

IN THE
Supreme Court of Pennsylvania

No. 16 EAP 2019

NICOLE B., INDIVIDUALLY AND ON BEHALF OF N.B.,

APPELLANT,

v.

SCHOOL DISTRICT OF PENNSYLVANIA, JASON JOHNSON AND JALA
PEARSON,

APPELLEES.

**BRIEF OF EDUCATION LAW CENTER OF PENNSYLVANIA,
JUVENILE LAW CENTER, PUBLIC INTEREST LAW CENTER,
WOMEN'S LAW PROJECT, COMMUNITY LEGAL SERVICES OF
PHILADELPHIA, AND PROFESSOR EMILY SUSKI AS *AMICI CURIAE*
IN SUPPORT OF APPELLANT NICOLE B., INDIVIDUALLY AND ON
BEHALF OF N.B.**

Appeal from the Order of Commonwealth Court of Pennsylvania dated
December 17, 2018, at 868 C.D. 2018 affirming the Judgment entered
on October 4, 2017, in the Court of Common Pleas, Philadelphia County,
Civil Division at 3745 April Term 2014

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I. **STATEMENT OF IDENTITY OF AMICI CURIAE, THEIR INTEREST IN THE CASE, AND THE SOURCE OF THEIR AUTHORITY TO FILE**¹

The Education Law Center-PA (“ELC-PA”) is a non-profit legal advocacy organization dedicated to ensuring access to a quality public education for all children in Pennsylvania. For more than 40 years, ELC-PA 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 learners, LGBT students, and children experiencing homelessness. ELC-PA’s priority areas include ensuring all students have equal access to safe and supportive schools and the full range of services and programs they need to succeed. ELC-PA works to eliminate systemic inequalities that lead to disparate educational outcomes based on race, gender, sexual orientation, gender expression, disability status, and many who are at the intersection of these identities.

Juvenile Law Center advocates for rights, dignity, equity, and opportunity for youth in the child welfare and justice systems through litigation, appellate advocacy and submission of amicus briefs, policy reform, public education, training, consulting, and strategic communications. Founded in 1975, Juvenile Law Center is the first non-profit public interest law firm for children in the

¹ No person or entity other than the *amici curiae*, their members, or counsel paid in whole or in part for the preparation of this *amicus curiae* brief or authored in whole or in part this *amicus curiae* brief.

country. Juvenile Law Center strives to ensure that laws, policies, and practices affecting youth advance racial and economic equity and are rooted in research, consistent with children’s unique developmental characteristics, and reflective of international human rights values.

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. The Law Center uses 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. They were counsel in the landmark decision *Pa. Assoc. for Retarded Children v. Commonwealth of Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972), which led to the Congressional passage of the initial version of the Individuals with Disabilities Education Act. The Law Center remains a vigorous advocate for Pennsylvania children’s rights to a quality and inclusive public education. The Law Center devotes substantial resources to protect children from discrimination including 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.

Women’s Law Project (“WLP”) is a non-profit public interest law firm with offices in Philadelphia and Pittsburgh, Pennsylvania. WLP’s mission is to create a more just and equitable society by advancing the rights and status of all women throughout their lives. To this end, WLP engages in high-impact litigation, advocacy, and education. The core values of the WLP are a belief in the right of all women to bodily integrity and personal autonomy; dedication to listening to women and being guided by their experiences; and commitment to fairness, equality, and justice. WLP is committed to ending harassment and violence against women and children and to safeguarding the legal rights of women and children who experience sexual harassment and sexual assault. WLP provides representation and counseling to survivors of sexual harassment and sexual assault, participates in amicus curiae briefs seeking to ensure appropriate remedial measures for survivors of sexual harassment and sexual assault, and engages in public policy advocacy work to improve institutional responses to sexual harassment and sexual assault.

Community Legal Services of Philadelphia (“CLS”) has served the legal needs of low-income Philadelphia residents by providing them with advice and representation in civil matters, advocating for their legal rights, and conducting

community education about legal issues for over 50 years. CLS’s practice model combines direct representation with policy advocacy that is informed by the experiences of our clients. CLS’s Youth Justice Project provides holistic legal services and advocacy for youth ages 16-24. CLS’s Family Advocacy Unit represents parents in truancy dependency cases in Philadelphia. CLS has seen first-hand how chronic and unaddressed bullying and educational discrimination, as well as barriers to youth and families asserting their rights under the PHRA, lead to negative outcomes for children, including truancy and family separation.

Professor Emily Suski is an Assistant Professor at the University of South Carolina School of Law. She is an expert on K–12 school sexual harassment law. Professor Suski’s research in this area has been published or is forthcoming in the *UCLA Law Review*, the *California Law Review*, and the *Maryland Law Review*. She has also represented numerous children in special education, Section 504, and Americans with Disabilities Act claims in the District of Columbia, Virginia, and Georgia. Prior to joining the faculty at the University of South Carolina, she was a clinical teaching fellow at Georgetown University Law Center, a staff attorney with the JustChildren Program of the Legal Aid Justice Center, and an Assistant Clinical Professor at Georgia State University College of Law.

Amici seek to participate in this case to explain why the protections of the Pennsylvania Human Relations Act, 43 Pa.C.S. § 951–963 (“PHRA”) are vital for

students who have experienced discrimination and why minority tolling is necessary to ensure meaningful access to the PHRA's protections. Absent minority tolling, many students will be unable to assert their rights under the PHRA, increasing the likelihood of continuing discriminatory conduct in schools.

II. SUMMARY OF ARGUMENT

This case concerns an eight-year-old boy, N.B., whose pleas to his school to intervene and protect him from increasingly violent racial and sexual harassment went unanswered. When N.B. began fourth grade, he became the target of three student aggressors who continually assaulted and harassed him by, among other things: using derogatory epithets against N.B. based on his race and perceived sexual orientation; kicking, punching, and pushing N.B.; breaking N.B.'s glasses and dumping his books; cornering N.B. in a school bathroom and threatening to kill him; urging N.B. to kill himself; forcing N.B. to watch pornography; and forcing N.B. to mimic sexual acts in front of other students. Appellant's Third Am. Compl. ("TAC") ¶¶ 15-29. This conduct was reported to N.B.'s school, but no action was taken against the students. *Id.* ¶¶ 28-37. The aggressors' harassment escalated in October 2011, when N.B. was raped in a school bathroom. Because of his school's inaction, he was forced to endure regular verbal harassment, multiple physical assaults, and ultimately, rape. *Id.* ¶¶ 55-61.

After filing administrative complaints with the Pennsylvania Human Relations Commission (“PHRC”) against the District, N.B.’s principal, and N.B.’s teacher, N.B.’s mother filed suit in the Philadelphia Court of Common Pleas. At the conclusion of a six-day trial, the trial court granted the District’s motion for nonsuit, concluding that N.B.’s mother failed to timely file her administrative complaint. In its ruling, the trial court also concluded that Pennsylvania’s Minority Tolling Statute, 42 Pa.C.S. § 5533, did not apply to administrative complaints filed under the PHRA and that equitable tolling also did not apply.

Without the benefit of Pennsylvania’s Minority Tolling Statute or equitable tolling under the PHRA, N.B. and many Pennsylvania citizens who are victimized as children will be barred from asserting their rights under the PHRA. And without access to the PHRA, they will not be able to hold their schools accountable under state law for willfully turning a blind eye to their torment.

Amici urge the Court to confirm and uphold the principles of the PHRA and the Minority Tolling Statute: to deter discrimination on the basis of race, sex, and other innate characteristics; 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 places in which to learn. Harassment, left unaddressed, can be extremely damaging. Students who are 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 gender stereotypes, including those who are or are perceived to be lesbian, gay, bisexual, and/or transgender (“LGBT”), are particularly likely to experience harassment in the school setting. Unfortunately, although these students are particularly vulnerable to student-to-student harassment, their harassment in school is often 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.

The Commonwealth Court’s interpretation of the Minority Tolling Statute, Pennsylvania’s equitable tolling jurisprudence, and the PHRA is contrary to the animating principles of those rules and would leave many children without access to the protections of the PHRA when their schools fail to keep them safe. Under the Commonwealth Court’s interpretation, a student is required to have an active and knowledgeable parent or guardian to pursue their claims. Unfortunately, this is a benefit that many of Pennsylvania’s most vulnerable students simply do not have.

Furthermore, as explained below, Pennsylvania minors may invoke the Minority Tolling Statute when bringing claims under federal anti-discrimination

law. Thus, the Commonwealth Court’s ruling in this case creates a perverse result in which minors benefit from Pennsylvania’s Minority Tolling Statute when bringing claims under federal anti-discrimination law, but not when bringing a claim under their own state law.

This Court should reverse the Commonwealth Court’s decision, ensuring that children who are discriminated against during their minority are not barred from obtaining justice.

III. ARGUMENT

A. The Availability of Minority Tolling Is a Critical Mechanism for Children Who Are Subject to Discriminatory Harassment in School.

The protections of the PHRA are vitally important for N.B. and children like him throughout the Commonwealth. Children who experience unaddressed harassment at school often suffer severe, lifelong consequences. As *amici* have observed, many schools fail to intervene when they are notified about ongoing student-to-student harassment. Oftentimes, when parents and students call ELC-PA seeking help with harassment, they have already tried all avenues of relief outside of the court system—including reporting it to administrators, to their school districts, and to their school boards—to no avail. The judicial system is the only mechanism left for many families to redress their child’s harassment, which is why it is vital that our court system fulfills its obligation to hold schools

accountable for allowing discriminatory environments to flourish. This obligation is particularly important at this time, as instances of discrimination and racial harassment have increased in schools across the country. *See, e.g.*, Rebecca Klein, *Schools See Major Uptick in Racial Harassment, New Data Suggests*, Huffington Post (Feb. 23, 2018), https://www.huffingtonpost.com/entry/racial-harassment-in-schools-uptick_us_5a8db498e4b03414379cae76 [hereinafter Klein, *Schools See Major Uptick*].

Failing to allow for minority tolling of PHRA claims would bar many individuals who are victimized in childhood from seeking relief under the statute. Interpreting the PHRA to not allow minority tolling of claims turns a blind eye not only to the intent of the PHRA and the Minority Tolling Statute, but also to the lived experiences of all students who are assaulted and harassed. *See Foti v. Askinas*, 639 A.2d 807, 809 (Pa. 1994) (Pennsylvania legislature enacted the Minority Tolling Statute to “protect the rights of minors,” recognizing that many parents or guardians are unwilling or unable to pursue a minor’s rights on his or her behalf); *Pennsylvania Human Relations Comm’n v. Chester Sch. Dist.*, 233 A.2d 290, 296–99 (Pa. 1967) (construing the PHRA broadly to effectuate its anti-discrimination purposes).

1. The Pervasiveness and Negative Impact of School-Based Discrimination Demonstrates the Importance of the PHRA to our K–12 Students.

Children who experience discrimination and harassment while in school deserve access to a system wherein they can hold their schools accountable and address the myriad of harms that can arise from a school’s actions and inactions, which impact a student’s mental and physical health. *See, e.g., American Psychological Association, 2015 Stress in America*, <http://www.apa.org/news/press/releases/stress/2015/impact.aspx> (last visited July 27, 2019) (“[D]iscrimination-related stress is linked to mental health issues, such as anxiety and depression, even in children.”).

Unaddressed repeated harassment such as N.B. experienced is a particularly damaging form of discrimination. As *amici* have observed in their work, and as is supported by multiple research studies, students who are harassed 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-harassed peers. Sexual harassment adversely affects academic achievement to an even greater degree than bullying does. James Gruber *et. al.*, *Sexual Harassment, Bullying, and School Outcomes for High School Girls and Boys*, 1–22 *Violence Against Women* 1 (2015). The impact of being harassed extends beyond the schoolhouse doors, resulting in long-lasting negative mental and physical health

outcomes. *See, e.g.,* Jim Duffy et al., *Psychological Consequences for High School Students of Having Been Sexually Harassed*, 50 (11-2) *Sex Roles* 811 (2004).

Students who are gender-nonconforming and students of color are more likely to experience harassment in school compared to other student peer groups. *See* James Gruber & Susan Fineran, *Comparing the Impact of Bullying and Sexual Harassment Victimization on the Mental and Physical Health of Adolescents*, 59 (1-2) *Sex Roles* 1 (2018); Andre Perry & Michael A. Lindsey, *Schools Need to Step up to Fight a Rise in Suicides Among Black Children*, *The Hechinger Report* (Dec. 18, 2018), <https://hechingerreport.org/schools-need-to-step-up-to-fight-a-rise-in-suicides-among-black-children> (“Black children are more likely to be bullied in schools.”) (last visited July 27, 2019). While these students are particularly vulnerable, ELC-PA’s numerous conversations with youth, parents, and service providers reveal a disturbing trend where school teachers and administrators take the harassment 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 harassment of these students as normal, and thus are less likely to intervene when they are mistreated by their peers.

Amici’s personal experience in the District 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) (only one-fifth of LGBT students of color report that school personnel regularly intervene when biased remarks are made, and less than half of LGBT students of color reported effective intervention when they informed school personnel of harassment).

The importance of ensuring that children have access to the protections of the PHRA is particularly important at this moment in time, as incidents of harassment in schools are increasingly common, both statewide and nationally. *See, e.g.,* William Bender et. al., *Racial Incidents Rock Area Schools. Now what?*, Philly.com (Oct. 21, 2017), <http://www.philly.com/philly/news/racism-schools-trump-pennsylvania-20171022.html> (last visited July 27, 2019) (reporting that the Anti-Defamation League received an increase in complaints of bias-related incidents in 2017 compared to prior years); Klein, *Schools See Major Uptick* (reporting that in 2017, the Department of Education's Office of Civil Rights saw a 25 percent increase in racial harassment complaints compared to the prior year). ELC-PA has also observed an increase in instances of discrimination in Pennsylvania schools and in the number of students and guardians calling to seek assistance with incidents of harassment. Now more than ever, it is imperative that Pennsylvania students have access to the PHRA to redress the serious harm that

can manifest as a result of discrimination, particularly unaddressed harassment and abuse, in Pennsylvania schools.

2. Many Children Would Not be Able to Avail Themselves of the Protections of the PHRA Absent Minority Tolling.

Ensuring equal and meaningful access to the protections of the PHRA for all Pennsylvania children requires the application of minority tolling principles. To hold otherwise would unfairly bar a discrete class of individuals—those abused during their minor years—from accessing justice. Minors have limited agency to identify and address the discrimination they experience, and no control over whether their claim is heard during their minority. *See* 23 Pa.C.S. § 5101 (generally barring minors from bringing legal claims on their own behalf). Young people may not have a parent or guardian capable or knowledgeable enough to bring a claim on their behalf for any number of reasons, none of which justify barring that child from accessing the courts. As this Court has recognized, the issue is particularly acute for children who have additional stressors on their home life and developmental years. *See Foti*, 639 A.2d at 809 (“[One] . . . cannot . . . assume that orphanages, foster parents, and juvenile homes have the emotional dedication to fight a prompt legal battle and to maintain the often slow progress through the court system.” (quoting *DeSantis v. Yaw*, 434 A.2d 1273, 1276 (Pa. Super. 1981))).

Many of Pennsylvania’s most vulnerable young people do not have the benefit of an active parent or guardian who would bring claims on their behalf. *Amici* are attorneys and advocates for unaccompanied homeless youth,² youth in the foster care system, and youth whose parents are themselves minors—all of whom are particularly harmed by a standard that requires an active, knowledgeable, and proactive parent or guardian to timely pursue legal claims on their behalf. There are significant and growing numbers of children in foster care and youth experiencing homelessness in Pennsylvania. *See* Anna Shaw-Amoah & David Lapp, *Students Experiencing Homelessness in Pennsylvania: Under-Identification and Inequitable Enrollment* 1, 5 (Dec. 2018) (in 2016–17, the Pennsylvania Department of Education identified almost 25,000 K–12 students who were experiencing homelessness, a significant increase over the prior ten years; and *under*-identification of students experiencing homelessness is a persistent problem); Kids Count Data Center, *Children in Foster Care*, <https://datacenter.kidscount.org/data/tables/6243-children-in-foster-care#detailed/2/8,14,40/false/870,573,869,36,868,867,133,38,35,18/any/12987> (last visited Jan. 13, 2019) (reporting that 16,086 children in Pennsylvania were in foster care in 2016 as compared to 16,049 in 2015 and 14,840 in 2014). In *amici*’s

² Unaccompanied homeless youth are young people experiencing homelessness who are not in the physical custody of a parent or guardian. 42 U.S.C. § 11434a(6).

experience, youth who are unaccompanied or in foster care have often experienced significant trauma and are in crisis, and their primary concern is necessarily with how to meet their basic needs, rather than finding guardians to file lawsuits on their behalf. Children in foster care are also disproportionately identified as children with disabilities—they are between 2.5 and 3.5 times more likely to receive special education services than their peers outside of the foster system—thus leaving them even more vulnerable to forms of discrimination. *See* National Working Group on Foster Care and Education, *Fostering Success in Education: National Fact Sheet on the Educational Outcomes of Children in Foster Care*, Legal Center for Foster Care and Education 2 (April 2018). It is especially harmful to place additional barriers to relief from discrimination in front of these at-risk students.

Even those young people who have an active parent or guardian do not have the same ability as adults to bring a claim within the statute of limitations because of children’s relative difficulty in evaluating, recognizing, or alerting others to a potential legal claim. *See, e.g., Miller v. Alabama*, 567 U.S. 460, 471 (2012) (holding “children are constitutionally different from adults”); *accord*, American Academy of Child & Adolescent Psychology, *Teen Brain: Behavior, Problem Solving, and Decision Making* (Sept. 2016).

Particularly in cases of sexual abuse, children are less capable than adult plaintiffs of independently identifying violations and pursuing legal claims. In

part, this is because children have unique coping mechanisms, such as, “denial, dissociation, repression, and amnesia,” that “enable them to withstand the emotional trauma they experience” and make it more difficult to be able to file a claim within the standard statute of limitations. *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, 1366 (1993) [hereinafter Gordon, *Adult Survivors*]. The reports of sexual abuse of minors by Larry Nassar and Catholic priests illustrate how children are less likely to alert adults to potential legal claims. *See, e.g.*, Laurie Goodstein & Sharon Otterman, *Catholic Priests Abused 1,000 Children in Pennsylvania, Report Says*, N.Y. Times (Aug. 14, 2018); Brian Armen Graham, “*I was Molested by Dr. Larry Nassar*”: *How the Gymnastics Sexual Abuse Scandal Unfolded*, The Guardian (Jan. 27, 2018), <https://www.theguardian.com/sport/2018/jan/27/larry-nassar-trial-gymnastics-sexual-abuse>.

B. The Minority Tolling Statute Should Apply to PHRA Claims.

The Pennsylvania legislature has recognized that it is unfair to prevent children from accessing justice merely because they are harmed during their minority. This is evidenced by the Minority Tolling Statute, which ensures that a young person’s right to access the courts is protected in a variety of circumstances. *See* 42 Pa.C.S. § 5533 (Minority Tolling Statute).

Pennsylvania’s legislature has also recognized, through amendments to the Minority Tolling Statute, that the right to justice is both uniquely important and vulnerable to being lost in the context of children who have suffered sexual abuse and harassment. *See* 42 Pa.C.S. Ann. § 5533(b)(2)(i). The statute of limitations period for civil claims based on childhood sexual abuse is currently 12 years—*six times* longer than the statute of limitations for personal injury tort claims. *Id.*; 42 Pa.C.S. § 5524. And the Pennsylvania legislature is currently considering several bills which provide childhood sexual abuse victims an *indefinite* period of time to file a civil claim against their perpetrators.³ In practice, many children like N.B., who have been the victims of sexual harassment and abuse in our public institutions, would not be able to access the special protections of the Minority Tolling Statute if it did not apply to the PHRA.

Pennsylvania case law arcs in accord with the legislature’s special treatment of claims that accrue in minority. In cases such as N.B.’s, where a parent is aware of an instance of discrimination against her child but fails to file a claim within the statute of limitations, courts have found it is fundamentally unfair to hold children

³ Pennsylvania S.B. 540, 203d Gen. Assemb. 2019–2020 (Pa. 2019) (proposing changes to 42 Pa.C.S. § 5533(b)(2)(i), including the following: “If an individual entitled to bring a civil action arising from childhood sexual abuse is under 18 years of age at the time the cause of action accrues, the individual may commence an action for damages regardless of . . . the age of the individual.”). Similar amendments have also been proposed to 42 Pa.C.S. §§ 5524, 5531(4), including eliminating any time bar to file a personal injury action based on sexual abuse of a minor. *See* Pennsylvania S.B. 682, 203d Gen. Assemb. 2019–2020 (Pa. 2019).

responsible for the inaction of their parents, and the benefit of tolling applies regardless. *See S.J. by & through B. v. Gardner*, 167 A.3d 136 (Pa. Super. 2017) (applying Minority Tolling Statute to a case filed by the minor’s parents outside of the statute of limitations but before the minor reached the age of eighteen). Those who discriminate against children should not escape liability simply because a parent or guardian failed to file a claim within the statute of limitations, and children who are the victims of discrimination should not be barred from relief because of a mistake, or the absence, of a parent or guardian. *See, e.g., Santos ex rel. Beato v. United States*, 559 F.3d 189, 203–04 (3d Cir. 2009) (discussing Pennsylvania’s Minority Tolling Statute in the context of claims under the Federal Tort Claims Act) (“Thus, the Government is contending for a result likely to prejudice the weakest and most vulnerable members of our society who are surely compelled to rely on others for the assertion of their rights . . . There is no escape from the reality that the statute of limitations trap . . . is a perfect vehicle to ensnare children.”).

Pennsylvania federal courts, the Third Circuit, and Massachusetts appellate courts have also recognized that the protection of minority tolling is particularly important in the context of civil and human rights claims similar to those protected by the PHRA. For example, prior to the enactment of a statute of limitations that expressly put the Individuals with Disabilities Education Act (“IDEA”) claims

outside of the reach of the minority tolling statute, some federal courts applied Pennsylvania’s Minority Tolling Statute to these claims, which are intended to “remedy discrimination in education”—and which generally require the exhaustion of administrative remedies. *See Chambers v. Sch. Dist. of Philadelphia Bd. of Educ.*, No. CIV.A. 05-2535, 2014 WL 5343679, at *2 (E.D. Pa. Oct. 21, 2014).

Similarly, a plaintiff is generally required to exhaust administrative remedies prior to bringing suit under the Federal Tort Claims Act (“FTCA”). However, federal courts have permitted FTCA claims where the plaintiff was a minor at the time of the harm and failed to file an administrative complaint within the two-year statute of limitations such that an administrative complaint would be time-barred at the time the plaintiff commenced her civil suit. *See, e.g., Albright v. Keystone Rural Health Ctr.*, 320 F. Supp. 2d 286, 291 (M.D. Pa. 2004) (holding plaintiff’s minority and the difficulty in determining defendant’s federal status warranted equitable tolling). Here, N.B.’s minority, in conjunction with the traumatizing sexual nature of the harm he suffered, warrant tolling of the statute of limitations.⁴

Massachusetts has also applied that state’s analogous minority tolling statute to its own anti-discrimination law. *See, e.g., Bills v. Bobby’s Food Enterprises, Inc.*, No. 972314C, 1998 WL 1184157, at *2 (Mass. Super. Feb. 5, 1998). In *Bills*, the

⁴ For discussion of how the sexual nature of the harm justifies equitable tolling, see *infra* Section C.1.

Superior Court of Massachusetts found “[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 (“MCAD”). *Id.* The court explained 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 was not inconsistent to apply the minority tolling statute. *Id.* The court also 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.* This reasoning applies with equal force to the PHRA.

Amici urge this Court to apply the Minority Tolling Statute to instances where the failure to file an administrative complaint pursuant to the PHRA would otherwise bar civil suit, in order to fulfill the state’s promise of securing meaningful access to justice for children.

C. Equitable Tolling Provides an Independent Basis Authorizing PHRA Claims To Proceed.

Separately, equitable tolling provides another basis to authorize PHRA claims like N.B.’s to proceed when the claimant is bringing claims based on sexual abuse as a minor. Section 962(e) of the PHRA provides that “[t]he time limits for

filing under any complaint or other pleading under this act shall be subject to . . . equitable tolling.” As noted by the Pennsylvania Commonwealth Court, equitable tolling may apply to PHRA claims “where extraordinary circumstances prevent the plaintiff from asserting his rights.” *See Uber v. Slippery Rock Univ. of Pa.*, 887 A.2d 362, 366 (Pa. Cmwlth. 2005); *see also Sabo v. UPMC Altoona*, No. 3:17-CV-135, 2019 WL 1877177, at *10 (W.D. Pa. Apr. 26, 2019) (finding that mental incompetence can justify equitable tolling under the PHRA). As demonstrated by federal jurisprudence, both enduring sexual abuse due to the action or inaction of the defendant and a plaintiff’s minority at the time he was discriminated against are extraordinary circumstances that justify the use of equitable tolling.

1. Equitable Tolling Applies to Cases like N.B.’s Where the Relevant Harm Plaintiff Endured Was Sexual Abuse.

Even in instances when the plaintiff was not victimized as a minor, federal courts have tolled the statute of limitations where the plaintiff suffered sexual abuse, as the nature of the offense and its impact constitute an extraordinary circumstance. *See, e.g., Stoll v. Runyon*, 165 F.3d 1238, 1242 (9th Cir. 1999), (finding plaintiff was 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 appropriately applied under Title VII of the Civil Rights Act of 1964 where a 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 resulting in childhood sexual abuse should receive special consideration for equitable tolling. *See* Gordon, *Adult Survivors*, at 1359 (“[V]ictims of childhood sexual abuse are often unable to file lawsuits until many years after the abuse has ended.”). In this case, 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* TAC ¶¶ 15–59 (describing the harassment and assaults N.B. endured and the opportunities the school had to intervene). 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. because the nature of the trauma he endured amounts to an extraordinary circumstance.

2. The Commonwealth Court Relied on Inapplicable Case Law to Support Its Holding and Adopting the Commonwealth Court's Holding Would Create a Perverse Holding that Does Not Comport with Federal Anti-discrimination Law.

The lower court pointed to Superior Court cases for the proposition that tolling on the basis of a plaintiff's minority can never be a basis for equitable tolling. This Court, however, has never decided this issue. The Superior Court cases are not binding this Court and are readily distinguishable from the instant matter as they did not involve the PHRA. *See Redenz by Redenz v. Rosenberg*, 520 A.2d 883 (Pa. Super. 1987) (refusing, in the context of a personal injury claim, to find that the plaintiff's minority at the time of the alleged harm justified equitable tolling); *DeSantis*, 434 A.2d at 1273 (finding that a statute of limitations for a suit in trespass was constitutional even though it barred a minor's claim).

To hold that our Minority Tolling Statute does not apply to the PHRA, or that PHRA's equitable tolling provision cannot be invoked based on a plaintiff's status as a minor, would create a perverse result: Pennsylvania minors would benefit from Pennsylvania's Minority Tolling Statute when bringing claims under federal anti-discrimination law, but not when bringing a claim under their own state law. This is because federal courts hearing Title IX and Title VI claims have applied equitable tolling to the claims of plaintiffs who were minors at the time of

the discrimination and seek relief under the Civil Rights Act. In such instances, courts 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 plaintiff's Civil Rights Act claim); *Gaudino v. Stroudsburg Area Sch. Dist.*, No. 3:CV-12-2159, 2013 WL 3863955, at *6 (M.D. Pa. July 23, 2013) (applying Pennsylvania's Minority Tolling Statute to a Title IX claim).⁵ In these cases, courts held that tolling the statute of limitations was imperative to ensure that individuals victimized during their youth could vindicate their rights as adults.

IV. CONCLUSION

For the reasons set forth above and by the Appellant, the Court should reverse the Commonwealth Court's order and find that Pennsylvania's Minority Tolling Statute is applicable to the PHRA, and that Section 962(e) of the PHRA can be invoked based on the plaintiff's status as a minor.

Dated: August 5, 2019

Respectfully submitted,

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⁵ This is significant because the PHRA is read 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).

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CERTIFICATE OF COMPLIANCE WITH PA.R.A.P. 531 AND 2135

I hereby certify that this brief complies with the word count limits of Rules 531 and 2135 of the Pennsylvania Rules of Appellate Procedure. Specifically, this brief includes 5,491 words based on the word-counting feature of the word-processing system used to prepare this brief, excluding the materials specified in Rule 2135(b) of the Pennsylvania Rules of Appellate Procedure.

Dated: August 5, 2019

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**CERTIFICATE OF PUBLIC ACCESS COMPLIANCE
PURSUANT TO PA. R. A. P. 127**

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: August 5, 2019

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PROOF OF SERVICE

I, Paul H. Saint-Antoine, Esq., hereby certify that I am this day causing a copy of the foregoing Brief of Education Law Center – PA, Juvenile Law Center, the Public Interest Law Center, Women’s Law Project, Community Legal Services of Philadelphia, and Professor Emily Suski as *Amici Curiae*, to be served upon the following counsel via first class mail, postage prepaid, which satisfies the requirements of Pa.R.A.P. 121:

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