

SUPREME COURT OF NORTH CAROLINA

ASHLEY DEMINSKI, as guardian)
Ad litem on behalf of C.E.D, E.M.D.,)
and K.A.D.,)

Plaintiff-Appellants,)

v.)

PITT COUNTY BOARD)
OF EDUCATION,)

Defendant-Appellee,)

and)

THE STATE BOARD OF)
EDUCATION,)

Defendant.)

From Wake County
No. 17-CV-15159
COA18-998

**BRIEF OF AMICUS CURIAE
DISABILITY RIGHTS NORTH CAROLINA**

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**BRIEF OF AMICUS CURIAE
 DISABILITY RIGHTS NORTH CAROLINA**

Pursuant to Rule 28(i) of the North Carolina Rules of Appellate Procedure, Disability Rights North Carolina submits this brief as amicus curiae in support of Plaintiff-Appellants.¹

¹ No person or entity other than Disability Rights North Carolina, directly or indirectly, either wrote this brief or contributed money for its preparation.

NATURE OF APPLICANT'S INTERESTS

Disability Rights NC (“DRNC”) requests to participate in this matter as amicus curiae to address the effect this Court’s ruling may have on students with disabilities in our State.

DRNC is North Carolina’s designated Protection and Advocacy System (“P&A”). DRNC is authorized by federal law to protect and advocate for the rights of individuals with disabilities. *See* 42 U.S.C. § 10801 *et seq.*; 42 U.S.C. § 15041 *et seq.*; 29 U.S.C. 794e *et seq.* As the P&A, DRNC is empowered to “pursue administrative, legal or other appropriate remedies to protect and advocate on behalf of individuals with [disabilities] to address abuse, neglect or other violations of rights.” 42 C.F.R. § 51.31(a); *see also* 45 C.F.R. § 1326.21(e) and 34 C.F.R. § 381.10 (containing parallel provisions).

DRNC’s interest in the present case is to advocate for the legal rights of North Carolina students with disabilities to be free from abuse and neglect and to have access to the courts when they are subject to such harms.

ARGUMENT

Summary of Argument

The North Carolina Constitution’s guarantee of a sound basic education includes the right to be free from bullying, abuse, or neglect that interferes with a student’s education. Students must be able to obtain injunctive relief to end interference with their right to access their education, regardless of the subjective intent of the responsible school authorities.

I. Students with Disabilities Are Vulnerable to Bullying, Abuse, and Neglect That Interferes with Their Access to Education.

Students with disabilities are significantly more likely than students without disabilities to experience abuse from both peers and school staff. Based on analysis of data regarding over 12,000 students, as compared to students without disabilities, one study found that:

- Children with autism have a 50% greater risk of being bullied;
- Between 41% and 66% of students with emotional disabilities have been bullied;
- 73% of students with mild intellectual disabilities were verbally bullied; and
- 63.7% of students with ADHD and other disabilities experienced at least one type of bullying behavior.

Bear, George G., Mantz, Lindsey S., Glutting, Joseph J., Yang, Chunyan, Boyer, Deborah E., *Differences in Bullying Victimization Between Students With and Without Disabilities*, School Psychology Review, 2015, Volume 44, No. 1, pp. 98-116.²

The Government Accountability Office reported, regarding allegations of abuse by staff in schools: “we did discover hundreds of such allegations at public and private schools across the nation between the years 1990 and 2009. **Almost all of the**

² Available at: <https://disabuse.eu/sites/default/files/2018-10/Differences%20in%20Bullying%20.pdf>.

allegations we identified involved children with disabilities.... [W]e continue to receive new allegations from parents and advocacy groups.” GAO, *Seclusions and Restraints: Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers*, GAO-09-719T (Washington, D.C., May 19, 2009) (emphasis added).

DRNC’s works to end the abuse and neglect of students. Some of that work, funded by the Governor’s Crime Commission, is aimed at identifying abuse and neglect in integrated school settings as well as in separate schools or classrooms exclusively serving students with disabilities. DRNC regularly receives reports from parents about their children’s unexplained injuries while at school, including significant bruises, rug burns, ripped clothing, as well as medical reports documenting head injuries, sprains, broken bones, dehydration, and lack of adequate food intake. DRNC’s recent investigations of abuse and neglect of students with disabilities in schools include: i) a student who was punched on multiple occasions, likely over the course of more than one school year, by the aide in his classroom; ii) a student who was, on a daily basis, separated from her peers, tied to a chair and forced to wear a helmet with a face mask; iii) multiple Deaf students who were held face-down with their arms pinned, exacerbating underlying health conditions and preventing them from communicating via sign language; iv) a student who was restrained face-down with such force that he had petechia in his eyes (typically seen in strangulation victims); and v) countless students who have been locked for hours in closets, bathrooms, and make-shift seclusion spaces.

Every student in North Carolina has the right to a sound basic education, including those who require protection against abuse in order to access their education. *Hoke County Bd. of Educ. v. State*, 358 N.C. 605, 620, 599 S.E.2d 365, 379 (2004) (“We read *Leandro* and our state Constitution, as argued by plaintiffs, as according the right at issue to all children of North Carolina, *regardless of their respective ages or needs.*” (emphasis added).)³

Students with disabilities who are being victimized at school are not being afforded equal access to education. To the extent that such victimization impairs students’ ability to receive a sound basic education, they have suffered a constitutional injury that requires a remedy. *Deminski v. State Bd. of Educ.*, __ N.C. App. __, __, 837 S.E.2d 611, 619 (2020) (Zachary, dissenting)(noting the lack of meaningful distinction between the failure to provide access to a sound basic education and permitting interference with access by bullying and harassment); *see also, Hoke*, at 615 (describing the state’s obligation to provide the “*opportunity* for a sound basic education” (emphasis added)).

³ The Court has previously recognized an individual direct constitutional claim for interference with a student’s right to education, where that interference was caused by assaultive behavior toward a student with a disability. *Craig v. New Hanover County Bd. of Educ.*, 363 N.C. 334, 678 S.E.2d 351 (2009). *Craig* settled the issue in this case by holding that sovereign immunity is not a bar to a direct constitutional claim for interference with access to education. *Id.* at 342, 678 S.E.2d at 356-57. While the Court of Appeals majority in this case felt constrained by the decision in *Doe v. Charlotte-Mecklenburg Bd. of Educ.*, the dissent in *Doe* correctly identified the inconsistency between *Craig* and the majority opinion in *Doe*. *Doe v. Charlotte-Mecklenburg Bd. of Educ.*, 222 N.C. App. 359, 373, 731 S.E.2d 245, 254 (2012).

II. The Court’s Previously Articulated Standard for Establishing a *Leandro* Claim Should Be Applied to Cases Involving Interference with Access to Education.

Should the Court reach the issue of the standard applicable to individual constitutional claims for interference with access to education, DRNC urges the adoption of a standard that does not rest on the subjective mindset of the educational authority, but that measures the effect on the constitutionally protected rights of the child(ren) involved.

In *Leandro*, the Court held that a child’s right to a sound basic education is violated where the educational authority has failed to ensure that the child has the opportunity to access such an education. *Leandro v. State*, 346 N.C. 336, 354, 488 S.E.2d 249, 259 (1997). The *Leandro* Court did not impose an intent, or even deliberate indifference, requirement as it relates to the relevant school authority; the effect on students is the gravamen of the constitutional violation. *Id.* at 357, 488 S.E.2d at 261 (“If on remand of this case to the trial court, that court makes findings and conclusions from competent evidence to the effect that defendants in this case are denying children of the state a sound basic education, a denial of a fundamental right will have been established”.); *see also Hoke County Bd. of Educ. v. State*, 358 N.C. 605, 615, 599 S.E.2d 365, 377 (2004) (articulating the standard of liability as “a clear showing of harm to those within the zone of protection afforded by the constitutional provision(s)”).

The *Hoke* Court described the elements of liability as: whether the State has violated a fundamental right, and, if so, whether the State established a compelling governmental need for the violation. *Hoke* at 610, 599 S.E.2d at 374. The former is established where, in addition to a “clear showing of harm,” the evidence is sufficient “to show that such a failure is primarily the result of action and/or inaction of the State.” *Id.* at 631, 599 S.E.2d at 386. Thus, the question is not one of intent but causation, with the Court concluding that liability was established where “the evidence presented also demonstrated that a combination of State action and inaction contributed significantly to the students' failings.” *Id.* at 605, 599 S.E.2d at 390.

With regard to whether peer or staff abuse or harassment interferes with an individual child’s opportunity for education, the standard should be the same: whether action or inaction by the defendant in the particular case contributed to the harm. *See Deminski v. State Bd. of Educ.*, ___ N.C. App. ___, ___, 837 S.E.2d 611, 619 (2020) (Zachary, dissenting) (“[I]t would be credulous to differentiate, for constitutional purposes, between a student whose teacher refuses to teach math and a student whose teacher fails to intervene when other students' harassing and disruptive behavior prevents her from learning it”.)⁴ Overlaying a requirement of

⁴ While the Plaintiffs in this case seek damages, as opposed to injunctive relief, there is no reason that the determination of liability (as opposed to remedy) should differ. *See Hoke* at 643, 599 S.E.2d at 393 (discussing remedy separately from liability in its review of the trial court’s order). To the extent that the Court would impose a higher standard with regard to damages, Amicus respectfully urges the Court to preserve the standard, articulated in *Hoke*, for injunctive relief.

deliberate indifference would be a retreat from *Leandro* and *Hoke*, and would render the rights at issue illusory in many cases. *See, e.g., Sinn v. Lemmon*, 911 F.3d 412 (7th Cir. 2018) (applying the deliberate indifference standard to deny a remedy to an inmate beaten by gang members based on prison officials' contention that they were trying to hire more guards and that the prison has anti-gang policies)⁵; and *Porto v. Town of Tewksbury*, 488 F.3d 67, 73 (1st Cir. 2007) (overturning jury verdict in favor of plaintiffs (a child with a developmental disability and his parents) and holding that "a claim that the school system could or *should have done more* is insufficient to establish deliberate indifference" where the school was aware of a multi-year pattern of inappropriate sexual conduct prior to the incident at issue)(emphasis added).⁶ *See also* Catharine A. McKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 Yale L.J. 2038, 2041 (2016).⁷ (concluding that the deliberate indifference standard in Title IX harassment claims "permits a wide margin of tolerance" of harassment,

⁵ The inmate's evidence showed: that he was beaten by gang members in an understaffed prison in which officials were aware of significant gang activity; that he made complaints about continued threats from the same gang and notified prison officials that two other inmates were beaten a second time by the same gang; and that after his verbal and written complaints, he himself was beaten again by the same gang. *Sinn*, 911 F.3d at 420.

⁶ The school received multiple reports by the students, parents and school staff, of repeated incidents of sexual contact between the same two students at school and on the school bus from fourth to seventh grades. The school continued to place the boys in the same class, despite the fact that the plan for addressing the inappropriate conduct – which formed the basis for finding no deliberate indifference - was to separate the boys. *Porto*, 488 F.3d at 70-71.

⁷ Available at: <https://www.yalelawjournal.org/feature/in-their-hands-restoring-institutional-liability-for-sexual-harassment-in-education>.

precluding liability even where complaint handling has been “concededly callous, incompetent, unresponsive, inept, and inapt”).

The concept of deliberate indifference, which centers on conscious choice and is measured in unreasonableness of procedural steps rather than in substantive ... outcomes, produces an incentive for schools to go through the motions with an eye primarily to looking as if action is being taken, rather than to redressing the injury, stopping the abuse, or addressing the climate in the environment that produced and permitted it.

Id. at 2091-92.

School boards do not have to exhibit subjective intent or deliberate indifference for bullying by peers or abuse by staff to have a devastating effect on a child’s access to a sound basic education. A requirement for such a showing before a child can obtain relief would be contrary to *Leandro* and *Hoke*, as well as to the Court’s history of interpreting our state Constitution in favor of the protection and enforcement of individual rights. *See e.g., Tully v. City of Wilmington*, 370 N.C. 527, 533, 810 S.E.2d 208, 214 (2018) (reiterating that “[w]e give our Constitution a liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard the liberty and security of the citizens in regard to both person and property”) (citations and internal quotation marks omitted); *see also, State v. Carter*, 322 N.C. 709, 724, 370 S.E.2d 553, 562 (1988) (declining to adopt a “good faith” exception to North Carolina’s exclusionary rule that would circumscribe a constitutional protection based on the subjective mindset of the state actor).

While DRNC supports Plaintiffs’ position with regard the justiciability of the right to access a sound basic education in this context, the deliberate indifference standard proposed by Plaintiffs is contrary to *Leandro* and *Hoke*, and is ill-suited to

protect the constitutional rights of students who are subject to harm that rises to the level of interfering with their access to their education.

CONCLUSION

DRNC urges the Court to reverse the Court of Appeals decision in this case, affirm the right of every child to be free of abuse that interferes with the opportunity to access a sound basic education, and retain the standard articulated in *Hoke* that ensures enforcement of that right so long as there is a clear showing of interference caused by the action or inaction of the relevant school authorities.

Respectfully submitted, this 5th day of August, 2020.

DISABILITY RIGHTS NORTH CAROLINA

Electronically Submitted

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she has this date served the foregoing Motion for Leave to File Amicus Curiae Brief together with the proposed Brief of Amicus Curiae upon all other parties in this cause via electronic mail, addressed to the parties or attorneys for said parties as follows:

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This the 5th day of August, 2020.

/s/ Lisa Grafstein
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