No. 12-13248

In the United States Court of Appeals For the Eleventh Circuit

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

v.

MURRAY COUNTY SCHOOL DISTRICT AND

C

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Garrett, Herbert, GSSA Executive Director

Georgia School Boards Association (GSBA), *Amicus Curiae*

Georgia School Superintendents Association (GSSA), *Amicus Curiae*

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Villani, Joseph, NSBA Interim Executive Director

This 28th day of November, 2012.

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National School Boards Association, State

INTEREST OF THE *AMICI*

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

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

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

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

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

STATEMENT REGARDING PREPARATION AND FILING OF THE BRIEF

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

This brief is filed with the consent of the parties.

STATEMENT OF THE ISSUE

This brief is limited to the following issue:

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

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

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

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

ARGUMENT

I. s Intentionally Narrow Davis Standard Should Not Be Expanded.

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

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

The Davis Court articulated a clear standard to be applied when a federal funding recipient could be liable in damages in a peer harassment case:

> [F]unding recipients are properly held liable in damages only where they are *deliberately indifferent* to *sexual harassment*, of which they have *actual knowledge*, that is so *severe, pervasive and objectively offensive* that it can be said to *deprive the victim of access* to the educational opportunities or benefits provided by the school.

Id. at 650 (emphasis added). A plaintiff must satisfy *each* prong of the standard to be awarded damages. The Court was also very clear in its admonition that the –deliberate indifference‖ prong affords school officials much deference:

> School administrators will continue to enjoy the flexibility they require so long as funding recipients are deemed –deliberately indifferent‖ to acts of student-on-student harassment *only where* the recipient‘s response to the harassment or lack thereof is *clearly unreasonable in light of the known circumstances*.

Id. at 648

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

[3] Id. at 2.

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

1. **<u>Davis</u> requires plaintiffs**

generally found in favor of school districts, often at the dismissal or summary judgment stage. These decisions turn on the plaintiff's failure to allege or present enough evidence with respect to one of the Davis prongs. For example, several courts have held in a school district's favor because the plaintiff was unable to show that the harassment at issue is based on a protected category, and/or is severe, pervasive, and objectively offensive.[8] In H.B. v. Monroe Woodbury Central Sch. Dist., No. 11–CV–5881, 2012 WL 4477552 (S.D.N.Y. Sept. 27, 2012), the court granted the district's motion to dismiss the students' claims under Title IX, stating, –the Supreme Court has admonished courts to take pains . . . to ensure that the purported harassment is sufficiently severe,‖ as not all conduct that is upsetting to a targeted student such as insults, teasing, name-calling, shoving, and pushing is actionable harassment. Id. at *16 (citations omitted).

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

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

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

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[9] E.g., LeVarge v. Preston Bd. of Educ., 552 F. Supp. 2d 248 (D. Conn. 2008) (finding no deliberate indifference where school officials acted to protect plaintiff who was teased in a homophobic manner by separating him from the other students and disciplining those students, although plaintiff

2.

recommendations on responding to harassment does not amount to deliberate indifference.

Although the Longs and their *amici* acknowledge that the Davis standard, including the requirement of deliberate indifference, is appropriately applied in this case, they urge this Court to adopt an analysis that departs from established legal doctrine on deliberate indifference. Instead, they are steering this Court toward a professional negligence standard, as measured against OCR's enforcement guidance, as well as the testimony of their "experts." This Court should reject this approach as an unwarranted extension of Davis that: (1) deprives school officials of the substantial flexibility that the Supreme Court acknowledged they need in responding to discriminatory peer harassment;[12] and (2) erroneously judges the effectiveness of the district's response in hindsight based on a review of the district's alignment with agency recommendations admittedly intended only to apply in enforcement actions,[13] and on "expert" evaluations made after the fact.[14]

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deliberate indifference where school had provided services and referrals to student who suffered disability-based harassment for years and eventually committed suicide; court did allow case to go forward on claim of denial of free appropriate public education).

[12] 526 U.S. at 648.

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

In Davis, the Court clearly confirmed the necessity for a standard higher than negligence in Title IX suits for monetary damages. Citing its landmark ruling on Title IX liability in Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 118 S.Ct. 1989 (1998), the Court explained in Davis that it not only had rejected the

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

By establishing a standard of liability more rigorous than negligence in peer harassment cases brought under Title IX (and, as applied, under Section 504 and Title VI), the Court remained consistent with the widespread and longstanding recognition by courts and legislatures that negligence is a standard of liability

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

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

OCR itself has acknowledged, however, that the –remedies in the [2010] DCL may not be required or appropriate in every case,‖ and that they –are designed to help schools better understand their responsibilities and their *options*

[19] See infra Part II.A.

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

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

Contrary to the Longs' contention, it is well-settled that the question of deliberate indifference is one of law for the court, and not one for a jury, regardless of evidence of continuing harassment. The Longs argue that the deliberate indifference question is one of fact because, they assert, MCSD officials knew that there was ongoing disability-based harassment despite disciplining the identified harassers, but took no action to stop this alleged continuing misconduct by other unidentified students. But, the Longs' contention conflicts with the Davis Court's express ruling that there is no requirement under federal law that to avoid liability, schools must eliminate or –remedy‖ peer harassment and –ensure that students . . .

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

[21] See, e.g

conform their conduct to certain rules.‖[22] In fact, in Davis, the Court explicitly contemplated the question as one of law, saying, –In an appropriate case, there is no reason why courts, on motion to dismiss, for summary judgment, or for a directed verdict, could not identify a response as not ‗clearly unreasonable' as a matter of law.‖[23] As noted above, lower courts have done exactly that in many peer harassment cases, including some that involved continuing mistreatment of the plaintiff.

Making deliberate indifference a jury question whenever harassment is not completely eliminated is untenable. Such a rule would impose a requirement on school districts to continuously experiment with strategy after strategy to stop misconduct even where the existence of harassment is isolated or minimal. Even if deliberate indifference turned on the question of effectiveness—which it does not—this is a wholly unworkable basis for liability. It demands that any –strategy‖ that a school official might try in response to harassment must work instantly and completely or risk being deemed ineffective when any student experiences *new* incidents of harassment. In the wake of these new incidents, school officials would be required to jettison –failed‖ approaches and find new ones, even if, in their

[22] 526 U.S. at 648.

[23] Id. at 649.

B. Davis Actual Notice Requirement Should Not Be Expanded So That *Any* Report to a School Employee o

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

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

This Court should reject the Longs‘ request for reversal of summary judgment based on genuine issues of material fact concerning deliberate

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

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

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

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[33] Id.

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

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

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

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

Because public education is the responsibility of state and local governments, state and local lawmakers –have taken action to prevent bullying and protect children. Through laws (in their state education codes and elsewhere) and model policies (that provide guidance to districts and schools), *each state addresses bullying differently*.‖[41] With each state legislature and education agency guiding school districts within its borders,

School officials need leeway to exercise educational discretion in determining whether an incident of bullying or harassment is isolated, is related to school climate issues, is a result of trending societal pressures in the community, or is related to another indicia of which only a school official can be aware. An isolated bullying incident may not indicate a pervasive bullying climate that requires a systemic approach. School size, student experiences and relationships, socio-economic realities, and community dynamics and history may all play a role.

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

School board members, school district administrators, school principals, and teachers have more direct and genuine information about their students than any other body of government—local, state, or federal. In addition, local school officials are keenly aware of societal issues affecting their own communities. They

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

typically have important leadership roles in their communities. School officials—especially school principals, who interact daily with students, parents, and staff—tend to be aware of individual students or groups of students who are coming up through the grades and may be having difficulties in peer-to-peer or peer-to-faculty interactions.

For students with disabilities, building and district-level educators trained in student service needs typically know community experts in the medical and social fields, such that they are able, through consultation and staff discussion, to obtain input and knowledge about what types of special education and related and other services would best serve each student. These educators could include school

student body size and demographics, staff size and experience, community characteristics, even weather. As student or staff demographics change, school officials often make adjustments to policies and procedures. For example, changes in community demographics brought about by economic tides might require the school board and district-level administrators to rethink how certain policies, including student discipline codes and harassment guidelines, might need to be modified to better address student needs and educational demands.

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

recognized, –deference is owed to a municipal body‘s statutory interpretation of its own rules and regulations _so long as its interpretation is based on a permissible construction.‘‖[45]

Courts have recognized that they are not educational experts in numerous areas in which school officials have had to make hard decisions,[46]

discipline,[48] student dismissal,[49] ADA/Section 504 harassment,[50] racial harassment,[51] grade appeals,[52] and First Amendment dress code challenges.[53]

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

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

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

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

[52]

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

CONCLUSION

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

Respectfully submitted this 28th day of November 2012.

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CERTIFICATE OF SERVICE

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

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