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* IN SUPPORT OF APPELLANT

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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I. STATEMENT OF INTEREST

The Education Law Center-PA (the "ELC") is a non-profit legal advocacy organization dedicated to ensuring access to a quality public education for all children in Pennsylvania. For over 40 years, ELC has advocated on behalf of the most at-risk students — children living in poverty, children of color, children in the foster care and juvenile justice systems, children with disabilities, English language learners, LGBT students, and children experiencing homelessness. Our priority areas include ensuring that all students have equal access to safe and supportive schools and the full range of services and programs they need to succeed. We work to eliminate systemic inequalities that lead to disparate educational outcomes based on race, gender, sexual orientation, gender expression, disability status, and other categories. We seek to participate as *amicus curiae* to explain why the protections of the Pennsylvania Human Rights Act (the "PHRA" or the "Act") are so vital for students of color and students who do not conform to gender stereotypes. In addition, we write to underscore the importance of PHRA's application to claims of indirect discrimination arising from student-to-student harassment based on race and perceived non-conformance to sex stereotypes.

The Public Interest Law Center (the "Law Center") is one of the original affiliates of the Lawyers' Committee for Civil Rights Under Law. The Law Center uses high-impact legal strategies to advance the civil, social, and economic rights

of communities in the Philadelphia region facing discrimination, inequality, and poverty. We use litigation, community education, advocacy, and organizing to secure their access to fundamental resources and services. The Law Center has a long history of representing children to ensure their rights to education. We were counsel in the landmark decision *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972), which lead to the Congressional passage of the initial version of the Individuals with Disabilities Education Act. The Law Center remains a vigorous advocate for children's rights to a quality and inclusive public education throughout Pennsylvania. We devote substantial resources to protect children from discrimination in school settings. Through advocacy and litigation — including litigation under Pennsylvania's anti-discrimination statute at issue in this case — the Law Center helps to ensure the civil rights of school-age children, especially those children who are marginalized by social factors and thus are more susceptible to inequities. If the Court of Common Pleas' narrow interpretation of the Commonwealth's anti-discrimination statute is left to stand, it will adversely affect these children.

The Juvenile Law Center (collectively, with the ELC and the Law Center, "*amici*") advocates for rights, dignity, equity and opportunity for youth in the foster care and justice systems. Founded in 1975, the Juvenile Law Center is the

first non-profit, public interest law firm for children in the country. Among other things, the Juvenile Law Center works to ensure that children's rights to due process are protected at all stages of juvenile court proceedings, from arrest through disposition, and post-disposition through appeal, and that the juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults in enforcing these rights.

We join this brief to underscore the importance of creating learning environments that affirm youths' whole identities, and of the need for school staff to protect vulnerable youth — especially LGBT/GNC youth and youth of color — from harassment and bullying in school.

II. STATEMENT OF CONCURRENCE IN PRELIMINARY MATTERS

Amici concur in the statements made by Appellant Nicole B., regarding the Statement of Jurisdiction, the Order in Question, the Statement of the Scope and Standard of Review, the Statement of the Questions Involved, and the Statement of the Case.

III. SUMMARY OF THE ARGUMENT

This is a case concerning an eight-year-old boy whose pleas to his school to intervene and protect him from increasingly violent racial and sexual harassment went unanswered. Because of his school's inaction, this child was forced to endure regular verbal harassment, multiple physical assaults, and rape. If this Court affirms the lower court's nonsuit, it will be telling school districts that they will not

face consequences under the PHRA when they fail to intervene to prevent discriminatory bullying from escalating. Without the benefit of equitable tolling or the Minority Tolling Statute, Pennsylvania's students will face insurmountable barriers to accessing justice under the PHRA. Without an affirmation that the PHRA recognizes claims of indirect discrimination against school districts that fail to address student-to-student harassment, Pennsylvania's children will be unable to hold their schools accountable under state law for willfully turning a blind eye to their torment.

This Court should stay true to the principles of the PHRA and the Minority Tolling Statute — to deter discrimination on the basis of race, sex, and other innate characteristics in public accommodations and remediate it when it occurs, and to ensure that all individuals — including those discriminated against as children — have access to justice. Adhering to the legislative intent of these statutes is necessary to ensure that Pennsylvania's children have safe and affirming places in which to learn. Bullying, left unaddressed, can be extremely damaging. Students who are bullied and harassed are more likely to struggle in school, and more likely to avoid school altogether, leading to absenteeism, truancy, and dropping out. They are also more likely to suffer from depression, anxiety, and other health consequences.

Students of color and students who fail to conform to sex stereotypes, including those who are or are perceived to be LGBT, are particularly likely to experience the negative effects of bullying, as it compounds broader societal stigma they already experience. Students who embody multiple marginalized identities, such as gender non-conforming or LGBT students of color, are the most at risk of experiencing negative academic and psychological effects due to being the target of bullying in school. Unfortunately, while these students are particularly vulnerable, several national studies reveal that their harassment in school is taken less seriously than the bullying of their white, straight, gender-conforming counterparts — which can lead to tragic consequences, as in the case of N.B.

Unfortunately, the Court of Common Pleas misinterpreted the PHRA and the Minority Tolling Statute in a way that leaves marginalized children without access to the protections of the PHRA when their schools fail to keep them safe. This Court should reverse the lower court and clarify that schools must take steps to intervene in discriminatory student-to-student harassment.

IV. ARGUMENT

A. THE APPLICATION OF THE MINORITY TOLLING STATUTE TO THE PHRA, PARTICULARLY IN THE CONTEXT OF SEXUAL ABUSE, IS NECESSARY TO ENSURE CHILDREN HAVE MEANINGFUL ACCESS TO RELIEF UNDER THE PENNSYLVANIA HUMAN RELATIONS ACT.

If youth are to have meaningful access to the protections of the PHRA, minority tolling must apply.[1] To hold otherwise would unfairly bar youth from accessing justice. Pennsylvania lawmakers recognized this, as evidenced by the passage of the Minority Tolling Statute, which ensures that a young person's right to access the courts is protected in a variety of situations and circumstances. *See* 42 PA. CONS. STAT. ANN. § 5533 (West) (Pennsylvania's minority tolling statute). The legislature enacted the Minority Tolling Statute to "protect the rights of minors." *See Foti v. Askinas*, 639 A.2d 807, 809 (Pa. Super. Ct. 1994). Because minors rely on adults to initiate legal claims on their behalf and are limited in their ability to evaluate, recognize, or alert others to a potential legal claim,[2] it would not be fair to hold minors to the same statute of limitations as adults, as they have limited agency in whether their claim is heard during their minority. *See id.* ("Section 5533 of 42 Pa.C.S.A . . . was enacted [so that] a minor who does not have a parent or guardian to initiate a suit would retain the legal right to bring an

[1] *Amici* adopt Appellant's legal arguments regarding the application of minority tolling.
[2] *See*, *e.g.*, *Miller v. Alabama*, 567 U.S. 460, 471, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012) ("children are constitutionally different from adults," due in part to their inability to assess consequences); *see also* American Academy of Child & Adolescent Psychology, *Teen Brain: Behavior, Problem Solving, and Decision Making* (Sept. 2016).

action."); 23 PA. CONS. STAT. ANN. § 5101 (West) (barring minors from bringing most legal claims on their own behalf). In Pennsylvania, the statute of limitations for torts and other civil claims is tolled until the minor victim turns eighteen. *See S.J. by & through B. v. Gardner*, 167 A.3d 136, 139 (Pa. Super. Ct. 2017). Pennsylvania's statute of limitations does *not* begin to run from the time the illegal act is revealed to the minor's parent, even when the parent opts to pursue the cause of action before the minor turns eighteen. *See id.* at 139. Rather, the statute of limitations is suspended until the minor turns eighteen. *Id.* The minority tolling statute applies in a variety of contexts. *See*, *e.g.*, *Seneway v. Canon McMillan Sch. Dist.,* 969 F. Supp. 325, 330 (W.D. Pa. 1997) (applying minority tolling to a Title IX claim); *Faison v. Sex Crimes Unit of Philadelphia*, 845 F. Supp. 1079, 1084 (E.D. Pa. 1994) (applying minority tolling to a 42 U.S.C. § 1983 claim alleging that Department of Human Services employees failed to adequately investigate claims that children in their care were sexually abused); *Osei-Afriyie by Osei-Afriyie v. Med. Coll. of Pa.*, 937 F.2d 876, 882 (3d Cir. 1991) (applying minority tolling to a medical malpractice case).

Applying the Minority Tolling Statute to the PHRA is consistent with how our sister states have applied their minority tolling and anti-discrimination statutes. *See, e.g.*, *Bills v. Boby's Food Enters., Inc.*, 1998 WL 1184157, at *2 (Mass. Super. Feb. 5, 1998). In *Bills*, the Superior Court of Massachusetts found that

"[t]here is no sound reason why minority should not toll" the statute of limitations for filing a complaint with the Massachusetts Commission Against Discrimination. *See id.* The court reasoned that the time period in which to file a complaint was not a "jurisdictional prerequisite" but "a statute of repose subject to limitations of . . . equitable tolling." *Id.* Thus, because the anti-discrimination statute did not specifically address the issue of minority tolling, it is not inconsistent to apply the minority tolling statute to it. *Id.* The court noted that the legislature could have specified that it did not wish minority tolling to apply to anti-discrimination claims — and in the absence of such a specification, courts should assume it was the intent of the legislature that minority tolling *should* apply to such claims. *Id.*

Minority tolling statutes have also been found to apply to anti-discrimination claims in the federal context. PHRA's federal anti-discrimination corollaries recognize the need to toll the statute of limitations so that plaintiffs who were minors at the time of the discrimination, as well as plaintiffs who suffered sexual abuse, have meaningful access to the protections of the Civil Rights Act. Courts hearing Title IX and Title VI claims invariably apply the relevant state's minority tolling statute. *See, e.g. Varnell v. Dora Consol. Sch. Dist.*, 756 F.3d 1208, 1213 (10th Cir. 2014) (applying New Mexico's minority tolling statute to the plaintiff's Title IX claim and clarifying that that interpretation is consistent with its view of the limitations period under Title VI); *Gaudino v. Stroudsburg Area Sch. Dist.*,

2013 WL 3863955, at *6 (M.D. Pa. July 23, 2013) (applying Pennsylvania's Minority Tolling Statute to a Title IX claim); Seneway, *supra*,969 F. Supp. at 330 (finding that the statute of limitations period for plaintiff's Title IX claim alleging the school district was deliberately or recklessly indifferent to the sexual abuse she suffered at the hands of her coach was subject to tolling under Pennsylvania's Minority Tolling Statute); *Doe By & Through Doe v. Petaluma City Sch. Dist*., 830 F. Supp. 1560, 1569 (N.D. Cal. 1993) (tolling the plaintiff's Title IX claim on the basis of her minority). In each of these cases, courts held that tolling the statute of limitations was imperative to ensure that individuals victimized during their youth were empowered to vindicate their rights as adults. Thus, under the PHRA's federal corollaries, N.B.'s claim would not be time-barred, as Pennsylvania's Minority Tolling Statute would apply.

Most importantly, it is vital to the safety and protection of the rights of Pennsylvania's students that those who faced discrimination as children have access to relief under the PHRA. As we have repeatedly seen in our work and as documented in multiple research studies, discrimination in the classroom by both teachers and students not only negatively impacts academic performance, it also undermines psychological and physical well-being, and has far-reaching consequences by impacting future health, relationships, and employment. *See* Jennifer Keys Adair, THE IMPACT OF DISCRIMINATION ON THE EARLY SCHOOLING

EXPERIENCES OF CHILDREN FROM IMMIGRANT FAMILIES 4 (Sept. 2015) (noting that "children who receive negative messages about themselves in school may be less likely to achieve academic success, graduate from school, and ultimately, surpass their parents' economic position"); Smart Richman *et al.*, *Reactions to discrimination, stigmatization, ostracism, and other forms of interpersonal rejection: A multimotive model.*, 116(2) PSYCHOLOGICAL REVIEW 365 (Apr. 2009) (describing reactions to societal or interpersonal rejection, such as lowered self-esteem); American Psychological Association, *2015 Stress in America*, http://www.apa.org/news/press/releases/stress/2015/impact.aspx (last visited Jan. 19, 2018) ("[D]iscrimination-related stress is linked to mental health issues, such as anxiety and depression, even in children.").

These devastating and long-term consequences highlight the importance of the PHRA and the role it must serve to address and redress discrimination against students. Students will not have meaningful access to the protections of the PHRA if minority tolling does not apply. We urge the court to follow the reasoning of federal anti-discrimination jurisprudence and the Pennsylvania legislature's intent when it adopted the Minority Tolling Statute to ensure that children will not face an unfair barrier when seeking justice under the PHRA.

B. EVEN IN THE ABSENCE OF MINORITY TOLLING, N.B.'S CASE SHOULD BE EQUITABLY TOLLED BECAUSE HE SUFFERED SEXUAL ABUSE AS A RESULT OF THE SCHOOL'S INDIRECT DISCRIMINATION.

Even when the plaintiff was not victimized as a minor, federal courts have tolled the statute of limitations where the plaintiff suffered sexual abuse, in light of the nature of the offense and its impact. *See*, *e.g.*, *Stoll v. Runyon*, 165 F.3d 1238, 1242 (9th Cir. 1999) *as amended* (Mar. 22, 1999) (plaintiff entitled to equitable tolling where the sexual abuse she suffered rendered her unable to file her Title VII claim within the statute of limitations). Equitable tolling is appropriate and applied under the Civil Rights Act where the plaintiff is prevented from timely filing a claim due to the wrongful conduct of the defendant or due to extraordinary circumstances beyond the plaintiff's control. *Id.* In *Stoll,* the plaintiff had produced "more than sufficient evidence to establish equitable tolling on both grounds as a matter of law" where repeated acts of assault and sexual abuse caused by the defendant rendered the plaintiff "so broken and damaged" that she could not defend her rights, as evidenced by psychological effects of the trauma impairing her daily functioning. *Id.*

Plaintiffs alleging discrimination and childhood sexual abuse should receive special consideration for equitable tolling. *See* Gregory G. Gordon, *Adult Survivors of Childhood Abuse and the Statute of Limitations: The Need for Consistent Application of the Delayed Discovery Rule*, 20 Pepp. L. Rev. 1359

(1993) ("[V]ictims of childhood sexual abuse are often unable to file lawsuits until many years after the abuse has ended. Children who are sexually abused often suffer severe psychological and emotional damage that may not become manifest until adulthood."). Those who suffer sexual abuse as children have unique coping mechanisms that "enable them to withstand the emotional trauma they experience" but make it more difficult to be able to file a claim within the standard statute of limitations, such as: "denial, dissociation, repression, and amnesia." *See id.* at 1366. The Pennsylvania legislature has recognized the unique needs of plaintiff survivors of childhood sexual abuse by setting a longer statute of limitations period for civil claims involving childhood sexual abuse. *See* 42 PA. CONS. STAT. ANN. § 5524, 5533 (West) (setting the statute of limitations for claims of childhood sexual abuse at twelve years compared to two years for other intentional torts).

In this case, the Minority Tolling Statute or other equitable tolling should apply to allegations of discrimination where a school district failed to intervene in the ongoing, severe harassment of N.B., and allowed the abuse to escalate to the point of rape. *See* Appellant's Third Am. Compl. (the "TAC") ¶¶ 15–59 (describing the harassment and assaults N.B. suffered at Bryant as well as the opportunities the school had to intervene in the harassment). The trauma N.B. suffered as a result of the school's indirect discrimination caused him to develop post-traumatic stress disorder and intense anxiety. TAC ¶ 81. He also began

hearing voices telling him to sexually assault other people and has attempted to commit suicide on multiple occasions. TAC ¶¶ 85-89. He has trouble engaging in everyday activities, including playing sports and sleeping. TAC ¶¶ 82-83. Under federal anti-discrimination law, even absent minority tolling, equitable tolling would be available to N.B. on these facts both on the basis that the wrongful conduct of the school caused his delay and because the nature of the trauma he endured amounts to an extraordinary circumstance.

Equitable tolling should apply when a plaintiff is sexually abused as a result of the defendant's actions, particularly when the plaintiff suffered the abuse as a child. Even absent the application of the Minority Tolling Statute, N.B.'s claims should be subject to equitable tolling due to the nature of the trauma he endured.

C. THE PHRA PROVIDES A CAUSE OF ACTION FOR INDIRECT DISCRIMINATION WHERE A SCHOOL DISTRICT FAILS TO ADDRESS STUDENT-TO-STUDENT HARASSMENT BASED ON RACE AND SEX DISCRIMINATION.

The PHRA is intended to and must protect children like N.B. from harassment and sexual assault at school based on race and perceived non-conformance to sex stereotypes. Harassment based on perceived non-conformity to societal sex stereotypes has consistently been recognized as a form of sex discrimination. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 251, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989); *Ellingsworth v. Hartford Fire Ins. Co.*, 247 F. Supp. 3d 546, 554-55 (E.D. Pa. 2017). N.B. was harassed on the basis of his race

as he was subjected to repeated racial slurs. He was also harassed for displaying characteristics his bullies deemed to be insufficiently masculine – for example, they perceived that "he plays sports like a girl" and "runs like a girl" (TAC ¶ 18) – and because he was perceived by his bullies as gay. The harassment N.B. endured due to his perceived gender non-conforming characteristics is a form of sex discrimination. *See Price Waterhouse*, *supra*, 490 U.S. at 251, 109 S.Ct. 1775. In addition, N.B. was discriminated against based on his perceived sexual orientation, and "[t]here is no more obvious form of sex stereotyping than making a determination that a person should conform to heterosexuality." *United States EEOC v. Scott Med. Health Ctr., P.C.*, 217 F. Supp. 3d 834, 841 (W.D. Pa. 2016). To find that the PHRA does not protect children like N.B. is akin to turning a blind eye not only to the intent of the PHRA, but to the lived experiences of all students who are assaulted, harassed, and bullied due to race and perceived divergence from stereotypical masculine traits.

1. The PHRA recognizes claims of indirect discrimination against students.

The court below offhandedly rejected N.B.'s claims as arising under a novel and not cognizable "hostile school environment" legal theory. *See Nicole B. v. Sch. Dist. of Phila.*, No. 3745 (Phila. Ct. Com. Pl. Aug. 7, 2017). To the contrary, N.B.'s claims fall clearly under the purview of the PHRA. At the heart of N.B.'s allegations is the school's failure to address escalating harassment about which it

was aware. From the early days of the PHRA's inception, Pennsylvania courts have recognized that its protections extend to indirect discrimination, where "a responsible party has the power to take corrective action" and fails to do so. *Pa. Human Relations Comm'n v. Chester Sch. Dist.,* 233 A.2d 290, 295 (Pa. 1967). This includes indirect discrimination in schools, which are places of public accommodation subject to the protections of the Act. *Id.*; *see also Pa. Human Relations Comm'n v. Sch. Dist. of Philadelphia*, 681 A.2d. 1366 (Pa. Commw. Ct. 1996). Indeed, the Pennsylvania Human Relations Commission (the "PHRC") lists as prime examples of illegal education discrimination a classmate who "repeatedly makes sexual comments or gestures, or subjects a peer to sexually offensive images" and classmates that "harass or bully a peer because of his or her race, sex, religion, disability, ancestry or national origin." *See* Pennsylvania Human Relations Commission, *Education Discrimination,* http://www.phrc.pa.gov/File-A-Complaint/Types-of-Complaints/Pages/Education.aspx (last visited Jan. 18, 2018).

In this case, a school repeatedly failed to intervene as an eight-year-old boy was targeted, harassed, assaulted, and raped at school because his assailants perceived him as Black and not conforming to masculine stereotypes. The court below conflated the absence of a parallel fact pattern in pre-existing state common law with a novel legal theory. But for over half a century, Pennsylvania courts have recognized that the PHRA's protections apply to school settings and that

school districts must, under the PHRA, take corrective measures against pervasive discrimination. State law is similarly clear on how this court should conduct its analysis when making a determination on matters as to which the Act is silent: the court should construe the Act liberally to effect its purpose and look to federal court decisions interpreting the Civil Rights Act of 1964. *See Hull v. Rose, Schmidt, Hasely & DiSalle P.C.*, 700 A 2d 996, 999 (Pa. Super. Ct. 1997).

2. The PHRA should be interpreted liberally to protect children from indirect discrimination arising from student-to-student harassment at school based on race and perceived non-conformance to sex stereotypes.

The PHRA need not explicitly acknowledge student-to-student sexual harassment as discrimination in order for it to be actionable. The Act clearly mandates that its provisions are to "be construed liberally for the accomplishment of the purposes thereof . . ." 43 PA. STAT. § 962 (c). This is "a task which compels consideration of more than the statute's literal words." *Chester Sch. Dist.*, *supra*, 233 A.2d at 295. The Act's purpose is made clear in Section 952: "This act shall be deemed an exercise of the police power of the Commonwealth *for the protection of the public welfare, prosperity, health and peace of the people of the Commonwealth of Pennsylvania.*" 43 PA. STAT. § 952 (emphasis added). Paramount to the welfare, prosperity, health and peace of the Commonwealth's people is the capacity for its children to be educated free of unmitigated

discriminatory harassment. It is, therefore, no surprise that the PHRA requires that the Commission deliver an annual report to the Legislature "on alleged acts of discrimination in schools, workplaces and communities across" Pennsylvania. *See* PENNSYLVANIA SENATE JOURNAL, 2014 Reg. Sess. No. 19. It also follows that the Pennsylvania Code explicitly provides, pursuant to the PHRA, that a "student may not be denied access to a free and full public education, nor may a student be subject to disciplinary action on account of race, sex, color, religion, sexual orientation, national origin or disability." 22 PA. CODE Ch. 7 & 12 (Students and Student Services).

From the PHRA's early inception, Pennsylvania courts have followed the Act's mandate of liberal construction to address discrimination in ever-changing social contexts. The most notable example of this is the seminal case of *Chester School District*, in which the court found that the PHRA's protections applied to both affirmative and indirect acts of discrimination. 233 A.2d at 294-95. At issue was whether the PHRC had authority to compel the school district to desegregate six public schools on the ground that the district's school zoning resulted in unmitigated *de facto* segregation. The school district argued that the PHRA only prohibited affirmative acts of discrimination and that it contained no express authority for the PHRC to compel redistricting. The Court rejected that argument, construing the statute broadly to effectuate its purposes and underscoring the Act's

declaration that discrimination "foments domestic strife and unrest, threatens the rights and privileges of the inhabitants of the Commonwealth, and undermines the foundations of a free democratic state." *Id.* at 296-99; *see also* 43 PA. STAT. § 952. The opinion in *Chester Sch. Dist.* was issued in 1967 — it was over five decades ago that the Pennsylvania Supreme Court confirmed the PHRA's anti-discrimination protections extend to claims of indirect discrimination in school settings.

In *Cain v. Hyatt*, a federal court similarly followed the guiding principles of liberal construction set forth in Section 962 (c) of the Act to conclude that AIDS constituted a disability for the purposes of triggering the PHRA's protections. 734 F. Supp. 671, 678 (E.D. Pa. 1990). While acknowledging that the Act did not say on its face whether individuals with chronic, asymptomatic conditions such as HIV met the definition of "disabled," the court relied on PHRC regulations establishing that a disability consisted of a physical impairment that substantially limited one or more major life activities, including where the limitations arose solely as the result of the attitudes of others towards the impairment. *Id.* at 677–78. The court held that asymptomatic HIV substantially limited life activities because "AIDS has engendered such prejudice and apprehension that its diagnosis typically signifies a social death as concrete as the physical one which follows." *Id*. at 679. In rejecting the employer's defense that the employee's HIV status rendered him unfit

due to the prejudice of coworkers and clients, the Court emphasized the Act's purpose "to eradicate the harm that ubiquitous stereotyping perpetuates." *Id.* at 681 (*citing* 43 PA. STAT. § 952).

When drafting the PHRA, the legislature did not necessarily contemplate all of the possible forms of discrimination that might arise in the ensuing years. Courts have recognized that the built-in deference to the mission of the Act in a variety of contexts and circumstances provides, and must continue to provide, sufficient flexibility to address divergent manifestations of discrimination as they materialize in our society and in our schools. Courts have liberally construed the Act from the outset, holding the Act applicable in an ever-changing society, but the underlying principles that define the Act's purpose — combatting discrimination for the preservation and prosperity of the Commonwealth — remain the same. There can be no doubt that a school's repeated failure to intervene when it knew or had reason to know of the escalating student-to-student racial and sexual harassment of a fourth grader based on race and sex is unacceptable, counter to the interests of the Commonwealth, and in violation of the PHRA. Finding as much would serve the intentions of those who authored, passed, and amended the PHRA and would be consistent with the Act's clear purpose as broad remedial legislation that is intended to be liberally construed to protect all citizens of the Commonwealth from invidious discrimination.

3. Title VI and Title IX, the PHRA's federal corollaries, permit claims of indirect discrimination against a school district for failure to address student-to-student harassment.

The PHRA precludes discrimination on the basis of race and sex in public accommodations, including schools. 43 PA. CONS. STAT. ANN. §§ 954–955 (West) (declaring that "It shall be an unlawful discriminatory practice . . . . For any person being the owner, lessee, proprietor, manager, superintendent, agent or employee of any public accommodation, resort or amusement to: Refuse, withhold from, or deny to any person because of his race . . . sex . . . any of the accommodations, advantages, facilities or privileges of such public accommodation . . . ." and defining schools as a public accommodation). As evidenced by an analysis of the PHRA's federal corollaries, the PHRA recognizes claims of indirect discrimination against a school district for failure to address student-to-student harassment on the basis of protected characteristics including race and sex.

Courts have consistently held that the PHRA should be interpreted as identical to its federal counterparts absent authority requiring a different reading. *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 567 (3d Cir. 2002); *see also Chmill v. City of Pittsburgh*, 412 A.2d 860, 871 (Pa. 1980) (acknowledging that, in the employment context, the PHRA has been read as containing principles coextensive with federal law); *Lopez v. Citywide Cmty. Counseling Servs.*, No. 01250, 2015 Phila. Ct. Com. Pl. LEXIS 317, at *23 (Phila. Ct. Comm. Pls. Oct. 21, 2015)

(deciding that plaintiff, extern, was covered by PHRA as "employee" by looking to Title VII jurisprudence, noting that Pennsylvania courts have looked to federal court decisions interpreting Title VII to determine employee status under the PHRA). Title VI and Title IX are the PHRA's federal anti-discrimination corollaries that forbid discrimination on the basis of race and sex in federally-funded educational programs. *See* 20 U.S.C.A. § 1681 (West) ("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 . . . receiving Federal financial assistance . . . "); 42 U.S.C.A. § 2000d (West) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."). Title VI and Title IX both hold a school district liable for indirect sex and race discrimination when the school acts with deliberate indifference in response to student-to-student harassment. *See Davis Next Friend LaShonda D. v. Monroe Cnty. Bd. of Educ*., 526 U.S. 629, 633,119 S.Ct. 1661, 143 L.Ed.2d 839 (1999) (recognizing claims of indirect discrimination under Title IX where a school has actual notice of sexual harassment between students but fails to address it); *Whitfield v. Notre Dame Middle Sch*., 412 F. App'x 517, 521 n.2 (3d Cir. 2011) (applying the same standard laid out by the Supreme Court in *Davis*

under Title IX to a Title VI claim of racial discrimination, reasoning that it is appropriate to "construe Titles VI and IX similarly because they use parallel language").

There is no state authority indicating that the PHRA should *not* be interpreted identically to and coextensive with Title VI and Title IX by recognizing claims of indirect sex and race discrimination. On the contrary, state precedent makes clear that schools may be held liable under the PHRA not just for direct acts of discrimination, but also for failing to address discriminatory school environments. *See Chester Sch. Dist*., 233 A.2d at 294-95 (finding that the PHRA places the affirmative obligation upon school districts to integrate schools). Accordingly, in the absence of contradictory authority, the PHRA should be read to encompass the same indirect discrimination claims as its federal corollaries.[3] *Fogleman*, *supra*, 283 F.3d at 567; *see also Chmill*, *supra*, 412 A.2d at 871 (acknowledging that, in the employment context, the PHRA has been read as containing principles coextensive with federal law).

Notably, Pennsylvania law *does* set a different and less rigorous standard for measuring whether the inaction of school administrators rises to the level of

[3] While one court noted that the PHRA has not yet been interpreted "to create a cause of action for 'hostile environment' harassment of a public school student," as discussed *supra*, an absence of a decision applying a protection does not imply that the protection does not exist. *See Saxe v. State Coll. Area Sch. Dist*., 240 F.3d 200, 204 (3d Cir. 2001) (noting the lack of case law applying PHRA to cases where a student is harassed at school).

discrimination — namely, the corrective measures standard described in Appellant's brief. *See Chester Sch. Dist.*, *supra*, 233 A.2d at 294 (stating that where a school district has the power to take corrective measures to correct a discriminatory environment but fails to do so, that inaction amounts to discrimination under the PHRA).

D. SCHOOLS' FAILURE TO ADDRESS BULLYING AND HARASSMENT LEADS TO NEGATIVE OUTCOMES FOR BULLIED STUDENTS.

Unfortunately, N.B.'s story is not an isolated one — more schools need to ensure that they properly address bullying as soon as possible.[4] Students who are bullied are at an increased risk of absenteeism and poor academic performance, including attaining lower grade-point averages and levels of engagement in the classroom than their non-bullied peers. Jaana Juvonon, *et. al.*, Bullying Experiences and Compromised Academic Performance Across Middle School Grades, 31 J. OF EARLY ADOLESCENCE 152, 167 (2011) (noting how poor academic performance may manifest for bullied youth). The negative impacts of being victimized by bullying extend beyond the schoolhouse doors. *See* PREVENTING BULLYING THROUGH SCIENCE, POLICY, AND PRACTICE 115-29 (Frederick Rivara &

[4] For example, the School District of Philadelphia has systemically failed "to promptly and appropriately address pervasive and severe bullying of students with disabilities." *See, e.g.* Maura McInerney & Alex Dutton, *ELC Steps Up to Protect the Rights of Bullied Students with Disabilities*, The Legal Intelligencer (Dec. 26, 2017, 2:45 PM), https://www.law.com/thelegalintelligencer/sites/thelegalintelligencer/2017/12/26/elc-steps-up-to-protect-the-rights-of-bullied-students-with-disabilities/?slreturn=20180014222304.

Suzanne Le Menestrel eds., 2016). Students who were bullied are more likely to experience depression, anxiety, and feelings of loneliness. *Id*. at 129. They are also more likely to abuse alcohol or drugs. *Id.* Even after they have left high school, people who were bullied are more likely to suffer from anxiety, depression, obesity, and sleep difficulties than their peers who were not bullied. *Id.*

The negative outcomes associated with being a victim of bullying are particularly likely to manifest, and to be more acute, in vulnerable student populations such as students of color and students who do not fit sex stereotypes or are or perceived to be LGBT. *Cf.* GLSEN, THE 2015 NATIONAL SCHOOL CLIMATE SURVEY xviii (2016) (reporting that thirty-two percent of LGBT students surveyed did not believe they would finish high school or were not sure they would finish high school due to a hostile school climate). Not only are LGBT students more likely to experience the negative effects of bullying and to experience these effects more acutely when they are bullied, but they are more likely to be bullied in the first place. PREVENTING BULLYING THROUGH SCIENCE, POLICY, AND PRACTICE 48 (Frederick Rivara & Suzanne Le Menestrel eds., 2016) ("[P]revalence rates for being bullied on school property were lowest for both heterosexual boys and girls . . . and highest among gay boys."). The combination of higher rates of victimization and more acute negative academic and psychological responses to victimization contributes to hostile school

environments that lead to worse educational outcomes for LGBT students. *Cf.* GLSEN, THE NATIONAL SCHOOL CLIMATE SURVEY xviii (2016) (reporting that thirty-two percent of LGBT students surveyed did not believe they would finish high school or were not sure they would finish high school due to a hostile school climate).

Students who embody multiple marginalized identities — such as gender non-conforming or LGBT students of color — are even more vulnerable to the negative impacts of being bullied. *See* GLSEN, SHARED DIFFERENCES: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER STUDENTS OF COLOR IN OUR NATION'S SCHOOLS xii (2009) ("[S]tudents of color who were severely harassed in school because of both their sexual orientation and race/ethnicity were more likely [to have] miss[ed] school in the past month . . . than those who were severely harassed based on sexual orientation . . . [or] race/ethnicity only . . . ."). While these students are particularly vulnerable, ELC's numerous conversations with youth and service providers reveal a disturbing trend of school teachers and administrators taking the bullying of gender non-conforming and LGBT students of color *less* seriously than the bullying of their white straight, cisgender counterparts. Too many teachers and administrators view the bullying of these students as normal, and thus are less likely to intervene when they are bullied.

Our anecdotal evidence is supported by national data. *See* GLSEN, SHARED DIFFERENCES: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER STUDENTS OF COLOR IN OUR NATION'S SCHOOLS xi–xii (2009) ("LGBT students of color reported little intervention on the part of teachers or other school personnel when biased remarks were made in school, particularly with homophobic remarks . . . . Across all groups, only a fifth of LGBT students of color said that school personnel intervened 'most of the time' or 'always' when hearing these types of remarks in school . . . .[L]ess than half of students of color who did report incidents to school personnel said the situation was addressed effectively."). Schools' failure to respond appropriately to the bullying of gender non-conforming and LGBT youth of color results in a greater likelihood those youth will experience sustained bullying over a school year, which puts them at a greater risk of experiencing the negative academic and psychological impacts of being bullied. *See* PREVENTING BULLYING THROUGH SCIENCE, POLICY, AND PRACTICE 125 (Frederick Rivara & Suzanne Le Menestrel eds., 2016) (detailing studies that show that students who experience bullying sustained throughout a school year are at an increased risk of experiencing negative academic and psychological effects).

Reaffirming the legally enforceable obligations of schools and realistic threat of liability under the PHRA would motivate schools to intervene when students are bullied, leading to fewer students having to endure prolonged and

violent bullying. It would also support safer schools for all students who are negatively impacted by unaddressed bullying, including students who witness bullying and students who bully.[5] Access to the PHRA helps ensure that the marginalized students that the PHRA aims to protect have the same sense of safety in school as their more privileged counterparts. And more immediately, it would redress the pain and injustice that N.B., his family, and others like N.B. have endured when schools ignore their plight.

V. CONCLUSION

For the foregoing reasons, the decision of the Court of Common Pleas should be reversed.

[5] For a discussion of how bullying, left unaddressed, can negatively affect students who bully and students who witness bullying, see PREVENTING BULLYING THROUGH SCIENCE, POLICY, AND PRACTICE 133–35, 137–39 (Frederick Rivara & Suzanne Le Menestrel eds., 2016).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limitations of Pa.R.A.P. 2135 (a) (1) because this brief contains **6,573 words**, excluding the parts of the brief exempted by Pa.R.A.P. 2135(b). The word count was measured by the word-processing program used to prepare the brief, Microsoft Word 2010.

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