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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 1392 C.D. 2018

SCHOOL DISTRICT OF PHILADELPHIA,
Appellant,

v.

AMANDA WIBLE
Appellee.

APPELLEE BRIEF

Appeal from the Judgment of the
Court of Common Pleas of Philadelphia County,
Civil Trial Division, April Term 2015, No. 3169

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INTRODUCTION

> One of the declared purposes of the Human Relations Act is to assure equal opportunities to all individuals and to safeguard their rights at places of public accommodation. The equal opportunity safeguarded in schools, of course, is equal educational opportunity.
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> *Uniontown Area Sch. Dist. v. Pa. Human Rel's Comm'n (PHRC)*, 313 A.2d 156, 170 (Pa. 1973)

For more than half a decade, the School District of Philadelphia denied Amanda Wible equal educational opportunity. Her peers had a chance to learn in a school setting free from severe or pervasive sexual harassment, but she was denied that chance. Classmates sexually harassed her each day, assaulting her, spitting on her, destroying her schoolwork, spreading sexual rumors about her, and calling her "bitch," "she-he," "dyke," "fag," "slut," and other sexual epithets. The District did nothing, perpetuating the harassment through inaction.

These facts are not in dispute. The District does not challenge the trial court's findings, made after an eight-day bench trial. It instead argues that (1) the Political Subdivision Tort Claims Act shields it from liability and (2) its years of deliberate indifference to severe and pervasive sexual harassment did not violate the Pennsylvania Human

Relations Act (PHRA). The trial court did not err in rejecting these arguments. Both fail on multiple grounds.

The District first floated its Tort Claims Act argument in its post-trial motion—after more than three years of litigating this case without claiming immunity. The argument is dubious. The Tort Claims Act does not extend to PHRA claims because they do not sound in tort, and even if they do, immunity is waived in this case.

The District fails to even address whether PHRA claims sound in tort, and its argument that the PHRA does not waive immunity here depends on a farfetched assertion: that § 955(i) does not impose liability on "public accommodations" for discrimination. For over fifty years, Pennsylvania courts have held that § 955(i) creates a cause of action against public accommodations. Courts have applied § 955(i) to school districts, cemeteries, fraternal orders, and other accommodations. And although the legislature has repeatedly amended the PHRA, it has never changed § 955(i) in response to this interpretation. *See Fonner v. Shandon*, 724 A.2d 903, 906 (Pa. 1999) ("The failure of the General Assembly to change [a] law which has been interpreted by the courts

creates a presumption that the interpretation [i]s in accord[] with the legislative intent.").

Similarly, the District's argument that it did not violate § 955(i) fails for multiple reasons. According to the District, the trial court erred in finding it liable because it did not act on the basis of Amanda's sex—that is, it did not intentionally discriminate against her. But the District did in fact intentionally discriminate against Amanda: deliberate indifference constitutes intentional discrimination.

And even if the District did not act on the basis of Amanda's sex, it is liable because § 955(i) does not require intentional discrimination—intent or no intent, the District engaged in an unlawful discriminatory practice. In *PHRC v. Chester School District*, the Supreme Court expressly rejected the argument that § 955(i) prohibits only intentional acts of discrimination. 233 A.2d 290, 294 (Pa. 1967). The Court stated: "In adopting the construction [of § 955(i)] urged by the school district, the courts below reasoned: . . . the phrase 'either directly or indirectly' [in § 955(i)] contemplate[s] intentional or affirmative acts . . . . We cannot agree." *Id.* A district, the Court went on, indirectly withholds educational privileges from a child and violates § 955(i) if the child

attends school under discriminatory conditions and the district has the power to take corrective measures but does nothing. *Id.* at 294–95. That is what happened here.

Because these last-ditch arguments lack merit, the District turns to alarmist policy claims, contending, for example, that affirming the trial court will "impose liability on virtually every private and public entity in the Commonwealth that d[oes] not do enough to stop someone . . . from discriminating." District Brief at 25. This and the District's other sky-is-falling arguments mischaracterize the trial court's decision. The court found the District liable not simply because it "did not do enough to stop" sexual harassment but because for more than half a decade, the District—a public accommodation that exercises unique control over its environment—was on notice of and deliberately indifferent to severe and pervasive sexual harassment. *See Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 655 (1995) (stating that the state's power over students "is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults").[1]

[1] In Pennsylvania, public schools' power over children is particularly pronounced because the state compels school attendance. 24 P.S. § 13-1327.

COUNTER-STATEMENT OF THE QUESTIONS INVOLVED

I. Whether the Tort Claims Act shields the District

Question 1

The Tort Claims Act reaches a statutory claim only if the claim is based on an "injury to a person or property as a reflection of traditional tort jurisprudence." *Meyer v. Cmty. Coll. of Beaver Cty.*, 2 A.3d 499, 502 (Pa. 2010). PHRA claims are based on a denial of equal treatment, not an injury to a person or property as a reflection of traditional tort jurisprudence.

Does the Tort Claims Act reach PHRA claims?

Question 2

If § 955(i) clearly applies to public schools, the Tort Claims Act is waived in this case. The PHRA specifies that public schools are "public accommodations," and for over fifty years, Pennsylvania courts have held that § 955(i) applies to public accommodations. The Pennsylvania Supreme Court, for example, has held the District liable under § 955(i) because it is a public accommodation.

Even if the Tort Claims Act extends to PHRA claims, is immunity waived in this case?

II. Whether the District violated § 955(i) by subjecting Amanda to a sexually hostile school environment

Section 955(i) prohibits not only intentional but also indirect discrimination. The trial court's findings establish both types of discrimination. The court found that the District's conduct arose to deliberate indifference—a form of intentional discrimination. Also, the court found that Amanda faced a sexually hostile school environment for more than half a decade and that the District did nothing even though it had the power to take corrective measures—a form of indirect discrimination.

Based on the record, did the District violate § 955(i)?

COUNTER-STATEMENT OF THE CASE

I. Statutory and Legal Background

A. The PHRA's purpose, text, and structure

Passed in 1955 and amended and expanded numerous times, the PHRA is an ambitious civil rights statute. *See Chester Sch. Dist.*, 233 A.2d at 296. It aims to eradicate discrimination in employment, housing, and public accommodations, providing overlapping protections in each area. 43 P.S. § 952(a).

In its opening section, the PHRA declares that it is "the public policy of the Commonwealth" to "assure equal opportunities to all individuals and to safeguard their rights to public accommodation," employment, and housing regardless of race, religion, age, sex, national origin, or disability. § 952(b). This policy, the PHRA explains, is critical because discrimination causes "grave injury to the public health and welfare" and results in "racial segregation in public schools and other community facilities," "delinquency," and "other evils." § 952(a).

After declaring its policy and purpose, the PHRA grants all persons a "[r]ight to freedom from discrimination in employment, housing[,] and public accommodation." § 953. This right is robust—it

guarantees, among other things, "[t]he opportunity . . . to obtain *all* the accommodations, advantages, facilities and privileges of *any* public accommodation . . . without discrimination." § 953 (emphases added).

The PHRA then operationalizes this expansive right. First, it defines "employers," "housing accommodations," and "public accommodations," specifying, for example, that "kindergartens, primary and secondary schools, [and] high schools" are "public accommodations." § 954(l). Second, it establishes causes of action for unlawful discriminatory practices against employers, housing accommodations, and public accommodations. § 955. Finally, it provides that, if a plaintiff establishes liability under § 955, a court can award her any "legal or equitable relief as [it] deems appropriate." § 962(c)(3).

Consistent with its broad remedial goals, the PHRA concludes by directing courts to construe its provisions "liberally," and it declares that the provisions are entitled to supremacy over other laws. § 962(a).

B. Section 955(i): the PHRA's safeguard against denials of equal educational opportunity

Since the PHRA's enactment, courts have held that it requires public schools to provide students "equal educational opportunity." *Uniontown Area Sch. Dist.*, 313 A.2d at 170; *see also PHRC v. Sch. Dist.*

of Phila., 681 A.2d 1366, 1382 (Pa. Commw. Ct. 1996) ("An equal educational opportunity is a civil right enforceable [under the PHRA]."). Section 955(i) establishes a cause of action against public schools which fail to provide equal educational opportunity. *See Uniontown Area Sch. Dist.*, 313 A.2d at 157.

The Pennsylvania Supreme Court first held a school district liable under § 955(i) in *Chester School District*. There, the PHRC ordered the Chester School District to remedy school segregation caused by de facto residential segregation. 233 A.2d at 293. Chester appealed the order, arguing that the PHRA does not require it to correct educational disparities resulting from residential patterns "over which it has no control." *Id.* at 294. The Court, however, rejected that argument and found that Chester must "take corrective measures" because failing to do so would indirectly deny its students of color equal educational opportunity. *Id.* at 294–95.

In the decades since *Chester School District*, Pennsylvania courts have adhered to the decision, interpreting § 955(i) as creating a cause of action against school districts that either directly or indirectly deny equal educational opportunity. *See PHRC v. Norristown Area Sch.*

Dist., 374 A.2d 671, 673 & n.3 (Pa. 1977) (upholding finding that a district violated § 955(i)(1) by failing to address school segregation); *Uniontown Area Sch. Dist.*, 313 A.2d at 158 ("Since . . . *Chester,* the Legislature has not amended the [PHRA] in a manner which would suggest disagreement, and we therefore persevere in our belief that, indeed, the [PHRA] does speak to segregation that does not arise from official policy or acts."); *PHRC v. Sch. Dist. of Phila.*, 638 A.2d 304, 311 (Pa. Commw. Ct. 1994) (applying *Chester School District* and holding that the School District of Philadelphia "has a legal responsibility and duty to take steps to correct [de facto segregation] and [that] its failure to do so [violates] the [PHRA]").

Although the legislature has amended the PHRA multiple times, it has never revised § 955(i) in response to these precedents. The legislature passed § 955(i) in 1961 and has amended its opening language just once since, broadening it to cover not only physical "places of public accommodation" but all "public accommodations." *Compare* 43 P.S. § 955(i) (1961) ("It shall be an unlawful discriminatory practice . . . [f]or any person being the owner, lessee, proprietor, manager, superintendent, agent or employe of any place of public

accommodation . . . "), *with* 43 P.S. § 955(i) (2019) ("It shall be an unlawful discriminatory practice . . . [f]or any person being the owner, lessee, proprietor, manager, superintendent, agent or employe of any public accommodation . . . ").[2]

II. Facts[3]

From elementary school to ninth grade, Amanda had to endure violent, severe, and pervasive sexual harassment to access an education. Rule 1925(a) Op. at 2–3; R. 170a (Tr. 90:14–90:18). Because she did not conform to stereotypes about how girls should act and dress, peers terrorized her. Rule 1925(a) Op. at 2–3, 12. They called her "A-*man*-da" (emphasizing "man" when saying her name), "lesbo," "lesbian," "fag," "tranny," "transgender," "he-she," "she-male," "it," "freak," "mop," and "bitch." *Id.* at 5, 11–12. They punched, slapped, and hit her. *Id.* at 4–6. They spread sexual rumors about her. *Id.* at 5, 11. They vandalized her school supplies, stole her homework, and ripped up her

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[2] *See also* Elizabeth S. Shuster, *The Commonwealth Court and the Interpretation of the Pennsylvania Human Relations Act*, 21 Widener L.J. 41, 44 (2011) (explaining that § 955(i) used to ban discrimination by "places of public accommodation" but the legislature removed "places of" after this Court interpreted that language as limiting § 955(i)'s reach to only physical places of accommodation).

[3] The facts here are construed in the light most favorable to Amanda, the verdict winner. *See J.J. Deluca Co. v. Toll Naval Assocs.*, 56 A.3d 402, 410 (Pa. Super. Ct. 2012).

classwork, while taunting her for not presenting like a typical girl. *Id.* at 5. They told her to style her hair more like a girl and spat in her hair and on her belongings. *Id.* at 5, 11; R. 195a (Tr. 35:3–35:4, 35:14–35:16). They attacked her, assaulting her on the school bus, in class, and during gym. Rule 1925(a) Op. at 6, 9, 17.

The District was deliberately indifferent to this sexual harassment. *Id.* at 21. Amanda and her mother repeatedly reported it, but the District took no action. *Id.* at 4, 7–8, 13–15. Instead, it simply told Amanda to ignore the peers. *Id.* at 8, 13. The District's indifference deprived Amanda of educational opportunity for years, imposing on her an abusive, inferior school setting, one where verbal and physical harassment was a constant barrier to learning; one where she frequently had to miss class instruction to see the school nurse; one where peers destroyed her homework and classwork; one where harassment chilled her class participation; one where she could not participate in extracurriculars because doing so would have required her to endure abuse for more than just the seven-hour school day. *Id.* at 5–6, 14, 33–34; R. 191a (Tr. 17:2–17:7); R. 199a (Tr. 50:22–51:16); R. 213a (Tr. 165:8–165:14).

A. Elementary school: rather than focusing on math and reading, Amanda spends her days fending off constant sexual harassment.

Amanda attended Robert B. Pollock Elementary School. Rule 1925(a) Op. at 3. She was a tomboy. *Id.* She wore pants and shirts rather than dresses and blouses, she liked to play sports, and she kept her hair short. Rule 1925(a) Op. at 3; R. 188a (Tr. 6:16–6:22). Because Amanda did not present like a typical girl, her peers branded her "A-*man*-da," told her to stand in the boys' line, mocked her clothes, and ridiculed her for not brushing her hair. Rule 1925(a) Op. at 3–4. They even called her "dyke" and "bitch." *Id.* Amanda told District staff about the abuse, but they did nothing, so the harassment continued, remaining a constant barrier to her learning. *Id.*

Then, in fifth grade, the sexual harassment turned violent. *Id.* at 4. In the hallways and at recess, peers punched, shoved, and slapped Amanda. *Id.* In class, they pulled her hair, stole her things, and pulled her chair out from under her. *Id.* District staff did nothing. *Id.*

One of the peers went even further. While he and Amanda were leaving school one day, he grabbed her, pinned her against a fence, called her a "bitch," and assaulted her. *Id.* Amanda broke free for a

moment, but the boy slammed her to the ground and continued assaulting her until a crossing guard intervened. *Id.* With ripped jeans and scraped knees and elbows, Amanda ran home. *Id.* Her mother—who is a former teacher—reported the attack to District staff, but they ignored her report. *Id.* Worse still, they transferred the boy into Amanda's class a few months later, exacerbating the toxic learning environment that she faced. *Id.* The boy regularly pushed Amanda, shouldered her in the hallways, slid his chair in front of her when she walked around the classroom, and called her "A-*man*-da," "stupid," and "bitch." *Id.*

B. Middle school: the District remains deliberately indifferent to the harassment, so for three more years, Amanda must brave daily abuse to access an education.

Amanda began middle school at Alternative Middle Years at James Martin School (AMY). *Id.* Peers continued targeting her because she did not conform to sex stereotypes, and the District continued ignoring it. *Id.* The harassment therefore continued throughout Amanda's time at AMY, culminating in a violent assault which led her mother to transfer her to a new District school, Baldi

Middle School, in an (unsuccessful) attempt to access a non-hostile learning environment. *Id.* at 7–8, 10.

Like at Pollock Elementary, constant verbal and physical abuse was a condition of Amanda's education at AMY. *Id.* at 5–7. Throughout the day, peers ridiculed her about her gender presentation, calling her "tranny," "transgender," "it," "lesbo," "lesbian," "he/she," "she/male," "fag," "bitch," "freak," "mop," "slut," and "weirdo." *Id.* at 5. They mocked her hair and clothes. *Id.* They told her to wear makeup. *Id.* They spread a rumor that she masturbated and taunted her about it in the halls, at lunch, and during class. *Id.* Other peers watched and laughed at her. *Id.*

The physical abuse was just as jarring. Peers routinely punched Amanda, shoved her into railings and walls, tripped her, stepped on her, slapped her, threw things at her, spit in her hair, hit her in the back of the head, dumped water and milk on her at lunch, smashed food in her hair, and dragged her out of her seat on the school bus. *Id.* at 5–6; R. 193a (Tr. 26:21–26:24). These daily attacks bruised Amanda's face, back, ribs, knees, and hips, and she often had to endure the

humiliation of attending classes with milk in her hair and on her clothes. Rule 1925(a) Op. at 6.

The peers not only humiliated, abused, and ostracized Amanda but also sabotaged her schoolwork. *Id.* at 5; R. 213a (Tr. 165:8–165:14). While calling her "freak," "she/male," and the other sexual epithets with which they branded her, the peers repeatedly stole or destroyed her school supplies, homework, classwork, and school projects. Rule 1925(a) Op. at 5. They tore up her textbooks, stole her homework, ripped her classwork, dumped water on her classwork, and threw her backpack out of a school-bus window. *Id.* They smashed a Halloween pumpkin that she made for a class project. *Id.*; R. 192a (Tr. 23:13–23:16). One peer stole a spatula that Amanda had for a class assignment, rubbed it on his genitals, and tried to force it on her. Rule 1925(a) Op. at 6.

Because of the severity and pervasiveness of the sexual harassment, Amanda had to spend countless hours in the nurse's office missing classroom instruction. *Id.*; R. 199a (Tr. 50:22–51:16). She frequently had to see the nurse because the peers hit her "a little too hard"; because she needed to use her inhaler and calm down; or simply

because she needed a reprieve from the abuse. Rule 1925(a) Op. at 6; R. 199a (Tr. 50:22–51:16).

And the entire time, the District knew about the harassment but did nothing. Rule 1925(a) Op. at 7. District staff witnessed the harassment, and Amanda and her mother reported it. *Id.* at 7, 15. They told principals, guidance counselors, teachers, librarians, and teacher aides that peers were harassing Amanda because of her sex. *Id.* They told them that peers were assaulting her and calling her "tranny," "transgender," "it," "lesbo," "lesbian," "he/she," "she/male," "fag," "bitch," "freak," "mop," "slut," and "weirdo." *Id.*

In response, District staff just told Amanda to try to ignore the peers. *Id.* at 13, 16. They never investigated the harassment. R. 231a (Tr. 62:13–63:18). Nor did they implement standard preventive measures, such as daily check-ins, increased supervision in harassment "hot spots," or a safety plan (a written plan stating how school staff will protect a child from harassment). R. 232a (Tr. 66:15–66:22, 67:4–67:13); Rule 1925(a) Op. at 19–20. Nor did they separate the peers from Amanda. *See* Rule 1925(a) Op. at 7–8. Nor did they discipline the peers, save one suspension of one peer. R. 182a (Tr. 71:5–71:12); *see*

Rule 1925(a) Op. at 7. Nor did they provide the peers standard behavior interventions like one-on-one counseling or incentives for proper behavior. R. 232a (Tr. 65:24 –66:14); R. 179a (Tr. 69:18–69:6). They did not even follow the District's own procedures for addressing harassment and bullying. Rule 1925(a) Op. at 19, 21; *see also* R. 246a–53a (District's bullying and harassment procedures).

The District chose to take no action even though its indifference made further sexual harassment inevitable. Rule 1925(a) Op. at 31; R. 169a (Tr. 88:4–88:9).

Like at Pollock Elementary, the District's deliberate indifference led to a brutal attack at AMY. Halfway through seventh grade, during health class, Amanda's teacher left the room and two peers accosted her. Rule 1925(a) Op. at 9. She ignored them, so they grabbed her and dragged her out of her desk chair. *Id.* Amanda got up, but a third peer dumped garbage on her and then put the trashcan over her head. *Id.* The class laughed at her. *Id.* When Amanda removed the trashcan, several peers started hitting her. *Id.* She curled up in a ball on the floor, defensively covering her head with her hands while the peers

kicked her and called her "bitch" and "slut." *Id.* Amanda eventually got off the floor, ran out of the classroom, and had a panic attack. *Id.*

After the assault, Amanda's mother removed her from AMY. She could not afford a private school, so she contacted the District's superintendent of middle schools, reported the harassment to him, and obtained a transfer for Amanda to Baldi Middle School. *Id.* at 16.

Immediately after the transfer, Amanda's mother notified Baldi's principal and Amanda's new teachers about the sexual harassment at Pollock Elementary and AMY. *Id.* at 10. She met with the principal and sent letters to the teachers. *Id.* The teachers never responded to the letters. *Id.*

And the harassment continued. Baldi peers terrorized Amanda because she did not look and act like a typical girl. *Id.* at 12; R. 211a. Throughout the school day, they called her the same sexual epithets; they spread sexual rumors about her; they pushed, shoved, and punched her; they stole her things; they threw trash, books, and pencils at her; they told her to wear women's clothes and to style her hair more like a girl; they stabbed her while calling her "fag," faggot," and "bitch." Rule 1925(a) Op. at 11–12; R. 206a (Tr. 78:8–78:18, 80:3–80:14); R. 207a

(Tr. 81:2–81:25, 82:16–82:24); R. 208a (Tr. 85:2–85:8, 86:2–86:12). Female peers in gym class quarantined Amanda in the bathroom while they were changing, refusing to let her change with them in the locker room. Rule 1925(a) Op. at 11; R. 207a (Tr. 83:2 –83:25). Male peers tried to coerce Amanda and a female classmate into "giving them a show." Rule 1925(a) Op. at 11. Also, the male peers, like Amanda's peers at Pollock Elementary, told her that she did not belong in the girls' line. R. 210a (Tr. 96:14–96:20).

District staff witnessed the harassment, and Amanda reported it to her science teacher, her English teacher, her math teacher, her social studies teacher, her gym teacher, a librarian, a school dean, and an assistant principal, but the District continued its policy of indifference. Rule 1925(a) Op. at 12, 21; R. 207a (Tr. 83:15–83:18); R. 208a (Tr. 86:19–88:25); R. 209a (Tr. 89:1–90:12). So the harassment persisted until Amanda left Baldi for high school at the end of eighth grade. Rule 1925(a) Op. at 12.

C. High school: the District's ongoing indifference forces Amanda to drop out of the District and attend a cyber charter school.

Amanda attended ninth grade at George Washington High School. Peers, including some who harassed her at Baldi, started terrorizing her the first week of school. *Id.*; R. 211a (Tr. 99:22–99:25). Amanda's daily routine at George Washington was immediately the same as at Pollock Elementary, AMY, and Baldi: try to concentrate on learning while peers call her "tranny," "dyke," "she/he," "slut," "whore," "fag," and "it"; stave off panic attacks while peers hit, punch, and shove her; struggle to complete her assignments after peers steal her school supplies; report the abuse to teachers, deans, and principals who brush her aside and patronize her with the same three-word refrain that she had heard for years: "just ignore it." *See* Rule 1925(a) Op. at 12–14, 17; R. 211a (Tr. 100:17–100:25); R. 212a (Tr. 101:1–104:10).

Ninth grade ended like prior school years—with violence and humiliation. Near the end of the year, a peer hit Amanda in the head, concussing her and forcing her to miss several weeks of class. Rule 1925(a) Op. at 13. Then, at the senior graduation ceremony, peers humiliated Amanda in front of school staff, families, and other students.

Id. They threw food, paper, and gum at her while calling her "lesbo," "dyke," and "bitch." R. 212a (Tr. 103:4–103:9).

By the end of ninth grade, Amanda was defeated. More than half a decade of violent, severe, and pervasive sexual harassment not only hijacked her education but also caused her to develop depression, insomnia, suicidal thoughts, panic attacks, and a psychosomatic condition called amplified musculoskeletal pain syndrome. Rule 1925(a) Op. at 14. Amanda therefore dropped out of the District and enrolled in a cyber charter school. *Id.* at 3.

III. Procedural History

Amanda filed her complaint in the Court of Common Pleas in 2015 after exhausting her administrative remedies with the PHRC. R. 73a. The District filed two motions for summary judgment, one in May 2017 (which the court dismissed as premature) and one in September 2017. Rule 1925(a) Op. at 2. In both motions, the District argued that Amanda's claims are time-barred, that they are not cognizable under the PHRA, and that they fail because the District did not subject Amanda to a sexually hostile school environment. The trial court rejected the arguments.

In 2018, after three years of motions practice and discovery, the parties litigated an eight-day bench trial before the Honorable Gene D. Cohen. Judge Cohen ruled for Amanda, awarding her $500,000 in damages and $578,000 in attorney's fees and costs. R. 135a. In his Findings of Fact and Conclusions of Law, Judge Cohen held that the District violated the PHRA because for years it was deliberately indifferent to severe and pervasive sexual harassment. *See* Findings and Conclusions at 8. He found that Amanda was harassed based on her sex (because she did not conform to sex stereotypes); that the harassment denied her equal access to school; and that the District was deliberately indifferent to the harassment. *Id.*

The District moved for post-trial relief, arguing for the first time that the Tort Claims Act shields it from liability. R. 131a. Judge Cohen denied the motion. R. 135a.

This appeal and Judge Cohen's Rule 1925(a) opinion followed.

SUMMARY OF ARGUMENT

The District flouted its duty under the PHRA to provide Amanda equal educational opportunity. For years, it subjected her to a discriminatory school setting and denied her an education "on equal terms." *See Sch. Dist. of Phila.*, 681 A.2d at 1382 (internal quotation marks omitted). The trial court committed no error in finding the District liable. After trial, the District for the very first time claimed immunity and argued for a new standard of liability under § 955(i)—that a plaintiff can prevail only if she establishes intentional discrimination. These last-ditch arguments fail. The District is not immune, and based on the record, it violated § 955(i).

I. The Tort Claims Act does not shield the District.

The Tort Claims Act does not apply to PHRA claims, and even if it does, immunity is waived. First, the Act reaches a statutory claim only if it sounds in tort. *Meyer*, 2 A.3d at 502. The claim must be based on an "injury to a person or property as a reflection of traditional tort jurisprudence," *id.*, and PHRA claims like Amanda's are not based on such an injury. The gravamen of a PHRA discrimination claim is a denial of equal treatment, not trespass on one's person or property. *See*

Mansfield State Coll. v. Kovich, 407 A.2d 1387, 1388 (Pa. Commw. Ct. 1979); *Schweitzer v. Rockwell Int'l*, 586 A.2d 383, 389 (Pa. Super. Ct. 1990).

Second, even if the Tort Claims Act reaches PHRA claims, the legislature has waived immunity. A statute waives a political subdivision's immunity if it expressly permits claims against the subdivision. *See City of Phila. v. PHRC*, 684 A.2d 204, 208 (Pa. Commw. Ct. 1996). And § 955(i) expressly permits claims against public schools like the District: it imposes liability on public accommodations for discrimination, and the PHRA specifies that public schools are public accommodations. 43 P.S. §§ 954(l), 955(i).

The District's argument that § 955(i) does not apply to public accommodations is extraordinary. Fifty years of precedent establish that § 955(i) subjects public accommodations to liability. Courts have never splintered the text of § 955(i) and distinguished between "persons" and "public accommodations." They read § 955(i) as a whole, upholding the legislature's intent to hold public accommodations and their representatives accountable for discrimination.

Finally, even if § 955(i) applies exclusively to "persons" as the District contends, immunity is waived because § 955(i) specifies that "persons" include "superintendents," who are official representatives of schools and can be sued as a stand-in for school districts. *See* § 955(i).

II. The trial court did not err in finding that the District violated § 955(i).

The District's contention that it did not violate § 955(i) because it did not intentionally discriminate against Amanda is both factually and legally flawed. The District did indeed intentionally discriminate against Amanda—its deliberate indifference constituted intentional discrimination. *See Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 643 (1999) (concluding that "deliberate indifference to known" student-on-student harassment amounts to an intentional discriminatory act). Moreover, intentional discrimination is not required to establish liability under § 955(i). A student can also establish liability by showing that her school district subjected her to discriminatory school conditions which it had the power to correct. *See Chester Sch. Dist.*, 233 A.2d at 294–95. Amanda established that here—the District ignored severe and pervasive sexual harassment that it had the power to correct.

ARGUMENT

I. The Tort Claims Act does not shield the District from liability under § 955(i).

Determining whether government immunity shields a political subdivision from a statutory cause of action is a two-step inquiry. First, a court must determine whether the Tort Claims Act even applies to the cause of action. *See Dorsey v. Redman*, 96 A.3d 332, 337 (Pa. 2014) (concluding that the Act does not apply to all statutory claims). Second, if the cause of action is within the Act's purview, the court must consider whether the legislature nevertheless waived immunity—that is, whether the legislature intended to subject the political subdivision to liability under the statute. *See City of Phila.*, 684 A.2d at 208.

Both steps foreclose the District's argument that immunity shields it. The District fails to even address whether the Tort Claims Act reaches PHRA claims,[4] and its argument that the legislature did not intend to permit claims against public schools under § 955(i) borders on frivolous.

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[4] The District merely states that the Act reaches some statutory claims and then presumes without analysis that the Act reaches Amanda's claim. District Brief at 18.

A. The Tort Claims Act does not apply to PHRA claims because they do not sound in tort.

The Tort Claims Act codifies government immunity, a doctrine "root[ed] in English common law" which shields government entities "from tort liability." *Dorsey*, 96 A.3d at 340. Therefore, the Act reaches a statutory cause of action only if it sounds in tort—the cause of action must be based on an "injury to a person or property as a reflection of traditional tort jurisprudence." *Meyer*, 2 A.3d at 502 (quoting 42 Pa. C.S. § 8541). Put differently, the gravamen of the cause of action must sound in common-law tort. *See id.* at 502–03 & n.6. If the cause of action sounds in something other than tort, it is outside the Act's purview. *Dorsey*, 96 A.3d at 341.

PHRA claims do not sound in tort. "The discrimination cause of action is unique." *Freeman v. Kelvinator, Inc.*, 469 F. Supp. 999, 1004 (E.D. Mich. 1979). Its gravamen is a denial of equal treatment, not trespass on one's person or property. *See id.* The discrimination cause of action "is not derived from the English common law of personal freedom, but is rather an outgrowth of the fundamental principle that everyone should be treated equally without regard to" religion, sex, race, or disability. *Id.*; *see also Reagan v. City of Knoxville*, 692 F. Supp.

2d 891, 909 (E.D. Tenn. 2010) ("The civil rights laws share a much different purpose [than torts]. They . . . grow out of the fundamental principle that every citizen deserves equal treatment . . . ." (internal quotation marks omitted)).

In *Schweitzer v. Rockwell International*, the Pennsylvania Superior Court recognized this distinction between PHRA and tort claims. *See* 586 A.2d at 389. There, an employee brought a PHRA claim and a claim for intentional infliction of emotional distress against her employer, seeking damages under both claims. *Id.* at 385, 387. The employer argued that the PHRA provided the exclusive remedy for the employee since her claims arose from the same facts, but the court allowed the employee to proceed on her tort claim, concluding that it and the PHRA claim were "fundamentally different." *Id.* at 389. The PHRA, the court stated, "effectuates the state's interests in eradicating targeted forms of discrimination," while the "tort of intentional infliction of emotional distress vindicates the personal interest of freedom." *Id.* (citation omitted).

This Court, too, has recognized that PHRA claims are distinct from tort claims. In *Mansfield State College v. Kovich*, an employee

brought a PHRA claim against her employer (a state college) for sex discrimination. 407 A.2d at 1388. In rejecting the college's sovereign-immunity defense, this Court described the employee's discrimination claim as "not one sounding in trespass" but rather a distinct "statutorily created cause of action against the Commonwealth as an 'employer.'" *Id.* at 1388. The claim, in other words, arose from the college's statutory duty to treat the employee equally, not from a duty based on tort principles. *See id.*

Courts outside of Pennsylvania have also found that state anti-discrimination claims do not sound in tort. In *Sneed v. City of Redbank*, for instance, the Tennessee Supreme Court held that claims under the Tennessee Human Rights Act are not subject to government immunity because they "are not tort claims and do not originate in tort principles." 459 S.W.3d 17, 28 (Tenn. 2014). Similarly, the New Jersey Supreme Court has concluded that the state's tort immunities do not reach claims under the New Jersey Law Against Discrimination. *Leang v. Jersey City Bd. of Educ.*, 969 A.2d 1097, 1108 (N.J. 2009).

Schweitzer, *Kovich*, and persuasive authority thus illustrate that PHRA claims are unique. Their gravamen is a denial of equal treatment, not trespass on one's person or property.

And this is so for all PHRA claims since a denial of equal treatment is the only actionable injury under the statute. *See* 43 P.S. § 955 (establishing causes of action only for "unlawful discriminatory practices"). It does not matter whether a claim is against an employer or a public accommodation. The type of defendant does not alter the gravamen of a claim. Nor does it matter whether the plaintiff seeks legal or equitable relief. That does not change the substance of a claim either. Nor does it matter what form the discrimination takes (i.e., unlawful termination, workplace harassment, hostile school environment). Discrimination is discrimination. *See Jancey v. Sch. Comm.*, 658 N.E.2d 162, 173 (Mass. 1995) ("Acts of discrimination—whether intentional or unintentional—do not thereby become torts.").

The District, however, has suggested during these proceedings that Amanda's claim is similar to a tort claim because she sought and obtained damages for physical and emotional harm. But a discrimination claim does not mutate into a claim sounding in tort

simply because the discrimination is particularly egregious and results in physical or emotional harm. *Cf. Bash v. Bell Tel. Co.*, 601 A.2d 825, 829 (Pa. Super. Ct. 1992) (recognizing that a contract claim does not become a tort merely because the "conduct in question was wantonly done" (internal quotation marks omitted)); *Emerman v. Baldwin*, 142 A.2d 440, 447 (Pa. Super. Ct. 1958) (stating that damages for physical or emotional harm "are recoverable in a breach of contract action" when the breach "is wanton or reckless and cause[s] bodily harm").

B. Even if the Tort Claims Act reaches the PHRA, the legislature clearly intended to permit claims against public schools under § 955(i), so immunity is waived.

The second step of the immunity inquiry turns on whether the PHRA subjects public schools to liability under § 955(i). If it does, the legislature has waived immunity for claims like Amanda's. The District argues that § 955(i) does not impose liability on public schools because it applies to only "persons." That argument fails.

1. *Threshold matter: the District's attempt to isolate "damages claims" as a separate type of PHRA cause of action is misguided and confuses the waiver inquiry.*

The District states that the issue of waiver turns on whether § 955(i) expressly permits "damages claims" against public schools.

District Brief at 11. But "damages claims" are not a special cause of action under the PHRA. The PHRA does not distinguish claims based on the relief sought. *See* 43 P.S. §§ 955, 962. It treats all discrimination claims the same, subjecting them to the same legal framework: a plaintiff must establish liability under § 955, and if she does, she is entitled to the legal or equitable relief that the court "deems appropriate" to make her whole. *See* § 962(c)(3); *Canal Side Care Manor v. PHRC*, 30 A.3d 568, 574–75 (Pa. Commw. Ct. 2011) ("The goal of the PHRA is to make persons whole . . . ."). Thus, the District's contention that "damages claims" are a special cause of action is misguided.

And the contention confuses the waiver inquiry. To determine whether the legislature has waived immunity, this Court need only decide if public schools can be sued under § 955(i). If § 955(i) subjects public schools to liability, it plainly permits damages against them. 43 P.S. § 962(c)(3).

The District's emphasis on "damages claims," moreover, is misleading because it implies that the District is arguing that § 955(i) permits some actions against public schools, just not actions seeking

damages. But the District's argument is much more extreme. The District contends that § 955(i) permits actions against only "persons," which, according to the District, do not include public schools. District Brief at 15–17. That reading removes public schools from § 955(i)'s reach altogether, foreclosing *all* actions against them, not just actions for damages. Under that radical view of § 955(i), neither individuals nor the PHRC can sue a public school. The PHRC cannot even bring an action to address school segregation.

2. Section 955(i) expressly subjects public schools to liability.

If in passing a statute the legislature "clearly intended to permit" claims against a political subdivision, the Tort Claims Act does not shield the subdivision. *City of Phila.*, 684 A.2d at 208. Such intent is clear when a statute imposes liability on a class of defendants and includes the political subdivision in the class. *Id.*; *see also Doe v. Franklin Cty.*, 174 A.3d 593, 605–06 (Pa. 2017) (determining whether the Uniform Firearm Act waives a sheriff's high public official immunity by examining whether the Act "specifically include[s] [sheriffs] in [its] list of potential defendants"). In *City of Philadelphia*, for example, this Court held that government immunity does not apply

to PHRA claims against public employers because the PHRA defines "employers" as including "any political subdivision."[5] 684 A.2d at 208.

Here, legislative intent is clear: § 955(i) permits claims against public schools. Section 955(i) subjects "public accommodations" to liability for discrimination, *see, e.g.*, *PHRC v. Alto-Reste Park Cemetery Assoc.*, 306 A.2d 881, 885 (Pa. 1973) (interpreting § 955(i) as applying to "public accommodations"), and the PHRA defines "public accommodations" as including public schools, 43 P.S. § 954(l); *Chester Sch. Dist.*, 233 A.2d at 294 ("By virtue of . . . § 954, public schools are places of public accommodation.").

The District's argument that § 955(i) does not apply to "public accommodations" defies decades of precedent and legislative intent. Since the PHRA's enactment, the Pennsylvania Supreme Court and this Court have interpreted § 955(i) as imposing liability on public accommodations, including public schools such as the District. *See Uniontown Area Sch. Dist.*, 313 A.2d at 157 (affirming finding that multiple school districts, including the District, violated § 955(i)); *Alto-*

[5] The District agrees that legislative intent to waive immunity is clear when a statute defines a class of defendants as including the relevant political subdivision. *See* District Brief at 12–13.

Reste Park Cemetery Assoc., 306 A.2d at 885 (holding that § 955(i) subjects cemeteries to liability because they are public accommodations); *PHRC v. Lansdowne Swim Club*, 526 A.2d 758, 761 (Pa. 1987) (concluding that a swimming club is subject to § 955(i) if it is a public accommodation); *Chester Sch. Dist.*, 233 A.2d at 294 (imposing liability on a school district under § 955(i) since "schools are places of public accommodation"); *Commonwealth v. Dobrinoff*, 471 A.2d 941, 942 (Pa. Commw. Ct. 1984) (upholding a ruling that a "bar, as a place of public accommodation" violated § 955(i) by "discriminat[ing] on the basis of sex"); *Livingwell, Inc. v. PHRC*, 606 A.2d 1287, 1289 & n.4 (Pa. Commw. Ct. 1992) (determining that an exercise facility falls within the reach of § 955(i) because it is a public accommodation); *Loyal Order of Moose Lodge No. 145 v. PHRC*, 328 A.2d 180, 183 (Pa. Commw. Ct. 1974) (affirming the PHRC's conclusion that a fraternal organization which discriminated against a black family was liable under § 955(i) because the organization was a public accommodation); *Chestnut Hill Coll. v. PHRC*, 158 A.3d 251, 267 (Pa. Commw. Ct. 2017) (permitting a student's and the PHRC's suit against a Catholic college because

Catholic colleges are "not categorically excluded from the definition of 'public accommodation'").

In contrast to the District's novel reading of § 955(i), these precedents do not splinter the text of § 955(i) and distinguish between "persons" and "public accommodations." Instead, they read the provision as a whole and uphold the legislature's intent to hold public accommodations and their representatives accountable for discrimination.

Although the District's reading of § 955(i) would require this Court to upend decades of precedent, the District fails to even recognize the precedent, much less explain why it does not bind this Court. Like any other precedent, decisions interpreting the meaning of a statute are binding. *See Perma-Lite v. Workmen's Comp. Appeal Bd.*, 393 A.2d 1082, 1084 (Pa. Commw. Ct. 1978) ("This Court . . . is bound by the interpretation given Pennsylvania statutes by the . . . Supreme Court.").

But even if the Court could ignore decades of precedent, the District's novel reading of § 955(i) is unavailing because it defies

legislative intent.[6] The District pays short shrift to the General Assembly's intent. It reads § 955(i) in a vacuum, clinging to a hyper-textual interpretation and ignoring the Pennsylvania Supreme Court's conclusion that discerning the PHRA's legislative intent requires "consideration of more than the statute's literal words." *Chester Sch. Dist.*, 233 A.2d at 295.[7]

The District's blinkered approach leads it astray. The General Assembly intended § 955(i) to apply to public accommodations and their representatives. The "long-standing presumption that the [l]egislature is aware of the judiciary's construction and interpretation of statutes" is dispositive. *See Commonwealth v. Spenny*, 128 A.3d 234, 249–50 (Pa. Super. Ct. 1999) (citing *City of Phila. v. Clement & Muller*, 715 A.2d 397, 399 (Pa. 1998)). The legislature has amended the PHRA multiple times, yet it has never revised § 955(i) in response to the Supreme Court and this Court's interpretation of it. That failure to change §

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[6] The "object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly." 1 Pa. C.S. § 1921(a).

[7] This requirement is not unique to the PHRA; it applies to other civil rights statutes, too. *See Parr v. Woodmen of World Life Ins.*, 791 F.2d 888, 892 (11th Cir. 1986) ("It is . . . the duty of the courts to make sure that [Title VII] works, and the intent of Congress is not hampered by a combination of a strict construction of the statute in a *battle with semantics*." (emphasis in original)).

955(i) "creates a presumption that the interpretation [i]s in accordance with the legislative intent." *See Fonner*, 724 A.2d at 906.

"[T]he object to be attained" by § 955(i) also shows that the legislature intended it to cover public accommodations and their representatives. *See* 1 Pa. C.S. § 1921(c)(4). This is a particularly important factor in discerning legislative intent here since the legislature has expressly stated that § 955(i) must be "construed liberally for the accomplishment of [its] purpose." 43 P.S. § 962(a). The purpose of § 955(i), of course, is to eliminate the "denial of . . . *public accommodation opportunities*." *See Chester Sch. Dist.*, 233 A.2d at 296 (emphasis in original). And it is plain that reading the provision as applying to "persons" exclusively would frustrate that purpose. Doing so would shrink § 955(i)'s reach and force many plaintiffs, as well as the PHRC, to try to obtain damages and injunctive relief from individuals affiliated with public accommodations, who may lack the power to eliminate the discrimination or make the victim whole. *Compare* 43 P.S. § 954(a) (defining "person"), *with* § 954(l) (defining "public accommodation").

3. The District's argument that § 955(i) does not permit claims against public schools also fails because "persons" include "superintendents."

Even if § 955(i) applied exclusively to "persons," it would expressly permit claims against public schools because it specifies that "persons" include "superintendents." 43 P.S. § 955(i) ("It shall be an unlawful discriminatory practice . . . [f]or any person being the . . . *superintendent* . . . of any public accommodation . . . ." (emphasis added)).

Superintendents are the official representatives of public schools, and a plaintiff can sue a public school by naming the superintendent in her official capacity. *See Phila. Fed'n of Teachers v. Sch. Dist. of Phila.*, 109 A.3d 298, 298 (Pa. Commw. Ct. 2015) (action against Dr. William R. Hite, Jr., in his official capacity as the District's Superintendent of Schools); *Miller v. Bd. of Prop. Assess.*, 703 A.2d 733, 735 (Pa. Commw. Ct. 1997) ("Official capacity suits . . . represent only another way of pleading an action against an entity of which an officer is an agent." (internal quotation marks omitted)); *Youngman v. CNA Ins.*, 585 A.2d 511, 515 (Pa. Super. Ct. 1991) ("[A]n official-capacity suit is, in all respects other than name, to be treated as a suit against the entity.").

Consequently, the District's hyper-textual reading of § 955(i) does not even help it.[8]

II. The trial court did not err in finding the District liable under § 955(i).

A. The District intentionally discriminated against Amanda, so even under its view of § 955(i), it is liable.

Even accepting the District's argument that § 955(i) requires an intentional act of discrimination, the record supports the trial court's decision because the court found that the District was deliberately indifferent to severe and pervasive sexual harassment. The District does not challenge the finding, and the finding establishes intentional discrimination because deliberate indifference constitutes intentional discrimination. *See, e.g.*, *Davis*, 526 U.S. at 643 (concluding that "deliberate indifference to known" student-on-student harassment amounts to an intentional discriminatory act); *Gebser v. Lago Vista*

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[8] If the Court concludes that § 955(i) applies to "persons" exclusively and that Amanda therefore should have named the District superintendent rather than the District in her complaint, affirmance is nevertheless required. Even if the trial court erred in allowing Amanda to proceed without naming the superintendent, the error was harmless. The superintendent and the District are the same party, so naming the superintendent would not have affected the case.

To the extent necessary, Amanda requests leave to amend her pleading to name the superintendent. *See Zercher v. Coca Cola*, 651 A.2d 1133, 1135 (Pa. Super. Ct. 1994) ("[I]n cases where the statute of limitations has expired and a party seeks to amend its pleading . . . , the issue is whether the proposed amendment adds a new party to the litigation . . . . If an amendment constitutes a simple correcting of the name of a party, it should be allowed.").

Indep. Sch. Dist., 118 S. Ct. 1989, 1999–2000 (1998) (holding that deliberate indifference to teacher-on-student harassment amounts to an intentional discriminatory act); *S.H. v. Lower Merion Sch. Dist.*, 729 F.3d 248, 262–63 (3d Cir. 2013) (holding that deliberate indifference constitutes intentional discrimination); *Liese v. Indian River Cty. Hosp. Dist.*, 701 F.3d 334, 345 (11th Cir. 2012) (same).

B. Section 955(i), however, does not require intentional discrimination. Whether or not the District acted on the basis of Amanda's sex, it violated § 955(i).

1. Section 955(i) does not require intentional discrimination.

Under *Chester School District* and its progeny, § 955(i) does not require an intentional or affirmative act of discrimination since it bans school districts from not only "directly" but also "indirectly" withholding educational privileges from a child. *Chester Sch. Dist.*, 233 A.2d at 294–95. A district indirectly withholds educational privileges and violates § 955(i) when it "has the power to take corrective measures" to address discriminatory school conditions but fails to act. *See id.* (internal quotation marks omitted). Despite the district's "lack of involvement in creating the conditions," it is liable because its failure to act entrenches the conditions and denies the child an education on "equal terms." *See*

Sch. Dist. of Phila., 681 A.2d at 1382, 1389 ("[W]here the state has undertaken to provide [public education], [it] is a right which must be made available to all on equal terms. This principle is embodied in . . . the Human Relations Act." (citation omitted)).[9]

The District, however, argues that in *Chester School District*, the Supreme Court held the Chester School District liable for intentional acts of discrimination, so under the decision, a school district must engage in intentional discrimination to violate § 955(i). District Brief at 26–27. Inaction in the face of third-party conduct, the District asserts, is insufficient. *Id*. This portrayal of the decision is inaccurate, however. Inaction in the face of third-party conduct is precisely what the Court held Chester liable for. Chester refused to address de facto school segregation arising from the conduct of third-party community residents "over which [it] had no control." *Chester Sch. Dist.*, 233 A.2d

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[9] The Supreme Court has even held that inaction can trigger PHRA liability outside the school context. In *PHRC v. Chester Housing Authority*, the Court cited *Chester School District* and held that a housing authority ignoring de facto housing segregation is an unlawful discriminatory practice. *PHRC v. Chester Hous. Auth.*, 327 A.2d 335, 345–46 (Pa. 1974) ("We have determined that de facto segregation . . . is prohibited by the Human Relations Act."). Just as school districts must address discriminatory school conditions, housing authorities must address residential segregation because "[r]emoval of . . . discrimination and assurance of equal opportunity in housing are strong and fundamental policies of this Commonwealth," no different than removing discrimination from and assuring equal opportunity in education. *See id.* at 340.

at 294. And the Supreme Court found that Chester's "*inaction* under [such] circumstances . . . amount[ed] to a denial of [educational] advantages" and therefore an unlawful discriminatory practice. *Id.* at 295 (emphasis added).

In arguing that the Supreme Court held Chester liable for intentional discrimination, the District takes language from the Court's opinion out of context. It contends that Chester "was not liable for non-action, but for *'seemingly neutral decisions'* that constituted discrimination on the basis of race." District Brief at 26 (quoting *Chester Sch. Dist.*, 233 A.2d at 297) (emphasis added). The Court, however, did not hold Chester liable for "seemingly neutral decisions"—the District plucks that language from one section of the opinion, ignoring that later in the opinion the Court expressly declined to determine if Chester engaged in discriminatory decision-making:

> Under the circumstances we need not consider the extent to which the Chester School District was responsible for the existing condition. . . . [Because de facto segregation exists,] we need not, and do not decide, whether [the PHRC's] conclusion that the school authorities purposefully perpetuated the existing segregated structure meets the substantial evidence test.

Chester Sch. Dist., 233 A.2d at 300.

The District's claim that *Chester School District* requires an intentional act of discrimination is all the more perplexing because the dissenting opinion criticized the Court for *not* taking that position. The dissent argued, "[i]t is only when accommodation is intentionally refused or denied directly or indirectly . . . that discrimination is declared to be unlawful and is prohibited by" § 955(i). *Id.* at 304–05 (Bell, J., dissenting). It is error, the dissent went on, to hold Chester liable because the evidence does not establish "that [it] created racial imbalance by *intentionally or purposely* discriminating against [black students] in its buildings or in its assignment of students to the various schools in [Chester.]" *Id.* (emphasis in original).

Now, fifty years later, the District echoes the dissent and asks this Court to adopt the same failed interpretation of § 955(i). *See* District Brief at 24 ("For a defendant to be liable under the PHRA, its own actions . . . must discriminate on the basis of sex or another protected category, whether they do so directly or indirectly."). But § 955(i) protected children from discriminatory school conditions regardless of a district's intent back in 1967, and it still does in 2019.

2. Severe and pervasive sexual harassment is a discriminatory school condition. Ignoring it here, the District indirectly withheld educational privileges from Amanda and violated § 955(i).

The severe and pervasive sexual harassment that Amanda endured forced her to attend school under "abusive," "alter[ed]" conditions. *See Infinity Broad. Corp. v. PHRC*, 893 A.2d 151, 158 (Pa. Commw. Ct. 2006) (stating that severe or pervasive harassment "alter[s] the conditions of [a setting] and create[s] an abusive . . . environment" (internal quotation marks omitted)). The harassment created a discriminatory and "unacceptable toxic learning environment"—it was a constant barrier to Amanda accessing instruction, completing schoolwork, and participating in school activities.[10] *See T.K. v. N.Y.C. Dep't of Educ.*, 779 F. Supp. 2d 289, 293 (E.D.N.Y. 2011).

Therefore, by ignoring the harassment, the District indirectly withheld educational privileges from Amanda and violated § 955(i). *See Chester Sch. Dist.*, 233 A.2d at 294–95. Ignoring the harassment was no different than ignoring de facto segregation: third parties are responsible for both student-on-student harassment and de facto

[10] *See* Rule 1925(a) Op. at 5–6, 14, 33–34; R. 191a (Tr. 17:2–17:7); R. 199a (Tr. 50:22–51:16); R. 213a (Tr. 165:8–165:14).

segregation; both force a student to endure a discriminatory school setting; and school districts have the power to address both.[11]

Indeed, federal precedent and a legion of state court decisions underscore that severe or pervasive sexual harassment is a discriminatory condition which Pennsylvania school districts become responsible for when they ignore it.

First, federal courts have long held that Title VI and Title IX permit claims against school districts that ignore discriminatory student-on-student harassment. *See Davis*, 526 U.S. at 643; *Whitfield v. Notre Dame Middle Sch.*, 412 Fed. App'x 517, 521 (3d Cir. 2011). And Pennsylvania courts, including the Supreme Court, have held that the PHRA "should be construed in light of principles . . . which have emerged relative to" federal civil rights statutes. *Chmill v. Pittsburgh*, 412 A.2d 860, 871 (Pa. 1980) (internal quotation marks omitted); *see also Kroptavich v. Pa. Power & Light Co.*, 795 A.2d 1048, 1055 (Pa. Super. Ct. 2002) ("Generally, claims brought under the PHRA are analyzed under the same standards as their federal counterparts.").

[11] Further, eradicating sexual harassment and school segregation are both dominant public policies in the Commonwealth. *See Pa. State Sys. of Higher Educ. v. Ass'n of Pa. State Coll. & Univ.*, 2019 Pa. Commw. Unpub. LEXIS 289, at *10 (Pa. Commw. Ct. May 16, 2019) ("[T]he prohibition of sexual harassment constitutes a well-defined, dominant public policy recognized in this Commonwealth.").

Second, states across the country have anti-discrimination laws that, like the PHRA, ban school districts from indirectly withholding educational privileges from children, and courts have consistently interpreted the laws as requiring districts to address student-on-student harassment. *L.W. v. Toms River Reg'l Sch. Bd. of Educ.*, 915 A.2d 535, 547 (N.J. 2007) (holding that the New Jersey Law Against Discrimination "permits a cause of action against a school district for student-on-student harassment"); *Doe v. Kan. City*, 372 S.W.3d 43, 51–52 (Mo. Ct. App. 2012) ("[The Missouri Human Rights Act]'s prohibition against indirectly denying another of the benefits of a public accommodation encompasses a claim against a school district for student-on-student sexual harassment."); *Mercer Island Sch. Dist. v. Superintendent of Pub. Instr.*, 347 P.3d 924, 936 (Wash. Ct. App. 2015) ("A school district is responsible for addressing discriminatory harassment about which it knows or reasonably should have known." (internal quotation marks omitted)); *Washington v. Pierce*, 895 A.2d 173, 181 (Vt. 2005) ("[T]he [Vermont Public Accommodations Act] encompasses hostile school environment claims based on peer harassment."); *Donovan v. Poway Unified Sch. Dist.*, 84 Cal. Rptr. 3d

285, 293 (Cal. Ct. App. 2008) (recognizing that Section 220 of the California Education Code permits student-on-student harassment claims); *Williams v. Port Huron Area Sch. Dist.*, 2010 U.S. Dist. LEXIS 30472, at *37 (E.D. Mich. Mar. 30, 2010) (determining that Michigan's Civil Rights Act protects children from student-on-student harassment); *Montgomery v. Indep. Sch. Dist.*, 109 F. Supp. 2d 1081, 1094 (D. Minn. 2000) (recognizing that the Minnesota Human Rights Act permits claims for an "'intimidating, hostile, or offensive' educational environment").

III. The District's alarmist policy arguments are unavailing. The sky will not fall if this Court affirms the trial court.

Because its legal arguments are weak, the District resorts to policy arguments about the trial court's decision. First, the District speculates that affirming the trial court's damages award could have "potentially ruinous" consequences for public schools because "hundreds of thousands of students enjoy the advantages and privileges of public schools, providing endless possibilities for conflicts among students that can lead to the alleged denial of a student's access to school." District Brief at 19. But mere "conflict among students" does not establish liability under the trial court's decision. The trial court found the

District liable because for more than half a decade, it permitted violent, severe, and pervasive sexual harassment against Amanda. Moreover, damages awards in hostile-school-environment cases will not ruin Pennsylvania's public schools. Federal laws allow damages in such cases, and there is no evidence that schools in Pennsylvania or other states have buckled under the weight of the laws.[12]

Next, the District muses that affirming the trial court "might lead to courts overriding the wide discretion that school districts are given to administer the schools and students under their control." *Id.* at 20. The District, however, fails to explain how the trial court's decision affects school districts' control over their policies and procedures. *Id.* And the record here belies the claim: the District could have avoided liability if it simply followed its own bullying and harassment policies. *See* Rule 1925(a) Op. at 21.

Finally, the District asserts that affirming the trial court will "impose liability on virtually every private and public entity in the Commonwealth that d[oes] not do enough to stop someone . . . from

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[12] The New Jersey Law Against Discrimination also allows damages in hostile-school-environment cases, and New Jersey's schools are still standing. *See L.W. v. Toms River Reg'l Sch. Bd. of Educ.*, 886 A.2d 1090, 1110 (N.J. Super. Ct. App. 2005) (awarding damages), *aff'd as mod'd and rem'd on other grounds*, *L.W.*, 915 A.2d at 412.

discriminating on the basis of sex." District Brief at 25. This is more hyperbole. The trial court did not find the District liable simply because it "did not do enough to stop" sexual harassment but because the District—a public accommodation that has a unique degree of control over its environment—was for years deliberately indifferent to violent, severe, and pervasive sexual harassment. *See Vernonia Sch. Dist.*, 515 U.S. at 655; *Doe*, 372 S.W.3d at 51–52 (concluding that a "school district exercises significant control over its students," so if it "fail[s] to take prompt and effective remedial action to address" student-on-student harassment, it indirectly denies "the privileges of . . . public school").

CONCLUSION

The trial court did not err in holding the District liable under the PHRA. Amanda respectfully requests that the Court affirm and finally end her years' long struggle to vindicate her right to equal educational opportunity.[13]

Respectfully submitted,

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[13] After this Court issues its decision, Amanda intends to file a fee petition in the Court of Common Pleas under the PHRA for time spent litigating this appeal. She notes this in an abundance of caution to ensure that her right to file the petition is preserved.

CERTIFICATE OF COMPLIANCE

Word Count. Pursuant to Rule 2135 of the Pennsylvania Rules of Appellate Procedure, I certify that this brief complies with the Court's word count limits. According to the word processor used to prepare the brief, it includes 10,223 words.

Rule 127 Compliance. I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Service. I certify that on May 22, 2019, this brief was filed via the PACFile System and served on the following:

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