

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)

**MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE
IN SUPPORT OF PETITION FOR REHEARING EN BANC**

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***Supporting Appellee, Affirmance of the
Decision of the U.S. District Court, and
Appellee's Request for Rehearing En Banc***

Pursuant to Federal Rule of Appellate Procedure 29(b), the National School Boards Association (“NSBA”), the Virginia School Boards Association (“VSBA”), the Maryland Association of Boards of Education (“MABE”), the North Carolina School Boards Association (“NCSBA”), and the South Carolina School Boards Association (“SCSBA”), by counsel, respectfully request leave to file a brief amici curiae in the support of the Petition for Rehearing En Banc (Doc. 59) filed by Appellee Fairfax County School Board. As required by FRAP 29(b), this motion is accompanied by the proposed brief amici curiae. The School Boards conferred with counsel for the Appellant and the Appellee, and both parties consent

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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 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 concerns of Maryland boards of education before state and federal courts and agencies, the Maryland General Assembly, and the United States Congress.

The NCSBA is a non-profit 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.

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

Amendments of 1972, 20 U.S.C. §§ 1681-1688. Moreover, the panel's decision creates splits with six other circuits. This is a matter of exceptional importance, and en banc review is both merited and required.

An amicus brief from the School Boards Amici is desirable and the matters asserted by the School Boards Amici are relevant to the disposition of the case

Circuit. Therefore, the School Boards Amici respectfully ask the Court to grant leave to file the accompanying brief amici curiae.

Dated: July 7, 2021

Respectfully submitted,

/s/ Robert W. Loftin

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The Virginia School Boards Association,

The Maryland Association of Boards of Education,

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and

The South Carolina School Boards Association

CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2021, I electronically filed the foregoing Motion with the Clerk of this Court using the CM/ECF System, which will send notice of such filing to all counsel of record.

/s/ Robert W. Loftin
Robert W. Loftin

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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, Affirmance of the
Decision of the U.S. District Court, and
Appellee's Request for Rehearing En Banc

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The North Carolina School Boards Association (“NCSBA”) is a non-profit 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 of the Eastern Band of the Cherokee Nation. The NCSBA advocates for the concerns of 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 that has the same understanding of matters affecting them. The NCSBA files amicus briefs on behalf of North Carolina school boards in state and federal appellate courts.

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 79 school boards across South Carolina, but the SCSBA also provides resources to a number of non-traditional education entities. SCSBA is a membership-driven, non-profit organization that provides a variety of board services, ranging from legal resources to training for members, and represents the statewide interest in 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 interests before state and federal courts.

The decision in this case will affect every public school K-12 student throughout the Fourth Circuit. The School Boards Amici here represent the interests of every public school board in Virginia, Maryland, North Carolina, and South Carolina. Amici recognize safe and supportive learning environments are crucial to the mission of every public 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 school officials are in the best position to develop strategies to create safe learning environments for all students.

The School Boards Amici respectfully ask this Court to grant the Petition for Rehearing En Banc filed by Fairfax County School Board. See Doc. 59. The School Boards Amici previously filed a brief supporting Appellee Fairfax County School Board. See School Boards Br. Amici Curiae (Do30). No attorney for any party authored this brief in whole or in part and no person or entity other than Amici and their members and counsel made any monetary contribution to this brief's preparation or submission.

SUMMARY OF THE ARGUMENT

Rehearing is necessary to correct the ~~many~~ errors in the panel's decision. See Opinion (Doc. 56). The Supreme Court of the United States established a demanding liability standard for claims of student-on-student sexual harassment against school districts. The panel's ~~decision~~ significantly relaxes this standard and creates a liability regime that will expose school districts throughout the Fourth Circuit to unfettered litigation regardless of the manner in which an educator or administrator attempts to implement the requirements of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688. Moreover, the panel's decision creates splits with six other circuits. This is a matter of exceptional importance, and en banc review is ~~both~~ merited and required.

ARGUMENT

I. The Panel's Decision Fails to Apply the Correct Legal Standard When Reciting the Facts

As an initial matter, the panel failed to apply the correct legal standard when reciting the facts. Compare Opinion at 3-6 & 19-20 with Appellee's Br. at 42-45 and School Boards Br. Amici Curiae at 13-23. Because the school board was the prevailing party below, the panel was required to "view the trial evidence in the light most favorable to" the Fairfax County School Board. *Roe v. Howard*, 917 F.3d 229, 233 (4th Cir. 2019). In failing to follow the correct legal standard, the panel "improperly substitute[d]" its "finding for the jury's." Opinion at 34 (Niemeyer, J.,

dissenting)¹. This error by the panel ~~ch~~erits en banc review to ensure the proper standard is applied in future Title IX cases in the Fourth Circuit.

II. The Panel's Decision Conflicts with Supreme Court Precedent and this Circuit's Precedent, and Creates New Liability Standards that Will Expose Public Schools to Unlettered and Unlimited Liability

Left uncorrected, the panel's decision ~~on~~this case will expand the scope of Title IX liability for public school districts in the Fourth Circuit well beyond what Congress intended.

A. The Panel's New Actual Knowledge Standard Significantly Alters the Landscape for Public Schools and Requires En Banc Review

In *Davis v. Monroe County Board of Education*, the Supreme Court—by a 5-4 majority—confirmed that a school district may be liable for “student-on-student” harassment only where “the funding recipients with deliberate indifference to known acts of harassment in its programs or activities.” 526 U.S. 629, 633 (1999) (emphasis added). In articulating the liability standard, the Supreme Court held that 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 (emphasis added).

¹ As discussed below and separately by ~~the~~ Monroe County School Board, as well as for the reasons stated in his dissent, the School Board ~~and~~ agrees with Judge Niemeyer that there is a separate, alternative basis to affirm the judgment below. The School Board Amici respectfully request that rehearing ~~en~~ banc be granted and this issue be allowed to be briefed further.

Throughout its opinion, the Supreme Court was careful to specify that school officials must subjectively know about acts of harassment before liability may attach. 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”) at 647 (concluding that recipients are liable “where the recipients are deliberately indifferent to known acts of student-on-student sexual harassment”).

In *Davis*, the Supreme Court also construed “actual knowledge” with “constructive knowledge,” which would impose liability on school officials who “knew or should have known” about in-school harassment, e., those who were merely negligent. *Id.* at 642. Thus, as a first element, *Davis* makes clear that school officials must have “actual knowledge” of acts of student-on-student harassment to be liable for damages.

In *Baynard v. Malone*, 268 F.3d 228 (4th Cir. 2001), this Court applied the Supreme Court’s holdings in *Gebser* and *Davis* to determine the actual knowledge an educational institution must possess in its monetary liability under Title IX. This Court held “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. (emphasis added). This Court 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.

The panel decision below sidesteps, ignores, and alters this unambiguous and binding precedent. In the context of K-12 schools served by the School Boards Amici, the panel decision creates an unstable rule that will create chaos throughout public schools in the Fourth Circuit. In recognizing that the deliberate indifference element is a high bar,” the panel stated: “If a school becomes aware of an unsubstantiated allegation of sexual harassment, duly investigates it, and reasonably dismisses it for lack of evidence, the school would not be liable since it did not act with deliberate indifference.” *Id.* at 17. This new rule in the panel’s decision is a significant expansion on the rule announced in *Davis*, see 526 U.S. at 650, and is particularly problematic given the use of the word “unsubstantiated” by the panel. Moreover, it creates perverse incentives for schools “to expel first and to ask questions later.” *Foster v. Bd. of Regents*, 952 F.3d 765, 794 (6th Cir. 2020) (Sutton, J., dissenting). The en banc granted, 958 F.3d 540, reh’g en banc, 982 F.3d 960 (6th Cir. 2020) (led by Sutton, J.).

B. The Panel's Deliberate Indifference Ruling was Made Without the Benefit of Briefing by the Parties and Expands the Heightened Standard Created by the Supreme Court

Exacerbating these perverse incentives, the panel's decision also improperly expands the clear limitations set by the Supreme Court in *Davis* regarding deliberate indifference. See Opinion at 21-32. The Supreme Court was clear that a school's "deliberate indifference" must "subject[] its students to harassment" in order for a violation of Title IX to occur. *Davis*, 526 U.S. at 644. In recognizing schools may face Title IX liability based on student-on-student harassment, the Supreme Court rejected any type of negligence or agency analysis and stated that the scenarios that might subject a school to liability are "narrowly circumscribe[d]" and "cabin[ed]" and "limit[ed]." *Davis*, 526 U.S. at 644-645.

Until the panel's decision, this Court had recognized that deliberate indifference is a "very high standard—how[ing] 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,” 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,” 819 F.3d at 77.

Without the benefit of briefing by either party, the panel adopted the minority view among other federal circuits and held that a single isolated incident of pre-notice, student-on-student harassment may suffice to trigger Title IX liability for schools. Opinion at 26-27. The panel ~~did~~ without discussing the Sixth Circuit’s recent analysis of the issue in *Kollaritsch v. Mich. State Univ. Bd. of Trs.*, 944 F.3d 613 (6th Cir. 2019), cert. denied 141 S. Ct. 554 (2020). This significant expansion of Title IX liability by the panel justifies and necessitates en banc review.

C. The Panel’s Decision Eliminates an Educator’s Discretion

Finally, in granting en banc review, the School Board ~~Advisi~~ respectfully request the Fourth Circuit recognize that school officials need leeway to exercise discretion and judgment in school disciplinary matters. That judgment is informed by an understanding of student experiences and relationships, socio-economic realities, and community dynamics and history. In every case, however, officials’ discretion to evaluate the available information is essential.

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, which students just broke up. Myriad facts that officials have learned about the 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. Federal courts should not second-guess school officials' consideration of these realities or replace an educator's 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. Regardless of which party ultimately prevails, the

school can rarely satisfy the students ~~and~~ parents on the other side. The panel's expansion of liability only further narrows the channel through which schools must attempt to navigate.

In short, Title IX neither requires nor permits this Court to substitute its views, or the views of a "reasonable person," for ~~that~~ trained school officials. Absent en banc correction of the panel's decision, school officials will lose the ability to exercise their discretion and judgment in investigating and responding to Title IX complaints concerning student-to-student harassment.

III. The Panel's Decision Creates Splits with Six Other Circuits

The School Board's Amici agree with the points made by the Appellee regarding the two different circuit splits created by the panel's decision. See, e.g., Fairfax County School Board Petition for Rehearing En Banc (Doc. 59) at 1, 5, 6, 9-12, 13-16. These splits are especially problematic for the School Board's Amici because they must work with school districts throughout the Fourth Circuit to implement the panel's decision. If such splits are going to remain, the entire Fourth Circuit should address the issues raised in this appeal as they affect every public school student in the Fourth Circuit. The scope of Title IX liability is a matter of exceptional importance and ~~is~~ ^{is} ripe for en banc review.

CONCLUSION

The School Board Amici respectfully pray that this Court grant Appellee's request for rehearing en banc and affirm the judgment ~~law~~. Left uncorrected, the panel's decision will subject all school districts within the Fourth Circuit to increased litigation, while simultaneously denying school officials due deference to respond to and investigate alleged incidents.

Dated: July 7, 2021 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29((4) because it contains 2,569 words.

This brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) because it has been prepared in a proportionally spaced 14-point Times New Roman font using Microsoft Word.

/s/ Robert W. Loftin
Robert W. Loftin

CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2021, 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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