IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 22-0028

KANAWHA COUNTY BOARD OF EDUCATION, a political subdivision, GEORGE AULENBACHER, Principal, and BRAD MARANO, Assistant Principal, Defendants Below,

Petitioners

vs.

S.D., a minor, by and through her parents and next friend, J.D., Plaintiffs Below,

Respondents.

PETITIONERS' BRIEF

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I. ASSIGNMENTS OF ERROR

1. The trial court found that the individual Defendants below/Petitioners, George Aulenbacher (Principal) and Brad Marano (Assistant Principal), did not act maliciously, in bad faith, or in a wanton and reckless manner. It is undisputed that the individual Petitioners were acting within the scope of their employment at all times complained of, and Respondent S.D. has not identified any other basis for their liability per the West Virginia Code. Consequently, Mr. Aulenbacher and Mr. Marano are entitled to dismissal from this suit in accordance with West Virginia Code section 29-12A-5(b).

2. The trial court recognized that Respondent S.D.'s argument is that the school officials disciplined her fellow minor student for a Level II violation per the Kanawha County Board of Education handbook, as opposed to a Level III violation, such that the fellow minor student returned to school earlier than he should have, providing the opportunity for a second incident to occur. In short, Respondent S.D. argues that the county school board is negligent for failure to abide by policy. The Kanawha County Board of Education is, therefore, immune from suit and entitled to dismissal accordance with West Virginia Code section 29-12A-5(a)(4).

3. Section 18A-5-1(f) of the West Virginia Code provides the Kanawha County Board of Education with the exclusive authority to administer proper discipline in the public schools of Kanawha County. This Court has recognized that "Courts should not interfere with the decision of the school board officials in disciplinary matters except in extreme cases." *Keith v. Ball,* 177 W.Va. 93, 350 S.E.2d 720, 722 (1986) (citations omitted). As a matter of law, the Kanawha County Board of Education owed the Respondent no legal duty to discipline a fellow minor student for a Level III violation, as opposed to a Level II, per disciplinary terms of the Kanawha County

Board of Education handbook. The Kanawha County Board of Education is entitled to dismissal of this suit as it did not breach a legal duty owed to the Respondent.

4. This Court has long-recognized that the general rule is that there can be no recovery for mental suffering without presence of a physical injury. *See Monteleone v. Co-operative Transit Co.*, 128 W.Va. 340, 36 S.E.2d 475 (1945) (overruled by *Heldreth v. Marrs*, 188 W.Va. 481, 425 S.E.2d 157 (1992)). This Court has identified only a few exceptions to the foregoing rule, such as the "dead body" exception (where the emotional distress claimed is not spurious, *Ricotilli v. Summersville Mem. Hosp.*, 188 W.Va. 674, 425 S.E.2d 629 (1992), the fear of contracting a disease to which the claimant was actually exposed, *Marlin v. Bill Rich Const., Inc.,* 198 W.Va. 635, 482 S.E.2d 620 (1996), and witnessing someone closely related suffering critical injury or death, *Heldreth v. Marrs*, 188 W.Va. 481, 425 S.E.2d 157 (1992). Initially, Respondent S.D. failed to plead a claim of negligent infliction of emotional distress. Moreover, the Respondent has not identified any applicable exception to the general rule that she could recover for alleged mental suffering without presence of a physical injury. This case alleging negligence without any accompanying ascertainable physical injury must be dismissed.

II. STATEMENT OF THE CASE

In this case, Respondent S.D., suffering no physical injury, disputes the disciplinary action taken against another student by a public school Principal and Assistant Principal clothed with statutory immunities. Petitioners, the Kanawha County Board of Education, George Aulenbacher, Principal of George Washington High School, and Brad Marano, Assistant Principal of George Washington High School, bring this appeal as the Circuit Court of Kanawha County, West Virginia failed to dismiss this suit against them in accordance with the Governmental Tort Claims and Insurance Reform Act and substantive law.

On January 29, 2018, Respondent S.D., a student at George Washington High School, was walking in the hallway of the school when another student, M.P., grabbed or touched her on her "private area". [A.R. at 5 at ¶ 14; A.R. at 646-7]. S.D. went directly to the school office[1] and advised Petitioner, Principal George Aulenbacher, that "she had been hit on the behind - - smacked on the butt in the hallway by another student. [A.R. at 300]. Principal Aulenbacher "asked her . . 'What would you like me to do about it?'"[2]; Respondent S.D. stated that she did not want the student to be disciplined and, instead, simply wanted to inform someone about what occurred. *Id.* Petitioner Marano, Vice Principal of George Washington High School, saw Respondent S.D. in Principal Aulenbacher's office and stepped in, asking Respondent S.D. if she was "in trouble or something?" [A.R. at 346]. Respondent S.D. then advised Vice Principal Marano that she was not in trouble; "some boy walked by and slapped her on the butt." *Id.* Respondent S.D. repeated to Vice Principal Marano that she did not "want to do anything about it", but Petitioner Marano stated to her " 'nobody should touch you in any way or hit your anything . . . . No matter if you want to do anything about it or not, come with me; we're going to do something about it.'" [A.R. at 347]. According to Vice Principal Marano, Respondent S.D. "was pretty nonchalant about it and didn't want anything done" which "shocked me". [A.R. at 350]. Importantly, and contrary to the Respondent's entire theory of this case, Petitioner Marano **did not know who it was that allegedly smacked S.D.** [A.R. at 347].

It was ascertained that the other student was M.P., a basketball player. [A.R. at 247]. Vice Principal Marano called M.P. into his office later that day and advised M.P. that there was a report of him "smack[ing] a girl on the butt walking down the hallway"; M.P. admitted to Petitioner

[1] A.R. at 648.

[2] A.R. at 300.

Marano, " 'Yeah. I shouldn't have done that." [A.R. at 349]. Vice Principal Marano thus suspended M.P. for two days for an "indecent act on a student." [A.R. at 349]. Due to the suspension, M.P. was not at school Tuesday, January 30, 2018 and Wednesday, January 31, 2018. *Id.*

On February 1, 2018, when M.P. returned to school at George Washington High School, he reportedly "flinched" at Respondent S.D. while she was walking in the hallway. [A.R. at 655]. Respondent S.D. returned to Vice Principal Marano, indicating that M.P. " 'smiled at me'", and that she was leaving. [A.R. at 352]. Petitioner Marano followed Respondent S.D. to the parking lot and talked to her mother, stating " 'Hey, she's upset. [M.P.] is back today. She said he smiled at her.'" [A.R. at 352]. Vice Principal Marano advised Respondent S.D. and her mother that he could not take disciplinary action against a student for looking at another student and smiling, but assured Respondent S.D.'s mother that he would call M.P.'s parents. [A.R. at 353]. Vice Principal Marano believes Respondent S.D., a cheerleader, "came back the next day or even practiced that evening with the cheerleaders." [A.R. at 353].

Notably, the foregoing two (2) incidents are the only incidents occurring between M.P. and Respondent S.D. [A.R. at 667]. Also notable, Respondent S.D. was a sophomore at the time, M.P. a freshman, and the two were in vicinity of each other "while he was playing basketball and [S.D. was] a cheerleader." [A.R. at 700].

M.P.'s brother messaged Respondent S.D.'s boyfriend via social media; however, there was nothing directed toward S.D. [A.R. at 638].[3] Nevertheless, on February 5, 2018, Respondent S.D.'s mother spoke with Vice Principal Marano about the messages, and he escorted her to the School Resource [Police] Officer (hereinafter "SRO"). [A.R. at 353]. Petitioner Marano and the

[3] Respondent S.D. also discovered " 'a pipe thrown at [her house]'" but " 'can't prove it was them'". [A.R. at 687].

SRO recommended Respondent obtain a restraining order against M.P., and Petitioner Marano believes the SRO gave Respondent S.D.'s mother "some paperwork and stuff." [A.R. at 353]. Consequently, a temporary personal safety order was entered on that date. [A.R. 6 at ¶ 24]. Shortly thereafter, at a basketball game held at the South Charleston recreational center (not a school facility) M.P. and his mother "w[ere] looking at" Respondent S.D. Also, M.P.'s father reportedly said "something" to Respondent S.D.'s step-father, and the families were "going back and forth." [A.R. at 668]. Respondent S.D. left during the middle of the game. [A.R. at 672]. The Respondent did, however, return and cheer at the girls' basketball game. [A.R. at 537].

The temporary personal safety order was granted without a hearing. [A.R. at 500]. Per the temporary order, M.P. could not participate in sports, and was to check in with the SRO *Id.* A hearing was held on February 16, 2018 and a final order was entered which allowed M.P.'s athletic participation. [A.R. at 501; A.R. 6 at ¶ 25]. According to Vice Principal Marano, he was unaware that M.P.'s basketball coach was participating in the final hearing and, in fact, knew nothing of the modified order until the SRO showed it to him. [A.R. at 386]. Likewise, Principal Aulenbacher did not know what took place at the February 16, 2018 hearing and did not authorize the basketball coach's attendance. [A.R. at 318-9].

Respondent S.D. initiated this civil action on February 25, 2019. [A.R. at 1; A.R. at 3]. The Complaint alleged "Negligent Conduct (Against The Kanawha County Board of Education)" maintaining that the county board of education "failed to properly supervise" her, allowing another student to cause her alleged injuries. [A.R. at 6-7].[4] In Count II, the Respondent alleged

[4] Notably, with regard to the initial incident, when asked "Is there something that you think the school should have done to prevent [M.P.] from touching your private area?" Respondent S.D. answered "I don't think that they can necessarily control the actions that students decide." [A.R. at 711-12]. Similarly, S.D.'s mother was asked "Is there anything . . . the school could have done to prevent the incident that happened on January 29th . . .?" and answered "I don't think they could have controlled someone's behavior. So - - . . . as far as the incident, no, I don't". [A.R. 562].

"Negligence, Misfeasance, Nonfeasance, Carelessness and/or Recklessness (Against Defendant Aulenbacher)" contending that, as Principal of George Washington High School, Petitioner Aulenbacher allowed one minor student to harass or threaten her. [A.R. at 7]. Count III of Respondent S.D.'s Complaint alleged the same claim against Vice Principal Marano[5], while Count IV alleged negligent supervision against "John Doe and Jane Doe". [A.R. at 8]. In Count V, Respondent alleged "Vicarious Liability" against the Kanawha County Board of Education, *specifically alleging liability for the individual Petitioners acting within the course and scope of their employment.* [A.R. at 9-10]. Finally, Count VI alleged punitive damages against the individual Petitioners. [A.R. 11].[6]

The focus of this litigation is M.P.'s discipline, although Respondent S.D. readily admits ***"it's not my job to decide what his punishment should be."*** [A.R. at 709 (emphasis added)]. Indeed, Respondent S.D. has argued the individual Petitioners erred by "[f]ailing to remove M.P. from the school and the presence of S.D. on multiple occasions. M.P. was only suspended for two days for the first sexual assault of S.D., then allowed to return to the school where a second attempted sexual assault took place. M.P. was not even suspended by either Defendant after this incident because 'he was a vital member of the basketball team'". [A.R. at 777]. Respondent S.D. thereafter argued:

> The GWHS handbook lays out in more detail what punishments will be given for the different violations listed above. An indecent act towards another student is punishable by only 1-3 [days'] out of school suspension, while an act of sexual misconduct is punishable by up to 10 days of out of school suspension, and an act of bullying or harassment is a minimum of 3 days out of school suspension. All of these punishments are for first offenses only, second offense to sexual misconduct is expulsion, and second offense to bullying or harassment is 5 days of out of school suspension.

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[5] A.R. at 8.

[6] Count VII claimed damages. [A.R. at 11].

> In this case, Defendants found that M.P. had only committed an indecent act towards another student despite clear definitions of what sexual misconduct and sexual harassment/violence are. M.P., without the consent of Plaintiff, placed his hand in between Plaintiff's thighs, on her vaginal area, and grabbed her, holding for approximately 10 seconds.

[A.R. at 226]. As stated previously, Respondent S.D. did not advise Petitioners Aulenbacher and Marano of any "grabbing", only that a student smacked her bottom and she did not want him punished. Notably, Respondent S.D.'s mother did not request a suspension longer than 2 days or request expulsion or dismissal from the basketball team. [A.R. at 512-3].

M.P. was suspended for 2 days for an "indecent act" which, under Kanawha County Board of Education Policy, is:

> Profane Language/Obscene Gesture/Indecent Act Toward an Employee or Student. A student will not direct profane language, obscene gestures, or indecent acts towards a school employee or a fellow student. This inappropriate behavior includes but is not limited to, verbal, written, electronic and/or illustrative communications intended to offend or humiliate.

[KCBOE J25.07.1.3.8, A.R. at 836]. An "indecent act" is a Level II Violation: "Level II Violations. Disruptive and Potentially Harmful Behaviors – disrupt the educational process and/or pose potential harm or danger to self or others. The behavior is committed willfully but not in a manner that is intended maliciously to cause harm or danger to self and/or others." [KCBOE J25.07.1.3, A.R. at 834-35]. Per the George Washington High School Behavior Chart, a first offense Level 2 "indecent act" violation warrants 1 to 3 days of out of school suspension. [A.R. at 816].

Respondent S.D. mistakenly believes M.P.'s behavior was the Level III violation of "Sexual Misconduct". *See* J25.07.1.5.10, A.R. at 839-40. Such act, however, must be "of a sexual nature." *Id.* Notably, however, a first offense of Sexual Misconduct results in like discipline in

that it can result in "UP TO 10 OSS/PEX". [A.R. at 817]. Vice Principal Marano confirmed that in his investigation, the offense had nothing "to do with being sexual". [A.R. at 26].

Petitioners moved to dismiss the litigation seeking dismissal of the punitive damages claim against all Petitioners and asserting Respondent failed to state a claim against the individual Defendants as to all Counts in accordance with the Governmental Tort Claims and Insurance Reform Act. [A.R. at 764]. The trial court found that the individual Petitioners' "actions did not constitute actions done with malicious purpose, in bad faith, or in a wanton or reckless manner"[7], but the court only dismissed the punitive damages claim against all Petitioners. [A.R. at 792]. Indeed, the trial court erroneously held that "[t]he plaintiff's remaining claims are not impacted by this Order." *Id.*

Following additional discovery, Petitioners moved, substantively, for summary judgment on Respondent's claims against them. [A.R. at 27; A.R. at 30]. Petitioners challenged legal duty and Respondent's admitted lack of any ascertainable physical injury. [A.R. at 31].[8] Again, however, Petitioners' motion was denied. [A.R. at 258]. In denying the motion, the trial court expressly noted Respondent's challenge to the disciplinary action taken by the Petitioners against her fellow student. [A.R. at 268 at ¶ 51]. The trial court improperly held that "there is a genuine issue of material fact as to whether Defendants breached a duty owed to the Plaintiff and whether the Plaintiff was further injured by Defendants' response to the offenses committed by M.P. against the Plaintiff." [A.R. at 269 at ¶ 54].

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[7] A.R. at 791.

[8] Respondent S.D. conceded that she did not suffer an ascertainable physical injury. In her deposition testimony, Respondent S.D. was asked, "Now, going back to the — the original incident where he put his hand on your private area. Did you have any — it doesn't sound like it, but I've got to ask the question — any type of injury, like a bruise or scratch or anything like that?" [A.R. at 666]. Respondent S.D. responded, "[n]o." *Id.* Respondent S.D. also admitted that she did not sustain a physical injury from the second incident because M.P. did not touch her at that time. *Id.*

As Petitioners noted in their answer:

> Pursuant to Rule 12(b)(6) of the WV Rules of Civil Procedure, Plaintiff's Complaint fails to state a cause of action upon which relief may be granted. The Defendants have filed an accompanying Motion to Dismiss pursuant to the immunities afforded to them under the West Virginia Governmental Tort Claims and Insurance Reform Act and *Miller v. Carelink Health Plans, Inc.*, 82 F.Supp.2d 574, 579 n. 6 (S.D. W.Va. 2000) (holding that 'West Virginia law does not recognize an independent cause of action for punitive damages').

[A.R. at 15]. Petitioners further "plead all immunities available to them under state and federal constitutions and statutory and common law." [A.R. at 23]. The Governmental Tort Claims and Insurance Reform Act was also specifically raised in Petitioners' Answer. *Id.* As this Court has noted, " '[i]mmunities under West Virginia law are more than a defense to a suit in that they grant governmental bodies and public officials the right not to be subject to the burden of trial at all.'" *State ex rel. Grant Count Comm'n v. Nelson*, 244 W.Va. 649, 856 S.E.2d 608, 618 (2021) (quoting *Hutchison v. City of Huntington*, 198 W. Va. 139, 148, 479 S.E.2d 649, 658 (1996)). The trial court's denial of Petitioners' motion to dismiss, and motion for summary judgment, unnecessarily exposes the Kanawha County school board and its agents to burdens specifically eliminated by the Governmental Tort Claims and Insurance Reform Act. Consequently, the trial courts' orders must be reversed, and the case remanded for the purposes of dismissing the Petitioners from this suit.

III. SUMMARY OF ARGUMENT

Initially, this Court should remand for entry of judgment dismissing the individual Petitioners as West Virginia Code section 29-12A-5(b) affords them immunity for actions not manifestly outside the scope of their employment, not malicious or in bad faith, or not barred by another Code provision. Additionally, this Court should remand for entry of judgment dismissing Petitioner Kanawha County Board of Education pursuant to the Governmental Tort Claims and

Insurance Reform Act, West Virginia Code section 29-12A-5(a)(4), as Respondent S.D. alleges the Board failed to abide by Kanawha County Schools policy. Along those lines, dismissal is also appropriate as the Kanawha County Board of Education is statutorily authorized to exclusively administer the proper discipline in its schools under West Virginia Code section 18A-5-1(f).

Finally, this Court should enforce its precedent that there can be no recovery for mental suffering without presence of a physical injury absent exceptional circumstances not present herein. Pursuant to that precedent, this case should be remanded for entry of judgment of the Petitioners' dismissal.

IV. STATEMENT REGARDING ORAL ARGUMENT OR DECISION

Because the Circuit Court failed to apply settled law governing the Governmental Tort Claims and Insurance Reform Act, failed to apply this Court's well-established precedent governing causes of action alleging mental suffering with no ascertainable physical injury and improper judicial interference in public school disciplinary matters, and erroneously denied the Petitioners' Motion to Dismiss and Motion for Summary Judgment, R. App. P. 19 oral argument in this case is appropriate. Because Petitioners seek reversal of the trial court, a Memorandum Decision is not recommended per R. App. P. 21(d).

V. ARGUMENT

A. STANDARD OF REVIEW

This Court has stated:

> It is well-established that '[t]his Court reviews *de novo* the denial of a motion for summary judgment, where such a ruling is properly reviewable by this Court.' Syl. Pt. 1, *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W.Va. 80, 576 S.E.2d 807 (2002). Moreover, '[a] circuit court's denial of summary judgment that is predicated on qualified immunity is an interlocutory ruling which is subject to immediate appeal under the 'collateral order' doctrine.' Syl. Pt. 2, *Robinson v. Pack*, 223 W.Va. 828, 679 S.E.2d 660 (2009). This

> review, however, is guided by the following principle regarding immunity:
> ***[t]he ultimate determination of whether qualified or statutory immunity bars a civil action is one of law for the court to determine. Therefore, unless there is a bona fide dispute as to the foundational or historical facts that underlie the immunity determination, the ultimate questions of statutory or qualified immunity are ripe for summary disposition.***
> Syl. Pt. 1, *Hutchison v. City of Huntington*, 198 W.Va. 139, 479 S.E.2d 649 (1996).

West Virginia Regional Jail and Correctional Facility Authority v. A.B., 234 W.Va. 492, 766 S.E.2d 751, 760 (2014) (emphasis added). As this Court has recognized, "[t]he Court observed in *Robinson* that allowing interlocutory appeal of a qualified immunity ruling is the only way to preserve the intended goal of an immunity ruling: to afford public officers more than a defense to liability by providing them with 'the right not to be subject to the burden of trial.' *Id.* at 833, 679 S.E.2d at 665 (citation omitted)." *City of Saint Albans v. Botkins*, 228 W.Va. 393, 719 S.E.2d 863, 867 (2011).

Likewise, "[t]his Court previously has held that '[w]hen a party ... assigns as error a circuit court's denial of a motion to dismiss, the circuit court's disposition of the motion to dismiss will be reviewed *de novo*.' Syl. pt. 4, in part, *Ewing v. Bd. of Educ. of Cty. of Summers*, 202 W. Va. 228, 503 S.E.2d 541 (1998)." *West Virginia State Police, Dept. of Military Affairs and Public Safety v. J.H.*, 244 W.Va. 720, 856 S.E.2d 679, 690 (2021). In *Hess v. West Virginia Div. of Corrections*, this Court stated "[t]he Court reviews a circuit court's denial of a motion to dismiss a complaint under a de novo standard. See Syl. Pt. 4, *Ewing v. Bd. of Educ.*, 202 W.Va. 228, 503 S.E.2d 541 (1998) ('When a party, as part of an appeal from a final judgment, assigns as error a circuit court's denial of a motion to dismiss, the circuit court's disposition of the motion to dismiss will be reviewed *de novo*.')." 227 W.Va. 15, 705 S.E.2d 125, 127 (2010).

Similarly, in *West Virginia Dept. of Health and Human Resources v. Payne*, it was stated " '[t]his Court reviews *de novo* the denial of a motion for summary judgment, where such a ruling is properly reviewable by this Court.; Syl. Pt. 1, *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W.Va. 80, 576 S.E.2d 807 (2002)." 231 W.Va. 563, 746 S.E.2d 554, Syl. Pt. 1 (2013) (emphasis in original). Petitioners submit that, in accordance with the foregoing standards of review, this Court should reverse the trial court's orders and remand this matter for the entry of judgment of the Petitioners' dismissal.

B. THE INDIVIDUAL PETITIONERS, MR. AULENBACHER (PRINCIPAL) AND MR. MARANO (VICE PRINCIPAL), ARE IMMUNE FROM THIS SUIT IN ACCORDANCE WITH WEST VIRGINIA CODE SECTION 29-12A-5(B).

Respondent S.D. alleged that Petitioner "George Aulenbacher was employed by the . . . Kanawha County School Board as a principal." [A.R. at 4 at ¶ 9]. Likewise, S.D. averred that Petitioner "Brad Marano was employed by the . . . Kanawha County School Board as an assistant principal." *Id.* at ¶ 10. As such, both were employees of a political subdivision[9]:

> 'Employee' means an officer, agent, employee, or servant, whether compensated or not, whether full-time or not, who is authorized to act and is acting within the scope of his or her employment for a political subdivision. "Employee" includes any elected or appointed official of a political subdivision. "Employee" does not include an independent contractor of a political subdivision.

W.Va. Code § 29-12A-3(a).

Employees of political subdivisions, acting in good faith and in the course and scope of their employment, are clothed with statutory immunities by the Governmental Tort Claims and Insurance Reform Act. The Code states:

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[9] Respondent S.D. correctly plead that Petitioner "Kanawha County board of Education is a West Virginia political subdivision. . . ." [A.R. at 3 at ¶ 2]. By statute, the definition of a "political subdivision" includes a "county board of education". W.Va. Code § 29-12A-3(c).

> (b) An employee of a political subdivision is immune from liability unless one of the following applies:
> (1) His or her acts or omissions were manifestly outside the scope of employment or official responsibilities;
> (2) His or her acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner; or
> (3) Liability is expressly imposed upon the employee by a provision of this code.

W.Va. Code § 29-12A-5(b); *see also Byndon v. Pugh*, 350 F.Supp.3d 495, 511 (N.D. W.Va. 2018) ("Furthermore, even if the plaintiff properly alleged a claim for intentional infliction of emotional distress, Officer Pugh would be immune from liability due to West Virginia Code § 29-12A-5(b) of the Governmental Tort Claims and Insurance Reform Act. The plaintiff has not provided any evidence that Officer Pugh acted maliciously and there is no dispute that Officer Pugh was acting within the scope of his employment or official responsibilities at the time of the incident. Therefore, Officer Pugh is immune from liability."); *Kelley v. City of Williamson, West Virginia,* 221 W.Va. 506, 655 S.E.2d 528 (2007); *Reed v. Bord*, 206 W.Va. 568, 526 S.E.2d 534 (1999); *Wriston v. Raleigh County Emergency Services Auth.*, 205 W.Va. 409, 518 S.E.2d 650 (1999); *Brooks v. City of Weirton*, 202 W.Va. 246, 503 S.E.2d 814 (1998); *Moore by and through Knight v. Wood County Bd. of Educ.*, 200 W.Va. 247, 489 S.E.2d 1 (1997).

The *Moore* decision is instructive herein. In *Moore*, a 7th grade student sued for injuries received when he was assaulted by another student while waiting for the school bus. 200 W.Va. 247, 489 S.E.2d 1, 3 (1997). Suit was brought against the county board of education and the school Principal. *Id.* The trial court granted the school board and Principal summary judgment based upon immunities, and an appeal ensued. With regard to the Principal, this Court said:

> West Virginia Code § 29–12A–5(b) provides that employees of political subdivisions are immune from personal tort liability unless '[h]is or her acts or omissions were manifestly outside the scope of employment or official responsibilities; (2)[h]is or her acts or omissions were with malicious purpose, in bad faith, or in a wanton

> or reckless manner; or (3)[l]iability is expressly imposed upon the employee by a provision of this code.'
> Neither the complaint nor the supporting materials contain any indication that Mr. Kiger acted outside the scope of his employment or that he acted with a malicious purpose, in bad faith, or in a reckless manner. Similarly, there is no other statutory provision imposing liability on the principal. This provision constitutes a separate and sufficient basis for the circuit court's grant of summary judgment as to the Appellee, Kiger. We therefore affirm the summary judgment as to the individual Appellee.

Moore at 5 (citation omitted).

In accordance with the statutory immunities the individual Petitioners are afforded, they argued for dismissal of this suit. *See* A.R. at 769-70 ("An employee acting within the scope of his employment with a political subdivision cannot be named as a defendant for the purpose of establishing liability against the political subdivision."). Respondent S.D. argued in opposition that West Virginia Code section 29-12A-5(b)(2) was applicable as the individual Petitioners "could easily be shown to have acted with a malicious purposes, in bad faith and in a wanton and reckless manner". [A.R. at 776-7]. After being fully briefed and argued, however, the trial court disposed of Respondent S.D.'s argument:

> The Plaintiff identified the following two facts in alleging that Defendants Aulenbacher and Marano's conduct rose to the level of malicious purpose, in bad faith, or in a wanton or reckless manner so that they are not immune under the Act:
> (1) Failing to remove M.P. from school and the presence of S.D. on multiple occasions. M.P. was only suspended for two days for the first sexual assault of S.D. then allowed to return to the school, where a second attempted sexual assault took place. M.P. was not even suspended by either Defendant after this incident because he was a vital member of the basketball team;
> (2) Both defendants repeatedly told S.D. and her parents that they viewed the video of the first incident in the hallway at the school. Later, Defendant Aulenbacher sent a letter to the parents of S.D. claiming the camera did not show the incident.[10]

[10] The "video" is a non-issue. Petitioner Aulenbacher testified that he never reviewed video camera footage of the 2 instances complained of. [A.R. at 321]. As explained by Principal Aulenbacher, "[t]o my knowledge, there's - - was a dead spot in that part of the hallway" such that "you can see [S.D.] coming one way and [M.P.] coming one way;

(PL's Resp. to Def.'s Partial Mot. To Dismiss and Supporting Mem. Of Law at 4).

[A.R. at 791]. Disagreeing with the Respondent, the trial court recognized that Petitioner "Aulenbacher's and Marano's actions did not constitute actions done with malicious purpose, in bad faith, or in a wanton or reckless manner that would be give rise to punitive damages." *Id.* Although the Circuit Court made findings dispositive of Respondent S.D.'s argument against immunity per section 29-12A-5(b), the trial Court dismissed only the Respondent's request for punitive damages. *See Id.* ("Thus, a punitive damage award against individual Defendants Aulenbacher and Marano cannot be allowed by this Court."). Respectfully, the trial court's finding is more far-reaching than reflected by its holding – Petitioners Aulenbacher and Marano, employees of a political subdivision acting in good-faith and in the scope of their employment, are immune from the entire suit under West Virginia Code section 29-12A-5(b).

As Petitioners Aulenbacher and Maron are entitled to immunity under the Governmental Tort Claims and Insurance Reform Act, they were entitled to dismissal of this civil action and this case should be remanded for entry of judgment in their favor. *See, e.g., Hamstead v. Harvey*, 2022 WL 856610 (W.Va. March 23, 2022) (unpublished) (prosecuting attorney entitled to immunity as employee of county commission); *Thomas v. Davis*, 2021 WL 1158157 (W.Va. March 26, 2021) (unpublished) (police officer immune from suit because no evidence he intentionally, maliciously, or recklessly collided with the plaintiff's vehicle); *Myers v. City of Charleston*, 2021 WL 925326 (S.D. W.Va. March 21, 2021) (slip opin.); *Schoonover v. Clay County Sheriff's Dept.*, 2020 WL 2573243 (S.D. W.Va. May 21, 2020) (slip opin.) (police officers dismissed due to qualified

there's a block and, like, a dead spot in the camera". [A.R. at 322]. Similarly, Principal Marano testified that the SRO "pulled the security camera up after the suspensions. And we saw where they were in the hallway together, walking towards each other. Then there was a dead spot, and you could not see it. And it was, like, five seconds; they were on each other's end of the hallway." [A.R. at 367]. Vice Principal Marano testified that he did not tell Respondent S.D.'s mother that he had reviewed the security cameras. [A.R. at 387].

immunity or, alternatively, statutory immunity); *Lizotte v. Finley*, 2019 WL 2865864 (S.D. W.Va. July 2, 2019) (unpublished) (police officers statutorily immune from negligence claims); *Hamstead v. Walker*, 2019 WL 12313461 (N.D. W.Va. May 7, 2019) (slip opin.); *Frederick v. West Virginia Department of Health and Human Services*, 2019 WL 1198027 (S.D. W.Va. Feb. 15, 2019) (unpublished); *Kowalski v. Berkeley Co. Public Schools*, 2009 WL 10675108 (N.D. W.Va. Dec. 22, 2009) (unpublished).

C. THE KANAWHA COUNTY BOARD OF EDUCATION IS IMMUNE FROM THIS SUIT IN ACCORDANCE WITH WEST VIRGINIA CODE SECTION 29-12A-5(A)(4).

The crux of this case is set forth in the trial court's erroneous "Order Denying Defendants' Motion for Summary Judgment." [A.R. at 258]. The critical portions of the Order state:

> 24. Plaintiff alleges that the Kanawha County School Board has clear policies that describe the rules students must follow. In addition, GWHS has policies and procedures that conform to the Kanawha County School Board handbook while more clearly defining the punishments applicable to each offense.
>
> 25. Plaintiff alleges that Kanawha County School Board handbook has definitions for several different offenses that could have pertained to this situation; Indecent Act against a Student is not one of them.
>
> 26. Plaintiff alleges Defendants Aulenbacher and Marano could have found that M.P. committed sexual misconduct as described in 25.07.1.510 of the KCBE handbook, which is defined as '[a] student will not publicly and indecently expose themselves, display or transmit any drawing or photograph of a sexual nature, or commit an indecent act of a sexual nature on school property, on a school bus or at a school sponsored event.'
>
> 27. Plaintiff alleges Defendants also could have found that M.P. committed sexual harassment against Plaintiff, which is described in 15.07.1.5.13 of the KCBE handbook as 'sexually motivated physical conduct when such conduct creates an intimidating, hostile, or offensive educational environment.'
>
> 28. Plaintiff alleges that Defendants further could have found that M.P. committed sexual violence against Plaintiff, which is 'A

> physical act of aggression or force or the threat thereof which involves the touching of another's intimate parts, with intimate parts being described as the primary genital area, groin, inner thigh, buttocks or breast, as well as the clothing covering these areas."
>
> 29. Plaintiff alleges that sexual misconduct, sexual harassment, and sexual violence are all considered to be Level III violations. Level III violations are described in 25.07.1.5 as being imminently dangerous, illegal, and/or aggressive behaviors. These violations are considered to be willfully committed and are known to be illegal and/or harmful to people or property.
>
> 30. Plaintiff alleges an 'Indecent Act' towards a student is only a Level II violation, which is described as disruptive and potentially harmful behaviors; these behaviors are not considered to be malicious and are not intended to cause harm or danger to others.
>
> 31. Plaintiff alleges that while having knowledge of both the KCBE handbook and the GWHS handbook, Defendants only suspended M.P. for two days for an indecent act on a student, an offense that carries only a 1-3 day suspension. The punishment for sexual misconduct is suspension out of school for up to 10 days, and the punishment for sexual harassment is mandatory minimum of 3 days suspension.

[A.R. at 261-3]. It is readily apparent, therefore, that Respondent S.D. accuses Petitioners of the alleged failure to abide by policy and Petitioner Kanawha County Board of Education is immune from such claim pursuant to West Virginia Code section 29-12A-5(a)(4).

The purposes of the Governmental Tort Claims and Insurance Reform Act are to "limit liability of political subdivisions and provide immunity to political subdivisions in certain instances and to regulate the costs and coverage of insurance available to political subdivisions for such liability." W.Va. Code § 29-12A-1. Indeed, the Act states:

> The Legislature finds and declares that the political subdivisions of this state are unable to procure adequate liability insurance coverage at a reasonable cost due to: The high cost in defending such claims, the risk of liability beyond the affordable coverage, and the inability of political subdivisions to raise sufficient revenues for the procurement of such coverage without reducing the quantity and quality of traditional governmental services. Therefore, it is necessary to establish certain immunities and limitations with regard

> to the liability of political subdivisions and their employees, to regulate the insurance industry providing liability insurance to them, and thereby permit such political subdivisions to provide necessary and needed governmental services to its citizens within the limits of their available revenues.

W.Va. Code § 29-12A-2. As this Court has recognized "[t]he Tort Claims Act 'was enacted by the legislature in 1986 'to limit liability of political subdivisions and provide immunity to political subdivisions in certain instances....' ' *Walker v. Meadows*, 206 W.Va. 78, 82, 521 S.E.2d 801, 805 (1999). It was 'the result of legislative findings that political subdivisions of the State were unable to obtain affordable tort liability insurance coverage without reducing the quantity and quality of traditional governmental services. W.Va. Code, 29–12A–2.' *O'Dell v. Town of Gauley Bridge*, 188 W.Va. 596, 600, 425 S.E.2d 551, 555 (1992). Accordingly, 'to remedy this situation, the legislature specified seventeen instances in which political subdivisions would have immunity from tort liability. W.Va. Code, 29–12A–5(a).' *Id.*" *Standard Distributing, Inc. v, City of Charleston*, 218 W.Va. 543, 625 S.E.2d 305, 310 (2005).

This Court has also recognized the need for early resolution of immunities:

> '***Immunities under West Virginia law are more than a defense to a suit in that they grant governmental bodies and public officials the right not to be subject to the burden of trial at all.***' *Hutchison v. City of Huntington*, 198 W. Va. 139, 148, 479 S.E.2d 649, 658 (1996).

State ex rel. Grant County Comm'n v. Nelson, 244 W.Va. 649, 856 S.E.2d 608, 659 (2021)J.H (emphasis added). Although addressing qualified immunity, this Court reiterated in *West Virginia Regional Jail and Correctional Facility Auth. v. Grove*:

> As this Court explained in *Hutchison*, '[t]he very heart of the [qualified] immunity defense is that it spares the defendant from having to go forward with an inquiry into the merits of the case.' *Id.* at 148, 479 S.E.2d at 658. We also have recognized that
>
> a ruling on qualified immunity should be made early in the proceedings so that the expense of trial is avoided where the defense

> is dispositive. First and foremost, qualified immunity is an entitlement not to stand trial, not merely a defense from liability. *See Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985) ('The entitlement is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.').
>
> *Maston v. Wagner*, 236 W. Va. 488, 498, 781 S.E.2d 936, 946 (2015). Therefore, because we consistently have acknowledged that qualified immunity is not just a defense, but rather 'an entitlement not to stand trial,' *id.*, rulings on qualified immunity claims should be made as early in the proceedings as possible. The uniqueness of qualified immunity and its provision of total immunity from suit rather than just a defense is an important reason for the aforementioned heightened pleading.

244 W.Va. 273, 852 S.E.2d 773, 782 (2020) (additional citations omitted); *see also West Virginia State Police, Depart. Of Military Affairs and Public Safety v. J.H.*, 244 W.Va. 720, 856 S.E.2d 679, 688 (2021) ("As the United States Supreme Court has directed, 'qualified immunity is an immunity from suit rather than a mere defense to liability[.]' *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 815, 172 L. Ed. 2d 565 (2009) (internal citation and quotations omitted). Furthermore, ***'[o]ne of the most salient benefits of qualified immunity is protection from pretrial discovery, which is costly, time-consuming, and intrusive***[.]' *Backe v. LeBlanc*, 691 F.3d 645, 648 (5th Cir. 2012). *See also Yoak v. Marshall Univ. Bd. of Governors*, 223 W. Va. 55, 59, 672 S.E.2d 191, 195 (2008) (per curiam) (discussing qualified immunity and commenting that '[w]e are persuaded that 'sparing the defendant from having to go forward with an inquiry into the merits of the case' includes the burden of discovery. *See Holland ex rel. Overdorff v. Harrington*, 268 F.3d 1179, 1185 (10th Cir. 2001)').") (emphasis added).

As mentioned previously, Respondent S.D. correctly plead that Petitioner "Kanawha County Board of Education is a West Virginia political subdivision. . . ." [A.R. at 3 at ¶ 2]. Indeed, by statute, the definition of a "political subdivision" includes a "county board of education". W.Va. Code § 29-12A-3(c); *see also Moore by and through Knight v. Wood Co. Bd. of Educ.*, 200

W.Va. 247, 489 S.E.2d 1, 4 (1997) ("Section 29–12A–3(c) (1992) includes county boards of education within the definition of "political subdivision." Section 29–12A–4 (1992) sets out the circumstances in which a political subdivision, including a county board of education, may be held liable for damages."). The Governmental Tort Claims and Insurance Reform Act says that a political subdivision, like the Kanawha County Board of Education, is "immune from liability if a loss or claim results from . . . Adoption or failure to adopt a law, including, but not limited to, any statute, charter provision, ordinance, resolution, rule, regulation or written policy". W.Va. Code § 29-12A-5(a)(4).

In *State ex rel. City of Bridgeport v. Marks*, 233 W.Va. 449, 759 S.E.2d 192, 198 (2014), this Court noted the statutory immunity's applicability for the failure to adopt or *abide by* policy, stating "[t]he gravamen of the complaint filed by Doug's Towing is the failure of the City and its Police Department to adopt ***and abide by*** the Commission's towing policy and regulations. In this case, there can be no question that the claims asserted by Doug's Towing emanate from an alleged failure to adopt 'regulation or written policy.' *Id.* Because the claims at issue fall squarely within the purview of West Virginia Code § 29–12A–5(a)(4), the City and the Police Department are entitled to statutory immunity from liability for the claims asserted against them by Doug's Towing." [emphasis added]. Indeed, according to commentators, "[t]he enactment and enforcement of ordinances are the exercise of governmental functions; a municipality is generally not civilly liable for its failure to enact, enforce, or comply with ordinances." 63 C.J.S. Municipal Corporations § 893 (footnotes omitted).

In *C.C. v. Harrison Co. Bd. of Ed.*, this Court found that claims that the school board failed to adopt an anti-harassment policy, or that such policy was inadequate, "come within the statutory

immunity afforded to political subdivisions by the Tort Claims Act." 245 W.Va. 594, 859 S.E.2d 762, 770 (2021). This Court stated:

> because the Petitioners' allegations of negligence by the Board in this count pertain to its alleged failure to adopt an anti-harassment policy or adoption of an allegedly inadequate anti-harassment policy, both of which come within the ambit of the Act's grant of immunity to political subdivisions, we find that the circuit court did not err by dismissing this portion[11] of Count 5 of the Petitioners' complaint alleging negligence per se.

Id.

Likewise herein, Petitioner Kanawha County Board of Education was entitled to dismissal of this suit in accordance with the immunity afforded by section 29-12A-5(a)(4) of the Governmental Tort Claims and Insurance Reform Act. Remand, to enter judgment of Petitioner's dismissal, is appropriate.

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[11] In *C.C.*, this Court allowed a claim that the Assistant Principal violated the school board's anti-harassment policy to proceed as complementary of Petitioners' negligent retention claim. *C.C., supra* at 772. Such a claim is clearly distinguishable from the instant matter where Respondent S.D. is not alleging the individual Petitioners violated policy, but contends that they, in the exercise of their discretion, selected the *wrong* policy. Nevertheless, Justice Armstead's dissenting opinion is compelling:

> I believe the Petitioner's negligence *per se* claim in Count 5 is not only based on the adoption or failure to adopt a policy, which renders the Board immune from such claims pursuant to W.Va. Code § 29-12A-5(a)(4), it further constitutes a reiteration of Petitioners' negligent supervision claim. Moreover, even if its allegations go beyond a claim for the adoption or failure to adopt a policy, it still only alleges a 'responsibility' on the part of the board, rather than an 'expressly imposed' liability. The board is, therefore, immune from liability for the allegations set forth in Count 5. Accordingly, I believe Count 5, too, must be dismissed.

C.C., supra at 780 (Armstead, J. dissenting).

D. AS A MATTER OF LAW, THE KANAWHA COUNTY BOARD OF EDUCATION OWED THE RESPONDENT NO LEGAL DUTY TO DISCIPLINE A FELLOW MINOR STUDENT FOR A LEVEL III VIOLATION, AS OPPOSED TO A LEVEL II, PER DISCIPLINARY TERMS OF THE KANAWHA COUNTY BOARD OF EDUCATION HANDBOOK.

As noted previously, the crux of this case is that the individual Petitioners suspended M.P. for a Level II violation, as opposed to a Level III violation, under the Kanawha County Board of Education handbook. Respectfully, West Virginia law does not permit Respondent S.D. to substitute her judgment for that of the individual Petitioners, public school principals Mr. Marano and Mr. Ahlenbacher with regard to the discretionary discipline of students.

West Virginia case law recognizes that schools are not intended to be insurers of student safety. Indeed, in *Glaspell v. Taylor Co. Bd. of Educ.*, 2014 WL 5546480 at *3 (W.Va. 2014), this Court addressed a case where a student was allegedly injured by being choked at school. This Court held that the Taylor County School Board did not breach any duty in failing to notice high school students engaged in a "choking game" on a ramp adjacent to the choral department, where there was no evidence that the Board or its employees "had actual knowledge or notice" of the existence of the game, and it was "not feasible for school employees to be able to see what every student is doing in the cafeteria and hallways at every moment throughout a school day, ***particularly at the high school level***". [Emphasis added].[12]

[12] *See Narcisse v. Cont'l Ins. Co.*, 419 So.2d 13, 16 (La. Ct. App. 1982) ("[T]he fact that each student is not personally supervised every moment of each school day does not constitute fault on the part of the School Board or its employees.") (citations omitted); *Miller v. Griesel*, 308 N.E.2d 701, 706 (Ind. 1974) ("schools are not intended to be insurers of the safety of their pupils . . . ."). Significantly, the amount of supervision required for students is age-related. *See, e.g., Miller*, 308 N.E.2d at 707; *Convey v. City of Rye Sch. Dist.*, 710 N.Y.S.2d 641, 645 (N.Y. App. Div. 2000) ("Moreover, constant supervision of high school students is not required[.]") (citations omitted). Finally, "[w]here, as here, an accident occurs in so short a span of time that 'even the most intense supervision could not have prevented it', lack of supervision is not the proximate cause of the injury and summary judgment in favor of the school defendants is warranted[.]" *Janukajtis*, 726 N.Y.S.2d at 454 (emphasis added).

Admittedly, as a general proposition, schools have a duty to exercise reasonable care in supervising students. *See, e.g.*, *Moore*, *supra,* 200 W. Va. at 252, 489 S.E.2d at 6. However, per the West Virginia Code:

> Each county board is ***solely responsible for the administration of proper discipline*** in the public schools of the county and shall adopt policies consistent with the provisions of this section to govern disciplinary actions. These policies shall encourage the use of alternatives to corporal punishment, providing for the training of school personnel in alternatives to corporal punishment and for the involvement of parent(s), guardian(s) or custodian(s) in the maintenance of school discipline. The county boards shall provide for the immediate incorporation and implementation in the schools of a preventive discipline program which may include the responsible student program and a student involvement program which may include the peer mediation program, devised by the West Virginia Board of Education. Each county board may modify those programs to meet the particular needs of the county. The county boards shall provide in-service training for teachers and principals relating to assertive discipline procedures and conflict resolution. The county boards also may establish cooperatives with private entities to provide middle educational programs which may include programs focusing on developing individual coping skills, conflict resolution, anger control, self-esteem issues, stress management and decision making for students and any other program related to preventive discipline.

W.Va. Code §18A-5-1(f) (emphasis added). In this regard, ***"[c]ourts should not interfere with the decisions of school board officials in disciplinary matters except in extreme cases."*** Syl. Pt. 1, *Keith D. v. Ball*, 177 W.Va. 93, 350 S.E.2d 720 (1986) (emphasis added).[13]

The need for discipline in the public school system is well-understood. *See Goss v. Lopez*, 419 U.S. 565, 580, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975) ("Some modicum of discipline and order is essential if the educational function is to be performed."); *Id.* at 745-6 (Powell, J. dissenting)

[13] Akin to Respondent S.D.'s argument, the students in *Keith D.* argued that that discipline pursued against them was unduly harsh and inconsistent with the school board's regulations. In *Keith D.*, this Court held, however, that "the school board was not bound to impose the minimum punishment set out in the handbook." *Id.* at 96, 723.

("The lesson of discipline is not merely a matter of the student's self-interest in the shaping of his own character and personality; it provides an early understanding of the relevance to the social compact of respect for the rights of others. The classroom is the laboratory in which this lesson of life is best learned. Mr. Justice Black summed it up: 'School discipline, like parental discipline, is an integral and important part of training our children to be good citizens—to be better citizens.' *Tinker*, 393 U.S., at 524, 89 S.Ct., at 746 (dissenting opinion).").

The discretion afforded public school boards with regard to the needed discipline is equally as understood. *See Id.* at 744 (Powell, J. dissenting) ("In prior decisions, this Court has explicitly recognized that school authorities must have broad discretionary authority in the daily operation of public schools. This includes wide latitude with respect to maintaining discipline and good order. Addressing this point specifically, the Court stated in T*inker v. Des Moines School Dist.*, 393 U.S. 503, 507, 89 S.Ct. 733, 737, 21 L.Ed.2d 731 (1969): '(T)he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.'") (footnote omitted); *Wofford v. Evans*, 390 F.3d 318, 323 (4th Cir. 2004) ("Such leeway is particularly necessary when school discipline is involved. The Court has noted the 'substantial interest of teachers and administrators in maintaining discipline in the classroom.' *T.L.O.*, 469 U.S. at 339, 105 S.Ct. 733. Educators must be able to respond effectively to the disciplinary exigencies of the moment. They must also be able to tailor these responses to the peculiar remedial needs that exist in particular schools. The Supreme Court has long recognized that educators are best situated to identify those needs and optimize their implementation. The 'education of the Nation's youth is primarily the responsibility of parents, teachers, and state and

local officials, and not of federal judges.' *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988).").

Consequently, unless the circumstances are egregious, Courts do not "second guess" public school administrators' administration of discipline. *See, e.g., D.F. ex rel. Finkle v. Bd. of Educ. of Syosset Cent. School Dist.*, 386 F.Supp.2d 119, 128 (E.D.N.Y. 2005) ("A suspension for thirty days is not so egregious as to warrant this Court's intervention in the School's affairs."); *A.F. by Fenton v. Kings Park Cent. School Dist.*, 341 F.Supp.3d 188, 195 (E.D.N.Y. 2018) ("'[i]t is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion' and '§ 1983 was not intended to be a vehicle for federal [ ] court correction of errors ... which do not rise to the level of violations of specific constitutional guarantees. *Wood v. Strickland*, 420 U.S. 308, 326, 95 S.Ct. 992, 1003, 43 L.Ed.2d 214 (1975).'"); *Spero v. Vestal Centr. School Dist.*, 427 F.Supp.3d 294, 306-7 (N.D.N.Y. 2019) ("'Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.' *Epperson v. Arkansas*, 393 U.S. 97, 104, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968)."); *Hardwick ex rel. Hardwick v. Heyward*, 711 F.3d 426, 440 (4th Cir. 2013) ("Because school officials are far more intimately involved with running schools than federal courts are, '[i]t is axiomatic that federal courts should not lightly interfere with the day-to-day operation of schools.' *Augustus v. Sch. Bd. of Escambia Cnty., Fla.*, 507 F.2d 152, 155 (5th Cir.1975); *see also Epperson v. Arkansas*, 393 U.S. 97, 104, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968) ('Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint.').").

Petitioner Kanawha County Board of Education owed the respondent no legal duty to discipline M.P. for a Level III violation, as opposed to a Level II, per disciplinary terms of the Kanawha County Board of Education handbook and the trial court's failure to dismiss this case must therefore be reversed.

E. RESPONDENT S.D. HAS NOT IDENTIFIED ANY APPLICABLE EXCEPTION TO THE GENERAL RULE THAT SHE CANNOT RECOVER FOR ALLEGED MENTAL SUFFERING WITHOUT PRESENCE OF A PHYSICAL INJURY; THEREFORE, DISMISSAL WAS ESSENTIAL.

Respondent S.D. cannot recover for negligent infliction of emotional distress because it is undisputed that she did not suffer an "ascertainable physical injury" as a result of the hallway incident. The ascertainable physical injury requirement is deeply rooted in West Virginia law. "Until relatively recently, under West Virginia negligence law, there could be no recovery in tort for . . . emotional and mental trouble alone without ascertainable physical injuries arising therefrom[.]" *Workman v. Kroger Ltd. P'ship I*, 2007 WL 2984698, at *3 (S.D. W. Va. Oct. 11, 2007) (quoting *Monteleone v. Co-Operative Transit Co.*, 128 W. Va. 340, 36 S.E.2d 475 (1945)).

Summarizing the state of the law, the *Wood v. Harshbarger* Court explained, "West Virginia currently recognizes two types of negligent infliction of emotional distress: 1) emotional distress based upon the fear of contracting a disease, and 2) emotional distress based upon 'witnessing a person closely related to the plaintiff suffer critical injury or death.'" 2013 WL 5603243, at *9 (S.D. W. Va. Oct. 11, 2013) (citing *Marlin v. Bill Rich Constr., Inc.*, 198 W. Va. 635, 482 S.E.2d 620 (1996); *Heldreth v. Marrs*, 188 W. Va. 481, 425 S.E.2d 157, 161 (1992)).[14]

[14] This Court discussed an additional exception for "negligent mishandling of a corpse" as an extension of principles observed in *Heldreth*, but concluded that the record in that case was insufficient to warrant a formal holding. *See Ricottilli v. Summersville Mem'l Hosp.*, 188 W. Va. 674, 679-80, 425 S.E.2d 629, 634-35 (1992). Thus, this Court has thus "not yet formally recognized an extension of the 'dead body exception[.]'" *Id.*, 188 W. Va. at 679, 425 S.E.2d at 634.

These limited exceptions were also applied by this Court in *Mays v. Marshall Univ. Bd. of Governors*, 2015 WL 6181508. *3 (W.Va. Oct. 20, 2015) when affirming a trial court's award of summary judgment on a negligent infliction of emotional distress claim. In *Mays,* the Plaintiff planned to have corrective surgery on her left breast reconstruction and an employee of the plastic surgeon inadvertently sent her employer photographs taken of the Plaintiff's naked breasts – photographs taken only of the breasts, without her face. The *Mays* Plaintiff brought suit alleging, amongst other claims, the negligent infliction of emotional distress[15] and the trial court awarded the Defendant summary judgment:

> In its order dated May 23, 2014, the circuit court concluded that petitioner's allegations did not fall within the recognized framework of claims for negligent infliction of emotional distress. Absent a physical injury to the plaintiff, our law has recognized claims for negligent infliction of emotional distress only in limited circumstances. *See, e.g., Syl. pt. 1, Heldreth v. Mans*, 188 W.Va. 481, 425 S.E.2d 157 (1992) (pertaining to when plaintiff witnesses person closely related to him/her suffer critical injury or death as result of defendant's negligent conduct); Syl. pt. 12, in part, *Marlin v. Bill Rich Constr., Inc.*, 198 W.Va. 635, 482 S.E.2d 620 (1996) (allowing plaintiff to recover when defendant negligently exposes him/her to disease, thus causing plaintiff to experience emotional distress based on "fear of contracting a disease."); *Ricotilli v. Summersville Mem. Hosp.*, 188 W.Va. 674, 425 S.E.2d 629 (1992) (applying 'dead body exception' to allow recovery for negligent infliction of emotional distress for negligence in mishandling relative's corpse).

2015 WL 6181508. *3 (W.Va. Oct. 20, 2015). According to this Court, the trial court applied prior decisions and "noted that petitioner neither witnessed the injury or death of a close relative nor was she exposed to a disease which might be expected to cause her serious disability or death" such that "petitioner's claim for negligent infliction of emotional distress was not viable." *Id.* at *3. This Court agreed with the trial court, stating:

[15] The Plaintiff submitted the report of a forensic psychiatrist which indicated that she was predisposed to a unique psychological response to the event.

> On this record, we cannot say that the circuit court erred in granting summary judgment on petitioner's negligent infliction of emotional distress claim. As the circuit court noted, in order to have a viable claim for negligent infliction of emotional distress, petitioner must allege that her emotional distress was serious from the point of view of an ordinarily sensitive person, not a supersensitive person. The undisputed testimony of petitioner's psychiatrist highlighted the uniqueness of petitioner's emotional state when the events giving rise to this case occurred. Particularly, this testimony alleged that petitioner was predisposed to emotional distress by her previous life experiences (i.e., surviving an abusive childhood, three abusive relationships, and cancer); as a result of these experiences, petitioner developed psychological defense mechanisms; and the failure of petitioner's defense mechanisms, in response to seeing the pictures of herself, caused her emotional harm.
>
> This court in no way seeks to minimize petitioner's feelings of embarrassment as a result of the events herein described. However, under the peculiar facts of this case, we cannot say the circuit court erred by finding that the plaintiff failed to establish the elements of negligent infliction of emotional distress.

Id. at *4.

Similarly, in *Cruse v. Frabrizio*, 2014 WL 3045412 (S.D. W.Va. July 2, 2014) (unpublished), the Plaintiff filed suit for libel and emotional distress after discovering a WSAZ news article where he allegedly described himself as a "mule" delivering pills for a fee. The Magistrate Judge's Proposed Findings and Recommendations, which were adopted in their entirety, recommended dismissal of Plaintiff's negligent infliction of emotional distress claim, stating:

> The Supreme Court of Appeals of West Virginia has subsequently endorsed the view that '[a]lthough physical injury is no longer a necessary element of a negligent infliction of emotional distress claim, such a cause of action ***generally must be premised on conduct that unreasonably endangers the plaintiff's physical safety or causes the plaintiff to fear for his or her physical safety***.' *Brown v. City of Fairmont*, 221 W.Va. 541, 655 S.E.2d 563, 569 (W.Va. 2007); *see also Marlin v. Bill Rich Constr., Inc.*, 198 W.Va. 635, 482 S.E.2d 620, 638 (W.Va. 1996) (holding that plaintiffs could pursue a claim of negligent infliction of emotional distress absent physical injury based upon the fear of contracting a disease where 'he or she was actually exposed to the disease by the negligent

> conduct of the defendant'). Accordingly, in *Brown*, the Supreme Court of West Virginia rejected a claim of negligent infliction of emotional distress by a retired firefighter who alleged that the defendants had negligently administered his pension benefits prior to his retirement. *Brown*, 655 S.E.2d at 565, 569. ***Similarly, in this case Cruse plainly fails to state factual allegations consistent with a claim of negligent infliction of emotional distress in that he has not alleged any physical injury, or fear of physical injury, suffered by him or a close relative as a result of the publication of the Article.***

[Emphasis added].

In the case before this Court, Respondent S.D. conceded that she did not suffer an ascertainable physical injury. In her deposition testimony, the Respondent was asked, "Now, going back to the — the original incident where he put his hand on your private area. Did you have any — it doesn't sound like it, but I've got to ask the question — any type of injury, like a bruise or scratch or anything like that?" [A.R. at 666]. Respondent S.D. responded, "[n]o." *Id.* Respondent S.D. also admitted that she did not sustain a physical injury from the second incident because M.P. did not touch her at that time. *Id.* In short, it is undisputed that neither the Respondent., or a close relative, suffered physical injury or fear of physical injury. Consequently, the trial court erred in failing to award Petitioners summary judgment on Respondent S.D.'s negligent infliction of emotional distress claim.

VI. CONCLUSION

This Court has long-recognized the policy and purpose of immunities from suit:

> Immunities under West Virginia law are more than a defense to a suit in that they grant governmental bodies and public officials the right not to be subject to the burden of trial at all. The very heart of the immunity defense is that it spares the defendant from having to go forward with an inquiry into the merits of the case. *See Swint v. Chambers County Commission*, 514 U.S. 35, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995) (The Court distinguished summary judgment rulings on claims by individuals to qualified immunity as immunities from suit). ***In this vein, unless expressly limited by statute, the sweep of these immunities is necessarily broad.*** They

> protect 'all but the plainly incompetent or those who knowingly violate the law.' *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 1096, 89 L.Ed.2d 271 (1986). The policy considerations driving such a rule are straightforward: ***public servants exercising their official discretion in the discharge of their duties cannot live in constant fear of lawsuits, with the concomitant costs to the public servant and society***. *See Clark v. Dunn*, 195 W.Va. 272, 465 S.E.2d 374 (1995); *Goines v. James*, 189 W.Va. 634, 433 S.E.2d 572 (1993); *Bennett v. Coffman*, 178 W. Va. 500, 361 S.E.2d 465 (1987). Such fear will stymie the work of state government, and will 'dampen the ardor of all but the most resolute, or the most irresponsible, [public officials] in the unflinching discharge of their duties.' *Harlow v. Fitzgerald*, 457 U.S. 800, 814, 102 S.Ct. 2727, 2736, 73 L.Ed.2d 396 (1982) (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2nd Cir.1949)); see also *Parkulo v. West Virginia Board of Probation and Parole*, 199 W. Va. 161, 483 S.E.2d 507 [1996 WL 663338] (No. 23366, 11/15/96) ('The public interest is that the official conduct of the officer is not to be impaired by constant concern about personal liability'). The doctrine of qualified and statutory immunity was created to '***avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment***.' *Harlow*, 457 U.S. at 818, 102 S.Ct. at 2738.

Hutchison v. City of Huntington, 198 W.Va. 139, 479 S.E.2d 649, 658 (1996) (emphasis added). In accordance with these principles, Petitioners raised immunity defenses in their Answer and their Motion to Dismiss. The trial court failed to dismiss the claims against them. Petitioners then added substantive defenses to Respondent S.D.'s claims. Again, the circuit court failed to dismiss this case. In accordance with immunities afforded by the Governmental Tort Claims and Insurance Reform Act, as well as the West Virginia Code's award of the exclusive authority to discipline public school students and the Respondent's failure to suffer any ascertainable physical injury, Petitions respectfully request the decisions of the trial court be reversed.

WHEREFORE Petitioners, the Kanawha County Board of Education, George Aulenbacher (Principal of George Washington High School), and Brad Marano (Vice Principal of George Washington High School), respectfully request this Court reverse the trial court's Orders failing

to dismiss this case, and remand the case for the purpose of awarding Petitioners judgment of dismissal.

Petitioners, Kanawha County Board of Education, George Aulenbacher and Brad Marano,
By Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2022, true and accurate copies of the foregoing ***"Petitioner's Brief"*** were deposited in the U.S. Mail contained in a postage-paid envelope addressed to counsel for all parties to this appeal as follows:

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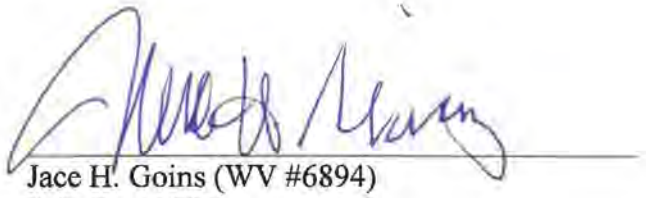

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