

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 3483 EDA 2017

NICOLE B., individually and on behalf of N.B.,
Appellant,

v.

SCHOOL DISTRICT OF PHILADELPHIA,
JALA PEARSON,
JASON JOHNSON,
Appellees.

BRIEF FOR *AMICI CURIAE*
COUNCIL OF PARENT ATTORNEYS AND ADVOCATES
AND DISABILITY RIGHTS PENNSYLVANIA

On Appeal from the Judgment of the
Court of Common Pleas of Philadelphia County,
Civil Trial Division, April Term 2014, No. 3745

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Council of Parent Attorneys and Advocates (COPAA) is an independent, nationwide nonprofit organization of attorneys, advocates, and parents in forty-nine states and the District of Columbia who are routinely involved in special education matters throughout the country. COPAA's primary goal is to secure appropriate educational services for children with disabilities, echoing a Congressional finding that "[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." 20 U.S.C. § 1400(1). Children with disabilities are especially vulnerable to school bullying, and COPAA is particularly concerned that bullying deprives students with disabilities of access to education and harms them both physically and emotionally.

Disability Rights Pennsylvania (DRP) is the protection and advocacy system designated by the Commonwealth of Pennsylvania pursuant to federal law to protect the rights of and advocate for Pennsylvanians with disabilities so that they may live the lives they choose, free of abuse, neglect, discrimination, and segregation. Equal access to education is vitally important for children with disabilities, who are disproportionately the victims of peer-on-peer bullying at schools based on their disabilities. DRP thus has an interest in ensuring an

interpretation of the PHRA which requires schools to address such discrimination, including against children with disabilities

ARGUMENT

A. The PHRA Prohibits Discrimination, Direct or Indirect, That Impedes a Student's Access to His Education Because of His Status as a Member of a Protected Group

The Pennsylvania Human Relations Act (PHRA) prohibits withholding from, or denying to any person “because of his race, color, sex, religious creed, ancestry, national origin or handicap or disability . . . , *either directly or indirectly*, any of the accommodations, advantages, facilities or privileges” of a public accommodation. 43 P.S. §955(i)(1) (emphasis supplied). Public schools are places of public accommodation. *See Pa. Human Relations Com. v. Chester Sch. Dist.*, 427 Pa. 157, 165 (1967). And in 1954, the Supreme Court stated:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954). These words still resonate today. Against this backdrop, however, the trial court held that the PHRA allows a school district to ignore years of bias-related bullying, harassment, and assault that caused significant and longstanding mental, emotional and physical harm and impaired the child victim’s ability to receive any education.

This case provides the Court with the opportunity to address claims of a hostile environment in public education for the first time, and overturn the trial court’s facile rejection of N.B.’s discrimination claims because “[t]he Pennsylvania state courts have not addressed claims for student hostile school environment.” Bench Op. at 52. The trial court’s ruling is entirely inconsistent with discrimination law generally and the PHRA in particular. The PHRA commands that the statute be “construed liberally” to accomplish its purposes. 43 Pa. C.S. § 962(a). For that reason, when a school “has the power to take corrective measures . . . failure to act amounts to” withholding a public education from victims of indirect discrimination. , the corrective measures provided by the PHRA apply in this instance. *See Chester Sch. Dist.*, 427 Pa. at 165.¹

¹ While prior to this case, Pennsylvania courts had not yet reached this question under the PHRA, the United States Supreme Court has long held that student-on-student hostile environment claims may be brought under federal law, Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.* *See Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 653-54 (1999). As discussed in footnote 3, *infra*, the standard for liability differs under federal and state law because

A hostile environment may arise as a result of either direct or indirect discrimination. Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 Colum. L. Rev. 1357, 1367 (2009). It is a harm caused by the victim's status as a member of a protected class. This type of "status causation" exists when there is actual disparate treatment, sometimes termed "intentional discrimination." Noah D. Zatz, *Disparate Impact and the Unity of Equality Law*, 97 B.U. L. Rev. 1357, 1360 (2017), available at <http://bit.ly/zatz17> (last visited Jan. 18, 2018). Status causation can also arise through multiple mechanisms and can be detected through multiple methods of proof. *Id.* Thus, anti-discrimination laws "prohibit us from adopting rules or practices that do not explicitly exclude anyone . . . but nevertheless have the effect of disproportionately disadvantaging some groups. Sophia Moreau, *What is Discrimination?*, 38 Phil. & Pub. Affairs 143, 143 (2010). Indirect discrimination is "disadvantage that indirectly results from a policy and affects particular groups because they possess a protected trait." *See* Sophia Reibetanz Moreau, *Equality and Discrimination*, at 8 (June 5, 2016), available at <https://ssrn.com/abstract=2815048> (last visited Jan. 11, 2018).

If a school district adopts a policy of indifference toward bullying and

Pennsylvania law does not impose a deliberate indifference standard. Rather, liability attaches for the failure to take corrective measures to address known discrimination.

harassment and that bullying imposes a disadvantage on particular groups of students in protected classes, it amounts to indirect discrimination. The concept of status causation – did the student’s status in a protected group, *either directly or indirectly*, cause the harm – allows evaluation of hostile environment claims in a manner consistent with the actual language of the statute. This also grounds the inquiry in the PHRA’s emphasis on individual harms directed at “any person.” *See Zatz, supra*, at 1367 & n.44.

Analogously, employers with notice of a discriminatory hostile environment have the obligation to take corrective measures to stop nonemployee harassment of employees. In *Turnbull v. Topeka St. Hosp.*, 255 F.3d 1238, 1245 (10th Cir. 2001),² a psychologist successfully sued her employer for creating a hostile work environment after she was assaulted by a patient. Like the classmates in N.B.’s case, the patient was not an employee of the defendant. However, the court of appeals held that a genuine issue of material fact existed as to whether the hospital was legally responsible for the patient’s actions because it failed to respond appropriately to known dangers. The court noted that the hospital had the responsibility to take appropriate preventive and remedial measures, such as “distribution of personal alarms to workers and construction of

² These cases arise under federal law. Pennsylvania courts construe the PHRA in light of principles that have emerged under federal civil rights law, when the language is similar. *Chmill v. Pittsburgh*, 412 A.2d 860 (Pa. 1980).

appropriately sized and visible treatment rooms,” to protect its staff. *Zatz, supra*, 109 Colum. L. Rev. at 1389; *see also Lockard v. Pizza Hut*, 162 F.3d 1062, 1072-1074 (10th Cir 1998) (when management knew or should have known of hostile or offensive environment based on sex created by customers and failed to take corrective action, employer violated federal anti-discrimination law); *Crist v. Focus Homes*, 122 F.3d 1107, 1111-1112 (8th Cir. 1997) (employer’s failure to take corrective measures after resident in group home created hostile environment based on sex violated federal and state anti-discrimination law).

In *Turnbull*, the court noted that the “negligence analysis can be divided into two separate inquiries.” 255 F.3d at 1244. First, did the defendant *know* of the harassment. Second, did the employer respond appropriately to the known dangers. *Id.* In determining whether a defendant has adequately responded to indirect discrimination resulting in an injury (creation of a hostile environment), courts engage in a *negligence* analysis. The plaintiff need not show deliberate indifference.³

³ The “deliberate indifference” standard developed in cases involving Title IX, was a direct result of statutory features that are not present here. Unlike the PHRA, Title IX did not contain an express private right of action for damages. *See Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979) (recognizing private cause of action); *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60 (1992) (holding that damages are available). In *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998), the Court limited the availability of damages because of Title IX’s status as a conditional federal funding statute, with an “administrative enforcement scheme

Existing research on the prevalence of bias-based bullying and its impact on school-aged children, discussed in the next two sections, compels the conclusion that any reasonable school district employee would know that the bullying endured by N.B. would injure him seriously. Because the District did not take appropriate corrective measures, the PHRA imposes liability for the harm caused by its negligence.

B. Abundant Empirical Evidence Establishes That Bias-Based Bullying Is a Pervasive Problem with Severe Consequences for Its Victims

Bias-based bullying that creates a hostile environment for students because of their membership in a protected class deprives the bullied students of the benefits of a public education just as segregation deprives students of the benefits of a public education. *Brown* relied heavily upon social science research establishing the harm of the discriminatory behavior. Mark C. Weber, *Meaningful Access and Disability Discrimination: The Role of Social Science and Other Empirical Evidence* (August 1, 2017) at 2, 39 *Cardozo Law Review* __ (forthcoming), available at SSRN: <https://ssrn.com/abstract=3012118> (last visited

[that] presupposes that an official . . . advised of a . . . violation **refuses** to take” corrective action.” 524 U.S. at 290. According to the Court, this implies a higher standard than negligence, resulting in the imposition of the requirement of deliberate indifference for damages liability. *Id.* Because the PHRA does include an express cause of action, it is appropriate to impose liability for failure to take corrective action, without imposing a heightened standard of deliberate indifference.

Jan. 10, 2018) .Similarly, social science research establishes that bullying harms students with disabilities as well as other students who are members of protected classes.

Bullying is defined as “any unwanted aggressive behavior(s) by another youth or group of youths who are not siblings or current dating partners that involves an observed or perceived power imbalance and is repeated multiple times or is highly likely to be repeated.” Chad A. Rose, Christopher D. Slaten, *et al.*, *Bully Perpetration and Self-Esteem: Examining the Relation Over Time*, 42 Behavioral Disorders 159, 159 (2017), available at <http://bit.ly/roseslaten>; see also Center for Disease Control (CDC), *Fact Sheet: Understanding Bullying* (2016), <http://bit.ly/cdcbullying> (CDC Factsheet) (last visited Jan. 18, 2018) (bullying generally defined to mean “any unwanted aggressive behavior(s) by another youth or group of youths . . . that involves an observed or perceived power imbalance and is repeated multiple times or is highly likely to be repeated”); Kimberly A. Twyman, *et al.*, *Bullying and Ostracism Experiences in Children With Special Health Care Needs*, 31 J. Developmental & Behavioral Pediatrics 1, 1 (2010), available at <http://bit.ly/twymansay> (last visited Jan. 18, 2018) (distinguishing bullying from “peer conflict,” where the parties are “equally matched—physically and/or psychologically”—and noting that bullying involves an imbalance of power “where the target has difficulty to defend him or herself and

feels helpless against the aggressor”); William J. Hall, *Initial Development and Validation of the BULLYHARM: The Bullying, Harassment, and Aggression Receipt Measure*, 53 *Psychology in the Schools* 984, 985 (2016), available at <http://bit.ly/bullyharm16> (last visited Jan. 18, 2018).

“Scholars have long recognized that prevention of youth aggression and bullying is a major public health issue.” Kathryn L. Modecki, *et al.*, *Bullying Prevalence Across Contexts: A Meta-analysis Measuring Cyber and Traditional Bullying*, 55 *J. of Adolescent Health* 602, 602 (2014), available at <http://bit.ly/modeckibullying> (last visited Jan. 9, 2018); Chad A. Rose, Melissa Stormont, *et al.*, *Bullying and Students with Disabilities: Examination of Disability Status and Educational Placement*, 44 *School Psych. Rev.* 425, 425 (2015), available at <http://bit.ly/2rosestor> (last visited Jan. 18, 2018) (“[p]ervasive peer aggression and bullying have emerged as a notable public health concern for school-aged youth. Bullying victims “tend to show high levels of emotional difficulties, such as depression, anxiety, loneliness, and difficulties with self-esteem, when compared to other students.”); Lyndsay N. Jenkins, *et al.*, *Social, Emotional and Cognitive Factors Associated with Bullying*, 46 *Sch. Psych. Rev.* 42, 44 (2017), available at <http://bit.ly/jenkinsdem> (last visited Jan. 18, 2018); see also Mitch Van Geel, *et al.*, *Relationship Between Peer Victimization, Cyberbullying, and Suicide in Children and Adolescents*, 168 *JAMA Pediatrics*

435, 440 (2014), available at <http://bit.ly/vangeeljama> (last visited Jan. 18, 2018) (meta-analysis demonstrated association between peer victimization and adolescent suicide or suicidal ideation); Bonnie Bell Carter, *et al.*, *The Fear Factor and Students With Disabilities*, 21 Int'l J. Special Educ. 11, 12 (2006), available at <http://bit.ly/carterspencer> (last visited Jan. 18, 2018) (bullying “[i]ncreasingly . . . being recognized as a serious threat to the health and development of our nation’s children); Jaana Juvonen, *et al.*, *Bullying Among Young Adolescents: The Strong, the Weak, and the Troubled*, 112 Pediatrics 1231 (2003), available at <http://bit.ly/juvonen03> (last viewed Jan. 18, 2018) (bullying and victimization recognized as health problems because of association with a range of adjustment problems).

Bullying is associated with “lowered academic achievement and aspirations, increased anxiety, loss of self-esteem and confidence, depression and post-traumatic stress, deterioration in physical health, self-harm and suicidal thinking, suicide, feelings of alienation, absenteeism and other negative impacts, both educational and health related.” Jonathan Young, *et al.*, *Bullying and Students with Disabilities: A Briefing Paper from the National Council on Disability*, March 9, 2011, available at <http://www.ncd.gov/publications/2011/March92011> (last visited Jan. 4, 2018) (NCD Paper); see also Tonja Nansel, *Cross-national Consistency in the Relationship Between Bullying Behaviors and Psychosocial Adjustment*, 158

Archive Pediatric & Adolescent Med. 730, 733-35 (2004), available at <http://bit.ly/crossnatl> (last visited Jan. 18, 2018); George G. Bear, *et al.*, *Differences in Bullying Victimization Between Students With and Without Disabilities*, 44 Sch. Psych. Rev. 98, 98 (2015), available at <http://bit.ly/bearspr> (last visited Jan. 18, 2018) ; Christina Yanez, *et al.*, *Student Victimization in U.S. Schools: Results from the 2015 Crime Supplement*, at 9 (2018), U.S. Dep't of Educ., Institute of Education Sciences, National Center for Education Statistics, available at <http://bit.ly/2018nces> (last visited Jan. 4, 2018); Jonathan Nakamoto, *et al.*, *Is Peer Victimization Associated with Academic Achievement?*, 19 Social Development 221, 234 (2010), available at <http://bit.ly/nspeervictim> (last visited Jan. 18, 2018) (meta-analysis revealed significant negative association between peer victimization and academic functioning); David S.J. Hawker, *et al.*, *Twenty Years' Research on Peer Victimization and Psychosocial Maladjustment: A Meta-analytic Review of Cross-Sectional Studies*, 41 J. Child Psychol. Psychiat. 441, 451 (2000), available at <http://bit.ly/hawker00> (last visited Jan. 18, 2018) (“victims of peer aggression experience more negative affect, and negative thoughts about themselves, than other children”); Rose & Stormont, *supra*, at 426 (“victimization is associated with lower levels of school engagement and academic outcomes and higher levels of delinquent behaviors”); Carter, *supra*, at 12 (effects of bullying include low morale, despair, truancy, chronic illnesses, anxiety, depression, poor

self-esteem, impaired concentration).

Bullying is so prevalent and the impact so deleterious that all 50 states and the District of Columbia have adopted anti-bullying legislation. Rose & Slaten, *supra*, at 159. Bullying negatively affects victims' school performance, emotional well-being, mental health, and social development. Nansel, *supra*, at 733-35; *see also* CDC Factsheet, *supra* ("Bullying may inflict harm or distress on the targeted youth including physical, psychological, social, or educational harm."). As the United States Department of Education (DOE) recognizes, "[s]tudents who are targets of bullying behavior are more likely to experience lower academic achievement and aspirations, higher truancy rates, feeling of alienation from school, poor relationships with peers, loneliness, or depression." DOE, Dear Colleague Letter (Aug. 20, 2013) at 2 (2013 DCL), available at <http://bit.ly/102013dcl>.

A 2017 report by the DOE, the Institute of Education Sciences, and the National Center for Education Evaluation and Regional Assistance reaffirms that "studies have linked teasing and bullying in high school with lower academic performance and higher dropout rates." Stephen Lipscomb, *et al.*, *Preparing for life after high school: The characteristics and experiences of youth in special education*, DOE, at 60 (March 2017), available at <http://bit.ly/lipshaim> (last visited Jan. 8, 2018); *see also* Jaana Juvonen, *et al.*, *Bullying Experiences and*

Compromised Academic Performance Across Middle School Grades, 31 J. Early Adolescence 152, 167 (2011) (finding “robust direct associations between peer victimization and compromised academic performance over time), available at <http://bit.ly/2juvonen> (last visited Jan. 18, 2018); *Shore Reg’l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 196 (3d Cir. 2004) (victim of bullying diagnosed with depression and subsequently needed special education). Overall, victims of bullying reported “significantly higher levels of health problems, poorer emotional adjustment, [] poorer school adjustment[,] [and] significantly poorer relationships with classmates than uninvolved youth” compared to non-bullied students. Nansel, *supra*, at 733–34.

The CDC has found that bullying “has serious and lasting negative effects on the mental health and overall well-being of youth involved in bullying in *any* way including: those who bully others, youth who are bullied, as well as those youth who both bully others and are bullied by others, . . . bully-victims.” CDC, *The Relationship Between Bullying and Suicide: What We Know and What it Means for Schools* at 2 (Apr. 2014), available at <http://bit.ly/cdcbully14> (last visited Jan. 8, 2018). Even youth who are merely bystanders report feelings of helplessness and less sense of support from responsible adults. Bullying results in many negative outcomes, including “depression, anxiety, involvement in interpersonal violence or sexual violence, substance abuse, poor social

functioning, and poor school performance, including lower grade point averages, standardized test scores, and poor attendance.” *Id.*

Youths who report victimization of bullying behavior have an elevated level of suicide-related behavior. *Id.*; Anna S. Mueller, *et al.*, *Suicide Ideation and Bullying Among US Adolescents: Examining the Intersections of Sexual Orientation, Gender, and Race/Ethnicity*, 105 *Am. J. of Pub. Health* 980, 983 (2015), available at <http://bit.ly/muellerjames> (last visited Jan. 18, 2018) (being bullied associated with higher odds of suicidal ideation among all students). Sadly, bullying has led to some students becoming so distraught that they resort to suicide. *See, e.g., Lamberth v. Clark Cnty. Sch. Dist.*, 698 F. App’x 387, 388 (9th Cir. 2017) (after being bullied for three months, student committed suicide, asking in her note that someone tell the schools so others would not be bullied in the future); *Tumminello v. Father Ryan High Sch., Inc.*, 678 F. App’x 281, 282 (6th Cir. 2017) (student committed suicide after students called him “gay” and “fag” and suggested that he kill himself); *Estate of Lance v. Lewisville Indep. Sch. Dist.*, 743 F.3d 982, 987 (5th Cir. 2014) (student who had a speech impairment, ADHD, and emotional disabilities “locked himself inside of the school nurse’s bathroom and took his own life” after being bullied); *Spring v. Allegany-Limestone Cent. Sch. Dist.*, No. 14-cv-476S, 2017 U.S. Dist. LEXIS 209250, at *4-*5 (W.D.N.Y. Dec. 19, 2017) (student committed suicide after being subjected

to numerous acts of fear and intimidation motivated in whole or part by his disabilities); *Long v. Murray Cnty. Sch. Dist.*, No. 4:10- CV-00015-HLM, 2012 U.S. Dist. LEXIS 86155 (N.D. Ga. May 12, 2012), *aff'd in part*, 522 F. App'x 576 (11th Cir. 2013) (student with Asperger's Syndrome committed suicide after having been subjected to bullying).

C. Bullying Creates Great Risk to the Ability of Students with Disabilities to Enjoy the Benefits of a Public Education

1. Students with differences are particularly vulnerable to bullying

“[O]ne meaningful factor that consistently predicts victimization is being different from the larger peer group.” Sandra Graham, *Victims of Bullying in Schools*, 55 *Theory Into Practice* 136, 139 (2016), *available at* <http://bit.ly/graham2016> (last visited Jan. 18, 2018); Chad A. Rose, Amanda B. Nickerson, *et al.*, *Advancing Bullying Research from a Social-Ecological Lens*, 44 *School Psychology Rev.* 339, 343 (2015), *available at* <http://bit.ly/rosenick> (last visited Jan. 18, 2018) (traditionally marginalized populations at escalated risk for bullying). “Young people from particular groups, such as those who are gay, lesbian or bisexual (GLB); those who are overweight; and those who have a physical disability or emotional or behavioral problem, report grossly higher levels of victimization than other young people. Weight, perceived sexual orientation, and ability in school are the most commonly observed ‘reasons’ for

harassment.” Marla E. Eisenberg, *et al.*, *Vulnerable Bullies: Perpetration of Peer Harassment Among Youths Across Sexual Orientation, Weight, and Disability Status*, 105 Am. J. Pub. Health 1784, 1784 (2015), available at <http://bit.ly/eisengower> (last visited Jan. 18, 2018);

Indeed, the DOE issued several Dear Colleague Letters (DCL) “in response to increased evidence that students from traditionally marginalized populations are more heavily entrenched within the bullying dynamic when compared with populations of majority.” Rose & Nickerson, *supra*, at 343; see DOE, Dear Colleague Letter (July 25, 2000), available at <http://bit.ly/dclharass>; DOE, Dear Colleague Letter (October 26, 2010) at 1, available at <http://bit.ly/dclbullying>; 2013 DCL, *supra*; DOE, Dear Colleague Letter (October 21, 2014), available at <http://bit.ly/3014dcl>.

“Among specific populations, such as students with disabilities and students who identify as lesbian, gay, bisexual, or questioning, the effects of victimization are especially worrisome.” Matthew T. King, *et al.*, *Suicidality and Intersectionality Among Students Identifying as Nonheterosexual and With a Disability*, 84 *Exceptional Children* 141, 143 (2018), available at <http://bit.ly/kingmerrin> (last visited Jan. 18, 2018) (students with disabilities are 1.5 times more likely to report being victimized by bullying); see also Tawanda Majoko, *Inclusion of Children with Autism Spectrum Disorders: Listening to and*

Hearing Voices from the Grassroots, 46 *J. Autism Dev. Disorders* 1429, 1430 (2016) (students with autism “across elementary, middle and high school levels have been reported to experience alarmingly high rates of bullying victimization”); Robert W.S. Coulter, A.L. Herrick, *et al.*, *Sexual Orientation Differences in Positive Youth Development: The Mediation Role of Bullying Victimization*, 106 *Am. J. Pub. Health* 691, 696 (2016), available at <http://bit.ly/coulter16> (last visited Jan. 18, 2018) (bullying victimization is major driving force in negative outcomes for sexual-minority youths); Eisenberg, *supra*, at 1784 (students with disabilities and sexual minorities “especially vulnerable to poor psychosocial outcomes resulting from harassment”); Dorothy L. Espelage, *Bullying and the lesbian, gay, bisexual transgender, questioning (LGBTQ) community*, White House Conference on Bullying Prevention, 65, 66, available at <http://bit.ly/espelage> (last visited Jan. 8, 2018) (sexual minority youth at greater risk for depression and self-destructive behavior such as suicide, especially if they are bullied frequently); Brendesha M. Tynes, *et al.*, *An Unwelcomed Digital Visitor in the Classroom*, 44 *School Psychology Rev.* 407, 418 (2015), available at <http://bit.ly/tynes4> (adolescents subjected to cyberbullying based on race showed decreased academic motivation).

“Peer aggression and victimization by bullying are persistent problems for students receiving special education services for their disabilities.” Michael T.

Hartley, *et al.*, *Comparative Study of Bullying Victimization Among Students in General and Special Education*, 81 *Exceptional Children* 176, 176 (2014), available at <http://bit.ly/Hartley14> (last visited Jan. 18, 2018). A “growing body of evidence suggests that students with disabilities are disproportionately represented within the bullying dynamic as perpetrators, victims, and bully-victims.” Chad A. Rose & Nicholas A. Gage, *Exploring the Involvement in Bullying Among Students With Disabilities Over Time*, 83 *Exceptional Children* 298, 298 (2017), available at <http://bit.ly/rosegage> (last visited Jan. 18, 2018); Bear, *supra*, at 98; Chad A. Rose, Anjali J. Forber-Pratt, *et al.*, *The Influence of Psychosocial Factors on Bullying Involvement of Students with Disabilities*, 52 *Theory Into Practice* 272, 273 (2013), available at <http://bit.ly/roseforber> (last visited Jan. 18, 2018). “Compared with students without disabilities, students with mild to moderate cognitive disabilities were 2 to 3 times more likely to be victimized; students with observable disabilities were 2 to 4 times more likely to be victimized.” Rose & Stormont, *supra*, at 427; *see also* King, *supra*, at 141. And adolescents with developmental disabilities have even higher rates of victimization (19% - 94% vs. 12% - 41%) when compared with typically developing peers. Paul R. Sterzing, *et al.*, *Bullying Involvement and Autism Spectrum Disorders*, 166 *Arch Pediatric Adolescent Medicine* 1058 (2012), available at <http://bit.ly/sterzing> (last visited Jan. 18, 2018); Carter, *supra*, at 12.

In short, disability status serves as a risk factor for increased victimization over time.” Rose & Stormont, *supra*, at 427.

Children with ASD “may be uniquely vulnerable to this form of aggression given the social and relational problems that are hallmarks of their condition.” Sterzing, *supra*, at 1058-1059. These students “experience difficulty using and understanding pragmatic language, which may limit their ability to connect with and form relationships with others. Moreover, some children with ASD are unable to interpret social situations appropriately or are unable to discriminate manipulation and deceit from good intentions.” Erin E. Ofe, *et al.*, *School-Based Speech-Language Pathologists’ Knowledge and Perceptions of Autism Spectrum Disorder and Bullying*, 47 *Language, Speech, and Hearing Services in Schools* 59, 61 (2016), available at <http://bit.ly/ofeslp> (last visited Jan. 18, 2018); see also Jessica H. Schroeder, *Shedding Light on a Pervasive Problem: A Review of Research on Bullying Experiences Among Children with Autism Spectrum Disorders*, 44 *J. Autism Dev. Disorders* 1520, 1521 (2014), available at <http://bit.ly/jhs2014> (last visited Jan. 18, 2018) (increased risk of bullying related to difficulties forming and maintaining positive peer relationships); NCD Paper, *supra*, at 1, 2; see also Chad A. Rose & Dorothy L. Espelage, *Risk and Protective Factors Associated with the Bullying Involvement of Students with Emotional and Behavioral Disorders*, 37 *Behavioral Disorders* 133, 134 (2012), available at

<http://bit.ly/2espelage> (last visited Jan. 18, 2018) (research “suggests that poor social skills serve as a common contributing factor for the overrepresentation of students with disabilities within the bullying dynamic”).

Likewise, several factors increase the likelihood that bullies will victimize children with learning disabilities (LD), who engage in fewer interactions, are less likely to initiate interactions, and are often less tactful and cooperative than typically developing peers.” Faye Mishna, *Learning Disabilities and Bullying: Double Jeopardy*, 36 J. of Learning Disabilities 336, 337 (2003), available at <http://bit.ly/mishna03> (last visited Jan. 18, 2018). “Approximately 25% to 30% of students with LD are socially rejected, in comparison to 8% to 16% of their peers.” *Id.* The resulting lack of social support “may allow bullies to attack without worry of retaliation.” *Id.* Additionally, the stigma associated with learning disabilities leads to bias against them. *Id.* Students with disabilities often have social skills and/or executive functioning deficits,⁴ both of which are associated with increased likelihood of bullying. Jenkins, *supra*, at 44-45. Lack of social skills limits the development of peer social supports, which protect against bullying. Chad A. Rose, Dorothy L. Espelage, *et al.*, *Bullying and Middle School*

⁴ “Social skills are observable behaviors often used to determine if someone has social competence, such as empathy, assertiveness, cooperation, and responsibility.” Jenkins, *supra*, at 44. “Executive functioning encompasses a set of self-regulatory processes responsible for problem solving and the management of goal-oriented behavior.” *Id.*

Students With and Without Learning Disabilities, An Examination of Social-Ecological Predictors, 48 J. of Learning Disabilities 239, 253 (2015), available at <http://bit.ly/roseesp1> (last visited Jan. 18, 2018).

Even more concerning, many children underreport bullying. “Possible reasons for this underreporting are shame, fear of retaliation, the inherent secrecy of bullying, and the children’s belief that they themselves are to blame, that should handle the problem on their own, and that telling others will not help.” *Id.* at 343. And “students with LD are less inclined than [peers] without LD.” *Id.* For students with ASD, data indicate that “reports may not capture the totality of bullying experiences.” Marisa H. Fisher and Julie Lounds Taylor, *Let’s Talk About It: Peer Victimization Experiences as Reported by Adolescents with Autism Spectrum Disorder*, 20 *Autism* 402 (2016), available at <http://bit.ly/fisherlounds> (last visited Jan. 18, 2018).

Consequently, students with disabilities are “more likely to worry about school safety and being injured or harassed by their peers.” *See* Conway F. Saylor, *et al.*, *Perceived Bullying and Social Support in Students Accessing Special Inclusion Programming*, 21 *J. Developmental & Physical Disabilities* 69 (2008), available at <http://bit.ly/saylorleach> (last visited Jan. 18, 2018). Students with learning disabilities report being threatened, assaulted, and having their possessions taken away from them with greater frequency than their peers. Carter,

supra, 21 Int'l J. Special Educ. at 18.

2. The impact of bullying is often more intense for children with disabilities

Even without the complication of bullying, students with learning disabilities “report more loneliness, lower social competence, and a decreased sense of belonging when compared to their peers without disabilities.” Rose & Espelage, *supra*, at 240. Research shows that “youths experiencing bias-based harassment at school are at greater risk for compromised health than are youth experiencing non-bias-based harassment or no harassment.” Stephen T. Russell, *et al.*, *Adolescent Health and Harassment Based on Discriminatory Bias*, 102 Am. J. Pub. Health 493, 495 (2012), *available at* <http://bit.ly/russinc> (last visited Jan. 18, 2018).

The same factors that place children with disabilities at greater risk for victimization “may also prevent them from coping successfully with being bullied.” Lisa L. Christensen, *et al.*, *Bullying Adolescents with Intellectual Disability*, *J. of Mental Health Research in Intellectual Disabilities* 49, 62 (2012), *available at* <http://bit.ly/christensen2> (last visited Jan. 18, 2018). For example, poor social skills may preclude forming close friendships and thus minimize opportunity to receive social support following incidents of victimization. *Id.*

“Mental health status and substance use levels were worse among youths suffering bias-based harassment than among those suffering non-bias-based

harassment. Bias-based harassment was associated marginally with grades but much more with truancy. Young people experiencing bias-based harassments had much higher odds than did those experiencing non-bias-based harassment of being threatened with a weapon and having property damaged at school.” *Id.* And the outcomes can be tragic. In one case, the incessant verbal and physical bullying of a student on the autism spectrum culminated with one of his peers kicking him down a flight of stairs, prompting suicidal ideations. He died of a self-inflicted gunshot wound. Chad A. Rose, Susan M. Swearer, *et al.*, *Bullying and Students with Disabilities: The Untold Narrative*, 45 *Focus on Exceptional Children* 1, 6 (2012), available at <http://bit.ly/untoldnarr> (last visited Jan. 18, 2018).

3. Bullying can create insurmountable obstacles to inclusive education, thereby denying children with disabilities their basic civil and human rights

Amici are particularly concerned with the impact of bullying on the ability of children with disabilities to access their education in the least restrictive environment. An individual’s social and environmental context determines the extent to which her exceptionality is actually disabling. “Within their multiple social contexts, children with exceptionalities may experience acceptance, positive validation for their strengths and talents, and support in coping with their weaknesses; but all too often they experience rejection, negative reflections of their worth, and barriers to inclusion and participation.” Joanne G. Cummings, *et*

al., *Bullying and Victimization Among Students With Exceptionalities*, at 3 (2006), available at <http://bit.ly/bullyexceptional> (last visited Jan. 22, 2018). Adult educators are responsible for organizing the educational environment to ensure that peer victimization does not render inclusive education impossible.

The preference for inclusive education reflects not only United States law and policy, but “compliance with civil rights movements as expressed in international conventions and human rights charters, including the Salamanca Statement (UNESCO 1994) and the Convention on the Rights of Persons with Disabilities.” Majoko, *supra*, at 1430. Representatives of 92 countries and 25 organizations signed the Salamanca Statement, which says “those with special educational needs must have access to regular schools.” Thomas Hehir, *et al.*, *A Summary of the Research Evidence on Inclusive Education*, at 4 (2016), available at <http://bit.ly/sumresearch> (last visited Jan. 9, 2018). The 2006 United Nations Convention on the Rights of Persons with Disabilities “binds its 161 signatory states to ensure that ‘persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live.’” *Id.*

It is therefore unsurprising that special education case law emphasizes and re-emphasizes the importance of education of students with disabilities in the least restrictive appropriate environment. IDEA mandates that children with disabilities

be educated in the general education classroom to the maximum extent appropriate. 20 U.S.C. § 1412(a)(5). Congress has made involvement and progress in the “general curriculum” an overall priority and goal for students with disabilities. 20 U.S.C. § 1400(c)(5)(D).

The policy favoring inclusion enjoys great support in academic research. In the 2004 reauthorization of IDEA, Congress relied on “30 years of research and experience, 20 U.S.C. § 1400(c)(5). That research showed that students with disabilities who are educated in general education classes do better academically and socially than comparable students educated in noninclusive settings, regardless of the type of disability or grade level. *See, e.g.,* Xuan Bui, *et al.*, *Inclusive Education Research & Practice*, Maryland Coalition for Inclusive Education, available at <http://bit.ly/mcieinclusion> (last visited Jan. 9, 2018) (compiling 30 years of research on inclusive practices demonstrating that included children perform better academically and socially and have a positive effect on peers without disabilities); Michael J. Guralnick, *et al.*, *Immediate Effects of Mainstreamed Settings on the Social Interactions and Social Integration of Preschool Children*, 100 *Am. J. Mental Retardation* 359 (1996), available at <http://bit.ly/immedeffects> (last visited Jan. 9, 2018) (finding that behavior of children with disabilities appears to be positively affected by participation in activities and classrooms with typically developing children); Sarah L. Ballard, *et*

al., *Addressing the General Education Curriculum in General Education Settings with Students with Severe Disabilities*, 42 *Research and Practice for Persons with Severe Disabilities* 155, 156 (2017), available at <http://bit.ly/ballard17> (research indicates that students with disabilities have improved access to the general education curriculum when educated in inclusive settings); Mary Fisher, *et al.*, *Development and Social Competence After Two Years for Students Enrolled in Inclusive and Self-Contained Educational Programs*, 27 *Res. & Prac. For Persons with Severe Disabilities* 165 (2002), available at <http://bit.ly/fishermeyer> (last visited Jan. 9, 2018); Lewis B. Jackson, *et al.*, *The Dynamic Relationship Between Context, Curriculum and Student Learning: A Case for Inclusive Education as a Research Based Practice*, 34 *Res. & Prac. For Persons with Severe Disabilities* 175, 190 (2008), available at <http://bit.ly/jackryn> (last visited Jan. 9, 2018) (inclusive education provides benefits to students with extensive support needs that self-contained settings cannot); Sue Buckley, *et al.*, *A comparison of mainstream and special education for teenagers with Down syndrome: Implications for parents and teachers*, 9 *Down Syndrome Res. & Practice* 54 (2006), available at <http://bit.ly/buckbird> (last visited Jan. 9, 2018) (children with Down syndrome included in general education were reading, writing, and speaking better than those educated in segregated settings); Hehir, *supra*, at 13 (studies of students around the world indicate that students with disabilities

instructed in general education classes outperformed their peers who had been educated in segregated settings).

Inclusion also benefits students with disabilities “through increased opportunities to interact and communicate with same-age peers without disabilities.” Ballard, *supra*, at 164. “[G]eneral education classroom environments that provide a supportive social context for learning . . . [are] important methods for facilitating access” for children with disabilities. *Id.* at 165. Development of peer relationships remains difficult for many students with disabilities. *Hehir, supra*, at 18

The goal of inclusion of “children with exceptionalities is to enhance their social development and educational opportunities, but without careful planning and attention to providing an inclusive, accepting social climate within a school, children with exceptionalities are vulnerable to being rejected, excluded and bullied.” Cummings, *supra*, at 12-13. The benefits of inclusion are therefore unavailable when children with disabilities are bullied. As one researcher noted:

It is required by law that students with ASD [autism spectrum disorder] be included in educational settings to the greatest extent possible. Not only does this give them exposure to typically developing peers, and access to a full range of normative social experiences, but, especially for students with ASD of average or above average cognitive and language abilities, inclusion in regular education is important to ensure that they are appropriately challenged. Unfortunately, while these characteristics of the general education setting offer important opportunities for growth in

social competency for adolescents with ASD, they also increase the probability of negative peer interactions and experiences.

Ryan Adams, *et al.*, *Peer Victimization and Educational Outcomes in Mainstreamed Adolescents with Autism Spectrum Disorder*, *J. Autism Dev. Disorders* 3557, 3563 (2016), available at <http://bit.ly/adams16> (last viewed Jan. 19, 2018) (citations omitted); *see also* Majoko, *supra*, at 1430 (students with “across elementary, middle and high school levels have been reported to experience alarmingly high rates of bullying victimization”).

Unfortunately, those students most at risk of bullying too often receive inadequate responses when they report bullying to teachers and other school officials. Even though students in special education reported higher levels of mistreatment based on disability, those students reported that adults in school told them not to tattle “almost twice as often as youth not in special education.” Stan Davis, *et al.*, *Preliminary results from the Youth Voice Research Project: Victimization & Strategies*, Youth Voice Project, at 15 (2010), available at <http://bit.ly/yvproject> (last visited Jan. 19, 2018). Educators are in a unique position to identify students with chronic histories of victimization and address their needs in the school setting. Cummings, *supra*, at 20. When they fail to do so, they deprive students with disabilities of access to a public education, in violation of the law.

CONCLUSION

The decision in this case should, consistent with the academic literature, recognize that bias-based bullying imposes significant harm and deprives students of educational benefit and opportunities. As such, bullying is indirect discrimination. *Amici* urge the Court to hold that the PHRA requires that school personnel on notice of bias-based bullying respond with appropriate corrective and remedial measures.

Dated: January 22, 2018

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Pursuant to Rule 2135 of the Pennsylvania Rules of Appellate Procedure, I certify that this brief complies with the Court's word count limits. According to the word processor used to prepare the brief, it includes 6,350 words.

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IN THE SUPERIOR COURT OF PENNSYLVANIA

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Appellant :
v. :
School District of Philadelphia, Jason Johnson and :
Jala Pearson :

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IN THE SUPERIOR COURT OF PENNSYLVANIA

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