018) ("A trial court's decision to instruct the jury on spoliation is reviewed for abuse of discretion."). While "[a]n error of law constitutes an abuse of discretion," *A Helping Hand v. Baltimore Cty., Md.*, 515 F.3d 356, 370 (4th Cir. 2008), "[a] judgment will be reversed for error in jury instructions 'only if the error is determined to have been prejudicial, based on a review of the record as a whole.'" *Abraham v. Cty. of Greenville, S.C.*, 237 F.3d 386, 393 (4th Cir. 2001) (quoting *Wellington v. Daniels*, 717 F.2d 932, 938 (4th Cir. 1983)).

The imposition of an adverse inference instruction is a severe sanction. When granted to a plaintiff, it creates an "evidentiary presumption" that "effectively relieve[s] [the plaintiff] of [her] burden to prove" her claims. *Blue Sky Travel & Tours, LLC v. Al Tayyar*, 606 F. App'x 689, 698 (4th Cir. 2015). For this reason, the Fourth Circuit has established clear circumstances justifying such a sanction. This case, which involves the negligent loss of evidence with no prejudicial effect on Doe, does not fit into those circumstances.

"Under the spoliation of evidence rule, an adverse inference may be drawn against a party who destroys relevant evidence." *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 155 (4th Cir. 1995). A district court may give an adverse inference jury instruction when necessary to "level[] the evidentiary playing field" and to "sanction[] the improper conduct." *Vodusek*, 71 F.3d at 156. But such an instruction

is appropriate only where the district court has found that "*intentional* conduct" contributed to the loss or destruction of relevant evidence. *Id.* (emphasis added). It cannot be given in cases involving negligent conduct:

> An adverse inference about a party's consciousness of the weakness of this case, however, cannot be drawn merely from his negligent loss or destruction of evidence; the inference requires a showing that the party knew the evidence was relevant to some issue at trial and that his willful conduct resulted in its loss or destruction.

Id. *See also Turner*, 736 F.3d at 282 (reiterating that "spoliation does not result merely from the 'negligent loss or destruction of evidence,'" but that "the conduct must be intentional") (quoting *Vodusek*, 71 F.3d at 156).

Doe's brief does not address the proper standard for an adverse inference instruction. Instead, she references only one unpublished case in a footnote, arguing that willful conduct does not have to be bad faith. Doe Br. at 45 n.10. But as her own case quote recognizes, willful conduct does not encompass the accidental or negligent loss or destruction of evidence. *Id.* (quoting *Callahan*, 756 F. App'x at 227).

Doe's brief identifies only two items of "spoliated evidence:" (1) a witness statement submitted by Brianna Murphy to Hogan; and (2) notes from Baranyk's interview of Laura Kelly. Doe Br. at 44. The School Board explained that it could not locate those two pieces of evidence likely due to renovations that caused the relocation of student files at various points. JA 93-94.

The magistrate judge found no evidence of "advantage-seeking behavior" on the School Board's part. JA 94. In addition, he found that this did not "rise to the level of intentional, purposeful, or deliberate conduct." JA 94 (internal quotations omitted). Instead, the magistrate found that the loss of evidence resulted from negligent conduct. JA 95, 97. In other words, the School Board did not engage in any "improper conduct" justifying the need for sanctions. *Vodusek*, 71 F.3d at 156. Doe filed no objections to the magistrate's findings. That failure prevents her from assigning error now. Fed. R. Civ. P. 72(a). Because the loss of evidence resulted from negligent or accidental conduct, rather than intentional or willful conduct, the district court properly declined to give an adverse inference jury instruction. *Turner*, 736 F.3d at 282; *Vodusek*, 71 F.3d at 156.

In addition, Doe suffered no prejudice from the missing statement and interview notes. Therefore, the circumstances did not warrant an adverse inference jury instruction to "level[] the evidentiary playing field. *Vodusek*, 71 F.3d at 156. Doe concedes that Murphy testified at trial about what her statement said. Doe Br. at 44. She also admits that Kelly testified at trial about what she told Baranyk during their meeting. *Id.* Based on the live, unrebutted testimony from Murphy and Kelly about the contents of the two pieces of missing evidence, the district court correctly found that Doe suffered no prejudice to warrant a spoliation instruction. JA 2317:8-16, 2320:11-16.

CONCLUSION

Amici respectfully pray that this Court affirm the judgment below. To do otherwise would subject all school districts within the Fourth Circuit to increased litigation, while simultaneously denying school officials due deference to respond and investigate alleged incidents.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,456 words, excluding the parts exempted by Rule 32(a)(7)(B)(iii).

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I hereby certify that on March 16, 2020, I electronically filed the foregoing Brief with the Clerk of this Court using the CM/ECF System, which will send notice of such filing to all counsel of record.

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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