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' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. 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 appeal, Respondents' theory has morphed again. Initially, Respondents asserted Petitioners Aulenbacher and Marano disciplined Respondent S.D.'s co-student for a Level II violation, as opposed to a Level III violation, because the co-student " 'was a vital member of the basketball team.'" [A.R. at 791 (citation omitted)]. This theory, however, was directly contradicted by the undisputed facts adduced during discovery.[1] Consequently, Respondents now theorize that the level of discipline was selected so as to "skip reporting" the matter to the State of West Virginia Department of Health and Human Resources or Petitioner Kanawha County Board of Education. [Response Brief at 6].[2] As more fully shown herein, however, Respondents' new argument is contrary to statute and, likewise, contrary to school policy.

Notably, at the trial court level, Respondents identified only two (2) bases for inaccurately alleging Petitioner Aluenbacher's and Marano's conduct was malicious, in bad faith, wanton, or reckless: the fact that the co-student was a basketball player and the fact that video was unavailable.

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[1] Indeed, Petitioner Marano did not know who it was that allegedly slapped Respondent S.D. on the bottom. [A.R. at 347].

[2] "Our general rule is that nonjurisdictional questions not raised at the circuit court level, but raised for the first time on appeal, will not be considered." *Barney v. Auvil*, 195 W.Va. 733, 466 S.E.2d 801, 809 (1995) (citations omitted).

[A.R. at 791]. The trial court correctly noted, however, that the individual Petitioners' "actions did not constitute actions done with malicious purpose, in bad faith, or in a wanton or reckless manner"[3], but while making that proper finding, the court only improperly dismissed the punitive damages claim against all Petitioners. [A.R. at 792]. Thus, 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.

Similarly flawed is Respondents' claim against Petitioner Kanawha County Board of Education ("KCBOE"). This Court should remand for entry of judgment dismissing Petitioner KCBOE 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 KCBOE is statutorily authorized to exclusively administer the proper discipline in its schools under West Virginia Code section 18A-5-1(f).

Finally, Respondents allege "the damages . . . did in fact constitute physical injury." [Response Brief at 15]. Again, however, Respondents' argument is in direct contravention to Respondent S.D.'s own testimony. *See* A.R. at 666 (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?" and answered "[n]o."; 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.). Because Respondent S.D. suffered no physical injury, nothing endangered Respondent S.D's

[3] A.R. at 791.

physical safety, or caused her to fear for her physical safety, the trial court erred in failing to award Petitioners summary judgment on Respondent S.D.'s negligent infliction of emotional distress claim.

II. ARGUMENT

A. 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).

Respondents do not dispute that Petitioners Aulenbacher and Marano are employees of a political subdivision. [A.R. at 4 at ¶¶ 9-10; W.Va. Code § 29-12A-3(a); Response Brief at 9]. As a matter of law, 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.

Different than what Respondents argued before the trial court, as set forth above, Respondents now wrongly assert immunity is unavailable because the individual Petitioners "acted in a reckless manner . . . in not finding sexual contact or sexual assault. . . . Furthermore, this incident was not reported to the KCBOE or the Title IX Department. . . ." Fatal to Respondents' argument is the fact that the Level III violation of "Sexual Misconduct" must be "of a sexual nature." [A.R. at 839-840].[4] Vice Principal Marano confirmed the inapplicability of such violation in his investigation stating that the offense had nothing "to do with being sexual". [A.R. at 26].[5]

The Code states:

> (b) An employee of a political subdivision is immune from liability unless one of the following applies:

[4] Notably, a first offense of Sexual Misconduct results in discipline like that afforded Respondent S.D.'s co-student in that it can result in "UP TO 10 OSS/PEX". [A.R. at 817].

[5] "Sexual harassment" must also be "of a sexual nature" which, as set forth above, was not relevant. [A.R. at 841].

> (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). Respondents' inapplicable counter to this statutory immunity is a reference to the abuse reporting statute which, itself, fails to provide an implied, private cause of action.[6] According to Respondents, "24.04.15 requires teachers, counselors, nurses, and other professionals who suspect that a student has been sexually abused at school to report their findings to the Department of Health and Human Resources." [Response Brief at 5]. The cited provision states:

> Child Abuse Prevention. Students have the right to grow up without being physically or sexually abused at school, in the home, or the community. W.Va[.] Code § 49-6A-2 requires teachers, counselors, nurses, or other professionals who suspect that a student is being abused to report the circumstances to the West Virginia Department of Health and Human Resources. Victims of abuse may seek the advice or assistance of a teacher, counselor, nurse, or other school professional. The school professional will assist students in getting needed help to prevent the abuse from recurring.

[A.R. at 823]. "Sexual abuse" is statutorily defined in terms of "sexual contact". *See, e.g,* W.Va. Code §§ 61-8B-7- 61-8B-9. "Sexual contact", according to the West Virginia Code, involves

[6] Under the previous version of the Child Welfare Act, this Court expressly held that the mandatory reporting statute "does not give rise to an implied private civil cause of action, in addition to criminal penalties imposed by the statute, for failure to report suspected child abuse where an individual with a duty to report under the statute is alleged to have had reasonable cause to suspect that a child is being abused and has failed to report suspected abuse." *Arbaugh v. Bd. of Educ., County of Pendleton*, 214 W.Va. 677, 591 S.E.2d 235, Syl. pt. 3 (2003). There may be a mistaken belief that *Arbaugh* left the door open for an implied, private cause of action under a different scenario. *See Arbaugh* at 241 ("in so holding, we have not ignored Mr. Arbaugh's plea to carve out a private cause of action for more egregious situations, such as where an eye-witness has failed to report"). Notably, however, such argument was soundly rejected by this Court in *Barbina v. Curry*, 221 W.Va. 41, 650 S.E.2d 140 (2007). In *Barbina* the Plaintiff sought to rely upon the *Arbaugh* statement regarding "more egregious situations" to distinguish his case. The *Barbina* Court rejected the Plaintiff's argument, stating "[t]he dicta language that Mr. Barbina seeks to rely upon states only that in a properly brought negligence action, a plaintiff may introduce evidence regarding failure to report. However, such evidence is not the basis for a cause of action; rather, it is evidence to support a legally recognized cause of action. Therefore, pursuant to *Arbaugh*, the circuit court was correct in granting summary judgment to Valley." *Barbina* at 147.

touching "done for the purpose of gratifying the sexual desire of either party." W.Va. Code § 61-8B-1(6). Again herein, Vice Principal Marano confirmed in his investigation that the offense in question had nothing "to do with being sexual". [A.R. at 26].[7]

Regardless, Petitioners Aulenbacher and Marano, employees of a political subdivision acting in good-faith and in the scope of their employment, are immune from Respondents' under West Virginia Code section 29-12A-5(b). In *R.A. v. Johnson*, ___ F.4th ___, 2022 WL 2036384 (4th Cir. June 7, 2022), the District Court permitted claims asserting the negligent failure to report abuse to proceed against school officials. The matter was the subject of an interlocutory appeal given public official immunity. The Fourth Circuit Court of Appeals reversed the District Court's decision, noting that the reporting statute, much like West Virginia's, "requires school personnel who have 'cause to suspect child abuse' to report it to the Director of Social Services. . . . But the existence of guiding regulations—even 'detailed' ones—does not eliminate the need for judgment. *See Baker*, 224 N.C. App. at 433. Most obviously, whether or not an official has 'cause to suspect' child abuse is a judgment call. It depends, among other things, on the official's assessment of an accusation's credibility and severity. And even assuming the accusation is credited, whether or not alleged behavior rises to the level of 'child abuse' is likewise a case-by-case decision. The official must assess the intent of the actor, the risk of injury to the child, the severity of physical injury,

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[7] Respondents' position about Level II disciplinary violations resulting in a lack of reporting and counseling referrals is mistaken. According to KCBOE policy, "[a]ll violations of this policy shall be reported to the principal of the school or his or her designee (assistant principal). Upon receipt of the student discipline report and after such investigation and due process as may be required under the circumstances, the principal or his or her designee will determine the level of violation and the school's response. The principal or designee shall promptly enter the required disciplinary data into the West Virginia Education Information System (WVEIS) in order to file the required information with the West Virginia Department of Education of all substantiated reports of all violations of the Student Code of Conduct." [A.R. at 829]. Moreover, while a potential school response to a Level III violation is "[r]eferrals and conference to support staff or agencies for counseling or other therapeutic services", a Level II response can also include "[r]eferrals and conference to support staff or agencies for counseling or other therapeutic services." [A.R. at 845, 837].

and the appropriateness of disciplinary devices, among other factors. . . . Surely those assessments require a good measure of 'personal deliberation, decision and judgment.' *Meyer*, 347 N.C. at 113." *Id.* at *___. The Court further found that no malice was alleged. "Nowhere has R.A. asserted that the school officials had any actual intent to harm G.A. Importantly, Ms. Johnson herself is not a party to this appeal; all appellants are school administrators at least one step removed from the incidents in question. The mere allegation that such disheartening things occurred at their school does not show that the school officials *intended* them to happen. We are thus left only with administrators' failure to report or take corrective action in response to Ms. Johnson's behavior, which R.A. argues amounts to a constructive intent to harm G.A. While we certainly do not hold that such a failure can never amount to malice, it is a high bar." *Id.* at ___ (emphasis in original). Thus, the Court found the school administrators entitled to public official immunity:

> The facts alleged here are concerning and disheartening. But concerning and disheartening facts do not alone pierce public official immunity. North Carolina law recognizes that school officials must be given a certain degree of latitude to run their schools. Given the intense community interest in public education, some of the many decisions administrators make will provoke disagreement. Other such decisions may even be ill-advised. If such judgments were often the prelude to litigation, however, the school environment would be transformed.
>
> We cannot say whether the school officials here exercised wise judgment. But that is the whole point. For if school administrators were infallible then no immunity would be necessary.

Id. at ___.

In the case before this Court, the trial court took the necessary step of determining the individual Petitioners acted in good faith:

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

[A.R. at 791]. Disagreeing with the Respondents, 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).[8]

[8] It should not be forgotten that, in this suit, Respondent S.D. alleges conduct unlike that she reported to the individual Petitioners at school. Respondent S.D. advised Vice Principal Marano that "some boy walked by and slapped her on the butt." [A.R. at 346]. Indeed, Respondent S.D. repeatedly stated that she did not "want to do anything about it". *Id* at 347. For the second of the only two (2) incidents complained of, Respondent S.D. told Vice Principal Marano that the student she complained about " 'smiled at me'. [A.R. at 352]. Despite this litigation, 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.'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].

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

Respondents miss the mark in opposing the KCBOE's assertion of immunity pursuant to West Virginia Code section 29-12A-5(A)(4). Respondents argue that their assertion is one of negligence, not of the failure to abide by its policy. Respectfully, Respondents' argument for negligence hinges upon KCBOE's alleged failure to abide by its policy. As the trial court noted:

> 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.
>
> . . .
>
> 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 KCBOE is immune from such claim pursuant to West Virginia Code section 29-12A-5(a)(4). *See State ex rel. City of Bridgeport v. Marks*, 233 W.Va. 449, 759 S.E.2d 192, 198 (2014) ("[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).

C. 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.

Respondents do not dispute that, per the West Virginia Code "[e]ach county board is ***solely responsible for the administration of proper discipline*** in the public schools of the county . . . ." W.Va. Code §18A-5-1(f) (emphasis added). Nor do the Respondents dispute that "***[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). Nevertheless, Respondents wrongly continue to argue that the decision to suspend Respondent S.D's co-student for a Level II violation, as opposed to a Level III violation, was improper.

The United States Supreme Court has advised that "[a]ssessment of the need for, and the appropriate means of maintaining, school discipline is committed generally to the discretion of school authorities subject to state law." *Ingraham v. Wright*, 430 U.S. 651, 681-2, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977). Thus, when examining a Constitutional challenge to the amount of discipline imposed by a public school principal, the United States District Court for the Southern District of Alabama stated "[t]o the extent that Plaintiff's complaint is directed towards the amount of discretion afforded Principal Keys in defining conduct sufficient for 'possession,' the Court notes that 'the system of public education ... relies necessarily upon the discretion of school administrators and school board members.' *Wood*, 420 U.S. at 326, 95 S.Ct. 992 (emphasis added). Vesting a school official with the discretion to determine which situations warrant expulsion is not only necessary 'in order to maintain discipline and good order,' it is desirable. *M. v. Board of Educ.*

Ball–Chatham, 429 F.Supp. 288, 291 (S.D.Ill.1977)." *Hammock ex rel. Hammock v. Keys*, 93 F.Supp.2d 1222, 1232-3 (S.D. Ala. 2000).

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."); *see also* Syl. Pt. 1, *Keith D. v. Ball*, 177 W.Va. 93, 350 S.E.2d 720 (1986) ("Courts should not interfere with the decisions of school board officials in disciplinary matters except in extreme cases."). Respondents, accordingly, wrongly argue that "this is clearly an extreme case".[9]

Likewise inaccurate is Respondents' assertion that "there were multiple incidents and . . . [Respondent S.D.] was assaulted again". [Response Brief at 14-15]. There were only two (2) incidents occurring between Respondent S.D. and the student she complained of. [A.R. at 667]. As to the first incident, Respondent S.D. advised Vice Principal Marano that "some boy walked by and slapped her on the butt." [A.R. at 346]. With regard to the second incident, Respondent S.D. told Vice Principal Marano that other student " smiled at me. [A.R. at 352].

Consequently, as a matter of law, Petitioner Kanawha County Board of Education owed the respondent no legal duty to discipline a student for a Level III violation, as opposed to a Level II violation, 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.

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[9] Respondents consistently assert that the incident was a reported "sexual assault", and cite to the Appendix Record, but when viewed the cited pages only reflect what the individual Petitioners were advised occurred, which was not a sexual assault. *See* A.R. at 349-350 ("Q. [S.D.] never told you that he grabbed her? A. No. . . . A. . . . she was pretty nonchalant about it and didn't want anything done."); A.R. at 352 (Respondent S.D. told Vice Principal Marano that the student she complained about " smiled at me").

D. 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.

Completely contrary to *Respondent S.D.'s own testimony*, Respondents wrongly assert "the damages alleged . . . did in fact constitute physical injury." [Response Brief at 15]. Actually, 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.*

Despite the fact that Respondent S.D. suffered no physical injury, Respondents wrongly assert that they are entitled to recover for the alleged negligent infliction of emotional distress because the "claims of emotional damages are not spurious." [Response Brief at 16]. In *Ricotilli v. Summersville Mem. Hosp.*, 188 W.Va. 64, 425 S.E.2d 629 (1992), this Court recognized that claims, unaccompanied by physical injury, are seldom concrete enough to warrant an exception to the general rule that "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)). The *Ricotilli* Court stated:

> As Prosser & Keeton note,
>
> [w]here the guarantee can be found, and the mental distress is undoubtedly real and serious, there may be no good reason to deny recovery. ***But cases will obviously be infrequent in which 'mental disturbance,' not so severe as to cause physical harm, will clearly***

> ***be a serious wrong worthy of redress and sufficiently attested by the circumstances of the case.***
>
> Keeton et al., *supra*, § 52, at 362.

Ricotilli at 635 (some emphasis added). Indeed, this Court has "emphasize[d] the requirements that a claim for emotional distress without an accompanying physical injury can only be successfully maintained upon a showing by the plaintiffs in such an action of facts sufficient to guarantee that the claim is not spurious and upon a showing that the emotional distress is undoubtedly real and serious." *Marlin v. Bill Rich Const., Inc.,* 198 W.Va. 635, 482 S.E.2d 620, 637 (1996). Accordingly, the United States District Court for the Southern District of West Virginia recently stated:

> "An individual may recover for negligent infliction of emotional distress absent accompanying physical injury upon a showing of facts sufficient to guarantee that the emotional damages claim is not spurious.' ' Syl. pt. 10, *Marlin v. Bill Rich Constr., Inc.*, 482 S.E.2d 620, 637 (1996) (quoting Syl. pt. 2, *Ricottilli v. Summersville Mem'l Hosp.*, 425 S.E.2d 629 (W. Va. 1992)). However, ' 'it is well-established under West Virginia law that, absent a physical injury to the plaintiff, negligent infliction of emotional distress claims may only be maintained in three very limited circumstances'—namely, 'when the plaintiff witnesses a person closely related to [her] suffer critical injury or death as a result of the defendant's negligent conduct,' 'when the defendant negligently exposed the plaintiff to disease, causing emotional distress based on fear of contracting a disease,' or 'for negligence in mishandling a corpse.' ' *Daniels v. Wayne Cnty.*, No. 3:19-0413, 2020 WL 2543298, at *7 (S.D.W. Va. May 19, 2020) (internal quotation marks and brackets omitted) (quoting *Frederick v. W. Va. Dep't of Health & Human Servs.*, No. 2:18-cv-01077, 2019 WL 1198027, at *16 (S.D.W. Va. Feb. 15, 2019); *see also Mays v. Marshall Univ. Bd. of Governors*, No. 14-0788, 2015 WL 6181508, at *3 (W. Va. Oct. 20, 2015) ('[O]ur law has recognized claims for negligent infliction of emotional distress only in [these three] limited circumstances.').

Domestic Violence Survivors Support Group, Inc. v. Crouch, 2020 WL 5949897, *25 (S.D. W.Va. Oct. 7, 2020) (slip opin.).

In the instant matter, although Respondent S.D. attended some counseling sessions at Kanawha Pastoral Center, the sessions also involved counseling regarding Respondent S.D.'s parents' marital difficulties. [A.R. at 616, 618]. Respondent S.D. does not know how many counseling sessions she has attended, and did not attend counseling at any other facility. *Id.* at 619. The counseling sessions have long-since ended. *Id.* at 618. Under no circumstances is a situation that Respondent S.D. was "nonchalant" about, that she did not want punished, that caused her no physical injury, where she did not witness anyone close to her suffer physical injury, and for which she failed to solely treat for, not "spurious" and "real and serious". Consequently, the trial court erred in failing to award Petitioners summary judgment on Respondent S.D.'s negligent infliction of emotional distress claim.

III. CONCLUSION

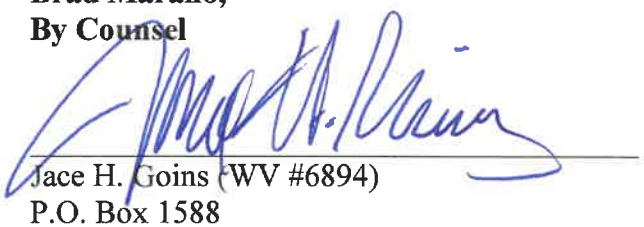
Public school administrators cannot perform their jobs if the discretionary discipline they afford is second-guessed.[10] Likewise, public school boards cannot operate effectively if their administrators' discretionary, disciplinary decisions are second-guessed. In short, immunities are afforded in these contexts so as to avoid the improper second-guessing. Pursuant to 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

[10] *See, e.g., 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.').").

to Respondent S.D.'s claims. Again, the circuit court failed to dismiss this case. Consequently, 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, Petitioners 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 that 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 June 16, 2022, true and accurate copies of the foregoing ***"Petitioner's Reply 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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