No. 12-41139

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ESTATE OF MONTANA LANCE, *et al.*,

Plaintiffs-Appellants

v.

CAROL KYER, *et al.*,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFFS-APPELLANTS

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INTEREST OF THE UNITED STATES

This case involves Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (Section 504), which prohibits discrimination on the basis of disability by recipients of federal finding, and Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 *et seq.* (Title II), which prohibits such discrimination by all state and local governments. The United States has substantial enforcement responsibilities under both statutes and has an interest in their proper interpretation.

Additionally, preventing and redressing student-on-student bullying and harassment is a priority for the Executive Branch, and particularly the Department of Education which has issued interpretive guidance to state and local school officials on bullying and harassment, including disability harassment. See "Dear Colleague" Letter: *Bullying and Discriminatory Harassment*, Russlyn Ali, Assistant Secretary for Civil Rights, Department of Education (October 26, 2010), *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html.

QUESTIONS PRESENTED

The United States addresses only the following questions:

1. Whether Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act provide private damages actions against a school district that is deliberately indifferent to severe and pervasive student-on-student harassment based on disability.

2. Whether, under the analytical framework set out in *Davis* v. *Monroe County Board of Education*, 526 U.S. 629 (1999), a reasonable fact-finder could find the school district here deliberately indifferent to such harassment.

STATEMENT OF THE CASE

1. At issue here is the serious student-on-student harassment Montana Lance suffered from the age of six until age nine, when he committed suicide.

Near the start of his education, Montana was diagnosed with attention deficit hyperactivity disorder (ADHD), emotional disturbance, dyslexia, and a speech impediment. Record Excerpts ("R.E.") 80; Record Document ("Doc.") 94-36.[1] The school district was aware of his disabilities, as well as the ways in which those disabilities manifested themselves in his behaviors, and provided him special education services pursuant to the Individuals with Disabilities Education Act ("IDEA"). R.E. 80. As noted in his Individual Education Plan ("IEP") and other school records, his disabilities caused him to have "difficulty maintaining peer relationships."[2] See Doc. 94-40 at 4; accord Doc. 94-36 (Montana had "difficulty initiating social interactions with his peers and compromising in conflict situations"; in particular, "Montana was observed to be unsure and hesitant of how to seek a partner for a class activity"). A later psychological assessment further indicated that he had major depressive disorder, autism, and Asberger's syndrome.

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[1] As amicus curiae, the United States does not have access to the consecutively paginated record prepared by the parties. Accordingly, this brief cites documents as they appear in the district court record. For the Court's convenience, where possible, we cite to the record excerpts filed by appellants.

[2] An IEP is a written document, developed by teachers, administrators, and parents, and reviewed annually, that is required under the IDEA. It lays out how the child's disability affects his educational progress and, for a child like Montana, generally includes behavioral supports. See 20 U.S.C. 1414(d).

R. 122 at 2.[3]

Beginning in kindergarten, Montana attended Stewarts Creek Elementary School in the Lewisville Independent School District. From the first year, he was bullied by other students, which worsened as time passed, often including physical abuse. R.E. 80; Doc. 94-16 at 5-6, 11-12. Montana was bullied daily, or even multiple times per day. See Doc. 94-20 at 9; Doc. 94-22. By the time he was eight, Montana spoke of suicide, leading to a special meeting of his IEP team. See Doc. 94-37 at 9.

Montana's teachers and administrators were made aware of the bullying repeatedly. Additionally, Montana recorded in a school journal that he no longer could handle the bullying, and he told school personnel that he would kill himself. Nonetheless, school officials failed to investigate the allegations Montana and his parents made or take any steps to stop the bullying. Instead, they called Montana a "problem child" and "tattletale" when he reported the bullying. R.E. 80; see, *e.g.*, Doc. 94-17 at 12 (teacher's "first words" at parent-teacher conference were "that Montana's a tattletale"). When Montana asked to stay inside during recess to avoid bullying, his teachers forced him to go outside and "work on his social skills." Doc. 94-17 at 11.

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[3] There is no evidence that the school district ever officially diagnosed Montana with these conditions, which were not added to his IEP. R.E. 97.

Not only did school officials not intervene to help, but they punished Montana for his response. In December 2009, when Montana was nine years old and in fourth grade, he pulled a small pen knife from his pocket in response to bullying. The other students involved received a day of in-school suspension, while Montana was sent to an alternative school for eight days. R.E. 81. This incident followed closely one in late October, when Montana told another child he had a knife, but no knife was found on him. See Doc. 76-2 at 4.

In January 2010, Montana returned to his regular classroom, where he faced continued bullying. He was sent to the office for in-school suspension, where he locked himself in the nurse's office bathroom and fatally hung himself. R.E. 81.[4]

2. Montana's experience was not unusual at Stewarts Creek. Parents and other children testified to a culture of severe bullying – especially of those children perceived as different – that went uninvestigated and unremedied. One mother of a second grader reported that, six months after she reported to various school officials that her daughter was being bullied pervasively, nothing had been done. See Doc. 94-33 at 8-9. Her daughter's face was pushed into concrete, requiring dental surgery to fix two broken front teeth. *Id.* at 10-11. A former student was

[4] Plaintiffs allege that school officials ignored signs of Montana's suicidal intentions and failed to take reasonable steps to ensure they could maintain access to the bathroom. We take no position on the issue whether defendants are culpable in Montana's suicide.

"slammed into a balance beam" while in third grade, leading to hospitalization, and was hospitalized again for a concussion in fourth grade after being thrown "into a metallic slide." Doc. 94-32 at 6-9. The school's consistent response was to punish the child who was bullied along with the child doing the bullying, *id.* at 7. See also Doc. 94-31 at 6, 8 (student was constantly bullied, with bullies saying "the school's for normal people," and was told by teachers "to get over it"); Doc. 94-30 at 5-7; Doc. 94-20 at 6-8 (student faced constant bullying, including a punch to the head and being called "Four-Fingers," because of his missing finger; school officials called him "a tattletale" when he reported it); Doc. 94-16 at 4-5 (former student was "frequently" bullied, including physically, and told school, "but nothing was done about it"); Doc. 94-18 at 5-6 (former student reported bullying to teacher and principal, to no effect); Doc. 94-21 at 5-7 (mother of former student complained of bullying and received no response).

Reviewing Montana's record, a psychologist found "gross departure from accepted standards among educational professionals in dealing with Montana Lance relating to and based on his disabilities," see Doc. 94-1 at 33, "little documentation" that any school official "considered his disabilities, or implemented appropriate strategies in disciplining him," *id.* at 45, and that school employees had shown "deliberate indifference to issues involving bullying." Doc. 94-1 at 43. The psychologist found that Montana's and his parents' "numerous

reports of and complaints about bullying," and the "injuries he sustained," "should have triggered an investigation to determine whether bullying occurred," but there was none. *Id.* at 35; accord *id.* at 43.

3. Montana's estate, by and through his parents, sued the school district and certain individuals under the Due Process Clause, Title II of the Americans with Disabilities Act, 42 U.S.C. 12131 *et seq.*, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, and Texas state law. A magistrate judge recommended dismissing all claims. With respect to the constitutional claim, the magistrate found that a school has no constitutional duty to protect students from their peers. R.E. 85-89.

Plaintiffs' claims under the ADA and the Rehabilitation Act failed, the magistrate found, because the school and its employees did not "intentionally discriminate[] against Montana solely on the basis of his disability." R.E. 90. The magistrate stated that defendants "grossly departed from accepted standards among educational professionals," R.E. 91, but held that "gross negligence" does not meet the standard of intentional discrimination without evidence that "these actions were taken against Montana solely on the basis of his disability." R.E. 92.

The district court granted the defendants summary judgment, notwithstanding finding that "[t]he treatment of peer bullying by [school] officials is, in the court's opinion, inadequate." R.E. 102. The court found that the school

officials' "approach to what seems to be fairly wide-spread bullying * * * is to bury their collective heads in the sand. When faced with a fork in the road, the District's choice seems to consistently be the path of inaction." R.E. 102. It concluded: "Montana's death might have been preventable had Defendants chosen to act on the subject of bullying." R.E. 102.

Nonetheless, the court found that plaintiffs have no claim under the ADA or the Rehabilitation Act "for disability-based peer-on-peer harassment" that goes unaddressed by school officials. R.E. 101. Rather, the court held, plaintiffs had to show "that Montana was bullied or treated differently *by school administration* because of his disability," R.E. 102 (emphasis added), and could not do so: "To the contrary, what Plaintiffs' record reveals is that Defendants had a consistent policy of ignoring bullying against *all* students." R.E. 102. Except for "the student with a hand deformity," the district court found, "none of the numerous students who gave accounts of bullying against them * * * state that they are disabled, or have any kind of handicap." R.E. 102. And while school officials may have acted improperly when Montana complained of being bullied, the district court found, "there is, again, no indication that they did so in any way based on his disability." R.E. 102.

SUMMARY OF ARGUMENT

1. Bullying and peer harassment are widespread problems in the nation's

schools, and they have a particularly harsh impact on young students with disabilities. Children with disabilities, who frequently are socially isolated and vulnerable, are much more likely to be bullied and otherwise harassed. Where, as in this case, such harassment is severe and pervasive during the vulnerable elementary school years, it can do profound harm. The district court correctly found the school district's refusal to investigate the harassment of a young child with disabilities to be unjustifiable, but erred in finding that the law provides no private remedy.

Title II and Section 504 provide a cause of action for damages where a school district is deliberately indifferent to severe and pervasive student-on-student harassment based on disability.[5] Such a cause of action exists under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 (Title IX), with respect to student-on-student harassment based on sex, see *Davis* v. *Monroe County Board of Education*, 526 U.S. 629 (1999). Title II and Section 504 are similarly worded anti-discrimination laws and should be construed, consistent with *Davis*, to ensure that schools cannot with impunity evade their responsibility to protect the most

[5] We address only the legal standard applied in a private damages action against a school district in cases alleging deliberate indifference to student-on-student harassment. This case does not implicate, nor do we address, the standard applicable in other cases, including those seeking only injunctive relief and administrative or judicial actions brought by the Department of Education or Department of Justice.

vulnerable children.

2. Because the district court did not apply the *Davis* framework, this Court should remand to the district court to decide in the first instance whether plaintiffs adduced sufficient evidence to survive summary judgment. But if this Court should choose to decide that question, it should find that the record creates a jury question as to whether the school district was deliberately indifferent to severe and pervasive harassment based on disability.

In particular, a jury could find a connection between the harassment Montana suffered and his disabilities. Montana's disabilities, including his social isolation and unusual behavior that were closely associated with them, made him a vulnerable target for his harassers. Moreover, much of the harassing conduct – such as deliberately provoking a child with emotional disturbance – was, by its nature, intrinsically related to Montana's disabilities. Accordingly, a jury could find that he suffered disability-based harassment and need not find that his harassers knew of his particular disabilities or harbored animus to students with disabilities. A jury also could find that the harassment Montana suffered was sufficiently serious as to be actionable under Section 504 and Title II, and that school officials were on sufficient notice of it to trigger their obligation to act.[6]

[6] We take no position on the viability of plaintiffs' other claims.

ARGUMENT

I

A SCHOOL DISTRICT THAT IS DELIBERATELY INDIFFERENT TO STUDENT-ON-STUDENT DISABILITY-BASED HARASSMENT IS LIABLE FOR DAMAGES

Both Section 504 and Title II require school officials to address severe or pervasive harassment of students with disabilities by their peers. This Court should join the other circuits that have found that, where school officials are aware of, and deliberately indifferent to, a substantial risk that disability-based harassment is occurring, school districts can be liable for damages. See *S.S.* v. *Eastern Ky. Univ.*, 532 F.3d 445, 453 (6th Cir. 2008).[7] As this Court appears to have recently acknowledged in *Stewart* v. *Waco Independent School* District, No. 11-51067, 2013 WL 1091654 (5th Cir. Mar. 15, 2013), that holding follows directly from the Supreme Court's decision in *Davis* v. *Monroe County Board of Education*, 526 U.S. 629 (1999), a student-on-student sexual harassment case brought under Title IX.

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[7] See also, *e.g.*, *Preston* v. *Hilton Cent. Sch. Dist.*, 876 F. Supp. 2d 235, 241 (W.D.N.Y. 2012); *Long* v. *Murray Cnty. Sch. Dist.*, No. 4:10-cv-15, 2012 WL 2277836, at *25 (N.D. Ga. May 21, 2012); *Doe* v. *Big Walnut Local Sch. Dist. Bd. of Educ.*, 837 F. Supp. 2d 742, 755-756 (S.D. Ohio 2011); *Werth* v. *Board of Dirs.*, 472 F. Supp. 2d 1113, 1126-1127 (E.D. Wisc. 2007); *K.M.* v. *Hyde Park Cent. Sch. Dist.*, 381 F. Supp. 2d 343, 357-359 (S.D.N.Y. 2005); *Biggs* v. *Board of Educ. of Cecil Cnty.*, 229 F. Supp. 2d 437, 444 (D. Md. 2002).

1. Section 504 prohibits discrimination against an individual based on disability by any program or entity receiving federal funds. 29 U.S.C. 794(a) and (b)(2)(B). Title II prohibits disability-based discrimination by any public entity. 42 U.S.C. 12131-12132. Both statutes, using nearly identical language, also provide that otherwise qualified individuals may not be excluded from participation in, or denied the benefits of, public services because of their disabilities.[8] Although these statutes provide distinct sources of protection against disability-based discrimination, this Court has "equated liability standards under" the two statutes and so has examined them together. *D.A.* v. *Houston Indep. Sch. Dist.*, 629 F.3d 450, 453 (5th Cir. 2010).

Title IX, with operative language nearly identical to that of Section 504 and Title II, prohibits discrimination on the basis of sex, including sexual harassment.[9] *Davis* held that a school district is liable for damages when it "is deliberately

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[8] Section 504 provides: "No otherwise qualified individual with a disability * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. 794(a). Title II of the ADA provides, in pertinent part, that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132.

[9] Title IX provides that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. 1681(a).

indifferent to known acts of student-on-student sexual harassment and the harasser is under the school's disciplinary authority." 526 U.S. at 647. It concluded that such liability does not punish school officials for the acts of the students, but rather for their "*own* decision to remain idle in the face of known student-on-student harassment in [their] schools." *Id.* at 641. Under such circumstances, the Court found, a school district's failure to act, as in this case, is intentional discrimination. *Id.* at 643.

Davis thus establishes that a school district faces potential liability for damages if it fails to respond promptly and adequately to known student-on-student harassment based on sex. All four courts of appeals to consider the question have extended *Davis*'s reasoning to claims for damages based on student-on-student racial harassment under the similarly worded Title VI of the Civil Rights Act. See *Zeno* v. *Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 664-665 (2d Cir. 2012); *Bryant* v. *Independent Sch. Dist. No. I-38*, 334 F.3d 928, 934 (10th Cir. 2003); *Saxe* v. *State Coll. Area Sch. Dist.*, 240 F.3d 200, 206 & n.5 (3d Cir. 2001); *Monteiro* v. *Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1034 (9th Cir. 1998). Section 504 and Title II are worded almost identically to Title IX and Title VI with respect to the banned discrimination.[10] Moreover, Section 504 and Title II

[10] Title VI provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the (continued…)

incorporate the rights and remedies available under Title VI. See 29 U.S.C. 794a(a)(2); 42 U.S.C. 12133. *Davis* and its progeny, as well as multiple guidance documents issued by the Department of Education (see p. 2, *supra*), provide clear notice to school districts of their obligation to address student-on-student harassment.

Deliberate indifference in this context is one form of intentional discrimination, contrary to the apparent belief of the courts below. See R. 122 at 14 (distinguishing between "failure to act" and "intentional conduct"). Cf. *Bartlett* v. *New York State Bd. of Law Exam'rs*, 156 F.3d 321, 331 (2d Cir. 1998) ("[I]ntentional discrimination against the disabled does not require personal animosity or ill will. Rather, intentional discrimination may be inferred when a policymaker acted with at least deliberate indifference to the strong likelihood that a violation of federally protected rights will result from the implementation of the challenged policy … or custom.") (citations, brackets, and internal quotation marks omitted). And deliberate indifference to a discriminatory environment is especially problematic in the education context. As the Tenth Circuit aptly stated in a Title VI student-on-student harassment case:

(…continued)
benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. 2000d.

> Choice implicates intent. It is inapposite that a court could hold that maintenance of a hostile environment is never intentional. Such a broad holding would permit school administrators to sit idly, or intentionally, by while horrible acts of discrimination occurred on their grounds by and to students in their charge. School administrators are not simply bystanders in the school. They are the leaders of the educational environment. They set the standard for behavior. They mete out discipline and consequences. They provide the system and rules by which students are expected to follow.

Bryant, 334 F.3d at 933.

2. There is no basis for the defendants' argument below that application of the deliberate indifference standard to student-on-student harassment based on disability is foreclosed in this Court, alone among the circuits, by dicta in *Delano-Pyle* v. *Victoria County*, 302 F.3d 567 (5th Cir. 2002). See, *e.g.*, Doc. 135 at 7. Indeed, this Court's recent decision in *Stewart*, 2013 WL 1091654, at *6-12, suggests the contrary.

Regarding *Delano-Pyle*, in that case this Court reviewed a jury's finding that a county was liable under Title II and Section 504 for a police officer's mistreatment of an individual with a hearing impairment while investigating a car accident. This Court rejected the county's argument that it could not be held liable in the absence of a county policy to discriminate, finding that these disability anti-discrimination statutes – unlike constitutional obligations enforced through 42 U.S.C. 1983 – "impose an affirmative duty on public entities to create policies or procedures to prevent discrimination based on disability." 302 F.3d at 575. This

Court then turned to what it characterized as the county's "assertion that [the plaintiff] failed to establish deliberate indifference." *Ibid.* This Court stated:

> There is no "deliberate indifference" standard applicable to public entities for purposes of the ADA or the RA. However, in order to receive compensatory damages for violations of the Acts, a plaintiff must show intentional discrimination. The facts addressed at trial support the jury's finding of intentional discrimination [by the individual officer].

Ibid. (citation omitted).

Read in context, this passage from *Delano-Pyle* does not impose a higher intent standard than deliberate indifference with respect to the defendants' conduct in this case. Indeed, far from heightening the plaintiff's burden of proof, *Delano-Pyle* relieved the plaintiff from showing even deliberate indifference on the part of the municipality once plaintiff showed intentional discrimination by an employee. The bottom line is that nothing in *Delano-Pyle*, which pertains to a municipality's liability for the wrongdoing of its officers, reasonably can be read to reject the deliberate indifference standard in the far different context of a school district's response to student-on-student harassment, and any such statement would be dicta in any event.[11]

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[11] Montana's case, which involves only the specific context of school district liability for unchecked student-on student harassment, does not require this Court to revisit more broadly its suggestion in dicta in *Delano-Pyle* that where intentional discrimination has been met, the deliberate indifference standard does not apply. Other courts have held that the deliberate indifference standard is

(continued…)

The district court also erred in suggesting that school officials may tolerate student-on-student harassment based on disability with impunity so long as they also tolerate all other bullying and harassment. This perverse rule, if adopted, would reward those school officials who are the most indifferent to student-on-student harassment and permit its disastrous effects on the children entrusted to their care. For good reason, neither *Davis* nor its progeny have adopted it.[12]

II

PLAINTIFF HAS CREATED A TRIABLE ISSUE OF FACT REGARDING EACH ELEMENT OF THE DELIBERATE INDIFFERENCE TEST

Under the *Davis* framework, a fact-finder must find the following five elements satisfied for a plaintiff to prevail on a claim of deliberate indifference to student-on-student disability-based harassment:

(1) Plaintiff has a disability.

(…continued)
applicable to such claims outside the school context. See, *e.g.*, *Liese* v. *Indian River Cnty. Hosp. Dist.*, 701 F.3d 334, 345 (11th Cir. 2012); *Meagley* v. *City of Little Rock*, 639 F.3d 384, 389 (8th Cir. 2011); *Barber* v. *Colorado Dep't of Revenue*, 562 F.3d 1222, 1229 (10th Cir. 2009); *Mark H.* v. *Lemahieu*, 513 F.3d 922, 938 (9th Cir. 2008).

[12] A pre-*Davis* case, *Rowinsky* v. *Bryan Independent School District*, 80 F.3d 1006, 1008 (5th Cir. 1996), held that a Title IX claim based on student-on-student sexual harassment required showing that a school district responded differently to harassment complaints based on the complainant's gender. *Davis* rejected *Rowinsky*, 526 U.S. at 638.

(2) He or she was bullied or otherwise harassed based on that disability.

(3) The harassment was sufficiently severe or pervasive to create a hostile educational environment or deprive the plaintiff of equal educational opportunities.

(4) The defendant knew about the harassment.

(5) The defendant was deliberately indifferent to the harassment.

See *Davis*, 526 U.S. at 650 (describing similar requirements for Title IX action);[13] see, *e.g.*, *S.S.*, 532 F.3d at 454 (applying *Davis* to student-on-student disability harassment case); accord *Big Walnut*, 837 F. Supp. 2d at 751; *Werth*, 472 F. Supp. 2d at 1127-1128; *Biggs*, 229 F. Supp. 2d at 445.

There is no dispute regarding the first element – that Montana had serious disabilities. Below, the defendants disputed the other elements. This Court should remand for the district court to apply the deliberate indifference standard in the first instance. But in any event, the plaintiffs adduced sufficient evidence on each element to create a triable issue of fact.

A. The Harassment Montana Suffered Was Based On His Disabilities

A jury looking at the entire record easily could draw the reasonable inference that the hostile treatment Montana received from his peers was based on

[13] *Davis* involved sexual harassment, but actionable harassment is not limited to the type involved in that case, and obviously reaches the conduct to which Montana was subjected.

his disabilities and related behaviors. Indeed, there is no evidence that Montana was harassed for any other reason. See *K.M.* v. *Hyde Park Cent. Sch. Dist.*, 381 F. Supp. 2d 343, 358 (S.D.N.Y. 2005) (jury could reasonably infer that harassment was based on disability where no other reason was presented). The plaintiffs are not required to demonstrate that the young children who tormented Montana were aware that Montana had disabilities and consciously targeted him as a result. Indeed, given their age, it is unlikely that the harassers fully understood the reasons for their actions, let alone could be expected to express them. So long as the harassment was related to Montana's disabilities – and the behaviors and social isolation that were manifestations of his disabilities – the only intent at issue here is the defendants.' That is to say, the school officials committed intentional disability discrimination if they tolerated severe and pervasive harassment based on disability, whether or not the children inflicting the harassment understood it as such.

Here, a jury reasonably could infer that Montana's disabilities made him particularly vulnerable to bullying and harassment. His disabilities – including a speech impediment, emotional disturbance, and ADHD – marked him as different, created behavioral and social difficulties, and isolated him socially.[14] A jury also

[14] Considerable research now supports the common-sense conclusion that children with disabilities – including those whose disabilities, like Montana's,

(continued…)

could find that children seen as not "normal," including children with obvious disabilities like Montana's, were targeted for bullying. See, *e.g.*, Doc. 94-31 at 6; Doc. 94-20 at 6. Finally, to the extent that Montana's own behavior or other characteristics made him the subject of harassment, they are inextricably intertwined with his disabilities.[15] For example, Montana's teachers noted that he

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(…continued)
create behavioral and social difficulties – are far more likely to face severe bullying than are children without disabilities. The interagency-sponsored website www.stopbullying.gov addresses leading research on the subject at Bullying and Children and Youth and Special Needs, http://www.stopbullying.gov/at-risk/groups/special-needs/BullyingTipSheet.pdf, at 4 (last visited Mar. 18, 2013). Children with ADHD are likelier to be bullied, *id.* at 1, as are children with learning disabilities. *Id.* at 2. Children with speech impediments, too, face pervasive harassment. One study found that 83% of adults who stammer were teased or bullied as children; in 71% of those cases, it happened weekly or more. *Ibid.* Another study found that almost 90% of children with autism spectrum disorder (ASD) suffer from bullying, with more than 40% experiencing bullying that lasts for a year or more. Massachusetts Advocates for Children, *Targeted, Taunted, Tormented: The Bullying of Children with Autism Spectrum Disorder* (2009), at 2-3, *available at* http://www.massadvocates.org/documents/Bullying-Report.pdf. Nearly a third of surveyed children with ASD missed school as a result. *Id.* at 7.

[15] Harassment of students with disabilities may occur even where overt animus on the basis of disability is not apparent, because disabilities lead to social isolation that in turn leads to bullying. See *T.K.* v. *New York City Dep't of Educ.*, 779 F. Supp. 2d 289, 303 (E.D.N.Y. 2011) ("Without healthy social interaction, students with disabilities become targets of harassment."). "Many students with disabilities have significant social skills challenges, either as a core trait of their disability or as a result of social isolation due to segregated environments and/or peer rejection," and "[s]uch students may be at particular risk for bullying and victimization." Jonathan Young, *et al.*, *Bullying and Students with Disabilities: A*
(continued…)

was harassed precisely because his disabilities made him unusually easy to provoke. See, *e.g.*, Doc. 94-36 (second grade teacher reported that another student would "intentionally upset Montana," who "becomes easily upset"). Under these circumstances, a jury readily could conclude that the harassment Montana suffered was based on his disabilities. Indeed, this Court in *Stewart* acknowledged that a child's conduct can be "attributable to manifestations of * * * disabilities." 2013 WL 1091654, at *8 n.9.

B. The Harassment Was Sufficiently Severe And Pervasive

There is sufficient evidence here to create a jury question as to whether the harassment Montana suffered was sufficiently "severe, pervasive, and objectively offensive" to deny him "equal access to education."[16] See *Davis*, 526 U.S. at 652. Such harassment must go beyond "the sort of unpleasant conflict that takes place every day in * * * schools." *Sanches* v. *Carrollton-Farmers Branch Indep. Sch. Dist.*, 647 F.3d 156, 167 (5th Cir. 2011).

Whether student conduct rises to this level "depends on a constellation of surrounding circumstances, expectations, and relationships, including but not

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(…continued)
Briefing Paper from the National Council on Disability (2011), at 2, *available at* http://www.ncd.gov/publications/2011/March92011.

[16] Egregious harassment may also deprive a child of the free, appropriate public education (FAPE) mandated by the IDEA. See *T.K.*, 779 F. Supp. 2d at 294, 312-313. We take no position as to whether Montana was deprived of FAPE.

limited to, the ages of the harasser and the victim and the number of individuals involved." *Davis*, 526 U.S. at 651 (citation and internal quotation marks omitted). This inquiry is necessarily a fact-intensive one; the considerations relevant to its resolution will vary from case to case. In this case, a number of factors permit a jury easily to find that the harassment was sufficiently severe and pervasive. Among them are:

- **The frequency and duration of harassment.** Montana was harassed for years, sometimes on a daily basis, by multiple other students. See, *e.g.*, Doc. 94-17 at 9-10 (in second grade, Montana was teased or bullied more times than his father could "remember or count"). It is irrelevant whether, as defendants assert, no individual incident rose to the necessary level. See Doc. 135 at 11-12. The cumulative effect of this pattern of incidents is to alter the very nature of Montana's educational experience. See *Zeno*, 702 F.3d at 667 (three-and-a-half years of harassment); *Riccio* v. *New Haven Bd. of Educ.*, 467 F. Supp. 2d 219, 227-228 (D. Conn. 2006) ("Andree was targeted nearly every school day, in class, in-between classes, and at lunch.").

- **Physical harassment.** Montana suffered enough physical harassment to create an atmosphere of terror, culminating in Montana, at the age of nine, finding it necessary first to claim to have a knife and then actually to carry a knife to school. See *Zeno*, 702 F.3d at 667 ("[T]he evidence showed more than mere verbal harassment; Anthony also endured threats and physical attacks."). While harassment need not be physical to be sufficiently severe, actual physical attacks – and the threat of more – contribute to the creation of a hostile educational environment.

- **Montana's despair in response.** While we take no position on whether defendants bear responsibility for Montana's suicide, his response to the harassment he faced – including documented suicidal thoughts – demonstrate that the harassment at issue here had effects much like that at issue in *Davis*, where the plaintiff contemplated suicide. See *Davis*, 526 U.S. at 634; see also *Vance* v. *Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 259 (6th Cir. 2000) ("Given the frequency and severity of both

the verbal and physical attacks, it is no wonder that Alma was diagnosed with depression.").

- **Actual loss of classroom time.** Montana incurred discipline, some of which resulted in lost class time, for behavior that a jury could conclude arose directly from the harassment he endured. See, *e.g.*, Doc. 94-41 (incident that started with Montana being "verbally provoked" concluded with Montana receiving in-school suspension and not attending speech class).

- **Montana's youth.** While older and younger children alike suffer from harassment, the type of harassment presented here is particularly harmful to younger children. In elementary school, where socialization is as much part of the curriculum as math and reading, harassment that isolates a student deprives him of the full benefit of his educational program. See *K.M.*, 381 F. Supp. 2d at 360 (harassment led student to stop eating lunch with his peers). At a critical age, Montana was deprived of "a supportive, scholastic environment." See *Zeno*, 702 F.3d at 667.

C. Defendants Had Sufficient Notice Of A Substantial Risk Of Serious Harm

The record shows that school officials were aware early in Montana's education that he had odd behaviors tied to his disabilities and that he was being teased, and then more seriously harassed, by other children. A jury could conclude that defendants had sufficient notice that Montana was at risk of serious and pervasive disability-related harassment to trigger their legal obligation to act under Title II and Section 504. Plaintiffs need not establish that school officials had actual knowledge of specific incidents of disability-based harassment aimed at Montana. Rather, plaintiffs must show only that those officials had knowledge of "a substantial risk" that Montana was being bullied based on his disabilities and that he would suffer "serious harm" as a result. See this Court's decision in

Stewart, 2013 WL 1091654, at *12 (citing *Vance*, 231 F.3d 253). See also this Court's decision in *Rosa H.* v. *San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 658 (5th Cir. 1997). A school district cannot "escape liability * * * if an appropriate official [was on notice of] warning flags of substantial risk." *Baynard* v. *Malone*, 268 F.3d 228, 240 (4th Cir. 2001) (Michael, J., concurring in part and dissenting in part) (citing *Rosa H.* favorably); accord *Bostic* v. *Smyrna Sch. Dist.*, 418 F.3d 355, 361 (3d Cir. 2005) (upholding jury instruction, derived from *Rosa H.*, providing that "[a]n educational institution has 'actual knowledge' if it knows the underlying facts, indicating sufficiently substantial danger to students, and was therefore aware of the danger"); *Johnson* v. *Galen Health Insts., Inc.*, 267 F. Supp. 2d 679, 688 (W.D. Ky. 2003) (school has the requisite notice where it "possessed enough knowledge of the harassment that it reasonably could have responded with remedial measures to address the kind of harassment upon which plaintiff's legal claim is based"). Whether an official "had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence." *Farmer* v. *Brennan*, 511 U.S. 825, 842 (1994).[17]

[17] *Rosa H.*, *Baynard*, *Bostic*, and *Johnson* all state these principles in Title IX cases, while *Farmer* does so for a claim that prison officials ignored dangerous conditions for inmates. Because they analyze the same deliberate indifference standard, they apply readily here.

It is highly relevant that the incidents here took place in the elementary school context. School officials necessarily are more aware of, and more responsible for, young students' interactions with each other than, for example, employers are with respect to their employees' interactions. See *Davis*, 526 U.S. at 649 ("A university might not * * * be expected to exercise the same degree of control over its students that a grade school would enjoy.").

Given that context, the ample warning flags in the record put school officials on the requisite notice that Montana was at substantial risk. For example:

- School officials were aware that Montana was being teased by other children from the very start of his education. See, *e.g.*, Doc. 94-17 at 7 (kindergarten teacher reported teasing to Montana's parents); Doc. 94-36 (second grade teacher reported regular incidents of another student intentionally upsetting Montana). "[P]rior complaints made by the same student also provide actual notice, even if the conduct complained-of was not identical to the conduct which the plaintiff alleges should have been remedied." *Doe* v. *Green*, 298 F. Supp. 2d 1025, 1033-1034 (D. Nev. 2004) (collecting cases).

- School personnel had warning signs that the harassment Montana was suffering was becoming so severe as to affect his behavior and his educational experience. The assistant principal acknowledged that, in second grade, "Montana received many disciplinary referrals" and ultimately received "a psychological evaluation from the school." Doc. 76-2 at 2. In third grade, the assistant principal worked individually with Montana "because he had been getting in trouble at recess." *Id.* at 3. Montana's third-grade teacher was aware that he "was involved in fights with other students," though she testified that "it never crossed my mind that these were due to bullying." Doc. 76-7 at 3. Montana's special education counselor received reports from Montana's teacher "that other students did not want to sit near Montana or be part of his group" and that she had to take steps "to include him in classroom activities." Doc. 76-8 at 3.

- By the fourth grade, those warning signs were even clearer. Montana told

his teacher twice that he did not want to participate in recess because of bullying. Doc. 94-17 at 11-12. The assistant principal was aware that, in late October 2009, Montana told another child he had a knife to defend himself. Doc. 76-2 at 4. On November 4, a discipline referral sheet prepared by school officials describes an altercation beginning when "[a] student verbally provoked (or tried to) Montana" and leading to that student "push[ing] Montana into a stack of chairs." See Doc. 94-41. Official student reports of the December 18 incident in which Montana brandished a knife indicate that he was targeted for bullying. See Doc. 94-23 at 5 ("Some older kid told me to beat Montana up so I chased him and I held him and he pulled out his pocket knife."); *id.* at 3 ("Student B came and Student C said 'Beat him up again.'").

- Other students testified that teachers were told that Montana was being bullied. See, *e.g.*, Doc. 94-20 at 10.

- Stewart's Creek Elementary School had a culture of pervasive and unremedied bullying, sometimes based on disability, that other students reported to school officials. See, *e.g.*, Doc. 94-20 at 5-8. Past harm suffered by other students can put school officials on notice that a current student risks similar treatment. *Johnson*, 267 F. Supp. 2d at 688. While the school district received considerable notice that Montana himself was suffering disability-based harassment, their obligation to protect Montana from a known risk of such harassment predated any such notice. See *Doe* v. *School Bd. of Broward Cnty., Fla.*, 604 F.3d 1248, 1257 (11th Cir. 2010) (district liable for sexual harassment where it had notice of teacher's past inappropriate conduct; there is no need to show "notice of the prior harassment of the Title IX plaintiff herself"); accord *Escue* v. *Northern Okla. Coll.*, 450 F.3d 1146, 1154 (10th Cir. 2006). Moreover, while the treatment of these other students arguably satisfies the severe and pervasive standard, "lesser harassment may still provide actual notice * * * for it is the risk of such conduct that the [Section 504] recipient has the duty to deter." *Doe*, 604 F.3d at 1258.

A jury could conclude that this information was sufficient to give the defendants the requisite notice. A factfinder may conclude that an official "knew of a substantial risk from the very fact that the risk was obvious." *Farmer*, 511

U.S. at 842. The defendants – all educational professionals – knew Montana had disabilities that affected his behavior and put him at extreme risk of harassment. They knew he struggled to socialize with his peers. And if the plaintiffs' account is credited, defendants were told repeatedly over a three-year period that Montana was suffering from relentless and escalating harassment. A jury reasonably could infer that the defendants, their protestations to the contrary notwithstanding, had actual knowledge of much of the severe and protracted disability-based harassment that Montana experienced.

In any event, defendants had actual knowledge of enough facts to trigger their obligation to do more than "bury their collective heads in the sand," R.E. 102. To satisfy their obligations under Title II and Section 504, defendants had the ability and the duty to investigate the reports of harassment they received, to ascertain how serious that harassment was, and determine whether it was disability-related. They now seek to benefit from their own failure to do so, contending they lacked sufficient knowledge to be held liable. Precisely in order to avoid such a perverse outcome, the law does not require the plaintiffs to prove that the defendants had actual knowledge of all the relevant particulars of the harassment that Montana suffered. Rather, plaintiffs need only show that defendants had sufficient knowledge to put them on notice of "a substantial risk" of such harassment, see *Rosa H.*, 106 F.3d at 658, such that they "reasonably could

have responded with remedial measures." *Johnson*, 267 F. Supp. 2d at 687. Here, a jury easily could find that test met.

D. Defendants' Failure To Act Was Clearly Unreasonable

Defendants contend primarily that Montana did not suffer actionable harassment and that they were unaware of such harassment. Unsurprisingly, they have made little effort to show that, having been made aware of severe harassment, they took all appropriate steps to ameliorate it. Accordingly, we need not address this prong of the *Davis* test at length.

In general, a school district may be "deemed 'deliberately indifferent' to acts of student-on-student harassment only where the * * * response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances." *Davis*, 526 U.S. at 648; see, *e.g.*, *Doe*, 604 F.3d at 1258. A jury can find that the district's failure to investigate the disability-based harassment Montana suffered or take *any* action reasonably calculated to ameliorate it was clearly unreasonable.

CONCLUSION

This court should reverse the district court's order granting summary judgment with respect to the claim that defendants were deliberately indifferent to disability-based harassment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 18, 2013, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFFS-APPELLANTS with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) and Federal Rule of Appellate Procedure 29(d), because it contains 6970 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Word 2007 in 14-point Times New Roman font.

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