

Case No. 26-5004

UNITED STATES COURT OF APPEALS
for the
NINTH CIRCUIT

A.A.,
Plaintiff and Appellant,

vs.

Seattle Public Schools,
Defendant and Appellee.

On Appeal from the United States District Court,
Western District of Washington
Case No.: 2:25-cv-01377-JLR
Hon. James L. Robart

**Brief of *Amici Curiae* Disability Rights Education and Defense Fund,
Council of Parent Attorneys and Advocates, Disability Rights Arizona,
Disability Rights California, Disability Rights Washington, and
the Education Advocacy Clinic at the University of Arizona
in Support of Appellant**

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**CONSENT OF THE PARTIES TO THE FILING PURSUANT TO
FEDERAL RULE OF APPELLATE PROCEDURE 29(b)(2)**

This motion is filed with the consent of both parties, Plaintiff-Appellant through counsel Jinju Park and Kerri Feeney at Feeney Law Office, PLLC, and Defendant-Appellee through counsel Sarah Johnson and Susan Windelman at Pacifica Law Group.

**STATEMENT PURSUANT TO
FEDERAL RULE OF APPELLATE PROCEDURE 29(a)(4)(E)**

The undersigned certifies that no party's counsel authored this brief in whole or in part, and that no party, party's counsel, or any other person other than *Amici*, their members, or their counsel, contributed money that was intended to fund preparing or submitting this brief.

IDENTITY AND INTERESTS OF *AMICI CURIAE*

Disability Rights Education and Defense Fund (“DREDF”) based in Berkeley, California, is a national nonprofit law and policy center dedicated to protecting and advancing the civil and human rights of people with disabilities, including students with disabilities. Founded in 1979 by people with disabilities and parents of children with disabilities, DREDF remains board- and staff-led by members of the communities for whom we advocate. DREDF pursues its mission through education, advocacy, and law reform efforts. For more than three decades, DREDF has received funding from the California Legal Services Trust Fund

(IOLTA) Program as a Support Center providing consultation, information, training, and representation services to legal services offices throughout the state on disability civil rights law issues. DREDF is nationally recognized for its expertise in the interpretation of federal disability civil rights and special education law. DREDF has participated as *amicus* and *amici* counsel in numerous cases addressing the scope and meaning of federal civil rights and disability law mandates, including the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1400, et seq

Council of Parent Attorneys and Advocates (“COPAA”) is a not-for-profit organization for parents of children with disabilities, their attorneys and advocates. COPAA provides resources, training, and information for parents, advocates, and attorneys to assist in obtaining the free appropriate public education (“FAPE”) such children are entitled to under the IDEA. Our attorney members represent children in civil rights matters. COPAA also supports individuals with disabilities, their parents, and advocates, in attempts to safeguard the civil rights guaranteed to those individuals under federal laws, including the Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq.

COPAA brings to the Court the unique perspective of parents, advocates and

attorneys for children with disabilities. COPAA has previously filed as *amicus curiae* in *A.J.T. v. Osseo Area Schs.*, 605 U.S. 335 (2025); *Perez v. Sturgis Pub. Schs.*, 598 U.S. 142 (2023); *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 580 U.S. 386 (2017); *Fry v. Napoleon Cmty. Schs.*, 580 U.S. 154 (2017); *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009); *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007); *Bd. of Educ. v. Tom F.*, 552 U.S. 1 (2007); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006); and *Schaffer v. Weast*, 546 U.S. 49 (2005); and in numerous cases in the United States Courts of Appeal.

Disability Rights Arizona (“DRAZ”) is a non-profit public interest law firm, dedicated to protecting the rights of Arizonans with a wide range of physical, mental, psychiatric, sensory, and cognitive disabilities. As part of the nationwide protection and advocacy (“P&A”) system, DRAZ is authorized to “pursue administrative, legal, and other appropriate remedies” to ensure the protection of, and advocacy for, individuals with mental illness, 42 U.S.C. § 10805(1)(B), and individuals with developmental disabilities, 42 U.S.C. § 15043(2)(A)(i). DRAZ provides outreach and training to individuals with disabilities about their rights; development and dissemination of self-advocacy resources; representation in negotiation, administrative proceedings before enforcement agencies, mediation, and other alternative dispute resolution, and in selected cases, litigation and appeals, including as *amicus curiae*.

One of DRAZ's priorities is—and has been since its designation—to ensure that students with disabilities have access to appropriate special education services under the IDEA. DRAZ believes it is critical for courts to uphold the letter and spirit of the IDEA by ensuring the standard set by the Supreme Court in *Endrew F.* is applied to all denial of FAPE claims.

Disability Rights California (“DRC”) is California's non-profit P&A agency mandated under state and federal law to advance the legal rights of Californians with disabilities. DRC was established in 1978 and is the largest disability rights legal advocacy organization in the nation. As part of its mission, DRC works to ensure children with disabilities receive a FAPE and are free from disability-based discrimination in elementary and secondary educational agencies throughout California. To this end, DRC initiates and participates in systemic litigation, represents parents and their children in legal proceedings, advocates for legislative and policy reform, and conducts a range of community awareness activities. DRC is signatory to this brief as it has a significant interest in ensuring children with disabilities who are victims of bullying at school receive legal protections afforded to them under federal and state disability laws.

Disability Rights Washington (“DRW”) is a private non-profit and the federally mandated P&A agency, designated by the governor, for the state of Washington. WASH. REV. CODE § 71A.10.080. DRW operates under several

Congressional mandates, including the Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. § 10801, et seq.; the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 15401, et seq.; the Protection and Advocacy for Individual Rights Act, 29 U.S.C. § 794e; and the regulations promulgated thereunder. DRW has the authority and the responsibility to pursue legal, administrative, and such other appropriate remedies necessary to protect and advocate for the rights of persons with disabilities, including students, in Washington.

Students with disabilities are bullied at a higher rate than their peers, and the resulting trauma can impair learning with profound nervous system dysregulation that impedes instruction and learning. DRW regularly receives calls from students and families whose bullying experiences have led to school disengagement and lost educational opportunity. For these students, tracking educational progress or deprivation after bullying is critical to determine whether benefit is derived from education. Adopting a FAPE threshold of “no benefit” requires students to demonstrate failure before schools are obligated to respond, leaving students without a means to timely determine whether interventions are needed, appropriate, or working. This is contrary to special education law and falls below the Supreme Court standard in *Endrew F.* A lower standard would leave many of the state’s most vulnerable students without appropriate education precisely when

intervention is critical.

Education Advocacy Clinic (“EAC”) at the University of Arizona James E. Rogers College of Law provides legal representation at no cost to families of children in Tucson schools. EAC primarily represents students with disabilities in special education and school discipline matters, with a priority on serving students in the child welfare and juvenile delinquency systems. EAC also provides information and training on student rights to members of the public throughout Southern Arizona.

EAC works to ensure that disabled students have access to FAPE under the IDEA, regardless of the individual circumstances that might affect access to education. EAC believes it is critical for this Court to ensure that all FAPE claims—including those that involve the impact of bullying on a student’s education—are evaluated under the standard announced by the Supreme Court in *Endrew F.*

SUMMARY OF ARGUMENT

Student-on-student bullying and harassment can have a devastating impact on a student’s ability to learn. When this happens to a student with a disability, school districts have an obligation under the Individuals with Disabilities Education Act (“IDEA”) to respond by making changes to the student’s individualized education program (“IEP”) to ensure they can still access their

education. If the school district fails to do so, the IEP is not “reasonably calculated” to enable the student to make meaningful educational progress, and the school district has denied that student a free appropriate public education (“FAPE”). *See Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 580 U.S. 386, 399 (2017). The district court’s decision below applied the wrong standard in determining whether the student was denied FAPE and should be reversed.

Both the ALJ and district court below agreed sixth-grader T.J. was “subjected to racial bullying.” 1-ER-26. This included being spat on and suffering the “emotional harm caused by the egregious use of racial slurs,” such as the “N-word.” *Id.* As the district court put it, “[n]o-one, especially a child, should be forced to endure” being called such epithets, much less at school. *Id.* The racial bullying took a toll on T.J.’s emotional and mental health and caused T.J. to avoid his classes. 5-ER-295-98, 381, 388-89, 8-ER-821-22, 832, 836, 885. T.J.’s parent alerted the school that the racial bullying was negatively impacting his ability to learn, but the school never held an IEP meeting. 1-ER-9-11. Eventually, the school did send home a “safety plan,” but it was a plan that school staff had created unilaterally, without parent participation, entirely separate from any conversation about T.J.’s disability-related needs, special education, or IEP. *Id.* at 12, 27-28.

In finding, nonetheless, that the school district had not denied T.J. a FAPE, the court below relied on the Ninth Circuit case *M.L. v. Fed. Way Sch. Dist.*, 394

F.3d 634 (9th Cir. 2004). *Amici* respectfully submit this brief to explain why *M.L.* is clearly irreconcilable with subsequent intervening authority and was otherwise incorrectly decided as it mistakenly held that bullied students bringing a denial-of-FAPE claim under the IDEA must meet the same high bar as a student bringing a Title IX *damages* action against a school district for failing to address sexual harassment. This Court should clarify that, consistent with the IDEA, as well as U.S. Supreme Court and Ninth Circuit case law, FAPE claims are not held to a different or higher standard just because unaddressed *bullying*, as opposed to some other school district failure, has resulted in the denial of FAPE.

If *M.L.* remains uncorrected, school districts will be at liberty to violate the IDEA and allow students to be denied FAPE, unless the bullied student can establish both that a school district was “deliberately indifferent,” and that the unaddressed bullying resulted in the student receiving *no* educational benefit. This is not the standard under the IDEA, which requires much more of school districts. Indeed, it is well-settled under both the Supreme Court’s ruling in *Endrew F. v. Douglas Cty. Sch. Dist. Re-1*, 580 U.S. 386 (2017), and the Ninth Circuit’s other FAPE cases, that the IDEA requires school districts to provide students a “meaningful educational benefit.” See *L.A. Unified Sch. Dist. v. A.O. by and through Owens*, 92 F.4th 1159, 1172 (9th Cir. 2024); *J.W. v. Fresno Unified Sch. Dist.*, 626 F.3d 431, 432-33 (9th Cir. 2010); *N.B. v. Hellgate Elem. Sch. Dist.*, 541

F.3d 1202, 1212-13 (9th Cir. 2008); *Adams v. State of Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999).

Allowing *M.L.* to stand will result in significant harm to students with disabilities across the Ninth Circuit. *Amici* present this Court with a robust body of social science research showing that students with disabilities are significantly more likely to be bullied and harassed, and more likely to lack coping, self-advocacy, and other tools to address bullying and harassment. Requiring bullied students with disabilities to meet the high bar required in private damages actions before a denial of FAPE can be remedied would contradict Supreme Court authority and erode the IDEA's central guarantee of FAPE for this vulnerable population of students.

ARGUMENT

I. The IDEA Requires School Districts to Address Bullying that Impedes Access to FAPE

The IDEA guarantees all qualified children with disabilities a “free appropriate public education that emphasizes special education and related services designed to meet their unique needs.” 20 U.S.C. § 1400(d)(1)(A); *see id.*

§§ 1401(3)(A), 1412(a)(1). A FAPE is implemented through the child's IEP, which is created by an IEP team made up of school staff and the child's parents. *Id.*

§§ 1401(9)(D), 1414(d)(1)-(2). The IEP team must review the IEP annually, at a

minimum, but more frequently if necessary to ensure the child receives a FAPE.

Id. §§ 1414(d)(1)(B), (4)(A); 34 C.F.R. § 300.324(b)(1).

To meet its FAPE obligation, a school district must provide “an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F.*, 580 U.S. at 403. “The program must be designed to convey a ‘meaningful benefit’ to the student.” *A.O.*, 92 F.4th at 1172; *see also N.B.*, 541 F.3d at 1212-13 (holding, even pre-*Endrew F.*, the IDEA requires school districts to provide students with a “meaningful educational benefit”); *J.W.*, 626 F.3d at 432 (“Through a FAPE, the door of public education must be opened for a disabled child in a ‘meaningful’ way.”) (citation and internal quotation marks omitted); *Amanda J. ex rel. Annette J. v. Clark Cty. Sch. Dist.*, 267 F. 3d 877, 890 (9th Cir. 2001) (“Congress did not intend that a school system could discharge its duty under the [IDEA] by providing a program that produces some minimal academic advancement, no matter how trivial.”) (alteration in original) (citation omitted).

An “educational benefit is not limited to academic needs but includes the social and emotional needs that affect academic progress, school behavior, and socialization.” *Cty. of San Diego v. Cal. Special Educ. Hearing Office*, 93 F.3d 1458, 1467 (9th Cir. 1996); *accord. N. E. Indep. Sch. Dist. v. I.M.*, 163 F.4th 193, 202-03 (5th Cir. 2025); *see also* 20 U.S.C. § 1400(d)(1)(A). The Supreme Court in

Endrew F. describes the FAPE standard as holistic and fact-intensive, noting that it is “a general standard, not a formula.” 580 U.S. at 402-03. Progress towards academic goals is thus just one factor in determining whether a child received an educational benefit. *I.M.*, 163 F.4th at 202-03.¹

Accordingly, a disabled student is denied FAPE when bullying or harassment prevents them from receiving a meaningful educational benefit. U.S. Dep’t of Educ., Office of Special Educ. & Rehab. Servs., Dear Colleague Letter (Aug. 20, 2013) (hereinafter “OSERS DCL”)² at 2-3 (“Whether or not the bullying is related to the student’s disability, any bullying of a student with a disability that results in the student not receiving meaningful educational benefit constitutes a

¹ Federal courts have consistently found FAPE denied where an IEP failed to adequately address non-academic concerns like a student’s behavioral, social, or communication needs. *See, e.g., Deer Valley Unified Sch. Dist. v. L.P. ex rel. Schripsema*, 942 F. Supp. 2d 880, 886-87 (D. Ariz. 2013) (finding denial of FAPE because IEP placed student in a program for non-verbal students when “socialization and communication” were identified needs); *Aaron P. v. Haw. Dep’t of Educ.*, 897 F. Supp. 2d 1004, 1023 (D. Haw. 2012) (finding denial of FAPE where IEP failed to “adequately address student’s severe behavior problems and communication needs”); *Katherine G. ex rel. Cynthia G. v. Kenfield Sch. Dist.*, 261 F. Supp. 2d 1159, 1195 (N.D. Cal. 2003) (finding the denial of FAPE because IEP offer “was not designed to address [student’s] unique needs in the areas of pragmatics and social skills”); *Coventry Pub. Schs. v. Rachel J.*, 893 F. Supp. 2d 322, 335 (D. R.I. 2012) (finding denial of FAPE where IEP “did not contain clearly delineated behavioral goals or behavioral modification methods” (internal quotation marks and citation omitted)).

² The U.S. Department of Education makes the Dear Colleague Letter on Bullying (August 20, 2013) available electronically at <https://sites.ed.gov/idea/idea-files/osep-dear-colleague-letter-on-bullying/> (last visited Oct. 21, 2026).

denial of FAPE under the IDEA that must be remedied.”); *cf. T.K. & S.K. v. N.Y.C. Dep’t of Educ.*, 810 F.3d 869, 876 (2d Cir. 2016) (assuming, without deciding, that bullying a student with a disability “can result in the denial of a FAPE under the IDEA” if it “reaches a level where a student is substantially restricted in learning opportunities”).

If bullying has denied a student FAPE, the IEP Team must meet to revise the IEP and identify appropriate special education and related services to address the impact of the bullying and ensure that student receives FAPE moving forward. *See* 20 U.S.C. § 1414(d)(4)(A); *see also* OSERS DCL at 3. This includes possibly setting or revising IEP goals and offering additional or different services in furtherance of those goals. Just as with any substantial change in a disabled student’s circumstances, the IEP team must identify what different or additional needs the student has as a result of bullying and its effects, and the programs or services that are most appropriate for those needs. 20 U.S.C. § 1401(29) (mandating that special education must “meet the unique needs of a child with a disability”).

Here, the district court below upheld the ALJ’s decision, concluding “T.J. was subjected to racial bullying.” 1-ER-26. The district court and ALJ should, next, have determined whether the school district had properly held an IEP meeting, explored the impact of the bullying on all aspects of T.J.’s education,

including the social and emotional impact, and considered the need for new or revised IEP goals and IEP services for T.J.

Instead, the district court and ALJ concluded, without such an inquiry, that the school district had not denied T.J. FAPE. In coming to this conclusion, the district court relied on the standard set out in *M.L. v. Fed. Way Sch. Dist.*, 394 F.3d 634 (9th Cir. 2004), which held that a bullied student bringing a denial of FAPE claim must show the school district was “deliberately indifferent” and deprived the student of *any* educational benefit. 1-ER-25-26. Applying *M.L.*, the court below concluded T.J. had not met this high standard because T.J. “continued to receive an educational benefit from the District’s services.” *Id.* at 26.

The district court’s decision should be reversed because, as explained in the following sections, *M.L.* is clearly irreconcilable with Supreme Court authority and was decided incorrectly.

II. *M.L. v. Fed. Way Sch. Dist.* is Clearly Irreconcilable with Intervening Authority

In the Ninth Circuit, “where the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority, a three-judge panel should consider itself bound by the later and controlling authority and should reject the prior circuit opinion as having been effectively overruled.” *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc).

M.L.'s holding is "clearly irreconcilable" with *Endrew F.* Accordingly, this Court should consider *M.L.* "effectively overruled." *Id.* at 893. The *M.L.* panel held that to establish a denial of FAPE due to bullying, a student must show "the abuse is so severe that the child can derive no benefit from the services that he or she is offered by the school district." *M.L.*, 394 F.3d at 650. This is patently *not* the FAPE standard described at length by the Supreme Court in *Endrew F.* There, the Supreme Court explicitly rejected a school district's argument that it satisfied its FAPE obligation so long as it provided *some* educational benefit that is "more than de minimis." *Endrew F.*, 580 U.S. at 397-98. The Court explained that "a student offered an educational program providing 'merely more than de minimis' progress from year to year can hardly be said to have been offered an education at all." *Id.* at 402-03. It went on to clarify the IDEA requires an educational benefit "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.* at 403. This FAPE standard is "markedly more demanding" than requiring merely "some" or "any" educational benefit, as opposed to none. *Id.* at 402.

M.L.'s suggestion that a school district might meet its obligation to provide FAPE if the student receives merely *any* educational benefit, as opposed to none, thus directly conflicts with *Endrew F.* Therefore, the *M.L.* panel's "no educational benefit" standard is clearly irreconcilable with the Supreme Court's ruling. It also

contradicts well-settled Ninth Circuit law in other FAPE cases which establish that, consistent with *Endrew F.*, the IDEA requires school districts to provide a “meaningful” educational benefit to students with disabilities. *A.O.*, 92 F.4th at 1172; *N.B.*, 541 F.3d, at 1212-13; *J.W.*, 626 F.3d at 432-33; *Amanda J.*, 267 F. 3d at 890.³ As such, *M.L.* was “effectively overruled” by *Endrew F.* and should be rejected. *Miller*, 335 F.3d at 893.

III. The Ninth Circuit Panel Decided *M.L. v. Fed. Way Sch. Dist.* Incorrectly

M.L.’s “no educational benefit” test was effectively overruled by *Endrew F.* and should not be followed. In the alternative, *M.L.* should be overturned by the Ninth Circuit sitting *en banc* because it was otherwise wrongly decided.⁴

When the *M.L.* panel considered the question of whether a school district’s failure to address bullying and harassment established a violation of FAPE, it

³ Among the sister circuits that have taken up the specific question of whether unaddressed bullying resulted in the denial of FAPE, none have applied the “no educational benefit” standard. Rather, they have consistently analyzed these cases under the same FAPE standard as would apply to any other claim for denial of FAPE. See *T.K. & S.K. v. N.Y.C. Dep’t of Educ.*, 810 F.3d 869, 876 (2d Cir. 2016) (explaining bullying “can result in the denial of a FAPE under the IDEA” if it “reaches a level where a student is substantially restricted in learning opportunities”); *Shore Reg’l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199-201 (3d Cir. 2004) (holding school district failed to “offer[] [student] an education that was sufficiently free from the threat of harassment to constitute a FAPE”).

⁴ The general rule is that a panel not sitting *en banc* has no authority to overturn Ninth Circuit precedent, except where irreconcilable with intervening higher authority, as stated in Section II. See, e.g., *U.S. v. Belgarde*, 300 F.3d 1177, 1181 (9th Cir. 2002); *Miller*, 335 F.3d at 893.

erroneously imported into its FAPE analysis the standard for when a student may recover *damages* for a school district's failure to address sexual harassment. Citing the Supreme Court's landmark Title IX case *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999), the panel in *M.L.* held: a teacher must be "deliberately indifferent to teasing of a disabled child and the abuse is so severe that the child can derive no benefit from the services that he or she is offered by the school district." *M.L.* 394 F.3d at 650 (citing *Davis*, 526 U.S. at 633). But the question of whether a school district is liable for denial of FAPE under the IDEA is entirely different from the question of whether it is liable for damages in a private action under Title IX or other civil rights laws. Thus, a denial of FAPE does not require a finding of "deliberate indifference."

Davis asked, "whether a district's failure to respond to student-on-student harassment in its schools can support a private suit for money damages" under Title IX. 526 U.S. at 639. To answer *that* question, *Davis* examined *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998), a teacher-on-student sexual harassment case where the Supreme Court had previously ruled that a private damages action was permitted where the school district had notice and an opportunity to take corrective action and failed. The Supreme Court applied the "deliberate indifference" standard, reasoning that a school district must have "actual knowledge" before it can be held liable for damages. *Gebser*, 524 U.S. at

290. As the Court explained, “[u]nder a lower standard, there would be a risk that the [school district] would be liable in damages not for its own official decision but instead for its employees' independent actions.” *Id.* at 290-91.⁵

Unlike in *Davis* or *Gebser*, both *M.L.* and the instant case deal with the question of whether a student was denied FAPE in violation of the IDEA. Under the IDEA, school districts have an affirmative obligation to offer special education and related services “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F.*, 580 U.S. at 399.⁶ In other words, the “deliberate indifference” inquiry looks at whether a government agency’s inaction evinces an intentional disregard for the rights of the people in its care. *Davis*, 526 U.S. at 642. The IDEA is unconcerned with a school district’s intent, as a school district has an affirmative obligation to provide FAPE and a

⁵ The “deliberate indifference” standard can be traced to *City of Canton v. Harris*, 489 U.S. 378 (1989), which held *Monell* liability can include when a government’s failure to act “reflects deliberate indifference to the constitutional rights of its inhabitants.” *Harris*, 489 U.S. at 389. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978), established municipal damages liability under 42 U.S.C. §1983 for policies or customs that cause a constitutional or statutory violation. *Harris* established the “deliberate indifference” standard to address when a public entity’s inaction could be considered policy or custom. *Harris*, 489 U.S. at 385.

⁶ Ninth Circuit cases applied a “meaningful educational benefit” standard consistent with *Endrew F.* even before that case was decided. *E.g.*, *Amanda J.*, 267 F. 3d at 890 (“Congress did not intend that a school system could discharge its duty under the IDEA by providing a program that produces some minimal academic advancement, no matter how trivial.”). The *M.L.* panel was bound by this pre-*Endrew F.* precedent and incorrectly failed to apply it.

school district is liable for a denial of FAPE, regardless of whether its failure to act was deliberate. *See Endrew F.*, 500 U.S. at 399 (confirming IDEA imposes a “substantive obligation” to provide FAPE); *D.A. v. Hous. Indep. Sch. Dist.*, 629 F.3d 450, 453 (5th Cir. 2010) (“IDEA imposes an affirmative obligation.”); *Richard S. v. Wissahickon Sch. Dist.*, 334 F. App’x 508, 510-11 (3d Cir. 2009) (IDEA creates an “affirmative duty”).

Therefore, unlike a Title IX inquiry, which mainly asks whether a school should have, but failed to take appropriate steps to stop the bullying behavior of others, the IDEA asks whether a school district met its affirmative, statutory obligation to provide programs, services, and supports to meet the needs of the disabled student, which may include, but is not limited to, addressing the bullying behavior. *Cf. Hamer v. City of Trinidad*, 924 F.3d 1093, 1105 (10th Cir. 2019) (“Failing to act in the face of an affirmative duty to do so axiomatically gives rise to liability.”).

Further, Title IX’s deliberate indifference standard was developed to determine when monetary damages were appropriate under a statute which did not provide a remedial scheme nor expressly grant a private right of action. The IDEA, unlike Title IX, specifically provides a remedial scheme for students who are denied FAPE. 20 U.S.C. § 1412(a)(10)(C)(ii). Once a parent has exhausted an administrative process, they are expressly granted a right to seek relief in federal

court. *Id.* § 1415(i)(2)(A). Monetary damages are unavailable under the IDEA; rather, parents “can pursue injunctive or other prospective relief, including reimbursement for the cost of private education.” *McIntyre v. Eugene Sch. Dist.* 4J, 976 F.3d 902, 910-11 (9th Cir. 2020). In requiring deliberate indifference under Title IX, *Gebser*’s “central concern” was “ensuring ‘that the receiving entity of federal funds [has] notice that it will be liable for a monetary award.’” 524 U.S. at 287 (quoting *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 74 (1992)) (alteration in original). IDEA claims for equitable or prospective relief, such as FAPE claims, pose no such concern. *See Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582, 597-98 (1983). Because the IDEA imposes affirmative obligations on a school district to provide FAPE, provides a statutory remedial scheme with robust notice procedures, and permits only equitable and prospective relief, it is inappropriate to apply Title IX’s “deliberate indifference” standard in analyzing FAPE claims.

In sum, *Davis* found an implied right of action for monetary damages under Title IX and held that, for a school district to be liable, a student must establish it was “deliberately indifferent.” A denial of FAPE claim, by contrast, arises under the IDEA, which contains an explicit remedial scheme granting students equitable relief for a school district’s failure to provide FAPE. Therefore, the *M.L.* panel incorrectly imported *Davis*’s deliberate indifference standard into a FAPE analysis,

and the district court below, which relied on *M.L.*, conducted an erroneous analysis into whether the school district denied FAPE.

IV. Allowing *M.L. v. Fed. Way Sch. Dist.* to Remain Uncorrected Will Result in Significant Harm to Students with Disabilities

A national consensus has emerged that bullying is neither an acceptable nor ordinary part of childhood, but a serious and adverse experience that can result in lasting emotional trauma and negative health consequences⁷ and have a toxic effect on school climate.⁸ Health and education experts have thus declared bullying a widespread public health problem.⁹

Students with disabilities who are already vulnerable to being denied access to educational opportunity are also disproportionately more likely to be impacted

⁷ William E. Copeland et al., *Childhood bullying involvement predicts low-grade systemic inflammation into adulthood*, 111 PROC. NAT'L ACAD. SCI. U.S.A. 7570, 7570-75 (Thomas W. McDade, ed., 2014), <https://doi.org/10.1073/pnas.1323641111>; William E. Copeland et al., *Adult Psychiatric Outcomes of Bullying and Being Bullied by Peers in Childhood and Adolescence*, 70 JAMA PSYCHIATRY 419, 419-26 (2013), doi: 10.1001/jamapsychiatry.2013.504.

⁸ Sharmila B. Mehta et al., *Bullying Climate and School Engagement in Ninth-Grade Students*, 83 J. SCH. HEALTH 45, 45-46 (2013), doi: 10.1111/j.1746-1561.2012.00746.x.

⁹ U.S. CTRS. FOR DISEASE CONTROL (“CDC”), YOUTH VIOLENCE PREVENTION: BULLYING (2024), <https://www.cdc.gov/youth-violence/about/about-bullying.html>; NAT'L CTR. FOR INJ. PREVENTION AND CONTROL, CDC, & U.S. DEP'T OF EDUC., BULLYING SURVEILLANCE AMONG YOUTHS: UNIFORM DEFINITIONS FOR PUBLIC HEALTH AND RECOMMENDED DATA ELEMENTS, VERSION 1.0, 4-6 (2014).

by bullying than their non-disabled peers.¹⁰ For example, students with learning disabilities, attention deficit or hyperactivity disorder, and autism spectrum disorder (“ASD”) are more likely to be targets of bullying than those who do not have a disability.¹¹ One study found that 63 percent of students with ASD ages six to 15 were bullied at some point, and that they were more than three times more likely to be bullied than their nondisabled siblings.¹² Furthermore, students with disabilities may have disability-related intellectual, communication, processing, socializing, behavior, or emotional challenges that make it hard for them to understand they are being bullied or to self-advocate or ask for help.

Once a student with a disability becomes the target of bullying behavior, there are many ways the bullying can significantly interfere with their ability to access their education. Students may develop fear of school participation and activities. Research indicates that bullying may be a leading cause of school refusal in students with ASD, who have less developed skills and mindsets for processing

¹⁰ Nicholas Gage et al., *Disproportionate Bullying Victimization and Perpetration by Disability Status, Race, and Gender: A National Analysis*, 5 ADVANCES IN NEURODEVELOPMENTAL DISORDERS 256, 257 (2021), <https://doi.org/10.1007/s41252-021-00200-2>.

¹¹ Kimberly A. Twyman et al., *Bullying and Ostracism Experiences in Children With Special Health Care Needs*, 31 J. OF DEVELOPMENTAL BEHAV. PEDIATRICS 1, 2 (2010), doi: 10.1097/DBP.0b013e3181c828c8.

¹² Connie Anderson, *Interactive Autism Network (“IAN”) Research Report: Bullying and Children with ASD* (Oct. 7, 2014), https://www.kennedykrieger.org/stories/interactive-autism-network-ian/ian_research_report_bullying.

and coping with bullying behaviors.¹³ Generally, students who are the targets of bullying behavior are more likely to experience lower academic achievement, higher truancy rates, self-esteem issues, and depression and anxiety disorders.¹⁴

Regardless of whether the bullying is related to a student's disability, if a disabled student cannot access FAPE, the IDEA requires school districts to reexamine "whether, as a result of the effects of the bullying, the student's needs have changed such that the IEP is no longer designed to provide meaningful educational benefit." OSERS DCL at 3. If so, the IEP team must revise the IEP to ensure student receives FAPE. As explained in Part I, because school districts must ensure an IEP is "reasonably calculated to enable a child to make progress *in light of the child's circumstances*," bullying is a circumstance that must be considered when calculating an offer of FAPE. *Endrew F.*, 580 U.S. at 403 (emphasis added). If a school fails to convene an IEP meeting and revise the IEP to account for the impact of bullying on a child's education, the school has failed in its affirmative duty to offer an education plan reasonably calculated in light of the circumstances.

¹³ Marina Ochi et al., *School refusal and bullying in children with autism spectrum disorder*, 14 CHILD ADOLESCENCE PSYCHIATRY MENTAL HEALTH, no. 17, 2 (2020), doi: 10.1186/s13034-020-00325-7.

¹⁴ Gelila Haile et al., NAT'L CTR. FOR HEALTH STATS., BULLYING VICTIMIZATION AMONG TEENAGERS: UNITED STATES, JULY 2021–DECEMBER 2023 4 (2024), <https://www.cdc.gov/nchs/data/databriefs/db514.pdf>; Gianluca Gini & Tiziana Pozzoli, *Association Between Bullying and Psychosomatic Problems: A Meta-analysis*, 123 PEDIATRICS 1059, 1063 (2009), doi: 10.1542/peds.2008-1215.

Leaving *M.L.*'s erroneous standard in place means that students with disabilities who are bullied will be denied FAPE, unless they can establish the school district was "deliberately indifferent" and they derived "no benefit." 394 F.3d at 650. This exacting standard has no basis in the IDEA or FAPE case law and will result in significant harm to a vulnerable population of students, denying them the core educational guarantee of the IDEA.

CONCLUSION

For the foregoing reasons, the Court should deem the panel decision in *M.L. v. Fed. Way Sch. Dist.*, 394 F.3d 634 (9th Cir. 2004), as effectively overruled, and the judgment below as to student's FAPE claim should be reversed.

Dated: October 21, 2026

Respectfully Submitted,

/s/ Leah J. Kang

Leah J. Kang

Peter Talkington

DISABILITY RIGHTS EDUCATION
AND DEFENSE FUND

Attorneys for Amici Curiae

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FORM 8. CERTIFICATE OF COMPLIANCE FOR BRIEFS

9th Cir. Case Number: 26-5004

I am the attorney for *Amici Curiae*.

This brief contains 5566 words, including 0 words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

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Signature /s/ Leah J. Kang

Date: October 21, 2026

CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2026, I electronically filed the foregoing Brief of *Amici Curiae* Disability Rights Education and Defense Fund, Council of Parent Attorneys and Advocates, Disability Rights Arizona, Disability Rights California, Disability Rights Washington, and the Education Advocacy Clinic at the University of Arizona in Support of Appellant with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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Dated: October 21, 2026

Respectfully Submitted,

/s/ Leah J. Kang

Leah J. Kang
DISABILITY RIGHTS EDUCATION
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