10-3604

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ANTHONY ZENO,

Plaintiff-Appellee

v.

PINE PLAINS CENTRAL SCHOOL DISTRICT,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFF-APPELLEE URGING AFFIRMANCE

CHARLES P. ROSE
General Counsel
Department of Education

THOMAS E. PEREZ
Assistant Attorney General

SAMUEL R. BAGENSTOS
Principal Deputy Assistant
Attorney General

DENNIS J. DIMSEY
ERIN H. FLYNN
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 514-5361

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QUESTIONS PRESENTED

1. Whether the school district's disciplinary action against individual students for their acts of racial harassment against Anthony Zeno precludes a finding of deliberate indifference under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, where those disciplinary measures did not prevent continued acts of racial harassment against Zeno by other students.

2. If not, whether the school district's additional remedial actions in this case preclude a finding of deliberate indifference under Title VI.[1]

INTEREST OF THE UNITED STATES

This case concerns the application of Title VI's deliberate indifference standard of liability to known acts of persistent student-on-student racial harassment. The Department of Justice has authority to enforce Title VI in federal court, see 42 U.S.C. 2000d-1, and coordinates the implementation and enforcement of Title VI by federal agencies. See Exec. Order No. 12,250; 28 C.F.R. 0.51. The Department of Education extends financial assistance to school districts nationwide and is authorized by Congress to ensure compliance with Title VI in the operation of educational programs and activities. The Department of Education also promulgates regulations interpreting Title VI, see 34 C.F.R. Part 100, and issues guidance regarding the obligation of school districts to respond adequately to known acts of student-on-student harassment. See, *e.g.*, *Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance*, 59 Fed. Reg. 11,448 (Mar. 10, 1994); "Dear Colleague" letter from Russlyn Ali, Assistant Secretary for Civil Rights, Department of Education (Oct. 26, 2010) (see Addendum). The United States thus has a significant interest in the resolution of the questions presented.

[1] We take no position on the remittitur issue.

STATEMENT OF THE CASE

1. Plaintiff Anthony Zeno filed a damages action against Pine Plains Central School District alleging that it failed to provide him an educational environment free from racial harassment and intimidation, in violation of Title VI. JA40.[2] The school district moved for summary judgment, arguing that it was not deliberately indifferent to known acts of student-on-student harassment, and that Anthony was not denied access to educational opportunities or benefits within the meaning of Title VI. See *Zeno* v. *Pine Plains Cent. Sch. Dist.*, No. 07 Civ. 6508, 2009 WL 1403935, at *1 (S.D.N.Y. May 20, 2009).

The district court denied defendant's motion. See *Zeno*, 2009 WL 1403935, at *1. The court noted that Anthony began reporting incidents of harassment shortly after enrolling in school in February 2005. See *ibid.* These "incidents included, *inter alia*: threats of physical violence, including lynching; the use of racial epithets; vandalism of Plaintiff's property; and actual physical attacks on Plaintiff." *Ibid.* During the three years between Anthony's enrollment in 2005 and his graduation in 2008, "[v]arious students were disciplined * * * for both incidents directly involving Plaintiff and general racist behavior." *Ibid.*

The court explained that "the fact that individual responses were made in response to [14 enumerated incidents of] harassment is not dispositive as to the

[2] "JA___" refers to pages in the joint appendix. "SPA___" refers to pages in defendant's special appendix.

question of deliberate indifference," *Zeno*, 2009 WL 1403935, at *2, where Anthony "alleged not only discrete incidents of racial harassment, but a pervasive atmosphere of racism that hindered his access to education," *id.* at *3. Relying on district court cases within this Circuit, as well as cases from the First and Sixth Circuits, the court stated that "[i]n light of repeated incidents * * *, a question of fact remains as to the reasonableness of [the school district's] comprehensive response to Plaintiff's situation." *Ibid.* The court also concluded a question of fact remained as to whether Anthony was denied access to educational opportunities in violation of Title VI. *Ibid.*

2. The case proceeded to trial. JA322-JA1080. After the district court denied defendant's motion for a directed verdict, the jury found defendant liable under Title VI and awarded Anthony $1.25 million in compensatory damages. JA14, JA965, JA995. Defendant renewed its motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(b), and alternatively, moved for either a new trial or remittitur of the jury award. JA15. Defendant argued it could not be found deliberately indifferent to the racial harassment against Anthony because for each reported incident of harassment, it responded quickly and there were no further incidents with the disciplined students. SPA2.

In denying defendant's motion, the court distinguished the two district court cases the school district relied upon for support, explaining that the courts in both

cases found that the behavior complained of was not severe enough to deprive the complainants of educational benefits or opportunities. SPA2-SPA3. The court further distinguished both cases based on the nature and duration of the harassment, which was shorter and less persistent than that which Anthony endured. SPA3. The court stated that Anthony "adduced evidence that [the school district] was aware of over a dozen incidents over a period in excess of three (3) years, several of which involved physical violence or threats of death." SPA3.

Referring to its ruling on summary judgment and citing cases that supported a finding of deliberate indifference where a school district's actions were inadequate in light of the known circumstances, the court stated that it was "within the province of the jury to decide whether the school district was deliberately indifferent in light of the sustained harassment suffered by Plaintiff, despite the disciplinary actions taken against individual malfeasors." SPA3-SPA4. The court concluded that "[i]n light of the evidence of the duration and severity of the harassment sustained by [Anthony], it cannot be said that there was such an absence of evidence as would support setting aside the jury's verdict." SPA4. The court, however, granted the motion for a new trial unless Anthony elected to remit the jury award to $1 million, which he did. SPA7; JA1351.

The school district now challenges the denial of the Rule 50(b) motion and the remittitur amount. JA1352.

STATEMENT OF FACTS

1. In January 2005, sixteen-year-old Anthony Zeno moved with his family to Pine Plains, New York. JA347.[3] At that time, Anthony started ninth grade at Stissing Mountain High School (SMHS), where he received special education for a math-learning/non-verbal learning disability and attention-deficit hyperactivity disorder. JA343-JA344, JA347-JA348. SMHS is the only high school in Pine Plains Central School District (PPSD), which has a 5% minority student population. JA723. There were approximately one hundred students in Anthony's grade, almost all of whom were white. JA419, JA945. Anthony attended SMHS until graduating in June 2008. JA414, JA504. During the entire time that Anthony attended SMHS, the school district had a code of conduct that listed various infractions and their disciplinary consequences, which included verbal and written warnings, detention, in-school suspension, out-of-school suspension for up to five days, out-of-school suspension in excess of five days after a superintendant's hearing, and permanent expulsion. JA243-JA269.

[3] When reviewing the denial of a Rule 50(b) motion, the Court "consider[s] the evidence in the light most favorable to the party against whom the motion was made and . . . give[s] that party the benefit of all reasonable inferences that the jury might have drawn in his favor from the evidence. [The Court] disregard[s] all evidence favorable to the moving party that the jury is not required to believe." *Zellner* v. *Summerlin*, 494 F.3d 344, 371 (2d Cir. 2007) (internal quotation marks and citations omitted).

Almost immediately upon arriving at SMHS, Anthony was subjected to race-based verbal and physical outbursts by his peers. JA348, JA373. For example, on February 16, 2005, while in the high school gym during lunch, Michael O. made "racial comments" and charged at Anthony, threatening to "kick [his] ass" and stating "we don't want your kind here." JA79, JA426, JA727. Upon learning of the incident, Mrs. Zeno immediately met with SMHS Principal John Howe, who said he would investigate the incident, but also advised the Zenos not to "burn[ ] bridges." JA349. Howe investigated the incident, spoke with both students and their parents, and issued a verbal warning to Michael. JA79-JA80, JA729.

Approximately one week later, on February 25, 2005, David L. ripped a chain off of Anthony's neck in the hallway. JA318, JA428. After being escorted to Principal Howe's office, David stated he should not get in trouble for "some kid's fake rapper bling bling." JA429. Howe issued David a five-day suspension and ordered David to pay to repair the chain. JA318. Mrs. Zeno repeatedly met with Howe that semester to discuss her safety concerns for Anthony. JA738. On May 13, 2005, she also wrote to Superintendant Linda Kaumeyer to express her concern that Anthony and his younger sister had been "victims of verbal racial attacks and physical abuse from some of the students" since beginning school at PPSD. JA84. Mrs. Zeno did not receive a response to her letter, and Kaumeyer

did not meet with her in person. JA354, JA357. In addition, during a school board meeting that May, Kaumeyer stopped Mrs. Zeno from discussing Anthony's problems. JA354-JA355.

Anthony's experience only worsened during the tenth grade. Almost immediately upon beginning the new school year, on September 12, 2005, Robert M. attempted to punch Anthony in the high school gym, calling Anthony a "stupid fucking idiot" and grazing Anthony in the head while being restrained by peers. JA271, JA275, JA430, JA481, JA742-JA743, JA1164. Mary Alm, a school aide who witnessed the incident, reported that a lot of foul language had been used but that she did not hear any racial comments. JA275. Robert, who ultimately left the school district in January 2006, was given a five-day suspension and placed on social probation. JA271, JA273, JA317.

The next day, on September 13, 2005, Kyle M., apparently upset about his friend Robert's suspension, confronted Anthony in the lunch line, holding up both his middle fingers at Anthony and telling him to "[g]o back to where you came from." JA89, JA275, JA433, JA752. Alm, also present during this incident, confirmed that Kyle used profanity and attempted to throw a metal chair at Anthony. JA89, JA275. Upon meeting with Principal Howe, Kyle stated that he "hated" Anthony and was "going to get him" and "beat him down." JA91, JA751. Howe issued Kyle a five-day suspension, placed him on social probation, and

referred him to the school psychologist. JA89, JA91. The police also met with Kyle at his home. JA91.

On September 19, 2005, Mrs. Zeno wrote to Superintendant Kaumeyer regarding both events. JA1165-JA1166. On September 21, 2005, Kaumeyer responded with a letter stating she was advised of the incidents and encouraging the Zenos to continue to reach out to school officials. JA1167-JA1168. Kaumeyer attached Mrs. Zeno's letter to her September 23 newsletter to the school board, in which she stated that "the incidents are minor and have been handled correctly." JA1169. The Zenos got orders of protection against both Kyle M. (in October 2005) and Robert M. (in January 2006). JA97, JA377-JA379, JA1157. While no one reported racial comments to Principal Howe with respect to either incident, Howe had concerns that the conduct against Anthony was race-based. JA752, JA756-JA758.

On October 19, 2005, Dutchess County Human Rights Commission (HRC) Director Marilynn Vetrano wrote to Superintendant Kaumeyer, notifying Kaumeyer that the NAACP had contacted HRC regarding alleged student racism and requesting that Kaumeyer contact her. JA1232. Shortly thereafter, on October 25, 2005, Anthony observed graffiti in the boys' bathroom that said "Zeno is dead" and "Zeno will die." JA99, JA436, JA488, JA766. Upon receiving the report, Principal Howe called the police, photographed the wall, and had the graffiti

removed. JA766. No perpetrator was identified. JA766. On October 27, 2005, Mrs. Zeno spoke with Howe about the incident and reported that Anthony often heard, in class and in the hallways, that he was going to get "beat up" and have his "ass kicked." JA777, JA1230.

On November 2, 2005, the Zenos' attorney wrote to the school district's attorney requesting a "shadow"[4] to accompany Anthony in school, and seeking the immediate implementation of racial-sensitivity programs that demonstrated PPSD's commitment to its zero-tolerance policy. JA362-JA363, JA1170. In addition, on November 4, 2005, HRC's Vetrano and NAACP's Elouise Maxey met with Kaumeyer to discuss the benefits of shadowing as well as training programs that the organizations could offer to the district at no cost. JA564, JA594, JA686, JA689. Kaumeyer advised the women to speak with Howe. JA595, JA1172. Vetrano and Maxey met with Howe and explained the full-day shadowing concept as well as free, ongoing racial sensitivity programs that could be implemented within a couple of weeks. JA691-JA692, JA713-JA714. They also discussed

[4] Elouise Maxey, President of the Northern Dutchess NAACP, explained a "shadow" as follows: "A shadow is like a guardian angel for a child. It's an individual that will go to all the classes with the child, sit in the classroom. They will – the shadow will escort the child or children through the hallways, to their lockers, to the bathroom. The shadow is there to give the child a sense of safety, to make the child feel more comfortable. The shadow can also diffuse confrontations if something should happen in the classroom or while the child is going from class to class." JA711. Maxey further explained that shadows had been provided in other school districts with success, and that the shadow normally stays in place until the harassment is resolved. JA711.

specific programs targeted at racial harassment between school-aged boys. JA689, JA691, JA697.

On November 8, 2005, Principal Howe spoke individually with Anthony's teachers and football coach regarding their observations of Anthony during school. JA217, JA779-JA780. While many teachers reported no problems and indicated that Anthony was transitioning well, Anthony's global studies teacher reported "some comments of a racial nature" and his art teacher, Mrs. Jamieson, reported "racial comments all the time." JA217, JA781. Howe directed staff to notify him of any problems; however, he did not speak directly to students in Anthony's global studies and art classes. JA881.

Despite confirming that Anthony consistently heard racial comments during class, neither Howe nor Kaumeyer followed up with Vetrano or Maxey regarding the use of a "shadow" for Anthony or any free training programs that HRC or NAACP could offer at the high school. JA694, JA764. Howe later explained that he felt shadowing was already in place because he had advised teachers and staff to watch out for Anthony during class and in the hallways. JA769-JA770. In addition, shadowing was not a "high priority" for Howe because he had not used shadowing in the way proposed (*i.e.*, having an adult assigned to Anthony throughout the day). JA775.

On November 16, 2005, Mrs. Zeno attended a school board meeting where she commented generally on her concern for the physical safety and emotional well-being of district students; Kaumeyer told Zeno that she was aware of her issues. JA367, JA1229. Less than a month later, in early December 2005, another student, Jeffrey M., received a three-day suspension and social probation after distributing a homemade CD containing racist, anti-Semitic, and sexually explicit language to other high school students, including Anthony. JA278, JA358, JA438.

In the second half of Anthony's tenth-grade year, on January 12, 2006, Mrs. Jamieson reported that Corey C. continued to direct racial comments toward Anthony (*e.g.*, "homie," "gangster," "what's up, nigger"). JA102, JA106, JA441, JA786, JA789. Her student referral stated that Corey's "[c]lassroom behavior is a continual litany of inappropriate comments & conversations. Inter-mixed with these, on a daily basis, are continued racially stereotypical remarks made to [Anthony], 'you're my homey' 'your people' 'the hood' 'you're so ghetto.' When I challenge these statements, Corey claims that he and [Anthony] are 'brothers' and that [Anthony] doesn't mind." JA102. Mrs. Jamieson characterized Corey's actions as "[v]erbal & physical intimidation of another classmate." JA102. The next day, Mrs. Jamieson reported that Corey was "ranting about something" and stating that "white people have to take anything that is said to them." JA104.

After getting increasingly upset and storming out of the classroom, Corey was suspended for five days. JA102, JA104.

Upon returning to school, Corey physically confronted Anthony, blaming him for the suspension, and received another five-day suspension. JA442-JA443, JA791. On January 25, 2006, Mr. Pasquarelli, another SMHS teacher, reported this incident after hearing commotion in the hallway. JA1175. Pasquarelli's referral specifically noted Anthony's distressed appearance and Anthony's statements that he was tired of the racism, he couldn't "take any more of it," and that it's "been going on forever." JA1175-JA1177. Ms. Cook, Dean of Students, spoke with Anthony and told him to report further incidents to her or Principal Howe. JA883-JA884. By the time of Pasquarelli's referral, Howe understood Mrs. Jamieson to have classroom management issues that extended beyond the racial comments. JA824-JA825. Howe also knew that Anthony was "frustrated, annoyed, [and] upset about things," and that students were not being deterred by other students' suspensions. JA746, JA767, JA795-JA796. By January 2006, Howe felt things had reached a point where he needed to bring in new initiatives and fresh ideas to assist Anthony and correct the general climate in the high school. JA798-JA799.

On February 3, 2006, Mrs. Jamieson called Howe to her classroom because groups of students were shouting in the hall. JA219. When Howe arrived, R.J.

was screaming at Anthony and threatening to "kick [his] ass." JA444. Anthony indicated to Howe that R.J. was "the one." JA219, JA812. Howe separated the students and sent them home because it was the end of the school day. JA219, JA444, JA812. A few days later, on February 7, 2006, R.J. received a five-day suspension after using profanity and racial slurs upon exiting a school assembly. JA238, JA240, JA808. Apart from cursing repeatedly, R.J. stated that "[i]t is time this school got rid of some of the fucking niggers anyway." JA238.

A week later, on February 16, 2006, students tampered with Anthony's locker so that the door fell off when he went to open it; the locker was filled with garbage. JA320, JA449. The school identified Michael M. and David L. (from the necklace incident in February 2005) as the perpetrators. JA819. Both students were suspended for three days. JA819-JA820. In late-February 2006, the school district attempted to engage some of the aforementioned students and their parents in peer mediation; Mrs. Zeno declined to participate, however, unless the mediator was trained in racial bias. JA189, JA368. At about the same time, Dean Cook reported that she had talked with Anthony, who indicated that he had no further problems with Corey. JA315.

On March 13, 2006, Kyle R. stated during Mrs. Jamieson's art class that "we should take a rope and go to the nearest tree. We should start acting like they used to in the South." JA191, JA447. Kyle was suspended for five days, and finished

the year in a different school. JA191, JA826. A few days later, a van with two adults appeared outside the Zenos' home; the adult occupants threatened Anthony with what he thought was a gun. JA369-JA370. The police reported the incident to the school, and that same day, the school went into lockdown for an hour after Howe saw a van on school premises matching the description the police had given him. JA828-JA832. During the lockdown, Anthony was brought to the principal's office and his parents were called to the school. JA369-JA370, JA453, JA831. The lockdown was lifted after police located the van and its occupants. JA832. At Anthony's special education meeting that June, Mrs. Zeno said Anthony experienced school as a "battleground" and that the constant threats, epithets, and racial slurs created an atmosphere that sent a hate message. JA372-JA373, JA1186.

During Anthony's junior year, in January 2007, Anthony was disciplined for hitting another student after that student threatened to rape Anthony's sister and "kick [Anthony's] black ass." JA455-JA456. In February 2007, Anthony reported that a student in his drama club stated that if there were any roles with a black gangster, Anthony would fit the part. JA458. Finally, during Anthony's senior year, on September 14, 2007, police were called to a SMHS football game after Bruce W. called Anthony's sister a "slut," threatened to kick Anthony's "ass," and

choked Anthony's friend. JA207, JA450. Bruce received a 45-day suspension and left SMHS. JA197-JA200.

In January 2008, Anthony reported that Neil S. used racial slurs toward him on the bus ride from Anthony's half-day, off-site instructional program. JA211, JA375, JA461, JA980. Dean of Students Richard Starzyk spoke with Neil, who admitted to calling Anthony a "nigger." JA215, JA980. Starzyk imposed a half-day in-school suspension. JA215, JA981. He also spoke with Mrs. Zeno, who reported that Anthony continued to be harassed in the hallways. JA212, JA382, JA991-JA992. Starzyk responded that he needed the names of the students who were bothering Anthony. JA983, JA991-JA992.

2. Mrs. Zeno met with Principal Howe approximately 30 to 50 times between February 2005 and June 2008. JA363-JA364. During the course of those meetings, Howe communicated to her that he could focus only on short-term measures that dealt with individual students, not long-term solutions to Anthony's safety in school. JA364-JA365, JA402. The school's special education director and Title IX officer, Maryann Stoorvogel, similarly stated to Mrs. Zeno in an IEP meeting that the school district could not guarantee Anthony's safety at school, but would take appropriate disciplinary action against individual students as incidents occurred. JA372-JA373, JA402, JA656. At trial, despite her presence at Anthony's special education meetings, Stoorvogel denied having any knowledge

of the racial harassment Anthony endured. JA635, JA638. While Superintendant Kaumeyer stated that school officials were informed of the harassment, Stoorvogel could not recall any meetings at which school officials were notified of the incidents or told to look out for Anthony. JA562, JA635-JA636, JA641-JA642, JA677.

In addition to Mrs. Zeno's efforts to stop the harassment, Anthony himself went to Howe on a regular basis regarding unidentified students who were harassing him in school. JA432, JA913. Anthony ate lunch in the principal's office on a regular basis, and also received hall passes to go to class after his peers had left the hallways. JA434. School officials would not take any remedial action, however, unless Anthony provided them with the names of students whom he often did not know or could not identify. JA510. While Dean Cook encouraged Anthony to report ongoing problems to her or Principal Howe, Anthony informed Howe after every larger incident that the harassment was a regular occurrence. JA497. Howe and Anthony spoke "often," both formally and informally. JA740, JA788. Howe did not prepare a report each time Anthony expressed frustration to him over other students' harassing conduct. JA741.

3. Apart from disciplining individual students on a case-by-case basis, the school district did implement some broader measures. For example, by May 2005, the school district contacted the McGrath program about conducting an anti-

bullying program at the school. JA82. While the program was originally scheduled for October 2005, it was postponed to mid-February 2006, because of trainer unavailability. JA607. The three-part program consisted of small student groups, teacher training, and an evening session for parents. JA623. The training was not mandatory, and the sessions failed to emphasize cultural diversity and racial harassment. JA366, JA446, JA583-JA584, JA693. Rather, the training focused primarily on sexual harassment. JA112-JA119, JA180-JA187, JA693-JA694. In addition, there was no evidence that McGrath was advised of the racial problems the school experienced as a result of Anthony's enrollment. JA736. Indeed, Howe did not know what prompted the school to bring in the McGrath program or whether anyone sought to get the training any sooner. JA735-JA736.

In addition to the McGrath program, the school district contracted with JaRa Consulting to do a series of diversity trainings for students and staff. Howe had preliminary conversations with JaRa during the 2005-2006 school year. JA837. In fall 2006 (Anthony's junior year), JaRa completed diagnostic work and held preliminary meetings; in spring 2007, it initiated small group training sessions. JA593, JA841, JA844. JaRa continued student sessions during the 2007-2008 school year (Anthony's senior year). JA594, JA950. Students were chosen randomly for sessions that consisted of 12 groups of 12-14 students each. JA846-JA847. Students could opt out of the training sessions with parental consent.

JA847. JaRa did not meet with all SMHS students or conduct any school-wide assemblies. JA847. In addition, in 2006-2007, SMHS asked teachers to volunteer to revive an anti-prejudice club called "STOP"; the few participating students attended a diversity conference, assisted JaRa with some of its preliminary work, and invited a rap artist to perform at the school. JA308, JA597, JA926. In fall 2007, SMHS started "Project Wisdom," a series of one-minute character-building announcements over the morning PA system that occasionally addressed diversity and prejudice. JA310-JA312, JA618-JA619, JA929-JA930.

STANDARD OF REVIEW

This Court reviews de novo a district court's denial of a Rule 50(b) motion, applying the same standard as the district court. See *Zellner* v. *Summerlin*, 494 F.3d 344, 371 (2d Cir. 2007). A district court may disturb a jury verdict under Rule 50 "only where there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or there is such an overwhelming amount of evidence in favor of the movant that reasonable and fairminded men could not arrive at a verdict against him." *AMW Materials Testing, Inc.* v. *Town of Babylon*, 584 F.3d 436, 456 (2d Cir. 2009) (internal quotation marks and citation omitted). The Court may grant a Rule 50 motion "only if it can conclude that, with credibility assessments made against the moving party and all inferences drawn against the moving party, a

reasonable juror would have been *compelled* to accept the view of the moving party." *Zellner*, 494 F.3d at 370-371 (internal quotation marks and citation omitted). The movant thus has a "particularly heavy" burden. *Cross* v. *New York City Transit Auth.*, 417 F.3d 241, 248 (2d Cir. 2005).

SUMMARY OF THE ARGUMENT

The district court properly applied the deliberate indifference standard in holding that the school district, despite taking disciplinary action against individual students, could be found liable for the persistent racial harassment that Anthony endured. The district court also applied the correct standard in denying defendant's Rule 50(b) motion. The evidence supported a finding that the school district was deliberately indifferent to the three years of student-on-student racial harassment directed at Anthony, as its remedial actions were not effective or reasonably calculated to prevent the harassment. Because a reasonable juror would not be compelled to find in favor of defendant, the district court's judgment should be affirmed.

ARGUMENT

A SCHOOL DISTRICT MAY BE FOUND LIABLE UNDER THE DELIBERATE INDIFFERENCE STANDARD WHERE ITS RESPONSE TO KNOWN ACTS OF STUDENT-ON-STUDENT HARASSMENT IS NOT REASONABLY CALCULATED TO END PERSISTENT RACIAL HARASSMENT

A. School Districts Are Legally Obligated To Respond Promptly And Adequately To Known Acts Of Student-On-Student Racial Harassment

1. Title VI of the Civil Rights Act of 1964 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 benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. 2000d. Congress used Title VI as a model in enacting Title IX of the Education Amendments Act of 1972. See *Fitzgerald* v. *Barnstable Sch. Comm.*, 129 S. Ct. 788, 797 (2009). Title IX similarly provides that "[n]o 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).

While the Supreme Court has not directly addressed the appropriate standard for determining liability for student-on-student racial harassment under Title VI, it has determined the standard for student-on-student sexual harassment under Title IX. See *Davis* v. *Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999). In *Davis*, the

Court held that a recipient of federal funding may be liable in a private damages action "where the recipient is deliberately indifferent to known acts of student-on-student sexual harassment and the harasser is under the school's disciplinary authority," *id.* at 647, so long as the harassment is also "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school," *id.* at 650.

Thus, the deliberate indifference standard in private actions for damages imposes liability upon a funding recipient only for its own misconduct – *i.e.*, deliberate indifference in the face of known acts of serious student-on-student harassment. See *Davis*, 526 U.S. at 640-641. A funding recipient's liability for damages therefore is limited to those circumstances in which an "appropriate person[,] * * * an official of the recipient entity with authority to take corrective action to end the discrimination[,] * * * has actual knowledge of discrimination in the recipient's programs and fails adequately to respond." *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998); see *Davis*, 526 U.S. at 641-642.

Because Title IX was patterned after Title VI, the Supreme Court has held that the statutes are to be interpreted and enforced in the same manner. See *Cannon* v. *University of Chicago*, 441 U.S. 677, 694-698 (1979); see also *Fitzgerald*, 129 S. Ct. at 797; *Barnes* v. *Gorman*, 536 U.S. 181, 185 (2002) ("[T]he Court has interpreted Title IX consistently with Title VI."). Lower courts,

including this Court, thus have relied on *Davis* to guide their analysis in Title VI damages actions. See, *e.g.*, *Bryant* v. *Independent Sch. Dist. No. I-38*, 334 F.3d 928, 934 (10th Cir. 2003); *Whitfield* v. *Notre Dame Middle Sch.*, No. 09-2649, 2011 WL 94735, at *3 (3d Cir. Jan. 12, 2011); *DT* v. *Somers Cent. Sch. Dist.*, 348 F. App'x 697, 699 & n.2 (2d Cir. 2009).

2. To prevail on a student-on-student harassment claim under Title VI, a private plaintiff seeking money damages must show that the school district had actual knowledge of, and was deliberately indifferent to, racial harassment that was so severe, pervasive, and objectively offensive that it deprived the plaintiff of access to the educational opportunities or benefits provided by the school. See *Davis*, 526 U.S. at 633; *Gant* v. *Wallingford Bd. of Educ.*, 195 F.3d 134, 140 (2d Cir. 1999). A school district's response to known harassment amounts to deliberate indifference both if it is "clearly unreasonable in light of the known circumstances," *Gant*, 195 F.3d at 141 (internal quotation marks omitted), or "when remedial action only follows after a lengthy and unjustified delay," *Hayut* v. *State University of New York*, 352 F.3d 733, 751 (2d Cir. 2003) (internal quotation marks and citation omitted). In addition, the deliberate indifference must "subject a student to harassment" – that is, it must "cause students to undergo harassment or make them liable to or vulnerable to it." *DT*, 348 F. App'x at 700 (quoting *Davis*, 526 U.S. at 645). On appeal, the school district argues only that it cannot be found

deliberately indifferent as a matter of law because it responded promptly to known incidents of harassment, and took proactive measures to counter that harassment.

This Court has recognized that the mere fact that a school district responds to known student-on-student harassment does not preclude liability under the deliberate indifference standard. For example, in *Doe* v. *East Haven Board of Education*, 200 F. App'x 46 (2d Cir. 2006), this Court affirmed the denial of a school district's Rule 50(b) motion. The Court held that a reasonable juror could find that the school was deliberately indifferent to known student-on-student sexual harassment even where the student was allowed to miss class and work in the guidance office, provided a private room in the guidance office, offered home schooling or a security guard in school, and offered free psychological counseling. *Id.* at 49. While acknowledging that a plaintiff has no right to make particular remedial demands, the Court held that the school could be found deliberately indifferent based on its five-week delay in taking "concrete action to get the perpetrators of the harassment to stop." *Ibid.* Thus, liability under the deliberate indifference standard depends on the scope, timing, and effectiveness of a school district's remedial actions in light of the nature, severity, and duration of the harassing conduct.

Other circuit courts likewise have held that a school district may be liable under Title VI where it knows of ongoing harassment and fails to take appropriate

remedial action in light of the known circumstances. For example, in *Vance* v. *Spencer County Public School District*, 231 F.3d 253, 255-256 (6th Cir. 2000), the Sixth Circuit affirmed the district court's denial of the school district's Rule 50(b) motion in a student-on-student sexual harassment case. In that case, a female student faced recurring sexual harassment, including verbal and physical acts of harassment, by her male peers. *Id.* at 256-257. Initially, school officials responded by reprimanding individual students; approximately two years later, they also implemented sexual harassment training for students and staff. *Ibid.* After acknowledging that the deliberate indifference standard does not require officials to purge their schools of actionable peer harassment or implement particular remedial measures, *id.* at 260, the Sixth Circuit reiterated that a school "must respond [to the harassment] and must do so reasonably *in light of the known circumstances*." *Id.* at 261 (emphasis added).

The court explained that where a school district is aware that its remedial actions are "inadequate and ineffective," it must take further "reasonable action in light of those circumstances to eliminate the behavior." *Vance*, 231 F.3d at 261; see *Doe* v. *School Bd. of Broward Cnty.*, 604 F.3d 1248, 1261 (11th Cir. 2010) (agreeing with *Vance*); *Patterson* v. *Hudson Area Sch.*, 551 F.3d 438, 449 (6th Cir.) ("Hudson's success with individual students did not prevent the overall and continuing harassment of DP, a fact of which Hudson was fully aware, and thus

Hudson's isolated success with individual perpetrators cannot shield Hudson from liability as a matter of law."), cert. denied, 130 S. Ct. 299 (2009); *Flores* v. *Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1136 (9th Cir. 2003) (jury question where "obvious need for training"); *Wills* v. *Brown Univ.*, 184 F.3d 20, 26 (1st Cir. 1999) ("[E]vidence of an inadequate response is pertinent to show fault and causation where the plaintiff is claiming that [he] was harassed or continued to be harassed *after* the inadequate response."). "Where a school district has actual knowledge that its efforts to remediate are ineffective, and it continues to use those same methods to no avail, [the] district has failed to act reasonably in light of the known circumstances." *Vance*, 231 F.3d at 261.

Thus, if a school district is aware that other students are not being deterred from engaging in harassment by individual disciplinary action, and the district continues to rely on those disciplinary measures as its exclusive remedy, that response would not be reasonably calculated to prevent persistent harassment from occurring again. This Circuit should adopt the Sixth Circuit's rationale in *Vance* and *Patterson* with respect to a school district's obligation to timely implement additional remedial measures where it knows that individual disciplinary action has failed to prevent persistent student-on-student harassment.

3. The cases the school district relies upon in its opening brief are distinguishable on multiple bases. For example, in both *Doe* v. *Claiborne County*,

103 F.3d 495 (6th Cir. 1996), and *Rost* v. *Steamboat Springs RES-2 School District*, 511 F.3d 1114 (10th Cir. 2008), the schools were not on actual notice of the harassment. Additionally, in *Doe* v. *Dallas Independent School District*, 220 F.3d 380 (5th Cir. 2000), cert. denied, 531 U.S. 1073 (2001), and *Fitzgerald* v. *Barnstable School Committee*, 504 F.3d 165 (1st Cir. 2007), rev'd on other grounds, 555 U.S. 246 (2009), school officials responded to discrete incidents of harassment; unlike this case, the school districts did not receive regular, substantiated reports of persistent, unabated harassment.

Similarly, in *Porto* v. *Town of Tewksbury*, 488 F.3d 67, 75 (1st Cir.), cert. denied, 552 U.S. 992 (2007), the First Circuit reversed the denial of a Rule 50(b) motion only because there was no indication that the school district's remedial action to separate the two boys was not working. *Doe* v. *Bellefonte Area School District*, 106 F. App'x 798 (3d Cir. 2004), also is distinguishable from this case because the school (a) held assemblies, lectured students, trained staff, and enacted policies addressing student-on-student harassment; (b) put special reporting procedures in place with teachers with whom Doe was comfortable; (c) offered a "buddy" to accompany Doe in the halls; (d) was unaware of many of the incidents of ongoing harassment; and (e) did not face escalating incidents of violence. See generally *Doe* v. *Bellefonte Area Sch. Dist.*, No. 4:CV-02-1463, 2003 WL 23718302 (M.D. Pa. Sept. 29, 2003). Thus, none of the cases relied upon by

defendant involved the issue presented here – *i.e.*, whether a school district may be liable under Title VI for the known persistent harassment of a student, even where it takes individual disciplinary action after each identified act of harassment. Consistent with this Circuit's cases and persuasive precedent from the Sixth Circuit, the district court properly denied defendant's motion after determining the school district's actions, or lack thereof, could amount to deliberate indifference under Title VI.

B. A Reasonable Juror Could Find The School District Deliberately Indifferent To Known Acts Of Racial Harassment Against Anthony Zeno

1. Based on evidence that showed ongoing harassment by multiple students, a reasonable juror could find the school district deliberately indifferent to the persistent racial harassment Anthony endured at school. Armed with the knowledge that targeted racial harassment persisted in the high school despite individual disciplinary action against numerous students, the school district continued to rely almost entirely on the same ineffective remedial measure for more than three years.

Specifically, the school district's failure to follow up on the offers of the HRC and NAACP to provide – without charge – programs designed to address the district's known racial problems is clear evidence of its deliberate indifference to the ongoing harassment Anthony was experiencing. In addition, as early as November 2005, Principal Howe knew Mrs. Jamieson had classroom management

problems and that "racial comments" were occurring in her class "all the time." Yet Howe left Anthony to languish in Mrs. Jamieson's classroom for his entire sophomore year without any additional supervision or support. Other readily available and more effective responses reasonably calculated to ending the harassment could have included: reaffirming the school district's zero-tolerance policy; redistributing the district's code of conduct; holding mandatory training for all employees and students; issuing a letter to all parents that racial harassment of any form would not be tolerated; publicizing the means to report alleged harassment; providing contact information for the school's anti-discrimination officer; and engaging Anthony in school-based counseling. See Addendum 3-5; *Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance*, 59 Fed. Reg. 11,448, 11,450 (Mar. 10, 1994) ("The appropriate response to a racially hostile environment must be tailored to redress fully the specific problems experienced at the institution as a result of the harassment. In addition, the responsive action must be reasonably calculated to prevent recurrence.").

Despite the many options available to the school district, it relied primarily on a single, ineffective remedy – *i.e.*, individual disciplinary action – that failed to prevent the same conduct by other students. While defendant argues that individual disciplinary action stopped further harassment by the disciplined

students, this statement is inaccurate and misleading given the evidence that two students persisted in their behavior (David L. and Corey C.), three students left SMHS (Robert M., Kyle R., and Bruce W.), one student was under an order of protection (Kyle M.), and numerous unidentified students consistently engaged in harassing conduct. By adhering to such a minimal and unfocused response in light of the ongoing racial harassment lasting more than three years, the school district failed to satisfy its obligation to protect Anthony from known student-on-student racial harassment.

While a school district is not *required* to implement particular remedial actions, such as "shadowing," it must take some additional remedial action that reasonably appears to be effective, when it knows its current efforts are not working. Here, a reasonable juror could find that the school district was aware that its reliance on individual disciplinary action was not an adequate and effective response to widespread racial harassment in the high school. Despite this knowledge, the school district persisted in relying primarily upon this inadequate remedial measure.

2. The school district also argues that its additional "proactive measures" to end the harassment preclude a finding of deliberate indifference. A reasonable juror could find, however, that these so-called "proactive" efforts could not reasonably be expected to end the harassment. First, the three-day McGrath anti-

bullying program in February 2006 was not mandatory and emphasized sexual, not racial, harassment. Second, the JaRa diversity trainings in 2007-2008 were not mandatory and failed to encompass the entire student body. A reasonable juror could easily find both of these "proactive" efforts to be too little, too late, especially where they were implemented a full year after Anthony's first encounter with racial harassment, were not intended to reach the entire student body, and did not focus directly on race-based problems at SMHS. Moreover, while reviving the "STOP" club and instituting character-building announcements might help to improve the future educational climate of the high school, these belated efforts could not reasonably have been expected to prevent the ongoing slurs, threats, and escalating incidents of violence that Anthony endured while in high school.

Had the school district responded appropriately to the pattern of racial harassment that began in spring 2005 and was readily apparent by fall 2005, it might have prevented the escalating incidents of harassment that occurred during the remainder of Anthony's time at SMHS. Based on the totality of the circumstances, a reasonable juror could easily find that the school district's unfocused, minimal "proactive" efforts were clearly unreasonable, given the persistent racial harassment of Anthony for more than three years.

CONCLUSION

The district court's denial of the Rule 50(b) motion should be affirmed.

Respectfully submitted,

CHARLES P. ROSE
General Counsel
Department of Education

THOMAS E. PEREZ
Assistant Attorney General

SAMUEL R. BAGENSTOS
Principal Deputy Assistant
Attorney General

s/ Erin H. Flynn
DENNIS J. DIMSEY
ERIN H. FLYNN
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 514-5361

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that the foregoing Brief For The United States As Amicus Curiae Supporting Plaintiff-Appellee Urging Affirmance complies with the type volume limitation because it contains 6997 words of proportionally spaced text, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). The foregoing brief was prepared using Microsoft Word 2007 in Times New Roman, 14-point font.

I further certify that the electronic version of this brief, prepared for submission via ECF, has been scanned with the most recent version of Trend Micro Office Scan (version 8.0) and is virus-free.

s/ Erin H. Flynn
ERIN H. FLYNN
Attorney

CERTIFICATE OF SERVICE

I hereby certify that on April 21, 2011, I electronically filed the forgoing Brief For The United States As Amicus Curiae Supporting Plaintiff-Appellee Urging Affirmance with the Clerk of the Court for the United States Court of Appeals for the Second Circuit using the Appellate CM/ECF system. I further certify that on April 21, 2011, six paper copies, identical to the electronically filed brief, were sent to the Clerk of the Court via certified mail.

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.

s/ Erin H. Flynn
ERIN H. FLYNN
Attorney

ADDENDUM

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

October 26, 2010

Dear Colleague:

In recent years, many state departments of education and local school districts have taken steps to reduce bullying in schools. The U.S. Department of Education (Department) fully supports these efforts. Bullying fosters a climate of fear and disrespect that can seriously impair the physical and psychological health of its victims and create conditions that negatively affect learning, thereby undermining the ability of students to achieve their full potential. The movement to adopt anti-bullying policies reflects schools' appreciation of their important responsibility to maintain a safe learning environment for all students. I am writing to remind you, however, that some student misconduct that falls under a school's anti-bullying policy also may trigger responsibilities under one or more of the federal antidiscrimination laws enforced by the Department's Office for Civil Rights (OCR). As discussed in more detail below, by limiting its response to a specific application of its anti-bullying disciplinary policy, a school may fail to properly consider whether the student misconduct also results in discriminatory harassment.

The statutes that OCR enforces include Title VI of the Civil Rights Act of 1964[1] (Title VI), which prohibits discrimination on the basis of race, color, or national origin; Title IX of the Education Amendments of 1972[2] (Title IX), which prohibits discrimination on the basis of sex; Section 504 of the Rehabilitation Act of 1973[3] (Section 504); and Title II of the Americans with Disabilities Act of 1990[4] (Title II). Section 504 and Title II prohibit discrimination on the basis of disability.[5] School districts may violate these civil rights statutes and the Department's implementing regulations when peer harassment based on race, color, national origin, sex, or disability is sufficiently serious that it creates a hostile environment and such harassment is encouraged, tolerated, not adequately addressed, or ignored by school employees.[6] School personnel who understand their legal obligations to address harassment under these laws are in the best position to prevent it from occurring and to respond appropriately when it does. Although this letter focuses on the elementary and secondary school context, the legal principles also apply to postsecondary institutions covered by the laws and regulations enforced by OCR.

Some school anti-bullying policies already may list classes or traits on which bases bullying or harassment is specifically prohibited. Indeed, many schools have adopted anti-bullying policies that go beyond prohibiting bullying on the basis of traits expressly protected by the federal civil

[1] 42 U.S.C. § 2000d *et seq.*
[2] 20 U.S.C. § 1681 *et seq.*
[3] 29 U.S.C. § 794.
[4] 42 U.S.C. § 12131 *et seq*.
[5] OCR also enforces the Age Discrimination Act of 1975, 42 U.S.C. § 6101 *et seq.*, and the Boy Scouts of America Equal Access Act, 20 U.S.C. § 7905. This letter does not specifically address those statutes.
[6] The Department's regulations implementing these statutes are in 34 C.F.R. parts 100, 104, and 106. Under these federal civil rights laws and regulations, students are protected from harassment by school employees, other students, and third parties. This guidance focuses on peer harassment, and articulates the legal standards that apply in administrative enforcement and in court cases where plaintiffs are seeking injunctive relief.

rights laws enforced by OCR—race, color, national origin, sex, and disability—to include such bases as sexual orientation and religion. While this letter concerns your legal obligations under the laws enforced by OCR, other federal, state, and local laws impose additional obligations on schools.[7] And, of course, even when bullying or harassment is not a civil rights violation, schools should still seek to prevent it in order to protect students from the physical and emotional harms that it may cause.

Harassing conduct may take many forms, including verbal acts and name-calling; graphic and written statements, which may include use of cell phones or the Internet; or other conduct that may be physically threatening, harmful, or humiliating. Harassment does not have to include intent to harm, be directed at a specific target, or involve repeated incidents. Harassment creates a hostile environment when the conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school. When such harassment is based on race, color, national origin, sex, or disability, it violates the civil rights laws that OCR enforces.[8]

A school is responsible for addressing harassment incidents about which it knows or reasonably should have known.[9] In some situations, harassment may be in plain sight, widespread, or well-known to students and staff, such as harassment occurring in hallways, during academic or physical education classes, during extracurricular activities, at recess, on a school bus, or through graffiti in public areas. In these cases, the obvious signs of the harassment are sufficient to put the school on notice. In other situations, the school may become aware of misconduct, triggering an investigation that could lead to the discovery of additional incidents that, taken together, may constitute a hostile environment. In all cases, schools should have well-publicized policies prohibiting harassment and procedures for reporting and resolving complaints that will alert the school to incidents of harassment.[10]

When responding to harassment, a school must take immediate and appropriate action to investigate or otherwise determine what occurred. The specific steps in a school's investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved, the size and administrative structure of the school, and other factors. In all cases, however, the inquiry should be prompt, thorough, and impartial.

If an investigation reveals that discriminatory harassment has occurred, a school must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile

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[7] For instance, the U.S. Department of Justice (DOJ) has jurisdiction over Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c (Title IV), which prohibits discrimination on the basis of race, color, sex, religion, or national origin by public elementary and secondary schools and public institutions of higher learning. State laws also provide additional civil rights protections, so districts should review these statutes to determine what protections they afford (*e.g.*, some state laws specifically prohibit discrimination on the basis of sexual orientation).

[8] Some conduct alleged to be harassment may implicate the First Amendment rights to free speech or expression. For more information on the First Amendment's application to harassment, see the discussions in OCR's Dear Colleague Letter: First Amendment (July 28, 2003), *available at* http://www.ed.gov/about/offices/list/ocr/firstamend.html, and OCR's *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (Jan. 19, 2001) (*Sexual Harassment Guidance*), *available at* http://www.ed.gov/about/offices/list/ocr/docs/shguide.html.

[9] A school has notice of harassment if a responsible employee knew, or in the exercise of reasonable care should have known, about the harassment. For a discussion of what a "responsible employee" is, see OCR's *Sexual Harassment Guidance*.

[10] Districts must adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee sex and disability discrimination complaints, and must notify students, parents, employees, applicants, and other interested parties that the district does not discriminate on the basis of sex or disability. *See* 28 C.F.R. § 35.106; 28 C.F.R. § 35.107(b); 34 C.F.R. § 104.7(b); 34 C.F.R. § 104.8; 34 C.F.R. § 106.8(b); 34 C.F.R. § 106.9.

environment and its effects, and prevent the harassment from recurring. These duties are a school's responsibility even if the misconduct also is covered by an anti-bullying policy, and regardless of whether a student has complained, asked the school to take action, or identified the harassment as a form of discrimination.

Appropriate steps to end harassment may include separating the accused harasser and the target, providing counseling for the target and/or harasser, or taking disciplinary action against the harasser. These steps should not penalize the student who was harassed. For example, any separation of the target from an alleged harasser should be designed to minimize the burden on the target's educational program (*e.g.*, not requiring the target to change his or her class schedule).

In addition, depending on the extent of the harassment, the school may need to provide training or other interventions not only for the perpetrators, but also for the larger school community, to ensure that all students, their families, and school staff can recognize harassment if it recurs and know how to respond. A school also may be required to provide additional services to the student who was harassed in order to address the effects of the harassment, particularly if the school initially delays in responding or responds inappropriately or inadequately to information about harassment. An effective response also may need to include the issuance of new policies against harassment and new procedures by which students, parents, and employees may report allegations of harassment (or wide dissemination of existing policies and procedures), as well as wide distribution of the contact information for the district's Title IX and Section 504/Title II coordinators.[11]

Finally, a school should take steps to stop further harassment and prevent any retaliation against the person who made the complaint (or was the subject of the harassment) or against those who provided information as witnesses. At a minimum, the school's responsibilities include making sure that the harassed students and their families know how to report any subsequent problems, conducting follow-up inquiries to see if there have been any new incidents or any instances of retaliation, and responding promptly and appropriately to address continuing or new problems.

When responding to incidents of misconduct, schools should keep in mind the following:

- The label used to describe an incident (*e.g.*, bullying, hazing, teasing) does not determine how a school is obligated to respond. Rather, the nature of the conduct itself must be assessed for civil rights implications. So, for example, if the abusive behavior is on the basis of race, color, national origin, sex, or disability, and creates a hostile environment, a school is obligated to respond in accordance with the applicable federal civil rights statutes and regulations enforced by OCR.

- When the behavior implicates the civil rights laws, school administrators should look beyond simply disciplining the perpetrators. While disciplining the perpetrators is likely a necessary step, it often is insufficient. A school's responsibility is to eliminate the

[11] Districts must designate persons responsible for coordinating compliance with Title IX, Section 504, and Title II, including the investigation of any complaints of sexual, gender-based, or disability harassment. *See* 28 C.F.R. § 35.107(a); 34 C.F.R. § 104.7(a); 34 C.F.R. § 106.8(a).

hostile environment created by the harassment, address its effects, and take steps to ensure that harassment does not recur. Put differently, the unique effects of discriminatory harassment may demand a different response than would other types of bullying.

Below, I provide hypothetical examples of how a school's failure to recognize student misconduct as discriminatory harassment violates students' civil rights.[12] In each of the examples, the school was on notice of the harassment because either the school or a responsible employee knew or should have known of misconduct that constituted harassment. The examples describe how the school should have responded in each circumstance.

Title VI: Race, Color, or National Origin Harassment

- *Some students anonymously inserted offensive notes into African-American students' lockers and notebooks, used racial slurs, and threatened African-American students who tried to sit near them in the cafeteria. Some African-American students told school officials that they did not feel safe at school. The school investigated and responded to individual instances of misconduct by assigning detention to the few student perpetrators it could identify. However, racial tensions in the school continued to escalate to the point that several fights broke out between the school's racial groups.*

  In this example, school officials failed to acknowledge the pattern of harassment as indicative of a racially hostile environment in violation of Title VI. Misconduct need not be directed at a particular student to constitute discriminatory harassment and foster a racially hostile environment. Here, the harassing conduct included overtly racist behavior (*e.g.*, racial slurs) and also targeted students on the basis of their race (*e.g.*, notes directed at African-American students). The nature of the harassment, the number of incidents, and the students' safety concerns demonstrate that there was a racially hostile environment that interfered with the students' ability to participate in the school's education programs and activities.

  Had the school recognized that a racially hostile environment had been created, it would have realized that it needed to do more than just discipline the few individuals whom it could identify as having been involved. By failing to acknowledge the racially hostile environment, the school failed to meet its obligation to implement a more systemic response to address the unique effect that the misconduct had on the school climate. A more effective response would have included, in addition to punishing the perpetrators, such steps as reaffirming the school's policy against discrimination (including racial harassment), publicizing the means to report allegations of racial harassment, training faculty on constructive responses to racial conflict, hosting class discussions about racial harassment and sensitivity to students of other races, and conducting outreach to involve parents and students in an effort to identify problems and improve the school climate. Finally, had school officials responded appropriately

[12] Each of these hypothetical examples contains elements taken from actual cases.

and aggressively to the racial harassment when they first became aware of it, the school might have prevented the escalation of violence that occurred.[13]

- *Over the course of a school year, school employees at a junior high school received reports of several incidents of anti-Semitic conduct at the school. Anti-Semitic graffiti, including swastikas, was scrawled on the stalls of the school bathroom. When custodians discovered the graffiti and reported it to school administrators, the administrators ordered the graffiti removed but took no further action. At the same school, a teacher caught two ninth-graders trying to force two seventh-graders to give them money. The ninth-graders told the seventh-graders, "You Jews have all of the money, give us some." When school administrators investigated the incident, they determined that the seventh-graders were not actually Jewish. The school suspended the perpetrators for a week because of the serious nature of their misconduct. After that incident, younger Jewish students started avoiding the school library and computer lab because they were located in the corridor housing the lockers of the ninth-graders. At the same school, a group of eighth-grade students repeatedly called a Jewish student "Drew the dirty Jew." The responsible eighth-graders were reprimanded for teasing the Jewish student.*

  The school administrators failed to recognize that anti-Semitic harassment can trigger responsibilities under Title VI. While Title VI does not cover discrimination based solely on religion,[14] groups that face discrimination on the basis of actual or perceived shared ancestry or ethnic characteristics may not be denied protection under Title VI on the ground that they also share a common faith. These principles apply not just to Jewish students, but also to students from any discrete religious group that shares, or is perceived to share, ancestry or ethnic characteristics (*e.g.*, Muslims or Sikhs). Thus, harassment against students who are members of any religious group triggers a school's Title VI responsibilities when the harassment is based on the group's actual or perceived shared ancestry or ethnic characteristics, rather than solely on its members' religious practices. A school also has responsibilities under Title VI when its students are harassed based on their actual or perceived citizenship or residency in a country whose residents share a dominant religion or a distinct religious identity.[15]

  In this example, school administrators should have recognized that the harassment was based on the students' actual or perceived shared ancestry or ethnic identity as Jews (rather than on the students' religious practices). The school was not relieved of its responsibilities under Title VI because the targets of one of the incidents were not actually Jewish. The harassment was still based on the perceived ancestry or ethnic characteristics of the targeted students. Furthermore, the harassment negatively affected the ability and willingness of Jewish students to participate fully in the school's

[13] More information about the applicable legal standards and OCR's approach to investigating allegations of harassment on the basis of race, color, or national origin is included in *Racial Incidents and Harassment Against Students at Educational Institutions: Investigative Guidance*, 59 Fed. Reg. 11,448 (Mar. 10, 1994), *available at* http://www.ed.gov/about/offices/list/ocr/docs/race394.html.
[14] As noted in footnote seven, DOJ has the authority to remedy discrimination based solely on religion under Title IV.
[15] More information about the applicable legal standards and OCR's approach to investigating complaints of discrimination against members of religious groups is included in OCR's Dear Colleague Letter: Title VI and Title IX Religious Discrimination in Schools and Colleges (Sept. 13, 2004), *available at* http://www2.ed.gov/about/offices/list/ocr/religious-rights2004.html.

education programs and activities (*e.g.*, by causing some Jewish students to avoid the library and computer lab). Therefore, although the discipline that the school imposed on the perpetrators was an important part of the school's response, discipline alone was likely insufficient to remedy a hostile environment. Similarly, removing the graffiti, while a necessary and important step, did not fully satisfy the school's responsibilities. As discussed above, misconduct that is not directed at a particular student, like the graffiti in the bathroom, can still constitute discriminatory harassment and foster a hostile environment. Finally, the fact that school officials considered one of the incidents "teasing" is irrelevant for determining whether it contributed to a hostile environment.

Because the school failed to recognize that the incidents created a hostile environment, it addressed each only in isolation, and therefore failed to take prompt and effective steps reasonably calculated to end the harassment and prevent its recurrence. In addition to disciplining the perpetrators, remedial steps could have included counseling the perpetrators about the hurtful effect of their conduct, publicly labeling the incidents as anti-Semitic, reaffirming the school's policy against discrimination, and publicizing the means by which students may report harassment. Providing teachers with training to recognize and address anti-Semitic incidents also would have increased the effectiveness of the school's response. The school could also have created an age-appropriate program to educate its students about the history and dangers of anti-Semitism, and could have conducted outreach to involve parents and community groups in preventing future anti-Semitic harassment.

Title IX: Sexual Harassment

- *Shortly after enrolling at a new high school, a female student had a brief romance with another student. After the couple broke up, other male and female students began routinely calling the new student sexually charged names, spreading rumors about her sexual behavior, and sending her threatening text messages and e-mails. One of the student's teachers and an athletic coach witnessed the name calling and heard the rumors, but identified it as "hazing" that new students often experience. They also noticed the new student's anxiety and declining class participation. The school attempted to resolve the situation by requiring the student to work the problem out directly with her harassers.*

  Sexual harassment is unwelcome conduct of a sexual nature, which can include unwelcome sexual advances, requests for sexual favors, or other verbal, nonverbal, or physical conduct of a sexual nature. Thus, sexual harassment prohibited by Title IX can include conduct such as touching of a sexual nature; making sexual comments, jokes, or gestures; writing graffiti or displaying or distributing sexually explicit drawings, pictures, or written materials; calling students sexually charged names; spreading sexual rumors; rating students on sexual activity or performance; or circulating, showing, or creating e-mails or Web sites of a sexual nature.

In this example, the school employees failed to recognize that the "hazing" constituted sexual harassment. The school did not comply with its Title IX obligations when it failed to investigate or remedy the sexual harassment. The conduct was clearly unwelcome, sexual (*e.g.*, sexual rumors and name calling), and sufficiently serious that it limited the student's ability to participate in and benefit from the school's education program (*e.g.*, anxiety and declining class participation).

The school should have trained its employees on the type of misconduct that constitutes sexual harassment. The school also should have made clear to its employees that they could not require the student to confront her harassers. Schools may use informal mechanisms for addressing harassment, but only if the parties agree to do so on a voluntary basis. Had the school addressed the harassment consistent with Title IX, the school would have, for example, conducted a thorough investigation and taken interim measures to separate the student from the accused harassers. An effective response also might have included training students and employees on the school's policies related to harassment, instituting new procedures by which employees should report allegations of harassment, and more widely distributing the contact information for the district's Title IX coordinator. The school also might have offered the targeted student tutoring, other academic assistance, or counseling as necessary to remedy the effects of the harassment.[16]

Title IX: Gender-Based Harassment

- *Over the course of a school year, a gay high school student was called names (including anti-gay slurs and sexual comments) both to his face and on social networking sites, physically assaulted, threatened, and ridiculed because he did not conform to stereotypical notions of how teenage boys are expected to act and appear (e.g., effeminate mannerisms, nontraditional choice of extracurricular activities, apparel, and personal grooming choices). As a result, the student dropped out of the drama club to avoid further harassment. Based on the student's self-identification as gay and the homophobic nature of some of the harassment, the school did not recognize that the misconduct included discrimination covered by Title IX. The school responded to complaints from the student by reprimanding the perpetrators consistent with its anti-bullying policy. The reprimands of the identified perpetrators stopped the harassment by those individuals. It did not, however, stop others from undertaking similar harassment of the student.*

As noted in the example, the school failed to recognize the pattern of misconduct as a form of sex discrimination under Title IX. Title IX prohibits harassment of both male and female students regardless of the sex of the harasser—*i.e.*, even if the harasser and target are members of the same sex. It also prohibits gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping. Thus, it can be sex discrimination if students are harassed either for exhibiting what is perceived as a stereotypical characteristic for their

[16] More information about the applicable legal standards and OCR's approach to investigating allegations of sexual harassment is included in OCR's *Sexual Harassment Guidance*, *available at* http://www.ed.gov/about/offices/list/ocr/docs/shguide.html.

sex, or for failing to conform to stereotypical notions of masculinity and femininity. Title IX also prohibits sexual harassment and gender-based harassment of all students, regardless of the actual or perceived sexual orientation or gender identity of the harasser or target.

Although Title IX does not prohibit discrimination based solely on sexual orientation, Title IX does protect all students, including lesbian, gay, bisexual, and transgender (LGBT) students, from sex discrimination. When students are subjected to harassment on the basis of their LGBT status, they may also, as this example illustrates, be subjected to forms of sex discrimination prohibited under Title IX. The fact that the harassment includes anti-LGBT comments or is partly based on the target's actual or perceived sexual orientation does not relieve a school of its obligation under Title IX to investigate and remedy overlapping sexual harassment or gender-based harassment. In this example, the harassing conduct was based in part on the student's failure to act as some of his peers believed a boy should act. The harassment created a hostile environment that limited the student's ability to participate in the school's education program (*e.g.*, access to the drama club). Finally, even though the student did not identify the harassment as sex discrimination, the school should have recognized that the student had been subjected to gender-based harassment covered by Title IX.

In this example, the school had an obligation to take immediate and effective action to eliminate the hostile environment. By responding to individual incidents of misconduct on an *ad hoc* basis only, the school failed to confront and prevent a hostile environment from continuing. Had the school recognized the conduct as a form of sex discrimination, it could have employed the full range of sanctions (including progressive discipline) and remedies designed to eliminate the hostile environment. For example, this approach would have included a more comprehensive response to the situation that involved notice to the student's teachers so that they could ensure the student was not subjected to any further harassment, more aggressive monitoring by staff of the places where harassment occurred, increased training on the scope of the school's harassment and discrimination policies, notice to the target and harassers of available counseling services and resources, and educating the entire school community on civil rights and expectations of tolerance, specifically as they apply to gender stereotypes. The school also should have taken steps to clearly communicate the message that the school does not tolerate harassment and will be responsive to any information about such conduct.[17]

Section 504 and Title II: Disability Harassment

- *Several classmates repeatedly called a student with a learning disability "stupid," "idiot," and "retard" while in school and on the school bus. On one occasion, these students tackled him, hit him with a school binder, and threw his personal items into the garbage. The student complained to his teachers and guidance counselor that he was continually being taunted and teased. School officials offered him counseling services and a*

[17] Guidance on gender-based harassment is also included in OCR's *Sexual Harassment Guidance*, *available at* http://www.ed.gov/about/offices/list/ocr/docs/shguide.html.

psychiatric evaluation, but did not discipline the offending students. As a result, the harassment continued. The student, who had been performing well academically, became angry, frustrated, and depressed, and often refused to go to school to avoid the harassment.

In this example, the school failed to recognize the misconduct as disability harassment under Section 504 and Title II. The harassing conduct included behavior based on the student's disability, and limited the student's ability to benefit fully from the school's education program (*e.g.*, absenteeism). In failing to investigate and remedy the misconduct, the school did not comply with its obligations under Section 504 and Title II.

Counseling may be a helpful component of a remedy for harassment. In this example, however, since the school failed to recognize the behavior as disability harassment, the school did not adopt a comprehensive approach to eliminating the hostile environment. Such steps should have at least included disciplinary action against the harassers, consultation with the district's Section 504/Title II coordinator to ensure a comprehensive and effective response, special training for staff on recognizing and effectively responding to harassment of students with disabilities, and monitoring to ensure that the harassment did not resume.[18]

I encourage you to reevaluate the policies and practices your school uses to address bullying[19] and harassment to ensure that they comply with the mandates of the federal civil rights laws. For your convenience, the following is a list of online resources that further discuss the obligations of districts to respond to harassment prohibited under the federal antidiscrimination laws enforced by OCR:

- *Sexual Harassment: It's Not Academic* (Revised 2008): http://www.ed.gov/about/offices/list/ocr/docs/ocrshpam.html
- *Dear Colleague Letter: Sexual Harassment Issues* (2006): http://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html
- *Dear Colleague Letter: Religious Discrimination* (2004): http://www2.ed.gov/about/offices/list/ocr/religious-rights2004.html
- *Dear Colleague Letter: First Amendment* (2003): http://www.ed.gov/about/offices/list/ocr/firstamend.html

[18] More information about the applicable legal standards and OCR's approach to investigating allegations of disability harassment is included in OCR's Dear Colleague Letter: Prohibited Disability Harassment (July 25, 2000), *available at* http://www2.ed.gov/about/offices/list/ocr/docs/disabharassltr.html.

[19] For resources on preventing and addressing bullying, please visit http://www.bullyinginfo.org, a Web site established by a federal Interagency Working Group on Youth Programs. For information on the Department's bullying prevention resources, please visit the Office of Safe and Drug-Free Schools' Web site at http://www.ed.gov/offices/OESE/SDFS. For information on regional Equity Assistance Centers that assist schools in developing and implementing policies and practices to address issues regarding race, sex, or national origin discrimination, please visit http://www.ed.gov/programs/equitycenters.

- *Sexual Harassment Guidance* (Revised 2001): http://www.ed.gov/about/offices/list/ocr/docs/shguide.html

- *Dear Colleague Letter: Prohibited Disability Harassment* (2000): http://www.ed.gov/about/offices/list/ocr/docs/disabharassltr.html

- *Racial Incidents and Harassment Against Students* (1994): http://www.ed.gov/about/offices/list/ocr/docs/race394.html

Please also note that OCR has added new data items to be collected through its Civil Rights Data Collection (CRDC), which surveys school districts in a variety of areas related to civil rights in education. The CRDC now requires districts to collect and report information on allegations of harassment, policies regarding harassment, and discipline imposed for harassment. In 2009-10, the CRDC covered nearly 7,000 school districts, including all districts with more than 3,000 students. For more information about the CRDC data items, please visit http://www2.ed.gov/about/offices/list/ocr/whatsnew.html.

OCR is committed to working with schools, students, students' families, community and advocacy organizations, and other interested parties to ensure that students are not subjected to harassment. Please do not hesitate to contact OCR if we can provide assistance in your efforts to address harassment or if you have other civil rights concerns.

For the OCR regional office serving your state, please visit: http://wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm, or call OCR's Customer Service Team at 1-800-421-3481.

I look forward to continuing our work together to ensure equal access to education, and to promote safe and respectful school climates for America's students.

Sincerely,

/s/

Russlynn Ali
Assistant Secretary for Civil Rights