**CASE NO. 13-2537**

In The
# United States Court of Appeals
For The Fourth Circuit

**JOHN DOE, Individually and as parents and next friends of J.D., a minor child; JANE DOE, Individually and as parents and next friends of J.D., a minor child,**

***Plaintiffs – Appellants,***

**v.**

**THE BOARD OF EDUCATION OF PRINCE GEORGE'S COUNTY; KATHLEEN SCHWAB,**

***Defendants – Appellees.***

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND AT GREENBELT**

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## MOTION OF *AMICUS CURIAE* COUNCIL OF PARENT ATTORNEYS AND ADVOCATES TO FILE *AMICUS CURIAE* BRIEF OUT OF TIME

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**MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE OUT OF TIME**

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, the Council of Parent Attorneys and Advocates ("COPAA"), hereby respectfully moves for leave to file the attached brief as *amicus curiae* in support of Plaintiff-Appellant. This motion is accompanied by *Amicus*' proposed brief as required by Rule 29(b).

**ARGUMENT**

**A. Interests of *Amicus***

COPAA is a not-for-profit organization for parents of children with disabilities, their attorneys and advocates. COPAA does not undertake individual representation for children with disabilities, but provides resources, training, and information for parents, advocates and attorneys to assist in obtaining a free appropriate public education ("FAPE") required by the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, *et seq*. COPAA also supports individuals with disabilities, their parents and advocates, in attempts to safeguard the civil rights guaranteed to those individuals under federal laws, including 42 U.S.C. § 1983 ("Section 1983"), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504") and Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131, *et seq*. ("ADA"). COPAA brings to this Court a unique perspective of parents

and advocates for children with disabilities and their experiences with the challenges faced by such children, whose success depends upon the enjoyment of all rights under federal law guaranteed to students, whether or not they receive special education.

This appeal presents significant issues regarding the proper interpretation of the standard for deliberate indifference under which a school district could be found liable for peer-to-peer harassment under federal anti-discrimination statutes. Although this case arises under Title IX of the Educational Amendments Act of 1972, 20 U.S.C. § 1681 *et seq.* ("Title IX") for sexual harassment, the standard for deliberate indifference under Title IX is the same standard that is applied in cases of disability-based bullying and harassment under Section 504. *See, T.K. v. New York City Dep't of Educ.*, 779 F. Supp. 2d 289, 314-315 (E.D.N.Y. 2011). Based on their experience, *amicus* offer the Court their unique and important views on the proper interpretation of the deliberate indifference standard under federal anti-discrimination laws.

**B. Why An *Amicus* Brief is Desirable and Relevant**

*Amicus'* brief is both relevant and desirable. *See,* Fed. R. App. P. 29(b)(2). The legal issues presented in this appeal are of great importance to *Amicus*, their members and to the Court. Congress enacted Title IX and Section 504 specifically to protect individuals from illegal discrimination,

including the right to be free from harassment based on sex or disability in a school setting.[1] *Amicus* offers the Court relevant matter not brought to Court's attention by the parties or other amici. *See, Funbus Sys., Inc. v. Cal. Pub. Util. Comm'n*, 801 F.2d 1120, 1124-25 (9th Cir. 1986). *Amicus* provides information regarding the prevalence and impact of the type of harassment and abuse alleged here, explains how the district court's interpretation of the deliberate indifference standard is overly narrow and inconsistent with precedent, and discusses the impact of an incorrect application of this standard on students in minority groups, including students with disabilities. *Amicus* will therefore supply a distinct and relevant analysis of the issues presented on appeal.

**C. Why This Brief Should be Permitted Out of Time**

This amicus brief was not filed within seven days of Appellant's principal brief, which was filed on March 18, 2014, as required by Rule 29(e) because at the time the principal brief was filed, Appellant had no knowledge that an amicus brief would be filed in support of Appellees. The National School Board Association and the Maryland Association of Boards of

[1] The deliberate indifference standard at issue also applies in cases of racial discrimination under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* *See, Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 665, n10 (2d Cir. N.Y. 2012).

Education filed an amicus brief in support of Appellees on June 4, 2014. As a result, Appellant sought Amicus support from COPAA after the seven (7) day window to file an amicus brief for Appellants had expired. Consent for filing this Amicus Brief was sought from Appellee's counsel on June 10, 2014 and denied.

The standard for deliberate indifference for peer harassment under federal anti-discrimination statutes affects millions of students across the country. Because of the extreme importance of this issue, the number of individuals who will be affected by the outcome of this case, and the potential for harm to these individuals as a result of the ruling in this case, it is critical for the Court to hear from interested parties on both sides of the issue. Allowing amicus support of only one of the parties in this case would not only prejudice Appellants, but would disadvantage the millions of individuals who are protected by federal civil rights statutes. Amicus requests that this Court grant leave to file so that both sides of the issue may be fully presented to the Court.

## CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests that the Court grant their motion to file the attached brief in support of Plaintiff-Appellant.

Respectfully Submitted,

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July 2, 2014

CERTIFICATE OF SERVICE

I certify that on July 2, 2014 the foregoing document was service don all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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## BRIEF OF *AMICUS CURIAE* COUNCIL OF PARENT ATTORNEYS AND ADVOCATES IN SUPPORT OF APPELLANT

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 13-2537 Caption: John Doe v. Board of Education of Prince George's County

Pursuant to FRAP 26.1 and Local Rule 26.1,

Council of Parent Attorneys and Advocates
(name of party/amicus)

who is Amicus Curiae, 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 grandparent and great-grandparent 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 (Local Rule 26.1(b))? ☐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, identify any trustee and the members of any creditors' committee:

Signature: /s/ Mark B. Martin Date: July 2, 2014

Counsel for: Amicus Curiae

## CERTIFICATE OF SERVICE

**********

I certify that on July 2, 2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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/s/ Mark B. Martin (signature) July 2, 2014 (date)

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## STATEMENT OF THE IDENTITY OF THE AMICUS CURIAE,[1] IT'S INTEREST IN THE CASE AND THE SOURCE OF IT'S AUTHORITY TO FILE

**Council of Parent Attorneys and Advocates ("COPAA")** is a not-for-profit organization for parents of children with disabilities, their attorneys and advocates. COPAA believes effective educational programs for children with disabilities can only be developed and implemented with collaboration between parents and educators as equal parties. COPAA does not undertake individual representation for children with disabilities, but provides resources, training, and information for parents, advocates and attorneys to assist in obtaining the free appropriate public education ("FAPE") such children are entitled to under the Individuals with Disabilities Education Act ("IDEA" or "Act"), 20 U.S.C. § 1400, *et seq*. COPAA also supports individuals with disabilities, their parents and advocates, in attempts to safeguard the civil rights guaranteed to those individuals under federal laws, including the Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983) ("Section 1983"), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504") and Title II of the Americans with Disabilities

[1] Pursuant to Federal Rule of Appellate Procedure 29, *Amicus* certify that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the brief's preparation or submission; and no person other than *Amicus* and their members and counsel contributed money intended to fund the brief's preparation or submission.

Act, 42 U.S.C. §12131, *et seq*. ("ADA"). COPAA brings to this Court a unique perspective of parents and advocates for children with disabilities and their experiences with the challenges faced by such children, whose success depends not only on the right to secure the FAPE promised by the IDEA and Section 504, but also upon the enjoyment of all rights under federal law guaranteed to students, whether or not they receive special education.

Because the standard for deliberate indifference under Section 504 is identical to the standard for deliberate indifference under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* ("Title IX"),[2] the outcome of this case could have a significant impact on the legal rights of students with disabilities. Failing to implement strategies proven to redress peer-to-peer harassment can be "clearly unreasonable" and has the effect of significantly impacting students with disabilities in public schools. For this reason, COPAA is filing this brief as *amicus.*

## INTRODUCTION AND SUMMARY OF ARGUMENT

The District Court's overly-narrow interpretation of the deliberate indifference standard under Title IX disregards established precedent, and frustrates the important national interest of providing safe schools for all

[2] *See, T.K. v. New York City Dep't of Educ.*, 779 F. Supp. 2d 289, 314-315 (E.D.N.Y. 2011).

students and eliminating discrimination and bullying in our nation's schools. A school district cannot escape liability merely by responding, notwithstanding the likelihood that the response will not be effective. In order to determine the reasonableness of a school district's response, courts must look to the totality of the circumstances in a particular case. In considering the circumstances, courts appropriately consider Agency guidance and research on what practices are likely to combat bullying.

## FACTUAL BACKGROUND

*Amicus* adopts fully by reference herein the Statement of Facts in the Brief for Plaintiff-Appellant John Doe and Jane Doe at pp. 3-8.

## ARGUMENT

### I. A School System's Ineffective Response to Harassment Does Not Preclude Liability under the *Davis* Standard.

*Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999) held that *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1 (1981) does not bar imposition of liability in a Spending Clause case "where the funding recipient engages in intentional conduct that violates the clear terms of the statute." 526 U.S. at 642. Although *Davis* created a stringent standard, a funding recipient faces liability if its indifference causes students to be harassed or if it makes them more vulnerable to such conduct. *Davis*, 526 U.S. at 645. Thus, a school board that receives federal funds will be liable when its "response to the

harassment or lack thereof is clearly unreasonable in light of the known circumstances." *Id.* at 648.

Courts have found both an inadequate response and the absence of a response clearly unreasonable. "Where a school district has actual knowledge that its efforts to remediate are ineffective, and it continues to use those same methods to no avail, such district has failed to act reasonably in light of the known circumstances. *Patterson* v. *Hudson Area Sch.*, 551 F.3d 438, 446-448 (6th Cir.), *cert. denied*, 558 U.S. 880 (2009).

In *Patterson*, the school responded to harassment that spanned several years "largely by giving verbal reprimands to the perpetrators." 551 F.3d at 448.

> [The] pervasive harassment escalated to criminal sexual assault. Moreover, Hudson was aware that the verbal reprimands regarding a few students were not stopping the overall harassment of [the plaintiff]; it is undisputed that [the plaintiff] continued to have problems with other students, even after some were reprimanded or even disciplined, and [the plaintiff] reported those continuing problems to Hudson.

*Id.* Further, the school did not dispute that it was aware that its "reprimands of a few individual harassers did not stop harassment by the many." *Id.* at 449 n.9. Under these circumstances, "a jury may legally find that a school district has 'failed to act reasonably in light of the known circumstances.'"*Id.* (quoting *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 261 (6th Cir. 2000)).

Further, a jury could easily determine that "a wholesale failure to employ established procedures for investigating sexual harassment complaints" amounted to deliberate indifference. *Brodeur v. Claremont Sch. Dist*., 626 F. Supp. 2d 195, 211 (D.N.H. 2009).

The sufficiency of a response is analyzed in light of the known circumstances and "as the known circumstances change, the sufficiency of a response may also have to evolve." *Zeno v. Pine Plains Cent. Sch. District*, 702 F.3d 655 (2d Cir. 2012). In *Zeno*, the district argued that the plaintiff could not establish deliberate indifference because school officials immediately suspended nearly every student who engaged in the harassment. *Id.* at 658. That response, in the circumstances of that case, was not sufficient because the school knew that discipline of the harassers did not deter others from offensive conduct. Further, the harassment grew increasingly severe despite the school's actions. School officials were also aware that the disciplinary actions did not stop taunting and other offensive conduct in the school's hallways. *Id.* at 669. Thus, *Zeno* held that either where a defendant fails to take timely remedial action or where the defendant's response was so inadequate or ineffective, discriminatory intent may be inferred.

This statement "adequately summarizes the current state of the law." *Id.* at 669 & n.12 (citing *Davis* and *Gebser v. Lago Vista Indep. Sch. Dist.*,

524 U.S. 274 (1998)); *see also Vance*, 231 F.3d at 260-261 (actual knowledge that a school's efforts to remediate are ineffective, combined with continued to use the same methods to no avail, constitutes failure to act reasonably in light of the known circumstances); *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 377 F. Supp. 2d 952, 966 (D. Kan. 2005); *Martin* v. *Swartz Creek Cmty. Sch.*, 419 F. Supp. 2d 967, 974- 975 (E.D. Mich. 2006), *Bethany T. v. Raymond Sch. Dist. with Sch. Admin. Unit 33*, 11-cv-464-SM, 2013 DNH 74 (D.N.H. 2013); *Flores* v. *Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1135-1136 (9th Cir. 2003).

## II. An Assessment of the Totality of the Circumstances Includes Consideration of Agency Guidance and Prevailing Methods Known to Be Effective in Combating Bullying and Harassment.

### A. Agency guidance is relevant in determining whether a response was clearly unreasonable.

While not dispositive on whether a particular set of facts gives rise to Title IX liability, guidance from the United States Department of Education's Office of Civil Rights ("OCR") is highly relevant to a deliberate indifference analysis and has been relied on by courts, including the Supreme Court, in cases involving deliberate indifference. *Davis* itself relied on OCR policy guidelines in construing Title IX, citing to OCR policy guidance three (3) times in its majority opinion. *See, Davis*, 526 U.S. at 647-648 (citing *United States Department of Education, Office of Civil Rights, Sexual Harassment*

*Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12034, 12039-12040 (1997) and *United States Department of Education, Racial Incidents and Harassment Against Students at Educational Institutions*, 59 Fed. Reg. 11448, 11449 (1994) ("1994 Racial Harassment Guidance")) (citing OCR guidance in support of proposition that federal spending clause statutes prohibiting discrimination proscribe student-on-student harassment); *Id.* at 651 (citing OCR guidance in support of the proposition that constellation of surrounding circumstances determines whether gender-oriented conduct rises to the level of actionable harassment). Other courts have followed suit, looking to OCR guidance in construing federal anti-discrimination statutes. *See*, *Vance*, 231 F.3d at 260-261 (citing OCR Guidelines in construing Title IX), *Carmichael v. Galbraith*, 2014 U.S. App. LEXIS 11581 (5th Cir. Tex. June 19, 2014); *Riccio v. New Haven Bd. of Educ*., 467 F. Supp. 2d 219, 226 (D. Conn. 2006) (relying on OCR guidance in its analysis of Title IX).

In *T.K. v New York City Dep't of Educ*., a disability discrimination case, the court relied on OCR guidance in applying federal anti-discrimination laws, stating:

> The applicable standard should take into account administrative advice that has long been given to schools in how to apply… [federal anti-discrimination] legislation. By giving weight to this guidance, the expectations of the parties are not upset, and

> precise notice of expected conduct is provided. To that end,… the question to be asked is whether school personnel was deliberately indifferent to, or failed to take reasonable steps to prevent bullying that substantially restricted a child with learning disabilities in her educational opportunities.
>
> This standard does not impose a new obligation on schools. For at least ten years the Department of Education has informed schools that they are legally obligated to comply with it.

779 F. Supp. 2d 289, 316 (E.D.N.Y. 2011).

OCR guidance provides context and a frame of reference for evaluating whether a school's response to harassment was clearly unreasonable. The easy-to-read and easy-to-understand guidance also provides schools with concrete recommendations for how to comply with Title IX and other federal anti-discrimination laws. Although OCR guidance does not and cannot lower the legal standard for liability enunciated in *Davis*, actions that fly in the face of agency guidance could be found to be "clearly unreasonable."

In its *1994 Racial Harassment Guidance*, 59 Fed. Reg. 11,448 (Mar. 10, 1994), OCR articulated the following standard: "To establish a violation of Title VI under the hostile environment theory, OCR must find that: (1) A racially hostile environment existed; (2) the recipient had actual or constructive notice of the racially hostile environment; and (3) the recipient failed to respond adequately to redress the racially hostile environment. Whether conduct constitutes a hostile environment must be determined from

the totality of the circumstances." *Id.* at 11,449. Because this is the same as the *Davis* standard, not a watered down negligence inquiry, the agency's guidance is instructive. The guidance states, "if OCR finds that the recipient took responsive action, OCR will evaluate the appropriateness of the responsive action by examining reasonableness, timeliness, and effectiveness." This statement supports the Does' argument that ineffective remedial action can support a Title IX claim. *See, e.g., Tesoriero v. Syosset Cent. Sch. Dist.*, 382 F. Supp. 2d 387, 398-399 (E.D.N.Y. 2005) (Title IX entity's response must be more than minimalist).

Likewise, the United States Department of Education Office for Civil Rights *Dear Colleague Letter dated October 26, 2010* (DCL) (available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf) is instructive. The DCL indicates that schools may be liable when there is notice of the harassment, DCL at 2 (obvious signs of the harassment are sufficient to put the school on notice) and it fails to take remedial action reasonably calculated to end the harassment. DCL at 2-3. Again, this standard is entirely consistent with *Davis*.

In the instant case, Appellees instituted a bathroom sign-in/sign-out policy to ensure that the harasser and the harassed were not in the bathroom at the same time. The policy required students to sign out of class to use the

bathroom, but school officials failed to enforce the policy, and within a week, students stopped using the logs consistently. Whether the school's abandonment of its own remedial measures in the absence of any evidence that the problem was solved amounted to deliberate indifference is a jury question.

Treating a series of incidents of sexual harassment that escalated in intensity over the course of two (2) years by the same perpetrator against the same student as isolated incidents requiring isolated responses is clearly unreasonable. Likewise, haphazard uncoordinated responses to a consistent and escalating pattern of sexual harassment are clearly unreasonable. The District Court's decision to treat each continuing incident of harassment as separate and unrelated events was inconsistent with the *Davis* standard. The DCL provides an example of gender-based harassment in which a school failed to recognize the pattern of misconduct as a form of sex discrimination under Title IX:

> In this example, the school had an obligation to take immediate and effective action to eliminate the hostile environment. By responding to individual incidents of misconduct on an *ad hoc* basis only, the school failed to confront and prevent a hostile environment from continuing. Had the school recognized the conduct as a form of sex discrimination, it could have employed the full range of sanctions (including progressive discipline) and remedies designed to eliminate the hostile environment.

The DCL also described an appropriate response in compliance with Title IX.

> [T]his approach would have included a more comprehensive response to the situation that involved notice to the student's teachers so that they could ensure the student was not subjected to any further harassment, more aggressive monitoring by staff of the places where harassment occurred, increased training on the scope of the school's harassment and discrimination policies, notice to the target and harassers of available counseling services and resources, and educating the entire school community on civil rights and expectations of tolerance... The school also should have taken steps to clearly communicate the message that the school does not tolerate harassment and will be responsive to any information about such conduct.

A reasonable trier of fact could easily conclude that actions that not only fail to comport with OCR's clear guidance, but in fact resemble OCR's examples of "what not to do," is "clearly unreasonable."

**B. Failing to implement strategies proven to redress peer-to-peer harassment can be "clearly unreasonable" for the purposes of applying the *Davis* standard**

Harassment based upon a protected characteristic is a type of bullying. DCL at p.1. The incidence of bullying in United States schools has reached epidemic levels. [3] "Were bullying characterized as a disease affecting

[3] Glew et. al., *Bullying, Psychosocial Adjustment, and Academic Performance in Elementary School*, 159 Archives of Pediatric and Adolescent Med. 1026 (2005) ("The prevalence of frequent bullying among elementary school children is substantial."); Nels, Ericson, U.S Department of Justice, Office of Juvenile Justice and Delinquency Prevention, *Fact Sheet: Addressing the Problem of Juvenile Bullying* (June 2001) ("The researchers estimated that 1.6 million children in grades 6 through 10 in the United States are bullied at least once a week and 1.7 million children bully others as frequently."); James Snyder et. al., *Observed Peer Victimization During Early Elementary School: Continuity, Growth, and Relation to Risk for Child*

America's youth, a team from the Center for Disease Control charged with investigating epidemics would have been called to study it." *T.K.*, 779 F. Supp. 2d at 316 (E.D.N.Y. 2011) (citing Joseph L. Wright, *Address at American Medical Association Educational Forum on Adolescent Health: Youth Bullying 23* (2002)). "The prevalence and epidemiology is striking." *Id.*

Sexual harassment of children in schools is similarly widespread.[4]

> Sexual violence (including sexual harassment, homophobic name-calling, and unwanted sexual touching) is increasingly being

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*Antisocial Depressive Behavior*, 74 Child Dev. 1881, 1885 (2003) (Researchers observing groups of kindergarten and first grade students noted an incident of bullying on the playground every three to six minutes); Doren, Bullis & Benz, *Predictors of Victimization Experiences of Adolescents With Disabilities in Transition*, Exceptional Children 63, 7-18 (1996): (Interview of 221 adolescents with disabilities in last year of high school. Over half (54%) had experienced peer harassment (teasing, bothering, theft, assault)); *TK*, 779 F.Supp at 297, citing Michaela Gulemetova, Darrel Drury, and Catherine P. Bradshaw, *Findings From the National Education Association's Nationwide Study of Bullying: Teachers' and Education Support Professionals'Perspectives,* in White House Conference on Bullying Prevention, at 11-12 (March 10, 2011), available at http://www.stopbullying.gov/references/white_house_conference/index.html (Over 40% of school staff indicated that bullying was a problem in their school with 41 percent reporting that they witness bullying once a week or more).

[4] Sarah Rinehart, Namrata Doshi, & Dorothy Espelage *Sexual Harassment and Sexual Violence Experiences Among Middle School Youth*, University of Illinois at Urbana-Champaign 5 (April 6, 2014), available at http://www.aera.net/Newsroom/RecentAERAResearch/SexualHarassmentandSexualViolenceExperiencesAmongMiddleSchoolYouth/tabid/15450/Default.aspx ("[T]wo national studies found that by the time students are done with school, 81% have experienced some sort of sexual harassment.")

> recognized as a public health concern among adolescents... Outcomes for those who suffer from sexual violence perpetration can be severe: from lower grades and missing more class to increased rates of risky behavior, depression, anxiety, and suicidality, the negative academic and mental health effects of sexual violence are well documented.[5]

A myriad of proven strategies to combat all types of bullying exist. *See, e.g.*, "*Effective Evidence-Based Practices for Preventing and Addressing Bullying*,[6]" Addendum to United States Department of Education, Office of Special Education and Rehabilitative Services *Dear Colleague Letter dated Aug. 20, 2013*.[7] A "meta-analysis of school-based programs implemented in the United States and internationally to reduce bullying . . . identified program elements (*i.e.*, critical practices or strategies) associated with effective programs." *Id.* at 1.

Consideration of whether a school district used research-based interventions does not involve application of a "mere negligence" standard in contravention of *Davis*. Indeed, a reasonable jury could conclude that failure to use program elements proven to be effective in addressing bullying and harassment is clearly unreasonable. *Cf. Patterson*, 551 F.3d at 449 (applying

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[5] *Id*. at 2.

[6] http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/bullyingdcl-enclosure-8-20-13.pdf.

[7] http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/bullyingdcl-8-20-13.pdf.

the *Davis* standard, found a school district deliberately indifferent because it failed to use response previously proven effective).

## CONCLUSION

Amicus respectfully submits that in order to ensure that students are protected, the Court must reverse the District Court's Order. The District Court erred when it granted the School District's Motion for Summary Judgment. The District Court's approach ignores both the letter and the spirit of the law and would have devastating consequences for students subjected to harassment throughout Maryland. The record in this case supports submitting to a jury the question of whether school officials acted with deliberate indifference in responding to J.D.'s complaints of harassment.

Respectfully Submitted,

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July 2, 2014

## CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Federal Rule of Appellate Procedure Rule 32(a)(7)(C)(i), the attached brief is proportionally spaced, has a typeface of 14 points, and according to the word-count feature of Microsoft Office Word 2013, contains 3,259 words, including footnotes, but not including parts of the brief exempted by Rule 32(a)(7)(B)(iii).

/s/
Mark B. Martin